No. 21-5923

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

2019

DEONTE KINWAN MCCOY

Petitioner,

v.

MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the Michigan Supreme Court

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PETITION FOR WRIT OF CERTIORARI

BY: Deonte Kinwan McCoy #382437
In Pro-Per
St. Louis Correctional Facility
8585 N. Croswell Rd.
St. Louis, MI 48880

v

QUESTIONS PRESENTED FOR REVIEW

ISSUE I

Was the Evidence Insufficient to convict Mr. McCoy of each offense. Should this court should reverse his convictions pursuant to federal and state constitutional amendments? V, VI, XIV, Mich Const. art 1 § 17, 20, and according to *People v. Hampton, 407 Mich 354, (1979),* and *In re Winship, 397 U.S. 358 (1970).*

Petitioner-Appellant Answered "yes"

Respondent-Appellee Answered "no"

ISSUE II

Was it an abused of discretion when trial court denied Mr. McCoy's Motion for a Change of Venue due to the trial's publicity, along with the exclusion of minority jurors? Defendant was denied his due process right to a fair trial under the State and Federal Constitution. U.S. Const. Amendment V, VI, XIV, Mich Const. 1963 art 1 § 17, 20.

Petitioner-Appellant Answered "yes"

Respondent-Appellee Answered "no"

ISSUE III

Was Mr. McCoy denied his right to a fair trial? Because the trial court abused its discretion in denying his Motion for a Mistrial, due to the improper jury selection process, were minority jurors were systematically excluded? He was denied his right to due process under the Federal and State Constitutions. U.S. Const, art IV, V, VI, Mich Const. 1963, art 1 § 17, and 20.

Petitioner-Appellant Answered "yes"

Respondent-Appellee Answered "no"

ISSUE IV

Was Mr. McCoy denied his right to due process of law and a trial when he was not allowed to present a defense? Did prosecution withhold a victim impact statement, which would have impeached the credibility of a complaining witness, and could have changed the jury's verdict? In violation of federal and state constitutions.

Petitioner-Appellant Answered "yes"

Respondent-Appellee Answered "no"

ISSUE V

Was Mr. McCoy denied his constitutional right to the Effective Assistance of counsel? Trial counsel failed to request that *MI Crim. JI 4.5* be given to the jury. Stipulating to the defendant's prior criminal conviction for Felon in Possession of a firearm charge. Was Defendant denied his due process of law under the federal and state constitutional guarantee for the effective assistance of counsel?

Petitioner-Appellant Answered "yes"

Respondent-Appellee Answered "no"

ISSUE VI

Was Mr. McCoy, denied a fair trial and due process? The trial court erroneously gave *MI Crim. JI 4.4*, were the evidence did not support it, and *MI Crim. JI 17.10*, and *17.11*. Were they did not include the definition of a shotgun, and as a result it violated Defendant's federal and state constitutional rights to a fair trial.

Petitioner-Appellant Answered "yes"

Respondent-Appellee Answered "no"

ISSUE VII

Did the trial Judge engaged in impermissible judicial fact-finding, by erroneously ruling that there were sufficient facts to support the scoring of offense variable's 3,4, and 5? When the facts established at trial did not support them beyond a reasonable doubt. Is defendant entitled to resentencing pursuant to the federal and Michigan constitutions? U.S. Const. Amend V, VI, Mich Const. 1963 art 1 § 17, and 20.

Petitioner-Appellant Answered "yes"

Respondent-Appellee Answered "no"

ISSUE VIII

Was Mr. McCoy denied due process of law? Should he been allowed to be present during the proceeding of his arraignment, or enter of plea? In order for the waiver of any constitutional and procedural right to be valid, it must be knowing, and voluntarily waiver of them, through an intentional relinquishment.

Petitioner-Appellant Answered "yes"

Respondent-Appellee Answered "no"

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The Michigan Supreme Court Denied Leave to Appeal on, **April 29, 2020 (attached).**

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV

The right of the people to be secure in their person, houses, papers, and effects, against the unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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

On October 24, 2017, a jury convicted the Defendant-Appellant, Deonte McCoy, lower case number 16-12682-FC, two counts of assault with intent to commit murder, MCLA 750.83; possession of a firearm by a felon, MCLA 750.224f; possession of a controlled substance less than 25 grams, 333.74032A5; 2 counts of felony firearm, MCLA 750.227BA, and as a consequence, Mr. McCoy's sentences were enhanced as an habitual offender, fourth degree, MCLA 769.12, before the Hon. Nick Holowka in the Lapeer County Circuit Court. (see Judgment of Sentence, Appendix).

On December 5, 2017, Judge Holowka sentenced Mr. McCoy to 25-40 years' imprisonment for 2 counts of assault with intent to commit murder; 5-25 years' imprisonment for felon in possession of a firearm; 2-15 years' imprisonment for possession of a controlled substance less than 25 grams, and 2 years' imprisonment for 2 counts felony firearm, with the sentences running concurrent to each other except for the felony firearm charges which can consecutive to the other charges. Each of the sentences imposed ran consecutive to the Genesee County Circuit Court sentences where Mr. McCoy was on parole from the Michigan Department of Corrections, which also precluded credit for time served. (ST, 31-34; Judgment of Sentence, Appendix)

At sentencing, Mr. McCoy objected to the scoring of offense variables ("OV") 3, 4, and 5, which were denied by Judge Holowka. (ST, 8-16). Judge Holowka ruled that Mr. McCoy's sentencing guidelines were properly scored at 270-900 months' incarceration after also hearing objections presented by the prosecution. (ST, 8-16; See PSIR, SIR, Appendix). Mr. McCoy also requested that his presentence investigation report (PSIR) be' corrected which was adopted by "ST" refers to sentencing transcript dated December 5, 2017. Judge Holowka. (ST 14-16). Furthermore, Judge Holowka denied Mr. McCoy's motion for a new trial because he was not provided with a pretrial victim impact statement that was submitted by complainant John Bucy before trial. (ST, 4-6,16,17). Prior to the start of the trial, Mr. McCoy made a motion for a change of venue due to pretrial publicity where he argued that it would deny him a fair trial, which was also raised again at trial. (T, 133-139). In addition, during jury selection, Mr. McCoy argued that since the jury pool did not contain any African-American jurors and they

were all white, it would likewise deny him a fair trial especially combined with the adverse pretrial publicity. Judge Holowka denied both of the motions. (T, 133-139).

On October 17-24, 2017, a jury trial was held before Judge Holowka in the Lapeer County Circuit Court on each of the above charges. The jury heard the case that arose on July 1, 2016 in Lapeer, Michigan. The testimony at trial revealed that on that date, complainant John Bucy picked up Mr. McCoy in Flint, Michigan and they went to Michelle Hornung's home at 1290 Bowers Road. (T, 180). While at Michelle Hornungs' home, a dispute arose over a drug debt that complainant Bucy's co-worker, Luke, had apparently owed to Mr. McCoy. According to Michelle Horning, Mr. McCoy became upset because Luke did not appear to pay his drug debt. (T, 337-338). Complainant Bucy testified that he and Mr. McCoy got into an argument about Luke's drug debt. (T, 185). During the argument, complainant Bucy testified that Mr. McCoy pulled out a .38 caliber pistol and pointed it at his head. (T, 186). After complainant Bucy settled Mr. McCoy down, they made a plan to go to complainant Brent Kozar's house at 5101 Genesee Road, in Lapeer, Michigan for a holiday social event. (T, 188). Before leaving, complainant Bucy told Mr. McCoy that he could not continue to possess his gun, so he drove Mr. McCoy back to Flint, Michigan so Mr. McCoy could leave the gun at his residence. (T, 235).

On the way to complainant Kozar's home, they picked up Mr. McCoy's father, Kenneth Cureton, who was to join them at the gathering at complainant Bucy's home. (T, 235). After they arrived at Complainant Kozar's home, Lori Strength testified that she had sex with Mr. McCoy in an upstairs bedroom. (T, 318). After they finished having sex, Lori Strength testified that she saw a gun fall out of Mr. McCoy's shorts and she put it on a table in the bedroom.

Afterward, Mr. McCoy, his father, Kenneth Cureton, complainant Kozar, and complainant Bucy went to the master bedroom of the house to consume cocaine and to be away from the children. (T, 194, 215). While in the bedroom, Mr. McCoy allegedly shot complainant Bucy once in the torso and once in the shoulder, while one shot missed him while he was positioned by the corner of the bed. (T, 197-198, 201, 241). Complainant Bucy

testified that Mr. McCoy then aimed the gun at complainant Kozar who ducked, and then fired two shots at him that missed by inches. (T, 201-202). Complainant Bucy stated that when complainant Kozar ducked, it caused both shots to miss him. (T, 201, 202). Complainant Bucy claimed that Mr. McCoy fired five shots total in the bedroom. (T, 219). Complainant Kozar indicated that the first three shots were fired at complainant Bucy while the last two were fired at him. (T, 258).

Complainant Kozar testified that after the shots were fired, he saw Mr. McCoy run out of the bedroom and down the hallway with his father, Kenneth Cureton. (T, 264). Michelle Hornung testified that she heard the gunshots while she was walking down the stairs after leaving the bedroom. After she heard them, she ran downstairs and out of the house with Lori Strength and the children. (T, 348-351). Lori Strength also testified that she heard gunshots coming from the upstairs bedroom, and she ran out of the house with the children. (T, 319-320). Lori Strength testified that she saw Mr. McCoy run out of the house and once outside, he demanded to have a ride to Flint, Michigan and the keys to her car. (T, 349). When both Lori Strength and Michelle Hornung refused Mr. McCoy's request, he ran down the driveway. (T, 321). Michelle Hornung claimed that as Mr. McCoy ran past her, she heard another gunshot after Mr. McCoy searched a purse for car keys. (T, 350, 379).

Meanwhile, inside of the house, Complainant Kozar said that he saw complainant Bucy bleeding profusely from 5-6 places from shots to his chest. (T, 265-266). After being shot, complainant Bucy was taken to the upstairs bathroom by complainant Kozar, and he was then put in a car to be rushed to a hospital. (T, 228, 321). On the way to the hospital, they passed a deputy sheriff who stopped on the side of the road. The deputy sheriff then transported complainant Bucy to the hospital. (T, 321, 352).

Dr. Sara Ornazian, an emergency room physician and who was qualified as an expert in emergency room medicine, testified that complainant Bucy arrived at the hospital with gunshot wounds to his chest and abdomen, with one bullet in his chest. (T, 388-395, 400). Dr. Ornazian testified that if she had not inserted a chest tube in complainant Bucy during treatment, he would have expired. (T, 396).

Trooper Steven Cavner testified that he received a radio call to the location and proceeded to search for an active shooter. (T, 411). When he arrived in the area, he claimed that he saw Mr. McCoy walking up in a ditch and then placed him under arrest. During the arrest, he patted down Mr. McCoy and did not locate any weapons or drugs. (T, 414-416). Trooper Cavner indicated that he did not conduct a gunshot residue test on Mr. McCoy to verify whether he ever fired a gun. (T, 428). Deputy Mariah Fredericks-Eckel of the Lapeer County Sheriff's Department was working at the jail and she searched Mr. McCoy as part of his processing. During the pat-down search, she claimed that she located a baggie of an apparent controlled substance in his possession. (T, 436). Deputy Christopher Bowman indicated that once the evidence was found, he turned the packet over to Lt. Gary Parks. (T, 462). Tyler Torbert of the Forensic Unit tested that evidence recovered from the bedroom and from Mr. McCoy's possession. Mr. Torbert testified that he tested two samples, and he concluded that the substances recovered tested positive for cocaine and crack cocaine. (T, 480).

Lt. Gary Parks, a crime scene technician, conducted an investigation of the shooting scene, took pictures, received witness statements, and collected evidence. (T, 480). Lt. Parks testified that he collected the cocaine evidence recovered both from Mr. McCoy and from. the home, and sent them to the lab for analysis. (T, 512). Lt. Parks testified that he saw and photographed bullet holes in the bedroom that complainant Kozar showed him. (T, 516). Lt. Parks indicated that he saw Detective Lutz recover a .38 slug from a box spring located in the bedroom that he placed on evidence. (T, 526). Lt. Parks said that he did not •search for additional bullet holes because he did not want to remove a wall and cause unnecessary damage to the home. Lt. Parks further testified that a gun was not recovered after a search was conducted to find it. (T, 530532).

On cross examination, Lt. Parks indicated that testing was not done to determine whether the reddish material located in the bedroom was actually blood. Lt. Parks testified that he was not certain whether the bullet hole was there before the alleged shooting occurred or how old it was. (T, 576). Lt. Parks conceded that he could not determine whether the shots were fired from the same gun because only one slug was recovered. (T, 588). Lt.

Parks indicated that a gunshot residue test was not conducted on Mr. McCoy and he did not possess any direct proof that he had a gun, and he did not determine the bullet angles during the crime scene investigation. (T, 600).

The prosecution admitted a certified conviction record for the felon in possession of a firearm charge without objection from defense counsel. (T, 618-620). The documents indicated that on March 24, 2005, Mr. McCoy was convicted of possession with intent to deliver a controlled substance less than 50 grams in the Genesee County Circuit Court. (T, 619).

After the prosecution rested its case, defense counsel made a motion for a directed verdict and argued that since there was insufficient evidence for assault with intent to commit murder due to the inconsistent statements and evidence in the prosecution's case and the lack of intent, the two counts should have been dismissed. (T, 627). Defense counsel argued that for felon in possession of a firearm, based on the inconsistent testimony and evidence, poor and incomplete investigation by the police, and the lack of proof that Mr. McCoy ever possessed a firearm, there was insufficient evidence that he ever possessed a firearm. (T, 628). Defense counsel argued that for possession of a controlled substance less than 25 grams, there was insufficient evidence because when Mr. McCoy was searched by Trooper Cavner when he was arrested and had his pockets turned inside out as shown in the scout car video, a controlled substance was not found. Defense counsel argued that since the police did not recover any drugs during the first search, but somehow drugs were later recovered by Deputy Eckel at the jail, the evidence was not sufficient and credible enough to support the charge. (T, 6'9).

After hearing the response from the prosecution, Judge Holowka denied the motion to dismiss the charges and case under MCR 6.419. (T, 632-637).

For Mr. McCoy's case, Steven Howard was qualified as an expert in crime scene investigation. Mr. Howard testified that the police's investigation was not thorough because a scale or ruler was not used to determine the trajectory and angle of the bullets which should have been done. (T, 720). Mr. Howard indicated that a bore scope for the bullet locations should have been used to find the bullets and determine their locations. Furthermore, Mr.

Howard indicated that the police did not photograph everything in the bedroom where the shots were fired which should have been done; numbers and scales were not used to determine size and scope of the bullet holes; the exact caliber of bullet could not be determined due to the poor investigation; it could not be determined if the bullet recovered went through a human being since there was not blood on it; and the bullet was improperly collected because the wood around it should have also been removed to preserve it.

(T, 738-73}).

In addition, Mr. Howard testified that because the second bullet was not removed from complainant Bucy's body, it compromised the investigation and a ballistics comparison could not be made on the evidence. (T, 740). After closing arguments and jury instructions, defense counsel objected to M. Crim JI 4.4 being read to the jury, and M. Crim JI 17.10 and M. Crim JI 17.11 for not including the definition of shotgun. The trial court denied defense counsel's objections. (T, 789), After deliberations, the jury found Mr. McCoy guilty on all counts. (T, 815). Mr. McCoy appeals his convictions and sentences as of right to this Honorable Court.

REASONS FOR GRANTING PETITION

ISSUE I

There was insufficient evidence to convict Mr. McCoy of each offense, and this court should reverse his convictions pursuant to federal and state constitutional amendments, V, VI, XIV, Mich Const. art 1 § 17, 20, and according to *People v. Hampton, 407 Mich 354, (1979),* and *In re Winship, 397 U.S. 358 (1970).*

Standard of Review:

The United States Supreme Court and the Michigan Supreme Court have determined that the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article l, Sec. 14 of the Michigan 1963 Constitution require that there be sufficient evidence proven beyond a reasonable doubt to convict a defendant. Jackson v Virginia, 443 US 307, 3 1 5;99 S. Ct 2781; 61 L Ed 2d 560 (1979), In re Winship, 397 US 358, 361-362; 90 S Ct 1068; 25 L Ed 2d 368 (1970); People v Wolfe, 440 Mich 508, 513-514; 489 NW2d 748 (1992). The sufficiency of the evidence supporting a jury verdict is reviewed de novo by this Court. People v. Wolfe, 440 Mich 508 (1992).

Discussion:

A. The prosecution presented insufficient evidence to convict Mr. McCoy of assault with intent to commit murder.

The evidence was insufficient to convict Mr. McCoy of two counts of assault with intent to commit murder, MCLA 750.83, and this Court must reverse his convictions. Assault with intent to commit murder has three elements: "(1) an assault, (2) with an actual intent to kill, and (3) which, if successful, would make the killing murder." People v Lawton, 196 Mich App 341, 350; 492 NW2d 810 (1992); MCL 750.83.

For the lessor included two charges of assault with intent to do great bodily harm less than murder, the elements are: (1) an attempt or offer with force or violence to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder. People v Pena, 224 Mich App 650, 659; 569 NW 871 (1997), modified, 457 Mich 883 (1998). No actual physical injury is required for the elements of the crime to be established. People v Harrington, 194 Mich App 424, 430; 487 NW2d 479 (1992). Intent to do great bodily

harm less than murder has been defined as an intent to do serious injury of an aggravated nature. People v Mitchell, 149 Mich App 36, 39; 385 NW2d 717 (1986).

Here, as defense counsel argued at trial, the prosecution did not meet its burden of proof for assault with intent to commit murder based on the above standard because the complainants' testimonies conflicted and were too incredible to be believed, and the crime scene investigation was too incomplete and incompetent to be trusted by the jury. During the trial as defense counsel asserted, the complainants' testimonies about where they were positioned in the bedroom and their designations on the display diagrams so widely differed, they could not have been believed by a rational trier of fact. (T, 775). In addition, the complainants' testimonies widely differed about who was supposedly shot first and how many times. (T, 776). These inconsistencies were made to be even more incredible where the bullet that went through complainant Bucy did not leave any blood on the bed, which it should have if the bullet actually traveled through his body. (T, 777).

The complainants' inconsistencies are even more incredible when the police did not conduct a complete investigation where they did not take the bullets out of the walls to verify that the holes were in fact made by bullets. The police also did not recover the bullet removed from complainant Bucy's body which could have supported a claim that the shots were fired from the same gun. (T, 784). Moreover, the police's crime scene investigation did not corroborate the complainants' testimonies because the bullet trajectories were never determined, which would have established the position of the guns. The police also did not perform a gunshot residue test on Mr. McCoy which would have supported or not, whether he fired a gun. Based on the inconsistencies in the complainants' testimonies and the very poor crime scene investigation work by the police, the evidence was insufficient to convict Mr. McCoy of assault with intent to commit murder and the corresponding charges of felony firearm, even when the evidence is taken in a light most favorable to the prosecution.

Alternatively, if the facts supported that Mr. McCoy assaulted the complainants, the prosecution only provided enough evidence to establish the two charges of assault with intent commit great bodily harm less than •murder, MCLA 750.83, because there was insufficient evidence of intent to commit murder. If, arguably, Mr. McCoy shot at complainant Bucy at such close range, he could have hit him all three times with his shots instead of missing once if he really intended to kill him. Furthermore, if he had possessed the intent to kill, he would have shot complainant Bucy twice in the head at close range which would have demonstrated his real intent to kill him. Here, complainant Bucy's gunshot wounds to his torso and upper shoulder showed an intent to do great bodily harm rather than an intent to kill.

When Mr. McCoy supposedly shot at complainant Kozdr and missed twice at very close range, he showed that he was not intending to kill him, but only to scare him. If Mr. McCoy really intended to kill complainant Kozar, he would not have missed him with both shots at such very close range. If the police had conducted a thorough investigation, it would have shown that Mr. McCoy's shots were designed to scare complainant Kozar, but not kill him. As a result, since Mr. McCoy's intent was to do great bodily harm to the complainants and not to kill them, his convictions must be reversed, and this Court must order that convictions for assault with intent to do great bodily harm less than murder be entered.

B. The prosecution presented insufficient evidence to convict Mr. McCoy of possession of a controlled substance less than 25 grams.

The prosecution's evidence was insufficient to convict, Mr. McCoy of possession of a controlled substance less than 25grams, and as a result, this Court must reverse his conviction. MCL 333.7403(2)(a)(v) prohibits the knowing or intentional possession of a mixture containing an amount of cocaine less than 25 grams. The term "possession" includes both actual and consecutive possession. People v Fetterley, 229 Mich App 511, 515; 583 NW2d 199 (1998). The essential question is whether the defendant had dominion or control over the controlled substance. A person's presence at the place where the drugs are found is not sufficient, by itself, to prove constructive possession; some additional link between the defendant and the contraband must be shown.

However, circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. [Id (citations omitted).]

Here, the prosecution's evidence was insufficient to convict Mr. McCoy of possession of a controlled substance less than 25 grams because immediately after he was arrested by Trooper Cavner, he was searched for drugs and guns. During that search, Trooper Cavner did not find any drugs even with Mr. McCoy's pockets turned-out as reflected in the scout car video. (T, 629). Surprisingly, Deputy Eckel found the controlled substance in Mr. McCoy's possession after he was searched at the jail during the second search of his clothing. Since the controlled substance was not found in Mr. McCoy's possession during the first search of his clothing which caused Deputy Eckel's testimony to be seriously questionable, there was insufficient evidence for this jury to convict Mr. McCoy of the offense.

In addition, if the conviction for his charge was based on the drugs found in the bedroom on the house, that charge was not proven with sufficient evidence beyond a reasonable doubt. The evidence at trial indicated that individuals who in the bedroom just before the shooting occurred consumed cocaine. But, the evidence did not sufficiently establish who brought the cocaine to the bedroom and who actually possessed it to support a conviction including for Mr. McCoy.

Lastly, during Deputy Eckel's testimony, although Mr. McCoy was mentioned by name during her testimony, the prosecution never had her identify Mr. McCoy in court and had her identification reflected on the record to establish that he was in fact the same person that she searched. (T, 434-438). Without this positive identification that Mr. McCoy was actually the person that Deputy Eckel searched, the evidence as insufficient to establish that he was actually in possession of the controlled substance. This Court must reverse Mr. McCoy's conviction for possession of a controlled substance less than 25 grams and his corresponding felony firearm charge.

C. The prosecution presented insufficient evidence to convict Mr. McCoy of felon in possession of a firearm.

The prosecution presented insufficient evidence to convict Mr. McCoy of felon in possession of a firearm, as a result, this Court must reverse his conviction. The pertinent part of MCLA 750.224f states:

(2) A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until of the following circumstances exist:
(a) The expiration of 5 years after all of the following circumstances exist:

(i) The person has paid all fines imposed for the violation.
(ii) The person has served all terns of imprisonment imposed for the violation.
(iii) The person has successfully completed all conditions of probation or parole imposed for the violation.
(b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored under section 4 of 1927 PA 372, MCL 28.424.

Since Mr. McCoy's prior conviction was a delivery, manufacture of a controlled substances less than 50 grams according to the certified record introduced a trial. it would constitute a "specified felony":

(10) As used in subsections (2) and (4), "specified felony" means a felony in which I or more of the following circumstances exist:

(a) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another maybe used in the course of committing the offense.

(b) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.

In order to prove felon in possession of a firearm, the prosecution must establish that the defendant possessed a firearm while ineligible to do so under MCL 750.224f as a result of a prior felony conviction. MCL 750.224f; see also People v Perkins, 262 Mich App 267, 269-270; 686 NW2d 237 (2004), abrogated in part on other grounds by People v Smith-Anthony, 494 Mich 669 (2013). Possession of a firearm "may be actual or constructive and may be proved by circumstantial evidence." People v Burgenmeyer, 461 Mich 43 1, 437; 606 NW2d 645 (2000), reh den 461 Mich 1289 (2000). "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." People v Johnson, 293 Mich App 79, 83; 808 NW2d 815 (2011).

At trial, the prosecution admitted a prior certified conviction record from Genesee County that supposedly established that Deonte McCoy had previously been convicted of controlled substance, delivery less than 50 grams on March 24, 2005. (T, 618-619). However, to establish that the conviction record was in fact Mr. McCoy and that he was the one who was actually convicted of the offense, the prosecution failed to establish an identification and connection between the conviction record and Mr. McCoy. Simply introducing a conviction record with Mr. McCoy's name on it was insufficient to establish that Mr. McCoy was actually the person who was convicted. The record could have contained a wrong name, a different Deonte McCoy could have been convicted in Genesee County, or someone else's alias could have been used. Without a substantiation and connection to Mr. McCoy, and further proof that he was the person who was actually convicted of the crime, the prosecution's evidence was insufficient to convict Mr. McCoy of felon in possession of a firearm and the corresponding charge of felony firearm.

Even though Mr. McCoy stipulated to the admission of the prior conviction record, it did not include an agreement that he was convicted of the offense. The stipulation only pertained to the contents on the record which did not include an identification of Mr. McCoy as the one who committed the offense and had that conviction entered against him. As a result, this Court must reverse his convictions for felon in possession of a firearm and the corresponding felony firearm charge.

When a defendant challenges the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether it would warrant a reasonable juror or trier of fact to find guilt beyond a reasonable doubt. People v. Nowackz, 462 Mich 392, 399; 614 NW 2d 78 (2000); People v. Hampton, 407 Mich 354, 366; 285 NW 2d 284 (1979), cert den. 449 US 885 (1980). This standard was articulated by the United States Supreme Court in Jackson v. Virginia, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979). According to Jackson, the sufficient evidence requirement is a part of every criminal defendant's due process rights. It is an attempt to give 'concrete substance' to those rights, by precluding

irrational jury verdicts. Jackson, supra, 443 US 315. The Jackson Court explained The [In re Winship, 397 US 358; 90 S. CT 1068; 25 L Ed 2d 368 (1970)] doctrine [requiring proof of guilt beyond a reasonable doubt] requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. [443 US 316-317]. see People v. Wolfe, 440 Mich 508, 514-515 (1992).

ISSUE II

The trial court abused its discretion when it denied Mr. McCoy's Motion for a Change of Venue due to the trial's publicity, along with the exclusion of minority jurors. Defendant was denied his due process right to a fair trial under the State and Federal Constitution. U.S. Const. Amendment V, VI, XIV, Mich Const. 1963 art 1 § 17, 20.

Standard of Review:

"The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v Dowd, 366 US 717, 722; 81 S Ct 1639; 6 L. Ed 2d 751 (1961); People v Jendrzejewski, 455 Mich 495, 500; 566 NW2d 530 (1997). The United States and Michigan Constitution's guarantee the defendant the right to a fair trial and due process of law. U.S. Const., Art Mich Const 1963, Art 1, sec. 17, 20.

Generally, criminal defendants should be tried in the county where the offenses charged allegedly occurred. Id. at 499; MCL 600.8312; Jendrzejewski, supra at 499. This Court reviews the grant or denial of a motion for change of venue for an abuse of discretion, Jendrzejewski, 455 Mich 495 at 501.

Discussion:

Under Michigan law, a trial court has discretion to change venue on motion by either party. MCL 762.7. The moving party has the burden on appeal to show an abuse of discretion. *People v Bailey*, 169 Mich App 492 (1988); *People v Clay*, 95 Mich App 152 (1980). The trial court can defer decision on the motion until there has been an attempt to seat an impartial jury. *People v Nixon*, 114 Mich App 233 (1982).

In *People v Jancar*, 140 Mich App 222, 229-230 (1985), the Court stated:

> Moreover, the existence of pretrial publicity does not itself require a change of venue. *Murphy v Florida*, 421 US 794; 95 S Ct 2031; 44 L Ed 2d 589 (1975). If jurors are able to set aside their impressions or opinions and render a verdict based upon the evidence adduced at trial, a change of venue is not necessary. *People v Prast (On Reh)*, 114 Mich App 469, 477; 319 NW2d 627 (1982). A change of venue is proper only where there is a finding of a strong community feeling or a bitter prejudice towards the defendant. *Id.*"

This standard is essentially the same as that applied in *Irvin, supra.* Michigan courts have dealt with change of venue issues in several cases which have engendered substantial publicity. See, for example, *Bailey, supra*; *People v Haggart,* 142 Mich App 330 (1985); *People v Collins,* 43 Mich App 259 (1972); *People v Hart,* 161 Mich App 630 (1987); *People v DeLisle,* 202 Mich App 658 (1993).

Here, defense counsel argued in the trial court that since there were media articles published about the trial and the prosecution gave interviews to the media about the case, it irreparably prejudiced Mr. McCoy's ability to receive a fair trial. Defense counsel pointed-out during jury selection that the media coverage was extensive, and that most potential jurors had seen the published article about the trial in the media just prior to the start of it. (T, 133). In addition, defense counsel asserted that because the published media article included Mr. McCoy's prior record, it irreparably prejudiced his ability to receive a fair trial in Lapeer County. This, coupled with the lack of a cross section of the community where African-Americans were not contained in the juror pool, it irreparably impacted Mr. McCoy's right to receive a fair trial and he did not receive one. Thus, the trial judge abused his discretion by not ordering a change of venue. In addition, a second standard must be met to change venue. "Consideration of the quality and quantum of pretrial publicity, standing alone, is not sufficient to require a change of venue." Jendrzejewski, supra at 517. This Court "must also closely examine the entire voir dire to determine if an impartial jury was impaneled. " Id. To hold that the existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would establish an impossible standard. See Jendrzejewski, supra at 517. It is sufficient if the jurors can lay aside their impression or opinion and render a verdict based on the evidence presented at trial. Id. "The value protected by the Fourteenth Amendment is lack of partiality, not an empty mind." Id. at 519.

As Defendants' defense counsel pointed out during his arguments, there were a sufficient number of jurors who had pre-exposure to the case to warrant a change of venue. Since according to defense counsel that "no less

than probably half of the jury pool by the time we had reached our jury that raised the issue they had seen that", that very high number of jurors pre-exposed to the case should have warranted a change of venue.

The existence of pretrial publicity alone does not require a change of venue. People v Jancar, 140 Mich App 222, 229-230; 363 NW2d 455 (1985). The "defendant has the burden of proving either (1) strong community feelings against him and that the publicity is so extensive that jurors could not remain impartial when exposed to it, or (2) that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice." People v Hack, 219 Mich App 299, 31 1; 556 NW2d 187 (1996). Two approaches have been used to determine whether the failure to grant a change of venue is an abuse of discretion. See Jendrzejewski, supra at 500-501. "Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice. " Id.

This Court must determine whether the effect of pretrial publicity on a relatively small jury pool was such "unrelenting prejudicial pretrial publicity [that] the entire community will be presumed both exposed to the publicity and prejudiced by it." Jendrzejewski, supra at 501. Moreover, we must distinguish between largely factual publicity and that which was invidious or inflammatory. Id. at 504.

Mich Const 1963, Art 1, sec. 17, 20. Generally, criminal defendants should be tried in the county where the offenses charged allegedly occurred. Id. at 499; MCL 600.8312; Jendrzejewski, supra at 499. However, a trial court can grant a change of venue for good cause. MCL 762.7. "Good cause" concerns the ability to obtain a fair trial in the county where the action is brought. In re Attorney General, 129 Mich App 128, 135; 341 NW2d 253 (1983). A court may, in special circumstances where justice demands or statute provides, change venue to another county. MCL 762.7; MSA 28.850; Jendrzejewski, supra at 499-500.

ISSUE III

Mr. McCoy was denied his right to a fair trial because the trial court abused its discretion in denying Motion for a Mistrial. Due to the improper jury selection process, were minority jurors were systematically excluded. He was denied his right to due process under the Federal and State Constitutions. U.S. Const, art IV, V, VI, Mich Const. 1963, art 1 § 17, and 20.

Standard of Review:

Defendant preserved this issue for appellate review when his defense counsel objected to the racial composition of the jury just before the preliminary instructions were given to them.

"To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systemic exclusion of the group from the jury selection process." People v Smith, 463 Mich 199, 203; 615 NW2d I (2000); see also Duren v Missouri, 439 US 357, 364; 99 S. CT 664; 58 L Ed 2d 579 (1979).

Discussion:

Since the jury panel did not include African-American jurors to present a cross-section of the community, Mr. McCoy was denied a fair trial and due process of law under the Federal and state Constitutions. US. Const Art V, VI, XIV, Mich Const 1963 Art 1, § 17, 20, Mr. McCoy asserts that he was deprived of his constitutional right to an impartial jury drawn from a fair cross section of the community because of the systematic exclusion of minority jurors in the county circuit court system. A defendant establishes a prima facie violation of the fair-cross-section requirement by showing: (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. People v Howard, 226 Mich App 528, 533; 575 NW2d 16 (1997). Duren Missouri, 439 US 357, 364; 99 S Ct 664, 668; 58 L Ed 579 (1979).

Here, defense counsel argued that the jury pool did not contain any African-Americans or minority citizens at all, and that the jury was not one of Mr. McCoy's peers. Defense counsel further pointed-out that the jury panel only contained Caucasian-Americans that could not be fair and impartial even though they were questioned during voir dire about being fair to Mr. McCoy. (T, 135).

The trial court erred by denying Mr. McCoy's motion because he did present a prima facie case in that for (1) above, African-American citizens would qualify as a distinctive group in the community; (2) that even though Lapeer County apparently does not contain a large number of minority residents, it still should have had a small percentage of minority jurors in the jury pool. Based on the complete lack of minority jurors from the panel, the system employed by Lapeer County was not fair and reasonable to have minority jurors appear as jurors. For (3) above, since there was not a single minority juror on the panel, it must have been from a systematic exclusion of African-Americans in the jury-selection process. If Lapeer County had a fair and reasonable system, then there certainly would have been some non-Caucasian jurors on the panel to have a fair cross section of the community represented on the jury panel.

ISSUE IV

Mr. McCoy was denied his right to due process of law and a trial when he was not allowed to present a defense. The prosecution withheld a victim impact statement, which would have impeached the credibility of a complaining witness, that could have changed the jury's verdict. In violation of federal and state constitutions.

Standard of Review:

This Court reviews for an abuse of discretion a trial court's ruling on a motion for new trial. People v Cress, 468 Mich 678, 691; 664 NW2d 174 (2003). In criminal cases, a new trial may be granted "on any ground that would support appellate reversal of the conviction or because the trial court believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B); see also MCL 770.1 ("when it appears to the court that justice has not been done"). This Court reviews due process claims, such as allegations of a Brady violation, de novo. People v Schumacher, 276 Mich App 165, 176; 740 NW2d 534 (2007); Brady v Maryland, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Discussion:

Federal and Michigan Constitution's guarantee that a defendant receives a fair trial and to present a defense. US Const Ams V, VI, XIV; Mich Const 1963, Art l, Sec 17, 20. Few rights are more fundamental than that of an accused to present evidence in his or her own defense. Chambers v Mississippi, 410 US 284, 302; 93'S. CT 1038; 35 L Ed 2d 297 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Holmes v South Carolina, 547 US 319, 324; 126 S. CT 1727; 164 L Ed 2d 503 (2006) (internal quotation marks and citations omitted). In Brady v Maryland, 373 US 83, 87; 83 S. CT 1194; 10 L Ed 2d 215 (1963),

The United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." To establish a Brady violation, a defendant must

prove that: (1) the prosecution suppressed evidence, (2) the evidence was favorable to the accused, and (3) viewed in its totality, the evidence is material. People v Chenault, 495 Mich 142, 155; 845 NW2d 731 (2014). "Evidence is favorable to the defense when it is either exculpatory or impeaching." Id. at 150. "To establish materiality, a defendant must show that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. (quotation marks and citation omitted).

Mr. McCoy preserved his issue for appellate review when he filed a motion for a new trial in the trial court which was denied on December 5, 2017. (ST, 4-6, 16-17). In order to preserve an issue for appellate review on the basis of the prosecution's suppression of evidence, a defendant must move for a new trial or for relief from judgement in the trial court. People v Cox, 268 Mich App 440, 448; 709 NW2d 152 (2005). Defendant argued in his motion for a new trial that the prosecution denied him a fair trial and due process when it did not provide him with a victim impact statement that was prepared by complainant John Bucy on July 12, 2016. (ST, 4-6, 17; see statement-PSIR, 7). Since complainant Bucy's credibility and truthfulness were a very important aspect of the prosecution's case and the jury needed to believe him to find Mr. McCoy guilty, the trial court erred by not granting him a new trial especially where the statement offered a conflicting statement. (ST, 4-5).

A person cannot be deprived of life, liberty, or property without due process of law. US Const, Ams V, XIV•, Const 1963, Art 1, sec. 17; People v Bears, 463 Mich 623, 629; 625 NW2d 10 (2001). "What process is due in a particular proceeding depends upon the nature of the proceeding, the risks and costs involved, and the private and governmental interests that might be affected." People v Pitts, 222 Mich App 260, 263; 564 NW2d 93 (1997).

Mr. McCoy argued in his motion for a new trial that the prosecution denied him a fair trial and due process when it did not provide him with a victim impact statement that was prepared by complainant John Bucy on July 12, 2016. (ST, 4-6, 17; see statement-PSIR, 7). Since complainant Bucy's credibility and truthfulness were a very important aspect of the prosecution's case and the jury needed to believe him to find Mr. McCoy guilty, the trial

court erred by not granting him a new trial especially where the statement offered a conflicting statement. (ST, 4-5). The trial court erred when it did not grant Mr. McCoy a new trial because it was apparent that the prosecution withheld the evidence when it knew it should have provided it to Mr.

McCoy prior to Defense counsel pointed-out that prior counsel for Mr. McCoy did not receive that statement and neither did he before trial. (ST, 5). Thus, under (1) above, Mr. McCoy showed that the prosecution withheld evidence. Under (2) above, the evidence was favorable to Mr. McCoy because complainant Bucy's statement conflicted with facts that he testified to at trial and the statement would have been used to impeach his credibility. In the statement, complainant Bucy indicated that he lost a lot blood which conflicted the scene evidence where very little, if not any blood was found. Furthermore, complainant Bucy indicated that Mr. McCoy consumed massive amounts of cocaine and alcohol which was not adequately established at trial. Complainant Bucy also claimed that Mr. McCoy reloaded the gun which was not supported by the trial testimony. (PSIR, 7). Under (3) above, complainant Bucy's statement was material since it would have been used to impeach his credibility.

Since the jury had to assess complainant Bucy's credibility and trustworthiness, and must have found him credible to find Mr. McCoy guilty, the statement if it was available would have been used to discredit him. Once the jury found that complainant Bucy's testimony could not be believed, they would have acquitted Mr. McCoy. Since Mr. McCoy established a Brady violation as a result of the withheld statement that would have changed the outcome of the trial, the trial court erred by not granting a new trial.

ISSUE V

Mr. McCoy was denied his constitutional right to the effective assistance of counsel, when his trial counsel failed to request that *MI Crim. JI 4.5* be given to the jury. Stipulating to the defendant's prior criminal conviction for Felon in Possession of a firearm charge.

Standard of Review:

The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel. People v Vaughn, 491 Mich 642, 669; 821 NW2d 288 (2012). Most claims of ineffective assistance of counsel are analyzed under the test articulated by the United States Supreme Court in Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Discussion:

"Generally, a trial court's findings of fact, if any, are reviewed for clear error, and questions of law are reviewed de novo." Id at 188. "When no Ginther hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." Id; People v Ginther, 390 Mich 436; 212 NW2d 922 (1973). "Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." People v Holloway, 316 Mich App 174, 187; 891 NW2d 255 (2016).

In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's error, there was a reasonable probability that the result of the proceeding would have been different. People v Mitchell, 454 Mich 145, 157-158; 560 NW2d 600 (1997); People v Stanaway, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant "must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. " Mitchell, supra. A motion for new trial or an evidentiary hearing is a prerequisite to appellate review unless the record contains sufficient details relating to the alleged deficiencies in representation to allow the appellate courts to adequately analyze the issue. People v Laidlaw, 169 Mich 4pp

84, 95; 425 NW2d 738 (1988). Where defendant fails to move for a new trial or evidentiary hearing, the appellate court review is limited to errors that are apparent from the trial court record. People v Nantelle, 215 Mich App 77, 87; 544 NW2d 667 (1996).

The Supreme Court has identified three additional "rare situations" in which counsel's performance is so deficient that prejudice is presumed. Id. Prejudice will be presumed where (l) there was the complete denial of counsel at a critical stage of (2) counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, or (3) counsel is called on to render assistance under circumstances where competent counsel very likely could not. United States v Cronic, 466 US 648; 659-660; 104 S Ct 2039; 80 L Ed 2d 657 (1984). A person cannot be deprived of life, liberty, or property without due process of law. US Const, Ams V, XIV•, Const 1963, Art 1, sec. 17; People v Bears, 463 Mich 623, 629; 625 NW2d 10 (2001). "What process is due in a particular proceeding depends upon the nature of the proceeding, the risks and costs involved, and the private and governmental interests that might be affected." People v Pitts, 222 Mich App 260, 263; 564 NW2d 93 (1997). The Federal appellate courts review the charge to the jury as a whole to determine whether it fairly and adequately submitted the issues and the law to the jury. United States v. Newcomb, 6 F 3d 1129, 1132 (1993).

Furthermore, the Federal and Michigan Constitution's guarantee that a defendant receives a fair trial and to present a defense. US Const Ams V, VI, XIV; Mich Const 1963, Art l, Sec 17, 20. Few rights are more fundamental than that of an accused to present evidence in his or her own defense. Chambers v Mississippi, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Holmes v South Carolina, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (internal quotation marks and citations omitted).

A. M Crim JI 4.5 "Prior Inconsistent Statement Used to Impeach a Witness" should have been given to the jury.

When Mr. McCoy's trial counsel did not object or request to have jury instruction, M Crim JI 4.5, "Prior Inconsistent Statement Used to Impeach a Witness" given to the jury so they could have properly applied the correct standards to assess the evidence, credibility of the witnesses and issues in the case, he •was denied effective assistance of counsel guaranteed to him under the Sixth Amendment of the Federal Constitution. US Constitution, Amend VI, XIV; Mich Const 1963, Art 1, Sec. 17, 20.MCR 2.512(D)(2) requires that the Model Criminal Jury Instructions be used when they (1) are applicable, (2) accurately state the applicable law, and (3) are requested by a party. People v Traver, 316 Mich App 588, NW2d (2016) (Docket No. 325883); slip op at 5. Even though the trial court was not required to use the model jury instructions, a defendant is still entitled "to have a properly instructed jury consider the evidence against him." People v Mills, 450 Mich 61, 80-81; 537 NW2d 909 (1995). 'Jury instructions should be considered as a whole when reviewed for error requiring reversal. People v Richardson, 490 Mich 115, 119; 803 NW2d 302 (2011). The trial court's instructions to the jury must include all elements for each offense charged. People v. Bartlett, 231 Mich App 139, 143; 585 NW2d 341 (1998). The instructions also must not omit material issues, defenses, or theories that are supported by the evidence. Id. "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect defendant's rights." Id. at 143-144. M Crim JI 4.5 "Prior Inconsistent Statement Used to Impeach a Witness" should have been given to the jury because throughout prosecution's case, its witnesses testified inconsistently during cross examination.

M Crim JI 4.5 states:

You have heard evidence that, before the trial, [a witness /witnesses] made [a statement/statements] that may be inconsistent with [her] testimony her in court.

(1) You may consider an inconsistent made before the trial [only] to help you decide how believable the [witness'/witnesses'] testimony was when testifying here in court.

(2) If the earlier statement was made under oath, then you may also consider the earlier statement as evidence of the truth of whatever the [witness/witnesses] said in the earlier [statement/statements] when determining the facts of this case. [emphasis added].

During the trial, complainant Bucy contradicted his testimony from the preliminary examination where he testified that Mr. McCoy pointed the gun at complainant Kozar first. (T, 226-227). In addition, Deputy Eckel contradicted her preliminary examination testimony at trial when she testified that Mr. McCoy had not been searched before he was taken to the jail, whereas at trial she testified that the road patrol deputies had searched Mr. McCoy. (T, 450-451).

Mr. McCoy was denied effective assistance of counsel when his defense counsel failed to object or request that the above omitted instruction, M Crim JI 4.5, be provided to the jury where it clearly would have benefited Mr. McCoy, addressed his issues, defenses and evidence as argued above. The first prong under Strickland, supra was met where trial counsel's performance fell below an objective standard of reasonableness when M Crim JI 4.5 should have been at least requested to be read to the jury since there were witnesses at trial who provided inconsistent testimony that impacted their credibility.

Defense counsel 's omission met the second prong of Strickland, supra and deprived Mr. McCoy of a fair trial and reliable verdict because had the jury been given the instruction and applied it to his benefit, there was a very strong likelihood that they could have found reasonable doubt in the prosecution's case based on their assessment of the credibility of the witnesses. The jury very likely could have found that the prosecution's witnesses and evidence were not credible, and evaluated the evidence differently.

Thus, this Court must reverse Mr. McCoy's convictions because the error was plain from the trial record.

B. Mr. McCoy was denied effective assistance of counsel when defense counsel did not stipulate to his prior felony conviction of possession with intent to deliver less than the 50 grams of a controlled substance.

In this case, Mr. McCoy was denied his right to a fair trial, due process and effective assistance of counsel when his defense counsel did not object to the admission of his prior felony conviction of possession with intent to deliver less than 50 grams of a controlled substance. Defense counsel was deficient under the first prong of Strickland, supra, because he should have stipulated to the prior felony conviction since the conviction record was not in dispute, where he did not object to the admission of the record. (T, 618). By stipulating to the record, the jury would not have heard that he was previously convicted of the offense and it would have protected Mr. McCoy from a very negative implication that was inherent in the offense.

Defense counsel's deficient performance prejudiced Mr. McCoy under the second prong of Strickland, supra because the facts surrounding his trial involved a drug deal with the complainants. When the jury was able to hear that he was previously convicted of a similar offense, they were likely to reach the conclusion that he was guilty in this case, especially for the possession of a controlled substance less than 25 grams' charge, and not be able to separate the two cases and disregard any negative implication from the prior conviction.

As a result, since the two conditions in Strickland, supra were met and the error was plain from the trial court record, this Court must reverse Mr. McCoy's convictions.

C. Mr. McCoy was denied effective assistance of counsel when his defense counsel did not object to an incriminating in-custody statement made by him without Miranda warnings.

Mr. McCoy was denied effective assistance of counsel, fair trial and due process of law when his defense counsel failed to object to Deputy Eckel's testimony where Mr. McCoy admitted to her that the substance that she recovered from him was heroin. (T, 436). "The United States Constitution and the Michigan Constitution both prohibit 'compelled' self-incrimination." US Const, Am V; Const 1963, Art 1, Sec 17. Before a suspect is subject to custodial interrogation, the suspect must be given the now familiar Miranda warnings; specifically, the suspect must be informed "(1) that he has the right to remain silent, (2) that anything he says can and will be used against him in court, (3) that he has a right to the presence of an attorney during any questioning, and

(4) that if he cannot afford an attorney one will be appointed for him." People v Daoud, 462 Mich 621, 625 n 1; 614 NW2d 152 (2000). "When a suspect has been afforded Miranda warnings and affirmatively waives his Miranda rights, subsequent incriminating statements may be used against him," provided that the waiver of rights is voluntary, knowing, and intelligent... Miranda v Arizona, 384 US 436, 473-474; 86 S. CT 1602; 16 L Ed 2d 694 (1966).

Here, defense counsel was deficient under the first prong of Strickland, supra, because he should have objected to the admission of Mr. McCoy's statement where he was clearly under arrest and in custody when he was searched by Deputy Eckel at the jail. Deputy Eckel's testimony was damaging to Mr. McCoy because she indicated that Mr. McCoy admitted to her that the drug that she allegedly found on him was a controlled substance, which was an element of the crime of possession of a controlled substance that had to be established by the prosecution. Defense counsel's deficient performance met the second prong of Strickland, supra because it affected the outcome of the charge because Deputy Eckel's testimony established that the substance was a controlled substance, without the need for the prosecution to prove that element beyond a reasonable doubt.

As a result, this Court must reverse Mr. McCoy's conviction for possession of a controlled substance Jess than 25 grams and remand for a new trial since the error was plainly ascertained from the trial court record.

Thus, this Court must reverse Mr. McCoy convictions, order a new trial or remand for an evidentiary hearing on this issue because Mr. McCoy was denied effective assistance of counsel as guaranteed by the Federal and Michigan Constitutions. US Const. Amend XI, XIV; Mich Const 1963, Art 1, Sect. 17, 20.

ISSUE VI

Mr. McCoy, was denied a fair trial and due process when the trial court erroneously gave jury instruction *MI Crim. JI 4.4*, were the evidence did not support it, and *MI Crim. JI 17.10*, and *17.11* were they did not include the definition of a shotgun, and as a result it violated Defendant's federal and state constitutional rights to a fair trial.

Standard of Review:

Defendant preserved this issue for appellate review when he objected to the trial court providing M Crim. JI 4.4 to the jury, and 17.10 and 17.11 without the definition of shotgun. (T, 761-766). A trial court's "determination whether a jury instruction is applicable to the facts of the case" is reviewed for an abuse of discretion." People v McKinney, 258 Mich App 157, 163; 670 NW2d 254 (2003).

Discussion:

Mr. McCoy argued at trial that M Crim JI 4.4" Flight, Concealment, Escape or Attempted Escape" should not have been provided to the jury because the facts did not support it, and further requested that M Crim JI 17.10 "Definition of a Dangerous Weapon" and 17.11 "Definition of Firearm-Gun, Revolver, Pistol" include the definition of a shotgun in each of them. "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." People v Canales, 243 Mich App 571, 574; 624 NW2d 439 (2000). A criminal defendant is only entitled to a jury instruction if the evidence supports it. People v Riddle, 467 Mich 116, 124; 649 NW2d 30 (2002). Mr. McCoy preserved this issue for appellate review when he objected to the trial court providing M Crim JI 4.4 to the jury, and 17.10 and 17.11 without the definition of shotgun. (T, 761-766). After hearing arguments from the parties, the trial court overruled Mr. McCoy's objections, and provided them as proposed to the jury. (T, 761-766).

A person cannot be deprived of life, liberty, or property without due process of law. US Const, Ams V, XIV; Const 1963, Art 1, sec. 17; People v Bearss, 463 Mich 623, 629; 625 NW2d 10 (2001). "What process is due in a particular proceeding depends upon the nature of the proceeding, the risks and costs involved, and the private and governmental interests that might be affected." People v Pitts, 222 Mich App 260, 263; 564 NW2d

93 (1997). The Federal appellate courts review the charge to the jury as a whole to determine whether it fairly and adequately submitted the issues and the law to the jury. United States v. Newcomb, 6 F 3d 1129, 1132 (1993).

Furthermore, the Federal and Michigan Constitution's guarantee that a defendant receives a fair trial and to present a defense. US Const Ams V, VI, XIV; Mich Const 1963, Art 1, Sec 17, 20. Few rights are more fundamental than that of an accused to present evidence in his or her own defense. Chambers v Mississippi, 410 US 284, 302; 93 S. CT 1038; 35 L Ed 2d 297 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Holmes v South Carolina, 547 US 319, 324; 126 S ct 1727; 164 L Ed 2d 503 (2006) (internal quotation marks and citations omitted).

MCR 2.512(D)(2) requires that the Model Criminal Jury Instructions be used when they (1) are applicable, (2) accurately state the applicable law, and (3) are requested by a party. People v Traver, 316 Mich App 588, NW2d _ (2016) (Docket No. 325883); slip op at 5. Even though the trial court was not required to use the model jury instructions, a defendant is still entitled "to have a properly instructed jury consider the evidence against him." People v Mills, 450 Mich 61, 80-81; 537 NW2d 909 (1995). Jury instructions should be considered as a whole when reviewed for error requiring reversal. People v Richardson, 490 Mich 115, 119; 803 NW2d 302 (2011). The trial court's instructions to the jury must include all elements for each offense charged. People v Bartlett, 231 Mich App 139, 143; 585 NW2d 341 (1998).

The instructions also must not omit material issues, defenses, or theories that are supported by the evidence. Id. "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect defendant's rights." Id. at 143-144. M Crim JI 4.4 Flight, Concealment, Escape or Attempted Escape provides the following:

(1) There has been some evidence that the defendant [tried to run away / tried to hide / ran away / hid] after [the alleged crime / (he / she) was accused of the crime / the police arrested (him / her) / . the police tried to arrest (him / her)].

(2) This evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of

(3) You must decide whether the evidence is true5 and, if true, whether it shows that the defendant had a guilty state of mind.

In this case, defense counsel argued at trial that since it only took about 18 minutes from the time of the alleged offense until the time that Mr. McCoy was arrested, and he gave himself up without a struggle when the police encountered him, the trial court when it provided M Crim JI 4.4 to the jury. Since Mr. McCoy did not attempt to flee from the police once they confronted him, and was found how close to the crime scene, the evidence did not support M Crim JI 4.4 being read to the jury. As a result, this Court must reverse Mr. McCoy's conviction and remand for a new trial.

M Crim JI 17.10 "Definition of Dangerous Weapon" provides:

(1) A dangerous weapon is any object that is used in a way that is likely to cause serious physical injury or death.

(2) Some objects, such as guns or bombs, are dangerous because they are specifically designed to be dangerous. Other objects are designed for peaceful purposes but may be used as dangerous weapons. The way an object is used or intended to be used in an assault determines whether or not it is a dangerous weapon. If an object is used in a way that is likely to cause serious physical injury or death, it is a dangerous weapon.

(3) You must decide from all of the facts and circumstances whether the evidence shows that the in question here was a dangerous weapon.

M Crim JI 17.11 Definition of Firearm-Gun, Revolver, Pistol provides:

(l) A gun [revolver / pistol] is a firearm. A firearm includes any weapon which is designed to or may readily be converted to expel a projectile by action of an explosive.

[(2) It does not matter whether or not the gun (revolver / pistol) was capable of firing a projectile or whether it was loaded.]

Here, Mr. McCoy requested that the trial court include the definition of shotgun in both of the above instructions so that his defense and arguments of a gun being present in the complainants Brent Kozar bed which was photographed by Lt. Gary Parks & described in (T. 570-571) in which he states: "that it shows that thing that appears to be a gun stock there," when he was asked about the two picture's that are the Defendant's Exhibit J & Exhibit V, could have been considered by the jury. When the trial court denied his Request, MR. McCoy contends that he was denied a fair trial and due process of law which warrants a Reversal and a new trial. Therefore, this court must reverse MR. McCoy's Conviction and remand for a new trial.

ISSUE VII

The defendant is entitled to resentencing pursuant to the federal and Michigan constitutions. U.S. Const. Amend V, VI, Mich Const. 1963 art 1 § 17, and 20. Since the trial Judge engaged in impermissible judicial fact-finding when erroneously ruling that there were sufficient facts to support the scoring of offense variable's 3,4, and 5. Because the facts established at trial did not support them beyond a reasonable doubt.

Standard of Review:

A defendant must be sentenced based on accurate information pursuant to the Federal and Michigan Constitutions. United States Const. Amend VI, V, VI, XIV; Mich Const Art l, Sec 17, 20; Townsend v. Burke, 334 US 736; 68 S. CT 1252; 92 L Ed 2d 1690 (1948); People v. Malkowski, 385 Mich 244 (1971). MCR 6.429 (A) states that, "[t]he court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law."

Defendant preserved this issue for appellate review when he presented objections that were heard at sentencing, and argued that his sentencing guidelines were erroneously scored.

Discussion:

On December 5, 2017, the trial judge denied Mr. McCoy's motions which preserved this issue for appellate review pursuant to MCR 6.311 and MCLA 769.34(10).

The issues in this case concern the proper interpretation and application of the statutory sentencing guidelines, MCL 777.11 et seq., and the standard to be applied to score them, both of which are legal questions that this Court reviews de novo. People v Morson, 471 Mich 248, 255; 685 NW2d 203 (2004). "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." People v Hardy, 494 Mich 430, 438; 835 NW2d 340 (2013) (citations omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." Id.

Recently, the Michigan Supreme Court in People v. Lockridge, 498 Mich 358; 870 NW 2d 502 (2015), held that Michigan's statutory sentencing guidelines scheme violates the U.S. Constitution under the Sixth and Fourteenth Amendments. The Court held that the sentencing guidelines are no longer binding and mandatory on the sentencing judge, and the sentences imposed by the trial courts will be reviewed for "reasonableness." The Court maintained that the sentencing court must determine the applicable sentencing guidelines range and take them into account when imposing a sentence. Id at 2, 28.

Mr. McCoy should be entitled to have his information corrected and sentence reconsidered because the trial court engaged in impermissible judicial fact-finding to score the sentencing guidelines, contrary to Alleyne v United States, 570 U.S; 133 S Ct2151•, L Ed 2d 314 (2013); Lockridge, supra. In Alleyne, 133 S Ct at 2163, the United States Supreme Court held that because "mandatory minimum sentences increase the penalty for a crime," any fact that increases the mandatory minimum is an "element" that must "be submitted to the jury and found beyond a reasonable doubt." In Lockridge, 498 Mich at 364, our Supreme Court held that Michigan's sentencing guidelines were constitutionally deficient under Alleyne to the extent that "the guidelines require judicial fact-findings beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range, i.e. the 'mandatory minimum' sentence under Alleyne." To remedy the constitutional violation, the Court severed MCL 769.34(2) to the extent that it makes the sentencing guidelines, as scored based on facts beyond those admitted by the defendant or found by the jury, mandatory. Id. Very recently, in People v. Steanhouse, 500 Mich 453, 461; 902 NW 2d 327 (2017), the Michigan Supreme Court reaffirmed that the sentencing guidelines are advisory only. The Court explained that a sentencing court must still score the guidelines to determine the applicable guidelines. The Court held that the sentencing guidelines are no longer binding and mandatory on the sentencing judge, and the sentences imposed by the trial courts will be reviewed for "reasonableness", but a guidelines range calculated in violation Alleyne is now advisory only. Id at 365. The Court in Lockridge held that:

> When a defendant's sentence is calculated using a guidelines minimum sentence range in which OVS have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness. Booker, 543 U.S. at 261, 125 S.Ct. 738. Resentencing will be required when a sentence is determined to be unreasonable. Because sentencing courts will hereafter not be bound by the applicable sentencing guidelines are, this remedy cures the Sixth Amendment flaw in our guidelines scheme .by removing the unconstitutional constraint on the court's discretion. Sentencing courts must, however, continue to consult the applicable guidelines range and take it into account when imposing a sentence. Further, sentencing courts must justify the sentence imposed in order to facilitate appellate review. People v. Coles, 417 Mich. 523, 549, 339 N.W.2d 440 (1983), in on other grounds by People v. Milbourn, 435 Mich. 630, 644, 461 N.W.2d 1 (1990). Lockridge, supra at 392; see United States v. Booker, 543 U.S. 220, 233, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

Under the principle of proportionality standard, a sentence must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." Milbourn, 435 Mich at 636. Accordingly, the sentencing court must impose a sentence that takes "into account the nature of the offense and the background of the offender." Id. at 651. Generally, sentences falling within the minimum sentencing guidelines range are presumptively proportionate. People v Cotton, 209 Mich App 82, 85; 530 NW2d 495 (1995). Factors that may be considered under the principle of proportionality standard include, but are not limited to: (1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. [People v Lawhorn, 320 Mich App 194, 207; NW2d _ (2017) (citation and quotation marks omitted)]. The Court in Milbourn held that under "unusual circumstances," a sentence within the guidelines range may "be disproportionately severe or lenient," which would result in a sentence that violates the principle of proportionality even though it is within the guidelines range. Milbourn, 435 Mich at 661.

Mr. McCoy asserted at sentencing that OV 3, Physical Injury to Victim" was erroneously scored 25 points. The probation department scored Mr. McCoy 25 points for life threatening or permanent incapacitating injury occurred to a victim. The evidence at trial indicated that complainant Bucy went to the hospital after he was shot and was examined by Dr. Onazian, who lacked personal recollection and relied on the medical records. Mr. McCoy argued at sentencing that he should have only been scored 10 points for OV 3 because only bodily injury requiring medical treatment occurred to a victim, complainant Bucy, under MCLA 777.33(1)(d). Mr. McCoy asserted at sentencing that when complainant Bucy was shot in the torso and shoulder area, it only showed that bodily injury occurred that was not life threatening. As a result, the trial court erred by scoring OV 3 at 25 points rather than 10 points.

Mr. McCoy asserts that OV 4, "Degree of Psychological Harm" was erroneously scored 10 points under MCLA 777.34(2) where the victim allegedly required professional treatment, in this case complainant Bucy who claimed that he suffered from post-traumatic stress disorder. At sentencing, defense counsel argued that complainant Bucy did not produce any documentation to support the claim, and he did not report that he actually received any treatment since he submitted his victim impact statement on June 12, 2016. (See PSIR, Appendix). MCLA 777.34 (1) (a).

The trial court improperly scores OV 4 if there is no evidence of any psychological injury to the victim, because the trial court may not assume that an injury occurred. People v Lockett, 295 Mich App 165, 183; 814 NW2d 295 (2012). The trial court may not assess points under OV 4 on the basis of its belief that anyone in the victim's position would have suffered a psychological injury. Id. The trial judge erroneously scored OV 4 at 10 points when it should have been scored at zero points, since there was insufficient evidence to score it.

The probation department scored OV 5 at 15 points because complainant Bucy claimed that his children suffered from post-traumatic stress disorder. (PSIR p. 3). At trial, the evidence revealed that the children were

outside of the house at the time of the shooting, and there was no evidence other than complainant Bucy's claim that they had suffered any emotional trauma. Although whether they had received treatment is not determinative, some reliable evidence was not presented to the trial court to support the score. Since no evidence was produced, the trial court erred by scoring OV 5 at 15 points. Mr. McCoy contended at sentencing that OV 5, "Psychological Injury to Member of a Victim's Family" under MCLA 777.35, was erroneously scored 15 points where it should have been scored zero points. Mr. McCoy asserted at sentencing that there was no evidence indicating that any member of the victim's family intended to receive professional' treatment in relation to the incident or required professional treatment because of the incident. See People v Portellos, 298 Mich App 431, 449; 827 NW2d 725 (2012) (affirming the trial court's refusal to assess points for OV 5 when there was no evidence that members of the victim's family intended to receive treatment).

Since the trial court sentenced Mr. McCoy based on inaccurately scored sentencing guidelines, his information must be corrected and his sentence reconsidered. Pursuant to MCR 2.613(A), a sentence must be consistent with "substantial justice." Our Supreme Court found in People v Francisco, 474 Mich 82, 88, 90-91 (2006), that "it is difficult to imagine something 'more inconsistent with substantial justice' than requiring a defendant to serve a sentence that is based upon inaccurate information." Id. at •91, n6. As a result, the Court held that a defendant must be resentenced when he is sentenced under mis-scored and inflated guidelines even if the minimum sentence imposed falls within both the mis-scored and the lower, correctly scored, guidelines. In Francisco, the sentencing court imposed a minimum sentence of 102 months where the guidelines range was 87-217 months under an inaccurate scoring, and 78-195 months under an accurate scoring. The trial court's 102-month sentence was well within both ranges, but the Michigan Supreme Court concluded that resentencing was required because the defendant was given "a sentence which stands differently in relationship to the correct guidelines range than may have been the trial court's intention." Id. at 91-92, 10.

As a result, the trial court sentenced Mr. McCoy based on impermissible judicial fact finding contrary to the federal and state constitutions, which requires that this Court order a resentencing based on accurately scored

sentencing guidelines. When the trial court sentenced Mr. McCoy, the sentencing guidelines were erroneously scored at 27040-900 months' incarceration for assault with intent to commit murder. (See SIR, attached; Sentencing grid for Class A offenses, MCLA 777. 62, F-IV range). With the corrections if they were applied, Mr. McCoy's range would have been reduced to 171 -to- 570 months' incarceration (F-IV range, Class A offense). Even though the trial judge's sentences would still be within the sentencing guidelines with his minimum sentence of 300 months' incarceration, his sentences were still nonetheless invalid due to the inaccurate scoring. As a result, this Court must order a correction of the Sentencing Information Report and reconsideration of his sentence.

As a result, this Court must reverse the trial court's denial of Mr. McCoy's motion to re score the sentencing guidelines pursuant to United States v. Crosby, 397 F 3d 103 (2005) because Lockridge, supra held that the scoring of the sentencing guidelines based on facts not .found by a judge or jury proven beyond a reasonable doubt or admitted by the defendant violates the Sixth Amendment. The Court in Lockridge held that:

Second, we consider the converse: cases in which facts admitted by a defendant or found by the jury verdict were insufficient to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced. In those cases, it is clear from our previous analysis that an unconstitutional constraint actually impaired the defendant's Sixth Amendment right. The question then turns to which of these defendants is entitled to relief, i.e., which can show plain error.

> We conclude that all defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry. We reach this conclusion in part on the basis of our agreement with the following analysis from United States v. Crosby, 397 F.3d 103, 117-118 (C.A.2, 2005):
>
> In cases such as this one that involve a minimum sentence that is an upward departure, a defendant necessarily cannot show plain error because the sentencing court has already clearly exercised its discretion to impose a harsher sentence than allowed by the guidelines and expressed

> its reasons for doing so on the record. It defies logic that the court in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory. Thus, we conclude that as a matter of law, a defendant receiving a sentence that is an upward departure cannot show prejudice and therefore cannot establish plain error. Lockridge, supra 395-396

Since the trial judge's sentences were not within the accurately scored sentencing guidelines was significantly different depending on how the offense variables are rescored, this Court must order that Mr. McCoy's information be corrected and/or order a hearing to review the standard applied. At the hearing, this Court should order that the trial judge determine whether the offense variables and sentences were based on facts not supported by Mr. McCoy's trial evidence or facts proven beyond a reasonable doubt. This Court should further order that the filial judge must examine whether his sentence would have been materially different if the sentencing guidelines were not inflated and hold a full resentencing hearing. See Lockridge, supra at 395-399.

Therefore, this Court must remand and order that Mr. McCoy's information be corrected, and base the scoring of the offense variables, particularly OV 3, 4 and 5, only on evidence established at trial or shown beyond a reasonable doubt, and order that his sentence be reconsidered applying the reasonableness standard.

ISSUE VIII

Mr. McCoy was denied due process of law, when he was not allowed to be present during the proceeding of his arraignment, or enter of plea. In order for the waiver of any constitutional and procedural right to be valid, it must be a knowing, and voluntarily waiver of them through an intentional relinquishment.

Standard of Review:

The Supreme Court held that a Defendant has a due process right to be present at a proceeding, "whenever his presence has a relation reasonably substantial to the fullness of his opportunity to defend against the charge..., [The] presence of a Defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." United States v. Gagnon, 405 U.S. 522, 526 (1985).

Reversal is mandated where the reviewing court has a firm conviction that a mistake has been made. *People v Walker, supra; People v McGillen #1*, 392 Mich 251; 220 NW2d 677 (1974).

Discussion:

At the arraignment in the circuit court, the information must be read to the defendant unless expressly waived by him or counsel. The prosecutor required to give a copy of the information, and the court must ask him what plea he desires. GCR 1963, 785.5(1); GCR 1963, 785.5(2), states;

> "The waiver of the arraignment must be by written statement signed by the defendant and his lawyer Acknowledging that the defendant has received a copy of the information." Because the waiver of the arraignment cannot become effective until Defendant has read the information or had it explained to him. People v. Swayne, 139 Mich App. 258, 262-265, (1984).

Therefore, the supreme court held that GCR 1963, 785, be interpreted in a similarly rigid manner. Guilty plea cases, 395 Mich 96 (975). This rule requires that a Defendant be given a copy of the information by the prosecutor at the arraignment and is only adequately complied with when the prosecutor hands the copy to the defendants' attorney in the presence of the defendant GCR 1963, 785.5(1). *People v. Spence,* 69 Mich App. 688, 670 (1976). In resolving the issue, we are guided by principles of statutory construction in determining the supreme courts intent in promulgating rules of practice and procedure Issa v. Garlinghouse, 133 Mich. 579, 581 (1984). There

can be no doubt that the supreme court is cognizant of doctrines of statutory construction and that such doctrines advanced the court's intention in adopting the general court rules. People v. Lange, 105 Mich. App. 263, 266-267 (1981). It is general principle statutory construction that when a statute is unambiguous as its face, interpretation and construction of its terms all unnecessarily. Sneath v. Popiolek, 135 Mich App 17, 23 (1984). Here, the court rule is unambiguous and should be applied as written. A person cannot be deprived of life, liberty, or property without due process of law. U.S. Const. Ams V, XIV; Const 1963 Art 1 sec 17. People v. Bearss, 463 Mich 623 (2001). "What process is due in particular proceedings depends upon the nature of the proceeding, the risks' and cost involved and the private and governmental interest that might be affected. People v. Pitts, 222 Mich. App. 260, 263 (1997). It is a fundamental due process right that a defendant knows the nature of the accusation being made against him. *People v. Ora Jones,* 345 Mich 379, 388 (1975).

This right is guaranteed under the federal and state constitutions. Const Ams V, VI, XIV; Mich Const. 1963 Art 1, sec 20; MCL 767.45; MSA 28.985. A defendant has a constitutional right to adequate notice of the nature and cause against him. *People v. Darden*, 230 Mich. App. 597, 600 (1988). Informing a defendant of the nature and cause of the accusation being made is the most important function of the arraignment *People v. Killebrew,* 16 Mich. App. 324, 327 (1969).

A. Waiver and forfeiture are distinct doctrines.

"Waiver has been defined as the intentional relinquishment or abandonment of a known right." *People v Carter,* 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *People v Carines* 460 Mich 750, 762-63 n 7; 597 NW2d 130 (1999), quoting *United States v Olano,* 507 US 725, 733 (1993) (internal quotation marks excluded). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski,* 489 Mich 488, 503; 803 NW2d 200 (2011) (defendant waived error in omitting *actus reus* element of offense from jury instruction where his attorney "explicitly and repeatedly approved the instruction."). "One who waives his rights under a rule may not then seek appellate review of a

claimed deprivation of those rights, for his waiver has extinguished any error." *Id.* at 215, quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

As the Court explained in *Carter*, waiver "differs from forfeiture, which has been explained as 'the failure to make the timely assertion of a right.' " *Id.* at 215, quoting *Carines*, 462 Mich at 762-63. Rights or errors that have been forfeited are reviewed under the plain error standard of review. *Id.* at 216, citing *Griffin*, 84 F3d at 924-26. "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v. Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). MCL 780.767(4) is not ambiguous. A "totality of the circumstances" test is employed in evaluating voluntariness. See *e.g.* *Brown v Illinois*, 422 US 590; 95 S.Ct. 2254; 45 LEd2d 416 (1975); *People v Cipriano*, 431 Mich 315; 429 NW2d 781 (1988).

A criminal defendant has a due process right to be present during every stage of his trial, including specifically the giving of any supplemental instructions to the jury. US Const Amends VI, XIV; *Illinois v Allen*, 397 US 337, 338; 90 S Ct 1057; 25 L Ed 2d 353 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial").

Moreover, the right to be present is a personal right that cannot be waived by counsel. *See, e.g.*, *Johnson v Zerbst*, 304 US 458, 464; 58 S.Ct 1019; 82 L Ed 1461 (1937); *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975).

Since absence of counsel at a critical stage is a structural error, defendant is entitled to an automatic reversal and new trial. *United States v. Cronic*, 466 US 648, 659 n25; 104 S. Ct 2039; 80 L. Ed 2d 657 (1984). The Court has uniformly found constitutional error without any showing of prejudice when counsel was either total absent, or prevented form assisting the accused during a critical stage of the proceedings. According to *People v. Russell*, 471 Mich 182, 194 n29; 684 NW 2d 745 (2004). ("the complete denial of counsel at a critical stage of a criminal proceedings is a structural error that renders the result unreliable thus requiring automatic reversal").

The record of arraignment on information form, indicates that the defendant and his attorney formally waives the formal arraignment, but the purpose of the information and the waiver must be explained to the defendant and the document must be signed by the defendant and his attorney indicating the waiver is in accordance with GCR 1963, 785.5 (2). *People v. Johnson,* 112 Mich. App. 41, 52 (1981). Here, Mr. McCoy was not given the opportunity to be present at his arraignment and was never consulted by his attorney about the waiver of his arraignment, a thorough review of the record of the waiver of arraignment proceeding will disclose that Mr. McCoy's attorney was not even present nor was Mr. McCoy present during the preceding the arraignment the information was amended and filed on 8/31/16 with the circuit court and the arraignment was scheduled on 9/12/16, which Mr. McCoy was prejudiced by not being able to file the appropriate motion to Quash the charging information being that the judge allowed the possession of cocaine to be set for trial when the District court never had a lab report to prove the drugs were actually drugs. Therefore, the court must revers Mr. McCoy's' conviction and remand it to the court for a new trial.

CONCLUSION AND REASONS FOR GRANTING PETITION

Mr. McCoy requests that this Honorable Court grant his Petition for Certiorari for the reasons stated in issues I-VIII 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.

Respectfully submitted,

Date; 8/16 ,2021

By:/s/ Deonte K. McCoy

Deonte Kinwan McCoy #382437
In Pro-Per

Michigan Court of Appeals Opinion

October 1, 2019