23-5571 ORIGINAL

No.

FILED
SEP 05 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

DEON JEFFERSON JOHNSON — PETITIONER

vs.

MIKE BROWN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Deon Johnson #264657

(Your Name) Deon Johnson

In Pro Se

Kinross Corr. Fac. 4533 W Industrial Dr.

(Address)

Kinchole , MI 49786

(City, State, Zip Code)

QUESTION(S) PRESENTED

ARGUMENT I

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL JURY TRIAL DUE TO HIS CONVICTION BASED ON A HUNG JURY.

ARGUMENT II

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHERE AN ERROR IN HIS TRANSCRIPTS WAS ALLEGEDLY CORRECTED OUTSIDE OF HIS PRESENCE.

ARGUMENT III

THE TRIAL COURT COMMITED REVERSIBLE ERROR WHEN IT DENIED PETITIONER'S MOTION FOR A NEW TRIAL WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

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ARGUMENT V

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LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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CASES PAGE NUMBER

STATUTE, RULE, CONSTITUTION

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court of appeals appears at Appendix **A** to the petition and is

[X] reported at Deon Johnson v Mike Brown 2023 U.S. App LEXIS 15753; or

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the United States district court appears at Appendix **B** to the petition and is

[X] reported at Deon Johnson v Mike Brown 2023 US Dist. LEXIS 19444; or

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

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

The opinion of the highest state court to review the merits appears at

[ ] reported at ; or

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the court

[ ] reported at ; or

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case

was June 22, 2023. .

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

[ ] A timely petition for rehearing was denied by the United States Court of

was , and a copy of the

[ ] An extension of time to file the petition for a writ of certiorari was granted

to and including (date) on (date)

in Application No. A .

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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

The date on which the highest state court decided my case was		.
A copy of that decision appears at Appendix		.
[ ]	A timely petition for rehearing was thereafter denied on the following date:	
	, and a copy of the order denying rehearing	
appears at Appendix		.
[ ]	An extension of time to file the petition for a writ of certiorari was granted	
to and including	(date) on	(date) in
Application No.	A	.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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 offense 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 deprive of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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 States 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.

Const. Amend VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Const. Amend XIV: 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 States 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.

Mich. Const. Art 1 Sec 16: Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.

Mich. Const. Art 1 Sec 17: No person 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. The right of all individuals, firms, corporations a voluntary association s to fair and just treatment in the course of legislative and executive investigation s and hearings shall not be infringed.

Mich. Const. Art 1 Sec 20: In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for and more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

MCLA 333.7411: Possession or use of controlled substance or imitation controlled substance; deferral or proceedings and order of probation; terms and conditions; violation of probation; discharge and dismissal; proceedings open to public; nonpublic records; violations; course of instruction or rehabilitation program; conviction of second violation; screening and assessment; cost. Section (1) When in individual who has not previously been convicted of an offense under this article or under any statute or the United States or of any state relating to narcotic drugs, coca leaves, marihuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under section 7403(2)(a)(v), 7403(2)(b) and (c) or (d), or of use of a controlled substance under section 7404, or possession or use of an imitation controlled substance under section 7341 for a second time, the court, without entering a judgment of guilt with the consent of the accused, may defer further proceedings and place the individual on probation upon terms and conditions that shall include, but are not limited to, payment of a probation supervision fee as prescribed in section 3c of chapter XI of the code of criminal procedure, 1927 PA 175, MCL 771.3c. The terms and conditions of probation may include participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1084. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings. Discharge and dismissal under this section shall be without adjudication of guilt and except as otherwise provided by law, is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under section 7413. There may be only 1 discharge and dismissal under this section as to an individual.

MCLA 769.12 section (1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 12 of this chapter.

MCLA 777.50(1) in scoring prior record variables 1 to 5 do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

MCLA 777.57 (1) Prior record variable 7 is subsequent or concurrent felony convictions. Score prior record variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points.

MCLA 750.360: Any person who shall commit the crime of larceny by stealing in any dwelling house, house trailer, office, store, gasoline service station, shop, warehouse, mill factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public shall be guilty of a felony.

MCLA 750.479a(3): Except as provided in subsection (4) or (5), an individual who violates subsection (1) is guilty of third-degree fleeing and eluding, a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both, if 1 or more of the of the following circumstances.

MCLA 763.8 (2): A law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony shall make a time-stamped, audiovisual recording of the entire interrogation. A major felony recording shall include the law enforcement official's notification to the individual of the individual's Miranda rights.

MCLA 777.40: Sec 40 (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

MCLA 777.49: Offense variable 19 is threat to the security of a penal institution or court of interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

STATEMENT OF THE CASE

This case is on appeal from the conviction of the Defendant, Deon Jefferson Johnson, of Count 1 First Degree criminal sexual conduct where the actor causes personal injury to the victim MCL 750.520b(1)(f) Count 2 assaulting resisting or obstructing a police officer, MCL 750.81d(1); and Count 3 assaulting resisting or obstructing a police officer, MCL 750.81d(1). Mr. Johnson was acquitted by the jury of a fourth count, bribing or intimidating a witness. Mr. Johnson was convicted of these offenses following a jury trial that took place in the Genesee County Circuit Court on Mach 25,26,27,28, 31 and April 1, 2014.

On May 9, 2014 the trial court sentenced Mr. Johnson as follows: Count 1, 180 months to 360 months; Count 2, 72 months to 180 months; and Count 3, 72 months to 180 months. Mr. Johnson was sentenced as an habitual offender, fourth offense, MCL 769.12.

Mr. Johnson appealed his case by right arguing in part, for resentencing. The prosecution cross-appealed arguing that "pursuant to MCL 769.12(1)(q), Mr. Johnson should have been sentenced to a mandatory minimum of 25 years' imprisonment for [CSC-1st] because he had previously been convicted of three felonies." Court of Appeals Opinion pg. 6. The Michigan Court of Appeals remanded for resentencing in part because Mr. Johnson was subject to the 25-year mandatory minimum habitual enhancement in accordance with MCL 769.12(1)(a).

In its opinion the Michigan Court of Appeals held that Mr. Johnson was subject to the 25-year mandatory minimum pursuant to MCL 769.12(1)(a) because CSC-1st was a "serious crime" and Mr. Johnson had at least one prior conviction for a "listed offense" under MCL 769.12(6)(a). Although Mr. Johnson's notice did not specifically say that he would be subject to the 25 year mandatory minimum sentence for CSC-1st , this Court found that notice was still sufficient because MCL 769.13(2) "only states that such a notice must provide 'the prior conviction or convictions that will or may be relied upon for purpose of sentence enhancement" and did not require that the mandatory minimum be stated. This Court also found that the notice complied with MCR 6.112(D) because it informed Mr. Johnson that CSC 1st was punishable by "[l]ife or any term of years[,]" and that an information complies with the court rule by including only the maximum penalty, People v St. John 230 Mich App 644, 648 (1998).

REASONS FOR GRANTING THE PETITION

ARGUMENT I

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL JURY TRIAL DUE TO HIS CONVICTION BASED ON A HUNG JURY.

DISCUSSION

The appropriate standard of review is *de novo* since defendant's constitutional right to have an impartial jury is at issue. US Const Amend VI; Mich Const 1963, Art. 1, § 20; *People v Manser*, 250 Mich App 21, 24, 645 NW2d 65 (2002).

In his motion for Relief from judgment, Appellant claims that his constitutional right to a fair and impartial jury trial has been violated when the trial court failed to comply with MCR 6.420 which provides:

> *(D) Poll of Jury. Before the jury is discharged, the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury.*

The Court failed in its duty to comply with the above, and continued with the poll as if Juror #5 never denied rendering a guilty verdict. Where one juror, when polled, denied that the announced verdict was her verdict, the proper procedure would have been to send the jury back into deliberations. MCR 2.512(B). *People v Bufkin*, 168 Mich App 615, 617 (1988). Here, the trial court neglected to adhere to the established procedure when a juror expresses disagreement with the verdict. Instead, the trial court proceeded without objection to enter a judgment of conviction.

Whether counsel's failure to object to the entry of the judgments of conviction or sentence was due to inattention or neglect is unclear from the record. However, Defendant-Appellant never knowingly, willingly, or intelligently waived his right to a unanimous verdict of twelve jurors of his peers and waiver of a constitutional right may not be presumed from a silent record. See e.g., *Carnley v Cochran*, 369 US 506, 516 (1962); *People v Willing*, 267 Mich App 208, 220 (2005).

A unanimous verdict is required for a conviction in Michigan criminal cases. *People v. Washington,* 43 Mich App 150, 152-153 (1972); MCR 6.410. In this case, where the trial court failed to ensure that a unanimous verdict was reached, a procedural irregularity has infected the entire trial process and rendered the judgment unreliable. Appellant respectfully submits that he has made a threshold showing of entitlement to a hearing on his claim the trial record is inaccurate.

Finally, it is also unclear why appellate counsel did not bring this substantial error to the attention of the trial court especially since appellate counsel has a duty to master the trial record. *McCoy v Court of Appeals of Wisconsin*, 486 US 429, 438 (1988). Both the presumption of regularity and the presumption of accuracy of the trial transcripts have been seriously undermined by the existing record. Therefore, Defendant has a vested liberty interest in the receiving a fair hearing regarding his claim that the transcripts reflect a substantive error as opposed to a clerical error. This issue was first addressed in a motion for a new trial in accordance with **MCR 6.431** to satisfy the 'exhaustion requirement. Because this issue is of major importance to the jurisprudence of this state, leave to appeal should be granted.

ARGUMENT II

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHERE AN ERROR IN HIS TRANSCRIPTS WAS ALLEGEDLY CORRECTED OUTSIDE OF HIS PRESENCE.

DISCUSSION

Upon informing the Court of the error in its inconsistent findings with the polling of the jury, the Court conducted a quasi-evidentiary hearing without notice to the parties or an opportunity to be heard and determined that the transcriber made a typing error. Appellant asserts that the trial court violated **MCR 6.435** which provides:

> (A) Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and *after notice* if the court orders it.
>
> (B) Substantive Mistakes. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.
>
> (C) Correction of Record. *If a dispute arises as to whether the record accurately reflects what occurred in the trial court, the court, after giving the parties the opportunity to be heard,* must resolve the dispute and, if necessary, order the record to be corrected. (Emphasis Added).

However, in his Motion for a New Trial, Appellant specifically requested the Court to correct the alleged error "jointly with the defendant and his attorney present to preserve the credibility" of the recording and to "extinguish any doubts" regarding the interpretation of any recorded notes. The Court simply relied on the alleged recording, along with Errata Transcripts filed by the Court Transcriber. See Exhibit #3. Appellant was never given the required notice nor was he granted an opportunity to be heard regarding the procedure utilized or the authenticity of the reporter's alleged

findings.

Appellant contends that the Court was required to give him an opportunity to be heard and conduct an evidentiary hearing so he could view the recording. Compare, *People v. Thomas*, 46 Mich. App. 312 (1973), (recognizing a defendant's right to be present at any critical stage of the trial where his substantial rights may be affected). Surely, Appellant's substantial right to a jury trial would be affected by the transcriber's actions, thus an evidentiary hearing was required. See e.g., *People v Juarez,* infra. Moreover, in absence of a valid conviction, Appellant returns to the status of a pretrial detainee with the presumption of innocence.

Here, the presumption of accuracy has been rebutted where the trial court acknowledged error. The error complained of was plain and obvious and not harmless. The transcripts reflect the illegal conviction of the Appellant in the absence of a unanimous verdict. Therefore, the ex parte actions of the trial court, under the circumstances of this case were highly inappropriate. Appellant has been wrongly convicted and has been denied the appropriate relief as the trial court opined that the error was a 'clerical error.' (See Order Denying Motion for a New Trial). Appellant respectfully submits that the trial court violated **MCR 6.435(A)-(C)**, by failing to provide Appellant 'fair notice' and an opportunity to be heard. Therefore, in the interests of justice, this Honorable Court should grant leave to appeal.

ARGUMENT III

THE TRIAL COURT COMMITED REVERSIBLE ERROR WHEN IT DENIED PETITIONER'S MOTION FOR A NEW TRIAL WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

DISCUSSION

Appellant respectfully submits that the trial court abused its discretion in correcting the record without giving him an opportunity to be heard. The closed chambers hearing in this case was akin to closing the courtroom to the public which affects the fairness, integrity, or public reputation of judicial proceedings. The correction of a substantial error without notice to defendant or his former counsel of record was an abuse of discretion. A trial court abuses its discretion when it misapplies the law, or commits an error of law. See e.g., *People v Swain*, 288 Mich 609, 628-629 (2010).

The Trial Court Violated The Procedural Mandates Of MCR 6.435(A),(C)

MCR 6.435(C), provides in pertinent part: "...*If a dispute arises as to whether the record accurately reflects what occurred in the trial court, the court, after giving the parties the opportunity to be heard,* must resolve the dispute..." The trial court was precluded from taking any action in regards to Appellant's challenge to the authenticity of the trial court record without affording the parties involved with an opportunity to be heard. The error complained of directly affected Appellant's liberty interests and he had a procedural due process right to *notice* and an *opportunity to be heard.* In *Powell v Alabama*, 287 US 45, 71 (1932), the Court noted:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law...He requires the guiding hand of counsel at every step in the proceedings against him."

In absence of a record which reveals a unanimous verdict, Appellant's convictions and sentences are a mere nullity and void. The trial court abused its discretion in concluding that juror five's denial of rendering a guilty verdict was a clerical error. The process by which this conclusion was reached lacks any appearance of propriety in absence of notice to the parties or an opportunity to be heard.

For example, in *People v Juarez*, 158 Mich App 66 (1987), the trial record contained a discrepancy regarding whether a unanimous verdict was reached in the case. A review of the post-verdict polling of the jury revealed that the verdict was reached by juror *Oglesby* who was excused on a defense peremptory challenge and was replaced by juror *Alger* who was not polled by name at all. This court held that it was necessary to remand for an evidentiary hearing to determine whether *Oglesby* or *Alger* actually sat on the jury and voted. If *Oglesby* actually served, the defendant would have been entitled to a new trial. *Id.*

In its order denying the Motion for a New Trial, the trial court relied on a video "recording" and the court transcriber to determine that the verdict was unanimous and that anything to the contrary in the record was merely a clerical error. However, as argued in issue II, Appellant was denied the right to view the alleged recording, or be heard in regards to its correction, which is in and of itself a procedural due process violation. Moreover, the failure to cease polling the jury and order further deliberations in this case denied Defendant his Sixth Amendment right to a fair jury trial as guaranteed by the Michigan and United States Constitutions. US Const Ams VI, XIV, Mich Const 1963, Art 1, §17, §20.

"Due process is flexible and calls for such procedural protections as the particular situation demands. At the most fundamental level, due process ensures the right to be heard "at a meaningful time and in a meaningful manner." See e.g., *Noyes v Hillier*, 65 Mich 636 (1887). In *Fay v Noia* ,

372 US 391; 83 S Ct 822; 9 L Ed 2d 837, 862 (1963), the Court noted that due process includes the right to be heard which should include the opportunity to fully present one's claim in the trial court. It is not sufficient that this Appellant had the right to appeal to the Court of Appeals. As this Court knows, appellate courts generally do not sit as fact-finders. *People v Coles,* 417 Mich 523, 550 (1983). Appellant respectfully submits that if juror five did in fact state that his/her verdict was not guilty, then the resulting conviction and sentence is unconstitutional. It is for this reason alone that Appellant was entitled to *notice* and an *opportunity to be heard.*

Moreover, the fact that trial and appellate counsel missed this plain and obvious error suggests that Appellant was denied his Sixth Amendment right to effective counsel. It is unclear why appellate counsel did not bring this substantial error to the attention of the trial court especially since appellate counsel has a duty to master the trial record. *McCoy v Court of Appeals of Wisconsin,* supra, 486 US at 438. In such a case, the State cannot claim a legitimate interest in finality, where such a substantive error means the difference between Appellant's freedom and incarceration.

ARGUMENT IV

MR JOHNSON'S SENTENCE WAS CONSTITUTIONALLY INVALID. HIS 25YEAR MANDATORY MINIMUM VIOLATED BOTH HIS STATE AND FEDERAL RIGHT TO BE FREE FROM CRUEL AND/OR UNUSUAL PUNISHMENT.

DISCUSSION

MCL 769.12 states that:

> If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:
>
> If the subsequent felony is a serious crime or a conspiracy to commit a serious crime, and 1 or more of the prior felony convictions are listed prior felonies, the court shall sentence the person to imprisonment for not less than 25 years. Not more than 1 conviction arising out of the same transaction shall be considered a prior felony conviction for the purposes of this subsection only.

Even though the sentencing guidelines prepared in Mr. Johnson's case indicated a minimum sentence of 135-450 months, the trial court was compelled to impose the mandatory minimum sentence of 25 years or 300 months. The mandatory minimum of 25 years violates the prohibitions against cruel and/or unusual punishment because it is disproportionate, does not allow for any consideration of the circumstances under which the offense occurred, or consideration of the probability of rehabilitation. Const. 1963, art 1 sec 16; US Const. Am VIII. Although Mr. Johnson's 300-month minimum sentence falls within his guidelines, the trial court was prohibited from imposing a minimum sentence less than that due to the mandatory minimum.

The United States Constitution protects against cruel and unusual punishment. "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our [n]ation' history. *Hamelin v Michigan*, 501 US 957, 994-

995 (1991). In contrast, in Michigan, a punishment which is cruel but not unusual is still prohibited by the state constitution. This "significant textual difference between parallel provisions of the state and federal constitutions' may constitute a 'compelling reason' for a different and broader interpretation of the state provision." *Solem v Helm*, 463 US 277, 290-291 (1983); *People v Bullock*, 440 Mich 15, 31 (1992); *People v Lorentzen*, 387 Mich 291 171 (1972. Under this analysis, the Court: 1) balances the gravity of the offense with the harshness of the penalty, 2) compares the sentence with sentences imposed on other criminals in the state, 3) compares the Michigan penalty with that imposed by other jurisdictions for the same crime, and to a lesser extent, 4) considers the goal or rehabilitation. Id at 176, 181; Bullock, 440 Mich at 33-34.

In Lorentzen, 387 Mich at 181, this Court struck down, under both the Eighth Amendment and Const 1963, art 1 sec 16, a mandatory minimum sentence of twenty years in prison (reducble to approximately ten years by earning "good time") for selling any amount of marijuana. See Lorentzen, 387 Mich at 181. Subsequently, this Court held in Bullock that the penalty of life in prison for possession of more than 650 grams of cocaine was go grossly disproportionate as the be "cruel or unusual." 440 Mich at 37. In considering the severity of the penalty, the Court stated:

> First there are three aspects of the severity of the penalty at issue: (1) its length (life); 2) its mandatory character, i.e. the absence of individualized consideration for each defendant at the sentencing stage; and 3) the absence of any possibility of individual parole consideration for each defendant. Id at 42.

In the instant case, the penalty is similarly severe. It is a significantly harsh sentence and is mandatory. There was no way for the court to take into consideration any individualized factors or mitigating circumstances. A bedrock principle in the law of sentencing in Michigan is that a sentence must be individualized. *People v McFarlin*, 389 Mich 557, 574 (1973).

The mandatory nature of MCL 769.12(1)(a) gives trial courts no power to take into consideration

any mitigating circumstances of the prior offenses. For example, Mr. Johnson's qualifying "listed offense" was a drug offense, not an assaultive crime. It would not allow the court to take into consideration if the prior convictions were old or any sort of rule like the "10-year gap rule". See MCL 777.50.

While other jurisdictions have imposed stiff penalties for habitual offenders, which have been upheld, MCL 769.12 is distinguishable. In *Ewing v California*, 538 US 11, 15-16 (2003), petitioners challenged California's "Three Strikes Law" in the Supreme Court. Under Cal Penal Code Ann sec 667.5 and 1192.7 when a defendant is convicted of three or more serious or violent felonies, sentencing is conducted pursuant to the three strikes law. Ewing, 538 US at 15-16. "Prior convictions must be alleged in the charging document, and the defendant has a right to a jury determination that the prosecution has proved the prior convictions beyond a reasonable doubt." Id at 15-16. At least one of the defendant's prior felonies must be a violent crime. Id at 14.

While the Supreme Court upheld the California law as not being cruel and unusual, the law is distinguishable from Michigan's "Super Habitual" statute. The California law requires at least one of a defendant's prior convictions to be violent. That is not necessarily the case with the Michigan law. In fact, a prior drug offense of Mr. Johnson's was used to qualify him for the "Super Habitual" enhancement under that statute. Also in California, trial courts can vacate allegations of prior "serious" or "violent" felony convictions either by motion by the prosecution or sua spone. Ewing, 538 US at 17. In ruling whether to vacate allegations of prior felony convictions, courts can take into consideration the "nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes] scheme's spirit, in whole or in part." Ewing, 538 US at 17, quoting *People v Williams*, 17 Cal 4th 148, 161 (1998). Michigan trial courts have no

such ability.

Therefore, Mr. Johnson request that this Court find the 25-year mandatory minimum, imposed pursuant to MCL 769.12(1)(a), disproportionate and unconstitutional as cruel and/or unusual punishment. The remedy is remanding for resentencing, without a 25 year mandatory minimum sentence enhancement.

ARGUMENT V

TRIAL COURT ERRONEOUSLY ASSESSED DEFENDANT JOHNSON 20 POINTS UNDER PRV 2. CONTRARY TO MCLA 333.7411.

DISCUSSION

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). Additionally, "[w]hether 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.

A challenge to the scoring here applying the conviction of possession of cocaine less than twenty-five grams was presented due to a plea agreement on March 16, 1998 that PWID-cocaine be amended to possession of cocaine under 7411 status. As the PSIR clearly presents the probation status of the Defendant was completed and discharged on April 23, 2001. Defendant Johnson plead guilty to a possession charge with the conditions that if he successfully complete it the court shall discharge the individual and dismiss the proceeding.

MCLA 333.7411 reads in relevant part upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceeds. Discharge and dismissal under this section shall be without adjudication of guilty.

Further support See *Carr v Midland County Concealed Weapons Licensing bd.*, 259 Mich App 428; 674 NW2d 709 (2003). In *Carr*, the court held that because the appellant successfully completes her probation under MCL 333.7411, and had the felony charge dismissed under that provision. The trial court should not have used that guilty plea to assess defendant 20 points. Like in

the present case the trial court used Defendant Johnson's guilty plea under MCL 333.7411 to score him 20 points where the court should not have scored Defendant.

In *People v Benjamin*, 283 Mich App 526, 530; 769 NW2d 748 (2009), If the offender complies with his or her probation the trial court does not enter an adjudication of guilty; however, if the offender does not comply, the trial court enters an adjudication of guilt. See MCL 333.7411(1). Proceedings under 7411 have been described as "deferral proceedings" under which the trial court does not adjudicate guilt when a plea is tendered. *Benjamin*, 238 Mich App at 530. Instead, the trial court defers proceedings and places the individual on probation." Id If the defendant complies with the terms of probation, the trial court is required the individual without an adjudication of guilt. Id. It was plainly stated that once an individual who successfully completes probation under MCL 333.7411 is not deemed to have been convicted of a felony. Also see *People v Ware*, 239 Mich App 437; 608 NW2d 94 (2000). Therefore, Defendant Johnson was not supposed to be assess 20 points under Prior Record Variable 2.

ARGUMENT VI

THE TRIAL COURT SHOULD NOT HAVE USED DEFENDANT'S CONVICTION OF FLEEING AND ELUDING POLICE OFFICER 3rd TO ENHANCE HIM TO A FOURTH DEGREE HABITUAL.

DISCUSSION

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). Additionally, "[w]hether 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.

On October 14, 1998, under MCL 750.479a(3) although Defendant was improperly scored 20 points under PRV 2 and sentence as fourth offender under MCL 769.12. Because the time of the offense fleeing and eluding was a misdemeanor punishable by imprisonment for not less than 30 days nor more than 1 year. However, the statute also contained an enhancement provision making a person who committed a second fleeing and eluding offense within five years of a prior fleeing and eluding conviction is guilty of a felony punishable by up to four years imprisonment under MCL 750.479A(3); *See People v Troy Michael Lynch* 199 Mich App 422.; *People v Burkhardt* 2005 Mich App Lexis 2261; *People v Robinson* 1998 Mich. App Lexis 651, *United States v Young*, 2007 U.S. Lexis 84941 and *United States v Martin*, 378 F3 578, under MCL 750.479A(3), 257.602A(3) is materially identical. Defendant committed the offense on 10-14-98, but the offense is under the June 1, 1997 historical and statutory notes because it was further amended in 1996 by PA 5861, effective June 1, 1997, it was again Amended in 1998 by 1998 PA 344 effective October 1, 1999. With respect and applying this to Defendant Johnson sentence of PRV 2 would properly score at 5 points.

ARGUMENT VII

DEFENDANT JOHNSON IS ENTITLED TO RESENTENCING WHERE THE TRIAL COURT ERRONEOUSLY SCORED DEFENDANT 10 POINTS FOR PRV 3, 5 POINTS FOR PRV 5, 20 POINTS FOR PRV 6, AND 20 POINTS FOR PRV 7.

DISCUSSION

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). Additionally, "[w]hether 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.

Here Defendant Johnson was scored 10 points for a conviction of armed robbery that the court used Larceny from a Person to support the claim. There are two reasons why this should fail. First, Mr. Johnson armed robbery charge was amended to MCL 750.360 Larceny in a Building and it's a low severity juvenile adjudication under a class G. Secondly, the Court sentenced Mr. Johnson under a deferred sentenced as long as he completes his community service and go to school. And successfully completed the community service. Defendant Johnson is entitled to resentencing because his sentencing judge was operating under inaccurate information at the sentencing hearing.

The trial court should not have assessed Defendant 5 points under PRV 5. because it was based on inaccurate information.

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). Additionally, "[w]hether 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.

Defendant Johnson was assessed 5 points under PRV 5 but the score is clearly wrong because one of the misdemeanors in the PSI the court gave Defendant a deferral sentence with 6-month probation and said if Defendant complete it the charge won't be on his record and subsequently, Defendant successfully discharged on June 25, 2003, and the PSI erroneously contain a charge and conviction that never happened. It states that Defendant was convicted of an Assault and Battery on 10/13/2004 and sentence to 93 days in jail and discharged on 10-13-04. The PSI is incorrect because Defendant never severed a sentence of 93 days in jail or been convicted for it. Furthermore, Defendant was paroled to Flint, Michigan on 9-24-04. So how could he serve 93 days in the county jail. Thus, the court should not have score him under this PRV. It should have assessed it at zero under MCL 777.55(1)(f). Moreover, the Due Process Clause of US Const, Am XIV requires that a trial court impose a sentence based on accurate information. *Townsend v Burke,* 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948). A sentence based on inaccurate information is invalid. *People v Miles,* 454 Mich 90, 96; 559 NW2d 299 (1997). PRV 5 concerns a defendant's prior misdemeanor convictions and prior misdemeanor juvenile adjudications. *People v Gibbs*, 229 Mich App 473, 485; 830 NW2d 821 (2013).

The trial court should not have assessed Defendant 20 points under PRV 6.

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). Additionally, "[w]hether 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.

PRV 6 addresses the offender's relationship to the criminal justice system. MCL 777.50(1) under this variable 5 points are to be assessed if "the offender is on probation or delay sentence

status or on bond awaiting adjudication or sentencing for a misdemeanor." Defendant was scored 5 point because in the PSIR no. 15 it says, bond set April 15, 2013, to $2,500, but it was revoked because Defendant was arrested and accused of Stalking. PSIR no. 16 for supposed been at the house the attempt trespassing to place. And the score should be zero under MCL 777.56(1)(e).

The trial court erroneously assessed Defendant 20 points under PRV 7.

PRV-7 subsequent or concurrent felony convictions. PRV was scored at 20 which is appropriate if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed. MCL 777.57(2)(A). It also says a conviction for felony that will result in a mandatory consecutive sentence may not be counted under PRV 7. MCL 777.57(2)(c). A score of zero would be justified on the basis for "the assaulting, resisting, or obstructing a police officer because the conviction didn't a rising from the same course of conduct as the sentencing offense they also were 24 hours apart and the R/O happen in a different town plus it's a straddle cell. See MCL769.34 (4)(c)(ii). Under the Michigan and United States Constitutions, defendants have a due process right to be sentenced on the basis of accurate information and in accordance with the law. *Townsend v Burke*, 334 US 736 (1948); *People v Lee*, 391 Mich 618, 636-637 (1974); *People v Malkowski*, 385 Mich 244 (1971).

ARGUMENT VII

DUE PROCESS REQUIRES RESENTENCING WHERE THE LEGISLATIVE SENTENCING GUIDELINES WERE MISSCORED AS TO OFFENSE VARIABLES 3,4,10,13, 19, RESULTING IN A SENTENCE BASED ON INACCURATE INFORMATION.

DISCUSSION

Every criminal defendant enjoys a due process right to be sentenced based on accurate information. *Townsend v Burke,* 334 US 736 (1948); US Const. Amend XIV; Mich Const. 1963, art I § 17. Mr. Johnson must be resentenced because his legislative guidelines were erroneously scored under Offense Variables.

The trial court erroneously scored Defendant Johnson 65 points under OV-3,4,10,13,19 and 60 points for the PRV 2,3,5,6.

The scoring of OV 3,4,10,19,13 at 65 points and PRV 2,3,5,6 at 60 points plus the habitual offender 4th was plain error. If the offense variable score and the PRV score is reduced as proposed by Defendant the total offense variable would decrease by 65 points from 65 point to 0 and the PRV score would decrease by 55 from 65 to 5 with the proposed present about PRV 2 habitual offender 4th is a plain error and Mr. Johnson should not be sentence with the habitual offender *4th People v Morales*, 240 Mich App 511. And recommended minimum sentencing range for the CSC 1st degree personal injury would decrease from 135 to 450 to 27 to 45 without the habitual offender 4th. The recommended minimum sentence range from assaulting, resisting and obstructing a police office would be decreased from 5 months to 46 to 0 to 6 months. In *Hardy*, however, our Supreme Court explicitly rejected the "any evidence" standard and held that any decisions from this court citing the "any evidence standard were incorrect. *Hardy*, 494 Mich at 438. Under the sentencing guidelines, the circuit court's factual determination is reviewed from clear error and must be supported by preponderance of the evidence. Id. However, we review de novo whether the fact found by the trial court are adequate satisfy the trial court scoring decision. Id Consequently we can no longer affirm a trial court scoring decision merely because any evidence in the record support that decision. See

People v Lockridge, 2015 Mich App 1774, *Alleyne v United States*, 133 SCt 2151, 2155; 186 L Ed2d 314 (2013).

The trial court erroneously assessed Defendant 10 points under OV 3.

OV 3 was scored at 10 points which is appropriate where "bodily injury requiring medical treatment occurred to a victim. MCL 777.33(A)(d)." There was no evidence of actual medical treatment, so there no base to score OV 3 at 10 points (Prelim Vol II pg 13,14) she said it was no type of assault that happen when testified. RN Michelle Haye testified and was ask about a tear and will it cause profuse bleeding and she said No! It was not a tear more like a continual abrasion. (See Prelim Vol 1 pg 23,24) She also said it was no massive amount of blood in her pants or in her underwear (TT Vol IV pg 17,18) RN Donald D Duvan also testified it was no sign of profuse bleeding or heavy bleeding (TT Vol III pg 169-173). Dr. Mark Dalton said he didn't see any blood externally or on the examination (TT Vol IV pg 31) The facts from the record lead to only one conclusion it was no medical treatment for bodily injury because no injury happened, only a CSC kit was done. See *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312(2004)(finding that vaginal irritation and redness was sufficient to score OV 3 at five points), overruled on other grounds by *People v White*, 501 Mich 160, 164-165, 905 NW2d 228 (2017). Also, See *People v Endres* 269 Mich App 414, 418; 711 NW2d 368, *People v Bauer*, 2013 Mich App Lexis 668, *People v Sweet*, 2019 Mich App Lexis 1677.

The trial court erroneously scored Defendant Johnson 10 points under OV-4.

OV 4 was scored at 10 point which is appropriate where there is evidence on the record of serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(A). In this case the alleged victim was ask do you know what happen she said, "I don't No !" "I just have like, have nightmares every night does that effect your ability to come and go and do

things as you used to." And she said, "No." Then she said, "I have fear inside of me." "See I've never lived on the eastside of Town, and it's different people and class of people." "Now, I am really – I am just scared." Then she was asked is it because of the location of where you've move to or because of what happened that is causing this. She said, "Well, both I --- I think – I keep thinking if I would move. I'd feed better." See TT pg 127, 128 Vol III. Ten points may be scored only when a serious injury disrupts a victim's life or functioning such that psychological treatment is required. Had the legislature intended that a sentence enhancement would automatically attach to every crime using any psychological injury. It would not have included the terms "serious and requiring professional treatment." In OV 4 MCL 777.34(1)(A) as explained in *People v McChester* Mich App 2015 Mich Lexis 923 pg 9-10. The trial Court may not simply assume that someone in the victim's position would have suffered psychological harm because MCL 777.34 requires that serious psychological injury occurred to a victim." See *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012)(emphasis in original) But a preponderance of the evidence must establish that Ms. Haddock suffered a" serious psychological injury" and this evidence is insufficient so OV 4 must be scored at 0 point.

The trial court erroneously scored Defendant Johnson 10 points under OV-10.

OV-10 was scored at 10 points which appropriate where "the offender exploited a victim's physical disability, mental disability or youth or agedness, or a domestic relationship, or the offender abused his or her authority status. MCL 777.40(A)(b)." There was no evidence that Mrs. Haddock had a physical or mental disability or that her age made her particularly vulnerable.

There was no dating relationship between Mrs. Haddock and Mr. Johnson or the Defendant didn't exploit a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated under the influence of drugs, asleep, or unconscious. MCL 777.40(1)(c)." OV-10

should be scored at zero because it's nothing on the record to support it. See Prelim Vol. II pg 13.,14.

The trial court erroneous scored Defendant 25 points for OV-13

OV-13 is scored at 25 points when the offense was part of pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(c). This should have been scored as 0 points. Because the two Genesee County Sheriff Deputy work for the friend of the court Warrant Apprehension Unit and they are designated as a crime against public safety or peace office means any of the follow corrections officer, prison guard, jail guard, jail personnel, conservation office. There are not otherwise any other crimes against a person that could be scored under OV-12 or 13. *See People v Bonilla-Machadov*, 489 Mich 412; 803 NW 2d 217; 2011 Mich Lexis 1390, *People v Wiggins*, 289 Mich App 126; 765 NW2d 232 (2010).

The other reason the trial improperly scored OV 13 at 25 points is because the 2 counts of assaulting, resisting, obstructing police officer convictions arose out of one incident. See Prelim Vol 1 pg 65, 70, 71, 72 – TT Vol IV 127, 128, 150, 152. Mr. Johnson R/O constitutes a single act, and although there were 2 victims, nothing was presented to show that he omitted separate acts against each individual victim in course of him getting handcuffs on him. OV 13 should be zero.

Regarding the plain meaning of the word "continue" clearly refers to an event or process that takes place over time. Merriam-Webster's collegiate Dictionary defines "continuing" as "to keep going or add to." It defines "pattern" as "a reliable sample of traits, acts, tendencies or other observable characteristics of person..."Id. Accordingly, the statute contemplates that there must be more than one felonious event.

The trial court erroneously scored Defendant Johnson 10 points under OV-19.

Mr. Johnson was assessed 10 point under OV-19. To justify a score of ten points under OV-19 the prosecution must establish that "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice. "MCL 777.49(c). There are no statutory instructions that explain how to score this variable. However, the plain language of the statute indicates that points should not have been scored. In *People v Barbee*, 470 Mich 283 (2003), the Michigan Supreme Court found "[p]roviding a false name to the police constitutes interfere with the administration of Justice." In Barbee the court disagreed with the Deline court's reasoning stating that: While the Deline panel held that OV 19 could only be scored when the conduct interfered with the judicial process we find that the phrase "interfered with our attempted to interfere with the administration of justice" encompasses more than just the actual judicial process. Law enforcement office are an integral component in the administration of justice, regardless of whether they are operating directly pursuant to a court order. The Barbee decision does not mean that anytime an offender fails to immediately turn himself in after commission of the crime that 10 points are appropriate. The failure to immediately turn oneself in after committing a crime does not suffice as a basis for scoring. Without a doubt, all police investigation would be easier if the perpetrator waited for the police to arrest them. If they were required to do so, virtually every criminal defendant would receive such a score.

In *People v Gajos*, unpublished opinion of the court of appeals on reconsideration decided February 3, 2009 (Docket No 2813440 this court held that 10 points was inappropriate where a defendant merely attempted to flee the scene of a crime. In reaching its decision this court stated that; there is no allegation that the defendant provided any false information otherwise interfered with the police response to his crime but for his attempt to flee in the first instance. If merely attempting to evade discovery or capture constituted interference with the administration of justice

OV 19 would have to be scored for virtually every criminal conviction. In this case the alternative to running away upon sighting the police would have been to stand still and wait capture. We do not deem such uncharacteristic submission and surrender necessary to avoid a penalty for interfering with the administration of justice. There is no indication that in the course of he/her flight from the police, defendant in fact disobeyed a command to stop. In the absence of a lawful such command, merely running from the police is nor more pernicious an activity than running from anyone else, or for any other reason. OV 19 should be, zero (MCL 777.49(d), because Mr. Johnson merely attempt to flee, it was not crime scene. The Deputy was assigned to the Friend of the Court, Warrant Apprehension Unit, and they were there because of a warrant for back payment of child support. Vol IV TT pg 120. And when Sergeant Pete Stocchl said get on the ground Defendant Johnson comply and laid face first on the ground. See Vol IV TT Pg 110,111,116,117,118). At most the office involved indication said that Mr. Johnson was a bit slow to comply with the order. But he put his hands out so they cuff him.

Our Supreme Court reversed the Court of Appeals ruling that offense variable are to be scored considering the offense-specific conduct only (and not the entire transaction) unless the particular offense-variable statute specifically provides otherwise. *People v McGram*, 484 Mich 120,126, 127; 771 NW2d 655 (2009) OV 3, OV 4, OV 10" must be scored in this case solely on the basis of defendant's conduct during the CSC 1st degree." The court concluded. "Defendant's resisting, assaulting, obstructing police office. Occurred one day after the CSC 1st degree offense was completed for purpose of scoring sentencing crime guidelines." OV 19, OV 13 cannot be score under the controlling charge.

The Circuit court error is plain from the record by scoring OV 19, OV 13 from the resisting and obstructing charge to the CSC 1st degree to score the OV at 65 point, the holding of McGraw

that only offense specific conduct only may be considered in scoring the CSC 1st degree and the resisting and obstructing and like variables) is well known and has been reiterated and affirmed in numerous appellate opinions See e.g. *People v Rodrigues*, 327 Mich App 573 (2019) The score of 10 points for OV 19 and 25 points for OV 13 was clearly base on conduct after the sentence offense. The error affected Mr. Johnson right to be sentenced only on the basis of accurate and permissible information. *Townsend*, 334 US 736; *Francisco*, 474 Mich at 86.

Based upon the foregoing points and authorities, the Petitioner respectfully requests this Honorable Court to grant the within writ and reverse the judgment of the court below. The petition for a writ of certiorari should be granted as Petitioner was denied his federal constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Deon Johnson

Deon Jefferson Johnson #264657

8-31-23