STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v No. 336050

GREGORY CARL WASHINGTON,

Defendant-Appellee.

Lower Court No. 04-004270-01
Prior Court of Appeals Nos. 260155, 274768, 292891

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

On November 22, 2016, the Honorable Patricia Perez Fresard of the Wayne Circuit Court issued an opinion and order granting defendant relief from judgment.[1] On December 8, 2016, the People applied for leave to appeal from Judge Fresard's order, and on January 24, 2017, the Court granted the application. This Court has jurisdiction over the People's appeal from the circuit court's non-final order under MCR 7.203(B)(1).

The People's motion for a stay of the lower court proceedings is pending before this Court.

[1] Opinion and Order (Appendix A).

STATEMENT OF QUESTION PRESENTED

Only claims based on a retroactive change in the law or new evidence that was not discovered before the first motion for relief from judgment may be raised in a second motion for relief from judgment. The circuit court granted relief from judgment and ordered resentencing because it did not have "jurisdiction" when it resentenced defendant while defendant's application for leave to appeal the affirmance of his convictions was pending in the Supreme Court. Did the circuit court abuse its discretion in granting defendant's successive motion for relief from judgment?

The People answer: Yes.
The Circuit Court answered: No.
Defendant answers: No.

STATEMENT OF FACTS

This case arises out of the death of John Scott on September 29, 2003. Scott and his wife Adrian Scott had purchased a house on Moore Place in Detroit as a rental property and were in the process of repairing it. Defendant Gregory Washington lived next door. 11/2, 208-209.[2] There was no hostility between the neighbors. Defendant had spoken to the Scotts about purchasing a garage on the property so that he would have a place to park his Jaguar. He had also indicated that he owned several houses and desired to sell them. 11/2, 211-212.

On the afternoon of September 29, 2003, two City of Detroit Water and Sewage Department workers met John Scott at the house on Moore Place to install a water meter. One worker, Ronald Franks, accompanied Scott into the home, while the other, John Lilly, remained outside. 11/1, 149-150. Once Franks confirmed that they could complete the job, Lilly retrieved his tool box from their truck, which was parked across the street. 11/2, 19-22. Before he picked up the tool box, Lilly removed the adaptor from his drill and put the drill back in the truck. He then carried the tool box to the side of Scott's house. 11/2, 18-19, 22-23.

Lilly left his tool box near the house and walked back to the truck. As he walked, he thought he heard a faint voice say "help, hey, hey." Lilly retrieved a milk crate containing a roll of wire and began to walk back to Scott's house. He then heard a man's voice from the house next door say "what you doing out there." He could see someone moving behind the upstairs window. Lilly was in the middle of the street when he heard the upstairs window break and saw the barrel of a handgun pointing in his direction. 11/2, 6-13, 26-27, 37. On seeing the gun, Lilly

[2] Transcripts are cited in this brief by month and day of the proceeding followed by page number.

dropped the wire, raised his hand, and identified himself as a Water and Sewage employee. He backed up to the driver's side of the truck and slowly lowered his hand. He then heard a gunshot and dove behind the truck. He crawled to a vacant lot, and heard more gunshots. He then ran to another street, where he heard more gunshots. 11/2, 13-15.

Ronald Franks was in the basement of Scott's home with Scott when he heard four gunshots. 11/1, 150. Franks told Scott that he needed to check on his partner. Scott led the way as they walked out of the house. They were standing at the side of the house when Franks heard four gunshots. The shots sounded as if they had been fired from above and from the house next door. After the first two shots, Franks turned and ran back to the house. Scott was following when Franks heard a "grunting and groaning sound." He ran inside the house. 11/1, 150-154, 175. Franks heard a total of approximately eight gunshots, four before he left the home and four more when he was outside. 11/1, 158.

Franks stayed in the kitchen for five or ten minutes and used his walkie talkie to radio his foreman and tell him what had happened. 11/1, 153. While in the kitchen, Franks could see the lower portion of someone's body and heard a man's voice say "I got one" and "I can hear the one inside talking on his walkie talkie." 11/1, 153-155. Franks went to the living room of the home and looked out the window. He could see the neighbor from across the street with whom the other person was talking. Franks radioed his foreman to report that the man "was getting ready to come inside the home." 11/1, 155-157.

Franks later went to check on John Scott. He found him lying on the basement floor with blood coming from his mouth and the left side of his head. Franks checked for Scott's pulse, and discovered that he had none. 11/1, 157-158. Scott died of two gunshot wounds. He was shot in

the right temple and the right hip. The trajectory of the bullets was consistent with having been fired from above. 11/3, 9-11.

Defendant's neighbor who lived across the street, Glenn Robinson, was in bed waiting for his wife to get ready for work when he heard yelling outside. He testified at trial that he possibly heard gunshots, but acknowledged that he had told the police that he heard shots and had testified to that effect at the preliminary examination. Robinson looked out a window and saw defendant standing on the roof over his front porch. Although Robinson testified at trial that he did not see anything in defendant's hands, he told the police that defendant had a gun. 11/2, 47-49, 53-54, 58-59. When Robinson asked defendant "what was going on," defendant yelled "help me" and said "somebody was trying to kill him." Robinson then went downstairs. He saw the water board truck parked on the street and went outside. Defendant was still on the roof yelling "please go get me some help." 11/2, 49-50. Robinson walked around the corner. The police arrived shortly after he returned to his house. He said that the police arrested him and questioned him. 11/2, 50-52. Robinson was jailed when he did not initially appear to testify at the preliminary examination. He then lost his job. 11/2, 63, 73-74.

Officer Samuel Choice responded to the call for assistance. On arriving at the scene, he saw defendant leaning out of an upstairs window of the house. Officer Choice said that defendant appeared normal. He spoke to defendant in an attempt to get him to surrender. Defendant was yelling, and told Officer Choice that he "shot someone" and that he would "come down" if Choice got "the person from the side of his house." 11/2, 81-83, 93. A phone inside the house rang during the time Officer Choice was talking to defendant. Officer Choice heard

defendant asking "what should I do" and saying "this is messed up." 11/2, 84-85. Officer Choice smelled marijuana. 11/2, 85.

Another officer who responded to the scene, Jared Dains, could see defendant in the window and heard him speaking to Officer Choice. Officer Dains saw the "point" of a black gun that defendant was holding in his right hand. He heard defendant asking "what should he do" and "saying something like, that the water department was going to blow up his house." 11/2, 109-113.

The special response team of the police department eventually came to the scene. 11/2, 112. While positioned at the rear of the house, Sergeant Kevin Shepherd saw defendant jump out of a first floor window. Sergeant Shepherd ordered defendant to stop, but defendant ran back toward the house. Sergeant Shepherd then ordered defendant to put his hands over his head, and other officers grabbed defendant. 11/2, 120-129, 134. Defendant's shorts fell off while the police were taking him away from the house. Officer Choice found $910.87 in the shorts. 11/2, 86-87. An evidence technician collected samples from defendant for purposes of gunshot residue testing. The tests detected the presence of gunshot residue on both of defendant's hands and on his forehead and face. 11/2, 193, 195.

Police evidence technicians collected evidence from the crime scene. They discovered that the passenger side of the water board truck had been struck by a bullet. The bullet struck the truck at head level, within arms reach of where Lilly was standing when he heard the gunshots and approximately fifty feet from the upstairs window of defendant's house. Three bullet fragments were recovered. One of them was found on top of the truck. Another, which had apparently struck an object, was found west of the truck. 11/2, 15-18, 152, 156, 163, 167; 11/3,

18-19. Five 9 mm shell casings were found on the lawn of the house next door to defendant's house. 11/2, 151, 154-155, 164-165. A Jaguar was parked in front of the house. 11/2, 173.

The police found guns and drugs in defendant's house. In one of the front bedrooms on the second floor, the police found a black Glock handgun on a dresser, a fully-loaded assault rifle on a bed, and a full clip for the rifle in a closet. The upper portion of the window in that room had been lowered and had no screen. 11/2, 153-155, 158-159, 162-163. A television was on the floor next to a television stand. 11/2, 153-154; 11/2, 57.

The other front bedroom contained racks of clothing. 11/2, 172-173. The back bedroom was arranged like a living room. 11/2, 153. Marijuana was found on the coffee table. 11/2, 154, 159, 166-167. A photograph of the room showed what the evidence technician believed were obituaries. There were many cigarettes butts on one of them. 11/3, 59-60.

Two barber chairs were in the basement of the house. The police found a baking soda box, a glass plate, and a razor blade in the stairwell leading to the basement. The police found a scale with a bag of suspected cocaine and a coin envelope containing suspected cocaine. 11/2, 159-160, 166. There were television sets and newspapers on the floor. The evidence technician saw a disconnected cable wire. 11/3, 55.

The Glock handgun found in defendant's home could hold fifteen bullets in the clip and one bullet in the chamber. When the police found the gun, there were six bullets in the clip and one in the chamber. 11/2, 161; 11/3, 45. Firearms experts testified that the Glock fired the bullet recovered from Scott's body and the shell casings found at the scene. 11/3, 11-12, 26-27, 46. The experts could not say whether the gun fired the bullet fragments found at the scene. 11/3, 28.

Defendant presented an insanity defense at trial. Dr. Eric Amberg, a clinical psychologist who specialized in neuropsychology, and Dr. Cathie Zmachinski, a forensic psychologist employed by the Forensic Center, opined that defendant was insane at the time of the shooting. 11/3, 78, 160-161. Dr. Zmachinski interviewed defendant for two hours and fifteen minutes on June 11, 2004. She testified that defendant told her that he remembered getting up on the date of the shooting. He said that he "was laying out my obituaries and talking to the dead," "looking for answers." Before he got ready for bed, someone came to pick up money and pay his bills. Defendant told Dr. Zmachinski that he was "sleeping during the day and staying up at night." He said that he was waiting for his sister to come and pick him up because he did not want to stay at the house anymore. He said that he saw "two men, the Masons, on my property coming across my grass" and saw "a gun in one of their hands." Defendant stated that he tore up his furnace because he was afraid they would blow up the house. He said that he thought that they would shoot him. Defendant told Dr. Zmachinski that he crawled on the roof and asked for help. He said the police surrounded the house and his sister arrived. He eventually came outside and the police took him to Detroit Receiving Hospital. 151-155.

Dr. Zmachinski testified that defendant told her that he had talked to the Masons about joining the group, but that he ultimately decided not to join. He said that he became paranoid and thought "the Masons were after him." He thought that the Masons killed Pia, Kenneth, and Clifford "as a way of getting to him." He said that he became less socially active in August because he was afraid that the "Masons were going to get him." 11/3, 155-156. According to Dr. Zmachinski, defendant said that he tore up his furnace and disconnected some electrical lines

because he was concerned that the house would be blown up. He said that he turned the televisions over because he "felt he was getting messages" through them. 11/3, 159-160.

Dr. Zmachinski initially testified that defendant said that he "thought that the people he saw, those two gentlemen from the water department and the neighbor were the Masons; and that he saw one of them holding what he thought was a gun. So he was attempting to protect himself." 11/3, 159. She later testified that defendant "did not tell me that he knew Mr. Scott" and did not say that he shot his neighbor because he was a Mason. 11/8, 8. Defendant never admitted shooting anyone. 11/8, 10.

Dr. Zmachinski admitted that defendant mentioned the Masons "very early in his account" when he spoke to her. She said that defendant first mentioned the Masons while being held at the Wayne County Jail and United Community Hospital. 11/8, 8-9. Dr. Zmachinski acknowledged that the first mention of the Masons by defendant was in a letter written to a mental health professional one and one-half months after the shooting. Defendant wrote the letter the day before he was to be evaluated for competency to stand trial. 11/8, 9.

Defendant told Dr. Zmachinski that he began using crack cocaine on the first of August and was using crack and marijuana every day. He was also drinking alcohol. 11/3, 160. Dr. Zmachinski testified that she interviewed defendant's family and reviewed records from the Wayne County Jail, United Community Hospital, and Detroit Receiving Hospital. She gleaned from those records that defendant "continued to be psychotic well after what. (Sic) I considered that to be a psychosis that was induced by crack cocaine." 11/3, 161-163. She opined that defendant "was mentally ill before he began using his substances, and that after his system was free of substances, that he continued to be mentally ill." 11/3, 163. Dr. Zmachinski explained

that she relied on records from Detroit Receiving Hospital which indicated that defendant was diagnosed after his arrest with "acute agitated delirium, secondary to cocaine." She also relied on notations in jail and hospital records that defendant's mental illness, including hallucinations, continued even after he was given antipsychotic medication. 11/3, 168-172.

Dr. Zmachinski administered the MMPI test to defendant to test whether he was malingering. She initially testified that she "thought he gave me genuine valid test results" and that the test "indicated that he was feeling psychotic, or had experiences of psychosis in the past and he was experiencing some symptoms of depression." 11/3, 157-158. Later, on cross-examination, she admitted that the test "suggested that he may be exaggerating somewhat his systems," but dismissed the results as "not a huge exaggeration." 11/3, 180-181.

Dr. Zmachinski conceded that there was a difference of opinion within the Forensic Center about whether defendant was malingering. She said that "there were several at the Forensic Center who gave him the diagnosis of malingering," 11/3, 180, and that "there were, in the records, from various places, diagnosis of malingering which would suggest that they questioned the truthfulness of his report of some of his symptoms." 11/8, 14. She agreed with a Forensic Center psychiatrist, Dr. Newman, that defendant showed no sign of psychosis on the date of his admission. 11/8, 18-19. She acknowledged that Dr. Newman believed that defendant's self-reporting was "less than reliable" and that he viewed the letter defendant had written as "manipulative." 11/8, 19, 24-25. She admitted that a social worker who interviewed defendant also suspected that he was malingering. 11/8, 31. She agreed that notes in defendant's records reflecting that he had told the social worker that he fired two shots in the air suggested that defendant was lying because his claim was not consistent with the facts. 11/8, 32-33. Dr.

Zmachinski said that her "sense was that when he got to the center he was malingering at that time," but that his actions "didn't indicate to me that he was malingering from the very beginning." 11/8, 58.

Dr. Zmachinski testified that she based her opinion on records from the jail and Community Hospital. 11/8, 58. She said that cocaine induced psychosis would disappear after the drugs leave the patient's system. 11/8, 59. Although she maintained that the Community Hospital records indicated behavior consistent with hallucinations, she acknowledged that defendant said during the admission interview at the Forensic Center that he had not hallucinated in over three weeks. 11/8, 17-18. Dr. Zmachinski testified that even if defendant was lying about his hallucinations, she would still say that he was insane at the time of the offense. 11/8, 15-16.

Dr. Zmachinski disagreed with the opinion of the People's expert, Dr. Clark, that defendant's psychosis was drug-induced. She said she relied on the reports of defendant's family and friends regarding defendant's behavior from January of 2003 until the date of the shooting. She said that they reported that "in January and February, he was talking a lot about death of his father and death of his brother." She concluded that "one of the critical factors in his life was the death of his friend Pia, which was in August" and opined that defendant "started to use the drugs quite significantly" after that date. 11/3, 166-167. She could not, however, say that defendant would have committed the crime even if he had not been high on marijuana and cocaine. 11/3, 182.

Defendant's other expert, Dr. Amberg, interviewed him and administered tests to him on July 25, 2004. He reviewed Dr. Zmachinski's report, spoke to her, and reviewed the jail records. 11/3, 71, 73, 82-83. He did not review other forensic center records, police records, reports

referenced in Dr. Zmachinski's report, or the records from Detroit Receiving Hospital. 11/3, 71, 107-108, 117. He spoke to defendant's family and John Baldwin, but did not reference those conversations in his report and did not keep notes of the conversations. 11/3, 109-110. Dr. Amberg initially said that he discarded the notes of his interview with defendant, but later admitted that he had those notes. 11/3, 71-72, 127.

Dr. Amberg testified that defendant told him about an auto accident and being hit in the head with a metal chair, but was not clear about the date of the accident. 11/3, 74. Dr. Amberg said that defendant was distant during the interview. Defendant told him that "the Masons were out to get him" and that he "felt persecuted by them." 11/3, 73-74. Defendant "talked about not sleeping very well." 11/3, 95. Dr. Amberg said that defendant "made reference to voices" and "talked about visual hallucinations, about these like black demons that were persecuting him, that were around his bedside." 11/3, 75. He said that he had been hearing voices "for a number of years." 11/3, 123. Dr. Amberg admitted that he would not be able to say that defendant's hallucinations were "drug induced" if the Detroit Receiving Hospital records contained an admission by defendant that he only had hallucinations while high on cocaine. Dr. Amberg nevertheless rejected the conclusion dictated by the information in defendant's records because, once the drugs were out of defendant's system, defendant "was able to talk about the fact that he had these problems before." 11/3, 124.

Dr. Amberg admitted that defendant's statement about the Masons "might" have been "the first thing he said" after his name and date of birth. 11/3, 129-130. Dr. Amberg testified that defendant told him about the gun and said that "he had it in order to protect himself from the Masons; that after Pia had been killed, he just couldn't keep it together any more and felt . . . that

he had to protect himself." 11/3, 95-96. Defendant said that he was "very agitated" on the date of the shooting, that "there was a knock on the door," that "he had thought that one of the people there had been carrying a gun, and that he remembered shooting a gun." 11/3, 104. Although Dr. Amberg later testified that defendant "didn't say specifically he shot his neighbor," he admitted that his notes stated "shot at my neighbor at home." Dr. Amberg said that defendant did not tell him that he was high on cocaine at the time of the shooting. 11/3, 130-131.

Dr. Amberg opined that defendant had evidence of a brain injury. 11/3, 74. He said that he gave defendant a "neuropsychology battery," including a drawing test, and that the testing showed that defendant was "impaired" in areas of organization, thinking, and processing information. He said that he gave defendant a test for malingering, and assumed that defendant was not because he came "out reasonably well." 11/3, 79, 88-90. Dr. Amberg's diagnosis was "dementia due to head trauma." He said that defendant "suffered from limbic system disorder." He opined that defendant was unable to appreciate his situation and had difficulty determining right from wrong because of the combination of deteriorating brain circuits and sleep deprivation. 1/3, 77-78, 98.

Dr. Amberg opined that "drugs may have been a contributing factor," but that the incident was "brain injury related." He formed that opinion on the basis of a statement by defendant's sister that "maybe three weeks or two weeks prior to the incident he was already acting very strange. There were no drugs involved." 11/3, 79-81. Dr. Amberg, however, admitted that he never looked at the hospital records which indicated the presence of marijuana and cocaine in defendant's system. He agreed with defense counsel that those substances did not "exclude the fact that this man has a deteriorating mental disease." 11/3, 138. He said that defendant "had a

history of disorder for many, many years," "whereas his use of substances was very infrequent." 11/3, 91-92.

Dr. Amberg disagreed with the People's expert, Dr. Clark, because he believed that Dr. Clark's finding was "primarily based on interview and MMPI, which is a personality test." Dr. Amber said that his test evaluates "brain function." 11/3, 83. He dismissed Dr. Clark's reliance on defendant's inconsistent statements because, in his view, defendant's "memory problems" were "more related to memory and not trying to create a false image of himself." 11/3, 90-91.

Defendant's sister, Danita Thomas, testified that defendant became withdrawn after his father's death in 1975 and his brother's death in 1985. In 1988 or 1989, defendant was in a car accident. In 1990, defendant told Thomas that he had been hit in the head with a chair during a fight at a bar. Sometime thereafter, defendant was hit in the head with a brick. 11/8, 103-109. Thomas maintained that defendant talked about joining the Masons after the death of his friend Ducey in 1991, but chose not to because the Masons had requested personal information. 11/8, 111. She said that defendant told her in the late 1990s that he had information about the Masons which could get him killed. 11/8, 125. She said that defendant thought that the Masons had killed Pia, Kenny, Ducey, Demetrius, and Kenya. 11/8, 129-130. Thomas testified that she first noticed that defendant was smoking marijuana in early 2000. He had been smoking crack cocaine since late July of 2003. 11/8, 112-113, 119.

Thomas claimed that she and her sister had decided to intervene and planned to pick defendant up on the date of the shooting and take him to live with her sister. Thomas received a call that day telling her that "Greg was out the window." When she arrived at the scene, the police told her that defendant had barricaded himself in the house. She said that she went to the

back of the house and called defendant on the telephone. She said that defendant climbed out of the window wearing only shorts and holding his hands up. When the SWAT team moved in, she "rushed on him" because she "thought they were shooting at him." She claimed that the police sprayed defendant with mace and "drug him out of the yard." The police handcuffed her, but she was eventually allowed inside the house. She saw that the "furnace was all torn up" and TVs were on the floor and unplugged. She testified that "he had obituaries lying all over the floor upstairs in his den" and that the house was messy. 11/8, 112-118.

Thomas admitted that defendant had told her about meeting his neighbor and never said that he thought his neighbor was a Mason. 11/8, 121. She also acknowledged that she visited defendant regularly in jail. 11/8, 120. During their conversations, defendant did not admit firing shots or killing anyone. Defendant said that he remembered getting up that morning and his girlfriend coming over. He said that he saw two men approach and asked them what was going on, but they did not reply. He said that he knew how "they blow up houses," and ran to the basement to tear up the furnace. Defendant said that he remembered going out of the house and calling "Glenn," but did not "remember too much after that." 11/8, 122-124.

Defendant's friend since childhood, John Baldwin, testified that defendant's head went through the windshield during a car accident in 1988 or 1989 and that he was later hit in the head with a chair during a fight. 11/8, 134-137. He said that defendant was "forgetful" after the car accident and that he "shut down" after their mutual friend died during a robbery two years later. 11/8, 137-138. Baldwin testified that defendant started talking about someone trying to kill him in March or April of 2003. 11/8, 139-140, 148. Defendant never mentioned the Masons and never said that those people had killed his friends. He never indicated that he was seeing things

that were not there. 11/8, 142, 150. Baldwin testified that he noticed that defendant's house was "messed up" after May of 2003. 11/8, 140, 148.

The People called Dr. Charles Clark as a rebuttal witness. He opined that defendant did not meet the criteria for legal insanity and that defendant was "criminally responsible." 11/8, 202. He opined that defendant's psychotic episode was triggered by the use of cocaine, marijuana, and alcohol, and that the episode quickly resolved itself. 11/9, 110.

Dr. Clark was a forensic psychologist who had been working full time in private practice for sixteen years after ending his employment at the Forensic Center. Approximately one-half of his practice involved criminal cases. He explained that doctors at the Forensic Center opine that a person is insane in five or ten percent of the cases, and that when he does a second evaluation, the "odds are much greater that I agree." He was not retained to disprove a theory, but to perform an independent evaluation and give an opinion. 11/8, 156-166.

Dr. Clark interviewed defendant on August 25, 2004. He reviewed the police reports, the reports and records from the Forensic Center, and the records from Detroit Receiving Hospital, Community Hospital, and the jail. 11/8, 168-169. Dr. Clark spoke with defendant's girlfriend, and attempted to contact one of his sisters. He spoke to that person in September. 11/8, 170.

Dr. Clark testified that defendant told him that he had not slept on the day of the shooting. He said that "he was concerned about the Masons being after him," and that the "Masons were killing up all his friends." 11/8, 189. Defendant claimed that the voices "said so." He said that he was hearing voices that day, but was "vague" about what the voices were telling him. 11/8, 189-190. Defendant told Dr. Clark that he had been reading obituaries, but did not say that "he was communicating with the dead, as such, or at least they were communicating with him." He said

that his girlfriend stopped by and drew him a bath, but that he sent her away. He said that he had been on the roof, had talked to his next-door neighbor, and had fallen out of the window. He reported that he woke up in the hospital. He said that he had no memory of handling a gun, did not see a water board truck, and did not recall shooting a gun. 11/8, 190-191. Defendant told Dr. Clark that he did not think that the voices had anything to do with the shooting, the guns, or John Scott. 11/8, 192-193.

Dr. Clark testified that defendant told him about his car accident and having been hit in the head with a chair. Defendant did not, however, "describe follow-up symptoms, nor did he demonstrate, on examination with me, or with anyone else, the kinds of problems that come with head injuries; cognitive loss of memory problems, for instance, or confusion and disorientation, word finding problems, other things that are distinctive to the head." 11/9, 56-57. Dr. Clark testified that "there was no good reason" to think that defendant's head injuries caused psychological problems. He explained that defendant's "report of his background was not consistent with his having suffered from cognitive problems that sometime does occur with head trauma." 11/9, 58-59.

Dr. Clark testified that a portion of his four-hour interview with defendant involved administering a test to assist him in determining whether defendant was being truthful. Dr. Clark decided not to administer the MMPI because that test had already been administered twice. Dr. Clark explained that the November 7, 2003, and June 11, 2004, MMPIs were both "in some way consistent with the presence of a mental illness. But also indicated the possibility that the person filling out the test was attempting to create a false impression to exaggerate. That particularly was true in the second test. That's why I didn't repeat it." 11/8, 172. According to Dr. Clark,

the second test showed "over generalized complaints of the sort that don't ordinarily occur naturally." He explained that the second test suggested that defendant "was a great deal more distressed looking" than he was in "November; only six weeks after the homicide." "[I]f you were to take the test on its face, that he was worse off despite by then he had been taking medication and been in treatment for months and been found competent. So this was a test that most readily fit the pattern of faking." 11/8, 173.

The test Dr. Clark administered, the PAI, generated similar results to the MMPIs – defendant was "attempting to exaggerate certain problems and hide others." 11/8, 173. Dr. Clark explained that there was no indication in the results that defendant was "experiencing hallucinations or delusions; which were very prominent in the MMPI's he took. Instead, he came across as being quite depressed and anxious, somatically preoccupied." 11/8, 174. The test did not indicate that defendant was "mentally ill or psychotic; rather at best that he was unhappy with his situation, and very anxious and worried." 11/8, 174. Dr. Clark opined that "much of what Mr. Washington presented as symptoms that he has or was experiencing even at the time I was meeting with him are certainly not genuine or true; that he is not doing this accidentally; that his result is a conscious, wilful attempt to make himself look impaired." 11/8, 175.

To determine whether defendant was malingering, Dr. Clark reviewed defendant's evaluation and treatment records with a particular focus on what the hospital workers had observed. He discovered that there was no objective evidence of defendant's condition. He explained that, other than defendant's own report "some weeks" after the event, there was no indication defendant was concerned about the Masons. No independent evaluation or observations corroborated defendant's report of hallucinations. Dr. Clark noted that visual

hallucinations are "extremely rare," and that nine out of ten reports of visual hallucinations are caused by "toxic states, not by mental illness." 11/8, 175-176. He explained that authentic reports are "sharp and detailed" whereas defendant's "early reports are actually not of any clear hallucinations of any sort." 11/8, 176.

Dr. Clark observed that defendant's reported symptoms were not "consistent or typical of a genuine pattern of mental illness." 11/8, 178. He stressed that defendant reported new "visual hallucinations" during the interview. 11/8, 177. Although "psychotic individuals do not see demons or see anything," defendant reported seeing "little black demons." When Dr. Clark asked defendant if he saw any animals, defendant said for the first time that he saw "beasts," "the kind with long scary teeth and stuff like that." That type of report was "most unusual. Not typical." Also for the first time, defendant said that he saw "dead people" and that the dead people "gave him advice, such as be careful. Watch out." 11/8, 177-178.

Dr. Clark explained that defendant's reported symptoms were "not typical symptoms of any state of mental illness" and were "not even typical of drug induced psychosis." He concluded that the symptoms were "not real" because they were not "consistent" and it took "until August of 2004 for these reports to fall out." 11/8, 178. Dr. Clark explained that "if you run through the treatment record, you have got a history of inconsistency in terms of when he said that they had stopped happening, and when he said that they had started happening again. That wouldn't be consistent or typical of a pattern of mental illness." 11/8, 178.

Dr. Clark noted that defendant's medical records also revealed that he "produced a new symptom" when the doctor and social worker at the Forensic Center advised him that he "could return to court." Defendant then became "very unhappy and withdrawn." Dr. Clark indicated

that defendant's chart reflected that "other professional and para-professional staff had all made observations consistent with the impression that he was not genuinely mentally ill during the time he was at the forensic center." 11/8, 179-180.

Dr. Clark testified that defendant told him that he had used crack "when it came out," but did not use it habitually until after his friend Pia died. Defendant said that he used marijuana and drank beer. He denied using marijuana or crack on September 29th, and persisted with that claim when questioned by Dr. Clark and shown photographs of the drugs found in his house. 11/8, 182-183, 185-186. Defendant told Dr. Clark that he did not sleep the day before the shooting and had not been using drugs. 11/8, 183. Dr. Clark noted that the hospital records indicated that defendant had tested positive for cocaine and marijuana after the shooting. 11/8, 184.

Dr. Clark explained that marijuana "isn't much of a hallucinogen" and that cocaine "has been associated in the literature with hallucinations; although commonly not." He then described cocaine-induced paranoia:

> Very characteristic of cocaine intoxication, is the fear and the sense that somebody is immediately threatening the person, that they are somehow able to watch them, keep surveillance on them, know what they are doing, that they somehow have them in their sights; but may not make sense to the person. They overwhelming panick (sic), feeling that they are in some sort of threatening situation. It's transitory. It doesn't last very long. Sometimes it last only minutes. In some cases hours. Rarely days. 11/8, 188-189.

Dr. Clark stated that mental illness is a "long lasting condition" that is "not simply the result of drug intoxication." 11/8, 187.

Dr. Clark opined that there was no "good reason" to believe defendant's claim that he could not remember the shooting when he "remembered so much else of the day, and the time

surrounding." 11/8, 191-192. As part of his analysis, Dr. Clark considered that the circumstances surrounding the shooting did not suggest that "this was random, undirected or uncontrolled violence on the part of the shooter." 11/8, 196-197. Dr. Clark also considered that, with the exception of Pia, defendant's brother and friends died years before the shooting, and that there were "no psychiatric records preceding the death, the homicide." 11/8, 192-194. He added that schizophrenia "typically occurs in the late teen years for the first time, late teens, earlier 20's," and that it "would not be expected to appear for the first time at age 37." 11/8, 194-195.

Dr. Clark explained that the fact that the shooting was "senseless" did not mean that defendant was mentally ill. 11/8, 198. He opined that "[d]rug intoxication, cocaine intoxication, can certainly provide the complete explanations for why someone does something as senseless as this." 11/8, 199. Dr. Clark disagreed with Dr. Zmachinski's view that defendant was insane because (1) there was no evidence that defendant was "mentally ill after that date," (2) defendant had not been treated for mental illness prior to the shooting, and (3) there was "no good evidence that any of the irrationality that he had at this time of the shooting was persistent much beyond the date itself." 11/8, 199-201. Dr. Clark opined that "there is no good reason to believe that his symptoms persisted much beyond the point of his actual intoxication, and to conclude that a person who is mentally disordered while intoxicated is actually suffering from a mental illness." 11/8, 201.

The jury rejected the insanity defense and convicted defendant of second-degree murder, two counts of assault with intent to murder (AWIM), felon in possession of a firearm,[3] and

[3] The parties stipulated that defendant could not possess a firearm on September 29, 2003, because he had been convicted of a specified felony. 11/3, 52.

felony-firearm. 11/10, 4. On December 13, 2004, the trial court sentenced defendant to terms of imprisonment of forty to sixty years for murder, life for AWIM, seven years for felon in possession, and two years for felony-firearm. 12/13, 20. The court later amended the judgment to reflect a sentence of two to seven and one-half years for felon in possession.

On August 17, 2005, this Court remanded the case to allow defendant to move for a new trial on the ground that the verdict was against the great weight of the evidence.

Defendant filed his motion for new trial on September 13, 2005, and the People filed its response on September 23, 2005. The trial court heard argument on the motion at a hearing held on September 30, 2005. 9/30, 3-10. The court then ruled on the motion:

> The court has heard the statements of counsel, as well as has read the motion and the response to the motion.
>
> This is not a case where the court is asked to find whether by a preponderance of the evidence the defense has proven that the great weight of the evidence was against the verdict of the jury on the issue of culpability of whether the act was committed; but whether, on the issue of insanity defense, the defendant was legally insane at the time.
>
> In this trial there was lengthy testimony and lengthy cross-examination of the experts on those issues.
>
> The jury did hear from experts for the defense, and did hear from Dr. Clark and his opinion that defendant's symptoms were not consistent, or typical of a genuine pattern of mental illness, but of a psychotic episode triggered by the use of drugs and alcohol.
>
> He, as did the other expert, testified for quite a length of time, and there was a great opportunity for cross-examination. It was a major issue given to the jury.
>
> The jury seemed to come to a reasonable decision, and I cannot, as a court, find that the great weight of the evidence was against the decision.
>
> The court denies the motion.

9/20, 10-11.

In an opinion issued on June 13, 2006, this Court affirmed defendant's convictions, but remanded the case for resentencing because the trial court did not satisfy the statutory requirements for imposing a sentence outside the sentencing guidelines.[4] The Court rejected defendant's challenge to the denial of his motion for new trial, reasoning that (1) the trial court applied the correct standard when deciding the motion, (2) the trial court gave appropriate consideration to the opinion and testimony of Dr. Clark, and (3) defendant had not established that Dr. Clark's testimony contradicted indisputable physical facts, defied physical realities, or was inherently incredible.[5]

Next, the Court concluded that the trial court did not abuse its discretion in allowing Dr. Clark to remain in the courtroom during Dr. Zmachinski's testimony. The Court reasoned that Dr. Clark was a rebuttal expert who did not give factual testimony and "it was not unreasonable for the trial court to allow Clark to hear if Zmachinski offered any additional information at trial regarding the basis of her opinion that should be contradicted, repelled, or explained.[6]

The Court likewise rejected defendant's claim of prosecutorial misconduct, concluding that the People properly argued from the evidence that Dr. Zmachinski was not credible and properly argued the weakness of evidence advanced by the defense. The Court further determined

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[4] *People v Gregory Washington,* unpublished per curiam opinion of the Court of Appeals, issued June 13, 2006 (Docket No. 260155).

[5] *Id.*, slip op p 6.

[6] *Id.* at 7.

that even if some of the comments were improper, the trial court's instructions cured any prejudice resulting from the prosecutor's remarks.[7]

On August 8, 2006, defendant applied for leave to appeal in the Michigan Supreme Court. On December 28, 2006, the Court denied defendant's application.[8]

On remand, a resentencing hearing was held on October 4, 2006. The trial court ruled on questions regarding the scoring of variables and calculated the guidelines range for defendant's second-degree murder conviction as 225 to 375 months or life. 10/4, 3-14. The victim's son, widow, and sister spoke at the hearing. 10/4, 14-21. The People urged the court to impose the same sentence as before and state additional reasons to support the departure from the guidelines range. The People identified two factors which would justify a departure: (1) the narcotics found in defendant's home and scales indicating that defendant possessed the narcotics for sale, and (2) defendant, while armed with a weapon, barricaded himself in the home. 10/4, 22-23.

Defense counsel argued that the court should sentence defendant within the guidelines. 10/4, 23-24. Defendant exercised his right of allocution, expressing his remorse but maintaining that because of his mental condition, he "had no control over what took place in the past." He promised that he would "never lack in treatments" in the future so that "nothing like this will never happen again." 10/4, 25-26.

The court then imposed the same sentences as it had imposed in 2004. The court explained that those sentences were "appropriate" in light of defendant's history and the evidence. The court noted that in convicting defendant the jury found "that his self-induced

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[7] *Id.* at 8.

[8] *People v Gregory Washington*, 477 Mich 973; 725 NW2d 20 (2006).

mental disorder did not rise to the level of any defense." 10/4, 28. The court noted defendant's actions before and during the offense and evidence that cocaine and scales were found in his home. The court emphasized defendant's actions, explaining as follows:

> The defendant's actions and his knowledge of his emotional condition, the knowledge of the deaths that affected his life, and how he chose to handle those rather than get his own help, and his own counselling (sic), this was his chosen way of dealing with his problems.
>
> He showed by his actions a total disregard not only for his own life, but for the life of civilians, and the lives of police officers. He had with him, knowing his self-induced condition that was increasing everyday during that period, an assault rifle, a gun, and will continue to be, in this court's opinion, a major danger to society, if he is ever released.

10/4, 28-29.

The court explained that defendant's actions and "the indication of the danger to society" supported the original sentence. The court then sentenced defendant to terms of imprisonment of forty to sixty years for murder, life for assault, two and one-half to seven and one-half years for felon in possession, and two years for felony firearm. 10/4, 29.

On May 4, 2007, the Court of Appeals denied defendant's application for leave to file a delayed appeal "for lack of merit in the grounds presented."[9]

On September 24, 2007, the Supreme Court denied defendant's application for leave to appeal from the decision of the Court of Appeals.[10]

On March 25, 2008, defendant moved for relief from judgment. The trial court ordered the People to respond to the motion, and the People filed a response on May 21, 2008.

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[9] *People v Gregory Washington*, unpublished order of the Court of Appeals, entered May 4, 2007 (Docket No. 274768).

[10] *People v Gregory Washington*, 480 Mich 891; 738 NW2d 734 (2007).

On July 9, 2008, the trial court issued an opinion and order denying defendant's motion for relief from judgment. The court reasoned that because it would not waive the good cause requirement of MCR 6.508(D)(3), defendant had to show good cause and prejudice. The court then concluded that defendant had not made those showings. The court explained that defendant's appellate counsel reasonably could have decided not to raise the claims defendant had raised in his motion. The court reasoned that counsel would have recognized the weakness of any challenge to the sufficiency of the evidence. Regarding defendant's due process claim, the court explained that counsel probably found it best not to raise a weak claim regarding the prosecutor's dismissive statements and instead focus on a stronger claim. The court concluded that the jurors would not have been mislead into thinking they could dismiss the insanity defense when so much time had been spent at trial addressing the defense. Regarding defendant's remaining claim, the court reasoned that counsel could have reasonably decided not to raise a claim of ineffective assistance of trial counsel because trial counsel reasonably decided not to pursue a mental retardation theory and could have decided as a matter of trial strategy not to object during trial. The court further concluded that additional expert witnesses would not have convinced the jury because the jury already heard two experts and still did not believe that defendant was mentally ill to the point of insanity.

On October 19, 2009, this Court denied defendant's delayed application for leave to appeal from the order denying relief from judgment.[11]

[11] *People v Gregory Washington*, unpublished order of the Court of Appeals, entered October 19, 2009 (Docket No. 292891).

On June 28, 2010, the Michigan Supreme Court denied defendant's application for leave to appeal.[12]

In June, 2016, defendant filed a second motion for relief from judgment raising three claims: (1) the trial court did not have jurisdiction when it resentenced him in 2006, and (2) the court erroneously failed to score the guidelines for defendant's AWIM convictions (even though the Court of Appeals indicated the guidelines for the murder conviction, not AWIM, need be scored), and (3) he was entitled to resentencing under *People v Lockridge*.[13]

On July 22, 2016, the trial court directed the People to respond to defendant's motion.

The People filed their responsive brief on September 9, 2016. The People argued that defendant's motion was barred by MCR 6.502(G) because (1) defendant's claim that the court did not have jurisdiction over the case when it resentenced him and that the sentencing guidelines should have been scored for his AWIM conviction are not based on a retroactive change in the law and are not claims of new evidence, and (2) defendant's *Lockridge* claim was barred because *Lockridge* does not retroactively apply to sentences on collateral review, and in any event, defendant would not be entitled to relief under *Lockridge*.

Defendant thereafter retained counsel and after receiving an extension, counsel filed a reply brief arguing that (1) defendant could raise a challenge to subject matter jurisdiction at any time and that MCR 6.508(D)(3) exempts jurisdictional defects from the "technical reasons" for which a motion may be denied, (2) defendant should be able to raise his challenges to the

[12] *People v Gregory Washington*, 486 Mich 1042; 783 NW2d 335 (2010).

[13] *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).

guidelines anew at a resentencing hearing, and (3) *Lockridge* applied retroactively to defendant's case.

The trial court did not entertain oral argument on the motion.

On November 22, 2016, the trial court granted defendant's motion for relief from judgment, concluding that the court did not have jurisdiction when it resentenced defendant and that subject matter jurisdiction could be raised at any time. The court determined that defendant was not entitled to relief under *Lockridge*. The court vacated defendant's sentence and indicated that it would resentence defendant.[14]

On December 1, 2016, the People moved for a stay of the lower court proceedings. The trial court denied the motion at a hearing held on December 9, 2016. 12/9, 6.

On December 8, 2016, the People applied for leave to appeal, arguing that the trial court violated MCR 6.502(G) when it granted defendant relief from judgment. Because defendant's claim did not fall within the exceptions to the rule barring successive motions for relief from judgment, the trial court abused its discretion in granting relief from judgment.

On January 24, 2017, this Court granted leave to appeal.

On February 13, 2017, the People moved for a stay of the lower court proceedings.[15]

[14] Appendix A.

[15] The trial court has not scheduled the resentencing hearing.

ARGUMENT

Only claims based on a retroactive change in the law or new evidence that was not discovered before the first motion for relief from judgment may be raised in a second motion for relief from judgment. The circuit court granted relief from judgment and ordered resentencing because it did not have "jurisdiction" when it resentenced defendant while defendant's application for leave to appeal the affirmance of his convictions was pending in the Supreme Court. The circuit court abused its discretion in granting defendant's successive motion for relief from judgment.

Standard of Review

The Court reviews a circuit court's decision on a motion for relief from judgment for an abuse of discretion, but reviews a circuit court's findings of fact supporting its ruling for clear error.[16] "[A] court 'by definition abuses its discretion when it makes an error of law.'"[17] An appellate court will also find an abuse of discretion when the lower court's decision falls outside the principled range of outcomes.[18]

The interpretation of a court rule is a question of law that is reviewed de novo.[19]

Discussion

The circuit court abused its discretion in granting defendant relief from judgment based on a claim that did not fall within one of the exceptions to the general rule barring successive motions for relief from judgment. Under MCR 6.502(G), a defendant generally is permitted "one

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[16] *People v McSwain,* 259 Mich App 654, 681; 676 NW2d 236 (2003).

[17] *People v Giovannini,* 271 Mich App 409, 417; 722 NW2d 237 (2006), quoting *Koon v United States,* 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996).

[18] *People v Swain,* 288 Mich App 609, 628-629; 794 NW2d 92 (2010).

[19] *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009).

and only one" motion for relief from judgment.[20] Two exceptions to the general rule prohibiting successive motions exists: "A defendant may file a second or subsequent motion based on a retroactive change in the law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion."[21] Because defendant's claim did not fall within those exceptions, the circuit court erred as a matter of law and abused its discretion in granting defendant's motion.

This Court held in *People v Swain* that "MCR 6.502(G)(2) provides the *only* two exceptions to the prohibition of successive motions."[22] The circuit court ignored that clear statement of the law and proceeded to carve out an additional exception not found in the court rule. This Court must, however, enforce the court rule as written. When construing a court rule, the Court begins with its plain language. When the language is unambiguous, the Court "must enforce the meaning expressed, without further judicial construction or interpretation."[23] MCR 6.502(G) has only two exceptions, neither of which encompass the claim raised by defendant.

Only the Supreme Court has the authority to modify MCR 6.502(G) to create a third exception to the bar on successive motions for relief from judgment.[24] But even if this Court were inclined to tread on the Supreme Court's authority, this case would not fall within a new

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[20] MCR 6.502(G)(1).

[21] MCR 6.502(G)(2).

[22] *Swain*, 288 Mich App at 632-633 (emphasis added).

[23] *Williams*, 483 Mich at 232.

[24] See Const 1963, art VI, § 5.

exception for jurisdictional defects. The cases relied on by the circuit court, *Smith v Smith*[25] and *People v Clement*,[26] involve claims of lack of "subject-matter jurisdiction,"[27] not the procedural error involved in this case.

This Court explained in *CMS Energy Corp v Attorney General*,[28] "[s]ubject matter jurisdiction is a broad concept referring to the right to exercise power over and to try cases of a particular class and character; it is not tied to the particular case before a decisional body." The United States Supreme Court has likewise embraced that restrictive definition of jurisdiction. In *United States v Cotton*,[29] the Court explained that it had once utilized an expansive notion of "jurisdiction" out of a desire to correct constitutional violations during an era when a defendant could not obtain direct review of his criminal conviction in the Supreme Court. The Court dismissed that broad view as "'more a fiction than anything else,'" explaining that this "elastic concept of jurisdiction is not what the term 'jurisdiction' means today."[30] Jurisdiction is "'the courts' statutory or constitutional *power* to adjudicate the case.'"[31]

The claim raised in the instant case does not involve subject-matter jurisdiction, because the Wayne County Circuit Court unquestionably had jurisdiction over the class of cases

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[25] *Smith v Smith*, 218 Mich App 727; 555 NW2d 271 (1996).

[26] *People v Clement*, 254 Mich App 387; 657 NW2d 172 (2002).

[27] *Smith,* 218 Mich App at 729-730; *Clement*, 254 Mich App at 394.

[28] *CMS Energy Corp v Attorney General*, 190 Mich App 220, 230; 475 NW2d 451 (1991).

[29] *United States v Cotton*, 535 US 625, 630; 122 S Ct 1781; 152 L Ed 2d 860 (2002).

[30] *Id.*, quoting *Wainwright v Sykes*, 433 US 72, 79; 97 S Ct 2497; 53 L Ed 2d 594 (1977).

[31] *Id.*, quoting *Steel Co v Citizens for Better Environment*, 523 US 83, 89; 118 S Ct 1003; 140 L Ed 2d 210 (1998).

encompassing defendant's case–felony crimes.[32] In *People v Goecke*,[33] the Supreme Court, quoting MCL 600.151 and Article 6, Section 13 of the Michigan Constitution, observed that "the circuit court is a 'court of general jurisdiction' . . . having 'original jurisdiction in all matters not prohibited by law."[34] Subject-matter jurisdiction, the Court explained, "is presumed unless expressly denied by constitution or statute."[35] Felony criminal offenses are not a category of cases assigned to another court. The circuit court has exclusive jurisdiction over that class of cases.[36]

Rather than the lack of subject-matter jurisdiction, this case involves a violation of MCR 7.208(A) and MCR 7.215(F)(1) by a court that prematurely resentenced a defendant. Such a timing error does not involve a want of subject-matter jurisdiction. While our Supreme Court characterized the timing error as a want of "proper jurisdiction" in *People v Swafford,*[37] the Court was not referencing subject-matter jurisdiction, as the Court had noted years earlier that subject-matter jurisdiction "is the right of the court to exercise jurisdiction over a class of cases, such as criminal cases."[38] The Court instead was using the term "jurisdiction" colloquially. That usage leads to confusion, and, as observed by the First Circuit Court of Appeals, gives "the word

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[32] *People v Murphy*, 203 Mich App 738, 749; 513 NW2d 451 (1994) (the circuit court has "exclusive jurisdiction to try felonies").

[33] *People v Goecke*, 457 Mich 442, 458; 579 NW2d 868 (1998).

[34] See MCL 600.601.

[35] *Id.*

[36] *Murphy*, 203 Mich App at 749.

[37] *People v Swafford*, 483 Mich 1, 6 n 5; 762 NW2d 902 (2009).

[38] *Goecke*, 457 Mich at 458.

'jurisdiction' a 'chameleon-like quality.'"[39] Properly understood, the term jurisdiction in this context references subject-matter jurisdiction, not other procedural matters, such as the timing of remand proceedings. Accordingly, even if this Court were inclined to carve an new exception to MCR 6.502(G) for claims of lack of subject-matter jurisdiction, this case would not fall within that exception.[40]

MCR 6.502(G) contains two exceptions to the bar on successive motions for relief from judgment, neither of which apply in this case. The circuit court therefore erred in concluding that MCR 6.502(G) did not bar defendant's claim. To remedy that error, the Court must reverse the decision of the circuit court.

[39] *United States v George*, 676 F3d 249, 259 (CA 1, 2012).

[40] MCR 6.508(D)(3) reinforces that conclusion. The Supreme Court was aware of possible jurisdictional defects, as is evident by its determination that the good cause and prejudice requirements of MCR 6.508(D)(3) would not apply to them. See *People v Carpentier*, 446 Mich 19, 27; 521 NW2d 195 (1994). The Court nevertheless did not exempt those claims from the bar on successive motions for relief from judgment. Further, even if defendant's motion was not barred by MCR 6.502(G), his motion would still be barred by MCR 6.508(D), as the phrase "jurisdictional defects" in MCR 6.508(D)(3) must be construed as limited to lack of subject-matter jurisdiction and defendant's sentence of forty to sixty years is not invalid. See MCR 6.508(D)(3)(b)(iv).

RELIEF

WHEREFORE, the People request that this Court reverse the decision of the circuit court because defendant's motion for relief from judgment is barred by MCR 6.502(G).

Respectfully Submitted,

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Dated: February 16, 2017.