STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant, **MSC No. 156648**

vs. **COA No. 336050**

GREGORY CARL WASHINGTON, **3rd Circuit No. 04-004270**

Defendant-Appellee.
_____/

JASON W. WILLIAMS (P51503)
Chief of Research, Training and Appeals
Frank Murphy Hall of Justice
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-5794

JOHN F. ROYAL (P27800)
Attorney for Defendant-Appellee
The Ford Building
615 Griswold St., Suite 1724
Detroit, Michigan 48226
(313) 962-3738
_____/

DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL BY DIRECTION OF THIS COURT'S ORDER OF JANUARY 24, 2018.

PROOF OF SERVICE

(Oral Argument Requested)

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The trial court said "Yes"

The Court of Appeals said "Yes"

The prosecutor says: "No"

The Defendant-Appellee says: "Yes"

II. WHERE THE TRIAL COURT DID NOT HAVE JURISDICTION TO RESENTENCE MR. WASHINGTON ON OCTOBER 4, 2006, IS THIS A "JURISDICTIONAL DEFECT" THAT CAN PROPERLY BE RAISED IN A SUCCESSIVE MOTION FOR RELIEF FROM JUDGMENT, OR BY A MOTION FOR RESENTENCING, AND SHOULD THE COURT OF APPEALS AND THE TRIAL COURT BE AFFIRMED?

The trial court said: "Yes"

The Court of Appeals said "Yes"

The prosecutor says: "No"

The Defendant-Appellee says: "Yes"

DEFENDANT-APPELLEE'S RESPONSE TO APPELLANT'S STATEMENT OF APPELLATE JURISDICTION

The Defendant-Appellee agrees with the Statement of Jurisdiction contained in the Plaintiff-Appellant's Supplemental Brief

STATEMENT OF FACTS AND PROCEEDINGS

Defendant-Appellee Gregory Carl Washington (hereinafter "Mr. Washington") accepts the Statement of Material Proceedings and Facts submitted in the Supplemental Brief filed by the Plaintiff-Appellant in this case. Any additional facts will be incorporated in the text of Mr. Washington's Brief as needed.

Arguments

I. WHERE THE TRIAL COURT'S ACT OF RESENTENCING MR. WASHINGTON WHILE AN APPLICATION FOR LEAVE TO APPEAL WAS PENDING BEFORE THIS COURT WAS AN ACT PERFORMED WITHOUT JUDICIAL AUTHORITY, IT WAS A JURISDICTIONAL DEFECT; AND WHERE THE PROSECUTION'S ARGUMENT THAT IT WAS NOT, HAS BEEN WAIVED OR FORFEITED BY THE FAILURE TO MAKE THIS ARGUMENT IN THE TRIAL COURT; THE COURT OF APPEALS SHOULD BE AFFIRMED.

Standard of Review: Whether the trial court's action of resentencing the defendant while an application for leave to appeal was pending before this Court was a jurisdictional defect is an issue of law, reviewable *de novo*. People v Carpentier, 446 Mich 19, 60, n. 19, 521 NW2d 195 (1994). Whether the prosecution has waived and/or forfeited this issue is a question of law, reviewable de novo. Id.

A. The trial court's action of resentencing Mr. Washington while his timely-filed application for leave to appeal was pending before this Court was a jurisdictional defect.

This Court adopted the meaning of the term "jurisdiction" very early in its history. In Palmer v Oakley, 2 Doug 433, 4 86 (Mich, 1847), this Court accepted the definition of jurisdiction set forth in United States v Arredondo, 31 U.S. 691, 709, 8 L.Ed. 547 (1832): "The power to hear and determine a cause is jurisdiction."

This is why the resentencing of Mr. Washington while his timely-filed application for leave to appeal was pending before this Court was a jurisdictional defect. At the time it acted to resentence Mr. Washington, the trial court did not have "power to hear and determine..." Mr. Washington's sentence. The trial court conducted the resentencing hearing at a time when it lacked the authority to exercise its judicial power. The trial court had no jurisdiction to act at that time.

The prosecution does not dispute Mr. Washington's assertion that his re-sentencing hearing took place improperly on October 4, 2006, while Mr. Washington's Application for Leave to Appeal

was pending before this Court. The judgment of the Court of Appeals was issued on June 13, 2006 (People v Gregory Carl Washington, unpublished Opinion of the Michigan Court of Appeals, (No. 260155, June 13, 2006) (27a - 35a) . Mr. Washington timely filed his Application for Leave to Appeal to this Court on August 8, 2006, exactly 56 days after the Court of Appeals issued its opinion. (See Appellate Docket Sheet for People v Gregory Washington, COA No. 260155; MSC No. 131820; 90b). Thus, the Remand Order of the Court of Appeals had not yet become effective on October 4, 2006, when the Circuit Court presided over the resentencing hearing. (4a, 36a - 62a).

This Court has already decided that a trial court has no jurisdiction to proceed with a case which has been "automatically stayed" as a result of a timely filed appeal from the Court of Appeals to this Court. This Court has already ruled that a trial court cannot act under these circumstances because it does not have: "proper jurisdiction." People v Swafford, 483 Mich 1, 6, n. 5, 762 NW2d 902 (2009) explains:

> After the Court of Appeals rendered its first decision, but before this Court vacated that decision, defendant was brought to trial, convicted as charged, and sentenced to life in prison. Defendant should not have been brought to trial at that time. The Court of Appeals decision reversing the trial court's dismissal of charges and remanding the case for trial had not taken effect, because defendant had filed a timely appeal to this Court. MCR 7.215(F)(1)(a). Moreover, during the pendency of a timely appeal to this Court, a Court of Appeals decision remanding to a lower court for further proceedings is automatically stayed, unless the Court of Appeals or this Court orders otherwise. MCR 7.302(C)(5) [now renumbered 7.305(C)(7)(a)]. Neither this Court nor the Court of Appeals ordered further proceedings to begin notwithstanding defendant's timely appeal. Accordingly, the trial court did not have proper jurisdiction to bring defendant to trial or convict defendant.
> Swafford, supra, at 6, n. 5 (emphasis added).

There is no indication in Swafford, supra, or in the Michigan Court Rules, that this Court's use of the term "jurisdiction," in Swafford, has any different meaning than the use of the term "jurisdictional defects" in MCR 6.508(D)(3).

As stated by this Court in Detroit v General Motors Corporation, 233 Mich App 132, 140 (1998):

> The judgment of the Court of Appeals as rendered in an opinion becomes effective after the expiration of the time for filing a timely application for leave to appeal to the Supreme Court, or, if a timely application has been filed, after the disposition of the case by the Supreme Court. MCR 7.215(E)(1)(a) [Now renumbered 7.215(F)(1)(a)]. When the Supreme Court denies leave to appeal after a decision from this Court, "the Court of Appeals decision becomes the final adjudication and may be enforced in accordance with its terms." MCR 7.302(F)(3) [Now renumbered 7.305(H)(3)].

The precisely applicable rule on these facts is MCR 7.305(C)(7)(a), which addresses appeals where the Court of Appeals issues an Opinion which denies relief on most issues, but orders a remand as to one issue.

MCR 7.305(C)(7)(a) states:

> (7) Effect of Appeal on Decision Remanding Case. If a party appeals a decision that remands for further proceedings as provided in subrule (C)(5)(a), the following provisions apply:
>
> (a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1), an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.
> (Emphasis added)

Thus, Mr. Washington's Application for Leave to Appeal to this Court, which was timely filed on August 8, 2006, stayed the proceedings ordered by the Court of Appeals to take place on remand. MCR 7.305(C)(7)(a). This means that the trial court lacked the power to act–it lacked jurisdiction. Palmer, supra. The proceedings remained stayed until this Court issued its Order denying leave to appeal on December 28, 2006. MCR 7.305(H)(3). (90b).

Circuit Court proceedings were stayed on October 4, 2006, when the Circuit Court presided over the improper resentencing hearing. For these reasons, the Circuit Court was without

jurisdiction to conduct the resentencing hearing on October 4, 2006.

The prosecution essentially argues that Mr. Washington's previous Motion for Relief from Judgment has somehow waived or forfeited his right to make this claim at this time. A review of the language of MCR 6.508(D) makes it clear this issue has been neither waived nor forfeited. MCR 6.508(D)(3)(a) and (b) clearly says that the trial court can grant relief on a jurisdictional issue without a showing of "good cause" or "actual prejudice."

> MCR 6.508
>
> ....
> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
> ....
> (3) alleges grounds for relief, *other than jurisdictional defects*, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
> (b) actual prejudice from the alleged irregularities that support the claim for relief. ....
> (Emphasis added).

Thus, jurisdictional defects are not waived by a prior appeal or a prior motion for relief from judgment.

Mr. Washington's Application for Leave to Appeal to this Court, which was timely filed on August 8, 2006 (90b), stayed the proceedings ordered by the Court of Appeals to take place on remand. MCR 7.305(C)(6)(a). The proceedings remained stayed until this Court issued its Order Denying Leave to Appeal on December 28, 2006 (90b). MCR 7.305(H)(3). Thus, Circuit Court proceedings were stayed on October 4, 2006, when the Circuit Court presided over the improperly conducted resentencing hearing. For these reasons, the Circuit Court was without jurisdiction to

conduct the resentencing hearing on October 4, 2006.

The prosecution argues for an unduly cramped definition of "jurisdiction." MCR 6.500 et seq was promulgated by this Court in 1989, and made effective on October 1, 1989. 432 Mich ccii (1989). This Court had virtually the same Justices sitting at the time these rules were adopted as it did when two seminal opinions on jurisdiction were issued. It must be concluded that the Justices intended for the term "jurisdictional defects" to have the same meaning as the word "jurisdiction" has when it was used in People v New, 427 Mich 482, 398 NW2d 358 (1986) and People v Carpentier, supra.

In New, supra, at 488, this Court reaffirmed the longstanding rule that: "...a plea of guilty 'waives all nonjurisdictional defects in the proceedings.' People v Alvin Johnson, 396 Mich 424, 440; 240 NW2d 729(1976), cert den sub nom Michigan v Johnson, 429 US 951...(1976)...." New went on to define "jurisdictional" as that term was used in People v White, 411 Mich 366, 397-399, 308 NW2d 128 (1981):

> Only those rights and defenses which reach beyond the factual determination of defendant's guilt and implicate the very authority of the state to bring a defendant to trial are preserved [following a plea of guilty]. Examples include: the prohibition against double jeopardy, Menna [v New York, 423 US 61, 96 S Ct 241; 46 LEd2d 195 (1975)]; the right to challenge the constitutionality of the statute under which one is charged, Journigan v Duffy, 552 F2d 283 (CA 9, 1977); the challenge that a charge is brought under an inapplicable statute, People v Beckner, 92 Mich App 166; 285 NW2d 52 (1979). These defenses are "similar to the jurisdictional defenses," Alvin Johnson, 444, in that they involve the right of the government to prosecute the defendant in the first place. Such rights may never be waived.
> New, supra, at 492, quoting from White, supra, at 398 (emphasis added).

It must be concluded that the Justices of this Court who issued this decision in 1986 were cognizant of this discussion and used the word "jurisdiction" in the same way when this Court promulgated MCR 6.508 just a few years later, in 1989.

When the trial court in this case proceeded with the improper resentencing hearing on

October 4, 2006, it acted in a manner that: "... implicated the very authority of the state" to sentence Mr. Washington. New, supra, quoting from White, supra. But the trial court acted without that authority, because proceedings in the case had been stayed, pursuant to MCR 7.305(C)(7)(a). The effect of this stay was that jurisdiction over Mr. Washington had not been returned to the trial court from the Court of Appeals. Thus, as this Court stated in Swafford, supra, at 6, n. 5, "...the trial court did not have proper jurisdiction" to re-sentence Mr. Washington.

Several Justices of this Court again discussed the concept of "jurisdiction" a few years after the adoption of MCR 6.500 et seq., in People v Carpentier, 446 Mich 19, 45-49, 521 NW2d 195 (1994) (concurring opinion of Justice Riley, joined by Justices Boyle and Griffin). Importantly, Justices Riley, Boyle, and Griffin were all on the Court in 1989 when MCR 6.500 et seq. was enacted. There is no reason to conclude that their understanding of the scope of the concept of "jurisdiction" had changed significantly between 1989 and the issuance of Carpentier, supra, in 1994.

Justice Riley first noted that: "Nonjurisdictional defects are waived by a guilty plea. People v Ginther, 490 Mich 436, 440, 212 NW2d 922 (1973)." Carpentier, supra, at 47, n. 3 (concurring opinion). Justice Riley then discussed the concept of "jurisdiction" as follows:

> Thus, a jurisdictional defect or its equivalent has been found when the defendant raises the issue of improper personal jurisdiction,[footnote omitted] improper subject matter jurisdiction,[footnote omitted] double jeopardy,[footnote omitted] imprisonment when the trial court had no authority to sentence defendant to the institution in question,[footnote 7] and the conviction of a defendant for no crime whatsoever.[footnote omitted]."

"[7] In Re Allen, 139 Mich 712, 714; 103 N 209 (1905)."
Carpentier, supra, at 47-48, n. 7 (concurring opinion)

The case of In Re Allen, supra, cited by Justice Riley is analogous to the instant case. The trial judge in that case sentenced the Defendant to a prison which was not authorized by statute. As noted by Justice Riley, the trial judge had no jurisdiction to sentence the defendant to that prison.

As a result, this Court found the sentence which was imposed to be void, and reversed. This Court, effectively found that the trial court had no jurisdiction to impose the sentence which it had imposed.

Similarly, the trial court in the instant case had no jurisdiction to proceed with resentencing Mr. Washington when it did because the decision of the Court of Appeals had been stayed. The trial court had no authority to act–it lacked jurisdiction. When the trial court proceeded without jurisdiction, it was a "jurisdictional defect."

The prosecution supplemental brief argues that three earlier cases of this Court adopted "a restrictive view of jurisdictional defects," which view the prosecution says should be adopted in the instant case. (Prosecution's Supplemental Brief, at 12). These cases are: People v Lown, 488 Mich 242; 794 NW2d 9 (2011); and In Re Hatcher, 443 Mich 426; 505 NW2d 834 (1993); and Bowie v Arder, 441 Mich 23; 490 NW2d 568 (1992). However, these cases only discuss the narrow issue of subject-matter jurisdiction. These cases do not address the power of a trial court to act in a particular case, when its judicial power has been stayed, and it therefore lacks jurisdiction to exercise its judicial power.

The prosecution brief then confuses the issue by arguing that Swafford, supra, used the term "jurisdiction" inaccurately, and speculates that this Court was relying in Swafford on a 30 year old opinion, People v George, 399 Mich 638,; 250 NW2d 491 (1977). (Prosecution's Supplemental Brief at 11-12). But there is nothing in Swafford to suggest that the earlier decision in George had any impact on the Swafford decision.

The prosecution then seeks to divine some substantive meaning in the deletion of the superfluous word "all" from GCR 1963, 853.2(2), when compared to MCR 7.305(H)(3). (Prosecution supplemental brief, at 12-13). The earlier rule read that if this Court grants leave to

appeal, "all jurisdiction over the cause shall thereafter be vested in the Supreme Court." The current rule reads simply that: "jurisdiction over the case is vested in the Supreme Court." MCR 7.305(H)(3).

The prosecution then argues that MCR 7.302(C)(5), the Court Rule which stayed proceedings in the trial court once Mr. Washington timely filed his Application in this Court, does not really divest the trial court of jurisdiction because MCR 7.208 lists a host of powers the trial court allegedly retains while his Application was pending. (Prosecution Supplemental Brief at 13-14). However, in fact, most of these powers have nothing to do with the exercise of judicial authority over Mr. Washington, and are irrelevant in the instant case. The only judicial power this rule gives the trial court that the trial court might have been able to exercise in this case once Mr. Washington filed his Application in this Court is found in MCR 7.208(J), the power to rule on requests for costs or attorney fees. But this subrule does not give the trial court the power to proceed in any way that would involve the exercise of authority, or jurisdiction, over Mr. Washington. So this argument is of no avail to the prosecution.

For these reasons, the trial court's action of improperly resentencing Mr. Washington during the time when trial court proceedings had been stayed was necessarily an action taken when the trial court did not have the power to act–it did not have jurisdiction over Mr. Washington at that time. For this reason, the trial court's resentencing was a "jurisdictional defect" as that term is used in MCR 6.508(D)(3). This Court should therefore reject the appeal filed by the prosecution, and affirm the Court of Appeals and the trial court.

B. Where the Prosecution's Brief in the Trial Court Did Not Contend that the Trial Court's Resentencing of Mr. Washington While His Application Was Pending Before This Court Was Not a Jurisdictional Defect, But Only Argued That Mr. Washington Could Not Raise This Issue In a Successive Motion For Relief From Judgment, The Prosecution has Waived or Forfeited This argument, and the Court of Appeals Should be Affirmed.

Argument: Mr. Washington filed the instant Motion for Relief From Judgment on June 22, 2016. (92b -- 96b). On July 22, 2016, the trial court directed the prosecution to file a response to Mr. Washington's Motion for Relief From Judgment. (4a).

The prosecution filed its Answer to Mr. Washington's Motion on September 9, 2016. (97b – 131b). This Answer contained a 20 page summary of the evidence presented at trial, followed by a two page legal argument. (The legal argument is found at 126b –127b). The 20 page summary of the trial proceedings contained no information relevant to the issues pending before the Circuit Court, or before this Court.

Mr. Washington argued in his Motion for Relief From Judgment that the trial court conducted the resentencing hearing ordered by the Court of Appeals while Mr. Washington's Application for Leave to Appeal was pending in this Court. Mr. Washington argued that this was a "jurisdictional defect," as the trial court lacked jurisdiction to conduct any proceedings in the case while the Application was pending in this Court. (92b – 95b).

The two page legal argument which was presented by the prosecution to the trial court only argued that Mr. Washington's claim of a "jurisdictional defect" could not be raised in a successive motion for relief from judgment. (126b – 127b). The prosecution did not dispute Mr. Washington's argument that the conducting of his resentencing while the circuit court proceedings were stayed was a "jurisdictional defect," as used in MCR 6.508(D)(3). Id. The prosecutor did not argue in the trial court that Mr. Washington's claim was not really a claim of a "jurisdictional defect" at all, but involved only a claim of "an error in the timing of remand proceedings."

Therefore, Mr. Washington contends that the prosecution has waived or forfeited the argument that the trial court's error in this case was not a "jurisdictional defect." The prosecution forfeited or waived this issue by failing to raise it in the trial court.

If the prosecution believed that the term "jurisdictional defect," as used in MCR 6.508(D)(3), did not encompass the trial court's error in this case, than it should have made this argument to the trial court. Instead, the prosecution laid back, and harbored potential appellate error as a parachute for an appeal, in case the trial court granted Mr. Washington's motion. This is not permitted under Michigan procedural rules. This Court made this clear in People v Grant, 445 Mich 535, 546-547 (1994):

> [T]he courts of this state have long recognized the importance of preserving issues for the purpose of appellate review. As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. See, e.g., Napier v Jacobs, 429 Mich 222, 235; 414 NW2d 862 (1987) (failure to raise a claim of insufficiency of the evidence); Moskalik v Dunn, 392 Mich 583, 592; 221 NW2d 313 (1974) (failure to object to an erroneous jury instruction); People v DerMartzex, 390 Mich 410, 416-417; 213 NW2d 97 (1973) (failure of the defendant to request a limiting instruction on admissibility of prior-acts evidence); People v Farmer, 380 Mich 198, 208; 156 NW2d 504 (1968) (failure to raise the issue of the involuntariness of a confession). Indeed, the United States Supreme Court has recognized a state's right to develop procedural rules that lead to issue forfeiture even where the procedural rules implicate constitutional protections if the rules serve a legitimate state interest. Henry v Mississippi, 379 US 443; 85 S Ct 564; 13 L Ed 2d 408 (1965). [footnote omitted].
>
> Grant, supra, at 546-547 (emphasis added).

This Court then explained the importance of the forfeiture rule for the efficient operation of the criminal justice system:

> A forfeiture rule, then, serves the important "'need to encourage all trial participants to seek a fair and accurate trial the first time around . . . .'" United States v Young, 470 US 1, 15; 105 S Ct 1038; 84 L Ed 2d 1 (1985), quoting United States v Frady, 456 US 152, 163; 102 S Ct 1584; 71 L Ed 2d 816 (1982).[29] See also

> Michigan v Tucker, 417 US 433, 446; 94 S Ct 2357; 41 L Ed 2d 182 (1974) ("[T]he law does not require that a defendant receive a perfect trial, only a fair one"). Accordingly, the United States Supreme Court has recognized the importance of an incentive for criminal defendants to raise objections at a time when the trial court has an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights. Failure to timely raise error thus requires defendants to establish prejudice in order to avoid the forfeiture of an issue. [footnote omitted].

> 29 See also Yakus v United States, 321 US 414, 444; 64 S Ct 660; 88 L Ed 834 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it").

> Grant, supra, at 551-552 (emphasis added).

In the above excerpt, this Court stated that the waiver/forfeiture rules apply to all: "trial participants." Thus, these rules apply to the prosecution as well as to the defense in a criminal case. Accord: People v Pipes, 475 Mich 267, 715 NW2d 290, 296-297 (2006).

In People v Carines, 460 Mich 750, 761 (1999), this Court explained that appellate consideration of unpreserved claims of error is disfavored:

> This state encourages litigants "'to seek a fair and accurate trial the first time around . . . .'" Grant, supra, 445 Mich 551. This Court disfavors consideration of unpreserved claims of error. In Grant, this Court discussed the standards for reviewing unpreserved claims of nonconstitutional error.
> Carines, supra, at 761.

The reasons for these policies was explained in more detail in People v Carter, 462 Mich 206, 214 (2000):

> The rule that issues for appeal must be preserved in the record by notation of objection is a sound one. People v Carines, 460 Mich 750, 762-765; 597 NW2d 130 (1999). Counsel may not harbor error as an appellate parachute. People v Pollick, 448 Mich 376, 387; 531 NW2d 159 (1995), quoting People v Hardin, 421 Mich 296, 322-323; 365 NW2d 101 (1984).
> Carter, supra, at 214. (Emphasis supplied).

Accord: Pipes, supra, at 297.

Carines, supra, at 762, n. 7, went on to explain the difference between forfeiture of an issue, and waiver of an issue:

> "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" United States v Olano, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993).
> Carines, supra, at 762, n. 7.

In this case, the argument the prosecution seeks to raise on appeal has been both forfeited and waived. First, the prosecution's argument is forfeited because the prosecution failed to timely raise this issue before the trial court, in its trial court Answer to Mr. Washington's Motion for Relief From Judgment. (126b–127b) Had the prosecution done so, the trial court would have had the opportunity to amplify the record, if it felt the need to do so. Similarly, in Grant, supra, at 538-543, 552, the trial court had failed to give a statutorily-required preliminary jury instruction on insanity. The defendant failed to request the instruction, or otherwise object to the failure to give the instruction. The error was forfeited. Similarly, in the instant case, the prosecution's failure to raise this issue in a timely manner has forfeited ths issue.

Alternatively, the prosecution's argument has been waived. The prosecution was obviously aware that an issue pending before the trial court was the correct interpretation of the term "jurisdictional defect," as used in MCR 6.508(D)(3). Therefore, by failing to raise its issue that the term "jurisdictional defect," as used in MCR 6.508(D)(3), does not include the type of "timing error' which occurred in this case, the prosecution has intentionally relinquished a known right, that is, the right to request the courts to address this issue. The prosecution here has waived this issue just as assuredly as did the defendant in People v Clark, 243 Mich App 424, 425-26 (2000). In that case, the defendant moved pretrial for a change of venue. The motion was denied without prejudice,

subject to reconsideration during the jury selection. "Defense counsel's failure to renew the motion and his expression of satisfaction with the jury waived the change of venue issue.[citations omitted]" Similarly, in the instant case, the failure of the prosecution to raise the issue in the trial court has waived it.

The prosecution here is trying to do what it frequently accuses criminal defendants of doing. This cannot be tolerated. Just as the defense in a criminal case cannot harbor error as an appellate parachute, neither can the prosecution. Yet that is exactly what the prosecution is seeking to do in this case. The Court of Appeals has repeatedly announced it will not allow a party to harbor error as an appellate parachute. In Valentine v Valentine, 277 Mich App 37 (2007), the Court reiterated:

> On numerous occasions, this Court has denied a party the right to raise an appellate challenge when the party harbored an error as an "appellate parachute." See, e.g., In re Gazella, 264 Mich App 668, 679; 692 NW2d 708 (2005); Marshall Lasser, PC v George, 252 Mich App 104, 109; 651 NW2d 158 (2002); Weiss v Hodge (After Remand), 223 Mich App 620, 636; 567 NW2d 468 (1997); Dresselhouse v Chrysler Corp, 177 Mich App 470, 477; 442 NW2d 705 (1989). We do so again.

The prosecution here has both waived and forfeited the principle issue it has presented this Court with in its Application for Leave to Appeal. This Court should therefore reject the appeal filed by the prosecution, and affirm the Court of Appeals and the trial court.

II. WHERE THE TRIAL COURT DID NOT HAVE JURISDICTION TO RESENTENCE MR. WASHINGTON ON OCTOBER 4, 2006, THIS IS A "JURISDICTIONAL DEFECT" THAT CAN PROPERLY BE RAISED IN A SUCCESSIVE MOTION FOR RELIEF FROM JUDGMENT, OR BY A MOTION FOR RESENTENCING, AND THE COURT OF APPEALS AND THE TRIAL COURT SHOULD BE AFFIRMED.

Standard of Review: This issue involves the interpretation of a Court rule, which is a question of law, reviewable de novo. People v Williams, 483 Mich 226, 231; 769 NW2d 605, 609 (2009).

A. Mr. Washington Properly raised the Jurisdictional Defect in This Case in a Motion for Relief From Judgment.

Argument: Mr. Washington asserts that the Circuit Court did not have jurisdiction to re-sentence him on October 4, 2006. The prosecution does not dispute Mr. Washington's assertion that this resentencing hearing improperly took place while Mr. Washington's Application for Leave to Appeal was pending before this Court. (See Issue IA, supra). The prosecution contends that Mr. Washington was precluded from seeking relief on this issue in a successive motion for relief from judgement, because of MCR 6.502(G), the subrule which discusses Successive Motions:

> (G) Successive Motions.
> (1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.
>
> (2) A defendant may file a second or subsequent motion based on a retroactive change in 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. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

But Mr. Washington contends that this provision does not limit or overrule MCR 6.508(D)(3) (a) and (b), which state that jurisdictional defects are not waived by a prior appeal or

a prior motion for relief from judgment.:

MCR 6.508

> ....
> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
> ....
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
> (b) actual prejudice from the alleged irregularities that support the claim for relief. ....

MCR 6.508 is a rule which was promulgated in 1989 along with the general enactment of the Michigan Court Rules. 432 Mich ccii (1989). The subrule entitled "Successive Motions" was not added to the rules until six years later. 449 Mich xciii (1995). There is no indication in the rules that MCR 6.502(G) was intended to limit the scope of the language of MCR 6.508(D)(3)(a) and (b), which state that a defendant does not have to show "good cause" for his failure to raise a jurisdictional claim in an earlier appeal or motion for relief from judgment.

The Court of Appeals panel in the instant case agreed with the prosecution that Mr. Washington could not raise his claim of a jurisdictional defect by way of a successive motion for relief from judgment:

> MCR 6.502(G)(2) provides two exceptions to the general rule against successive motions for relief from judgment, allowing a "second or subsequent motion based on a retroactive change in law that occurred after the first motion," or "a claim of new evidence that was not discovered before the first such motion." Any successive motion that does not assert one of these two exceptions must be returned to the defendant and not filed in the court. [People v] Swain, 288 Mich App [609], at 631[; 794 NW2d 92 (2010)], citing MCR 6.502(G)(1).

> This Court in Swain, 288 Mich App at 632, explicitly held that "MCR 6.502(G)(2) provides the only two exceptions to the prohibition of successive motions." Swain is binding on this Court, as it is on the trial court, MCR 7.215(C)(2), and we discern no ambiguity in the language of MCR 6.502(G) to warrant reconsideration of the issue.
>
> Defendant's successive motion for relief from judgment was predicated on a claimed "jurisdictional defect" invalidating the October 4, 2006 judgment of sentence. Defendant's successive motion for relief from judgment did not involve a retroactive change in the law or newly discovered evidence. Regardless of the merits of defendant's claim of error, the trial court lacked authority to grant defendant's motion under MCR 6.502.
> People v Gregory Washington, 321 Mich App 276, ____; ___ NW2d ___ (2017). (77a – 78a).

Mr. Washington respectfully disagrees with this ruling by the Court of Appeals, and with the earlier decision in Swain, supra. It is clear that in 1989 when this Court first promulgated MCR 6.500 et seq., it intended to preserve the right of Defendants in criminal cases to raise claims of jurisdictional defects in motions for relief from judgment without having to show good cause for not having raised the issue in a previous post-conviction pleading, and without having to show actual prejudice. MCR 6.508 (D)(3) (a) and (b). There is no indication in MCR 6.502(G) that this Court intended to overrule this principle by adopting the new rule on successive motions. So the statement in Swain, adopted by the Court of Appeals panel in the instant case, that there are no other exceptions to filing a successive motion for relief from judgment is a mistaken interpretation of MCR 6.500 et seq. This Court should reverse the Court of Appeals on this point, and rule that Mr. Washington could indeed properly file a successive motion for relief from judgment raising his claim of a jurisdictional defect.

B. The Court of Appeals Properly Held that Mr. Washington's Claim of a Jurisdictional Defect Could Properly be Filed and Heard by the Circuit Court.

The Court of Appeals went on to conclude that Mr. Washington could properly file his claim of a jurisdictional defect in the holding of his resentencing hearing, and have it heard by the Circuit Court. Although the Court of Appeals did not state how such a pleading should be titled, presumably it would be by way of a Motion for Resentencing. The Court of Appeals explained:

> However, a motion for relief from judgment under MCR 6.502 is merely a procedural vehicle, and our determination that relief under MCR 6.502 was unavailable to defendant here does not end our inquiry. We agree that the prosecution has failed to address the substantive issue in defendant's motion for relief from judgment, which, while brought pursuant to an inapplicable court rule, nevertheless constitutes an important and reviewable claim of error.
> (78a).
> ...
> Although the prosecution argues otherwise, the trial court's entry of the judgment of sentence without jurisdiction was not merely procedural error. "The term jurisdiction refers to the power of a court to act and the authority a court has to hear and determine a case." People v Clement, 254 Mich App 387, 394; 657 NW2d 172 (2002) (quotation marks and citation omitted). "Jurisdiction of the subject matter of a judicial proceeding is an absolute requirement." In re AMB, 248 Mich App 144, 166; 640 NW2d 262 (2001) (quotation marks and citation omitted). "When a court is without jurisdiction of the subject matter, its acts and proceedings are of no force or validity; they are a mere nullity and are void." Clement, 254 Mich App at 394 (quotation marks and citation omitted). Thus, because the trial court lacked jurisdiction to hold a resentencing hearing and enter the October 4, 2006 judgment of sentence, the resentencing hearing and the resultant judgment of sentence lack force and authority and are considered void.
>
> "Jurisdictional defects may be raised at any time." People v Martinez, 211 Mich App 147, 149; 535 NW2d 236 (1995); see also Smith v Smith, 218 Mich App 727, 729-730; 555 NW2d 271 (1996) ("[A] challenge to subject-matter jurisdiction may be raised at any time, even if raised for the first time on appeal."). "Subject-matter jurisdiction is so critical to a court's authority that a court has an independent obligation to take notice when it lacks such jurisdiction, even when the parties do not raise the issue." AMB, 248 Mich App at 166-167; see also Clement, 254 Mich App at 394 (explaining that a court is bound to notice the limits of its authority and recognize its lack of jurisdiction sua sponte). Regardless of whether the issue was raised in an improperly supported motion, the trial court clearly had the power to consider the jurisdictional issue brought to its attention.
> (79a).

The rule of law upon which the Court of Appeals relied on in its opinion in the instant case, supra, is well-settled. It has always been the rule in this and many other jurisdictions is that the issue of jurisdiction cannot be waived and can be raised at any time. The question of jurisdiction is always within the scope of this Court's review. Walsh v. Taylor, 263 Mich App 618, 622; 689 NW2d 506 (2004). Michigan courts are bound to take notice of the limits of their own authority, and act accordingly by dismissing or otherwise disposing of proceedings they have no power to conduct or adjudicate. In re Fraser Estate, 288 Mich 392, 394 (1939) (citing Bradley v. Board of State Canvassers, 154 Mich 274 (1908); J.F. Hartz Co. v. Luckaszcowski, 200 Mich 230 (1918); Bolton v. Cummings, 200 Mich 234 (1918); Warner v. Noble, 286 Mich 654 (1938)).

An order entered by a court without jurisdiction "is absolutely void." Fox v. Board of Regents of the University of Michigan, 375 Mich 238, 242; 134 NW2d 146 (1965). An order void for lack of jurisdiction is meaningless. Cf. United States v. United Mine Workers of America, 330 US 258, 293; 67 S.Ct. 677; 91 L.Ed. 884 (1947); Walker v. City of Birmingham, 388 US 307, 320-321 (1967).

This principle regarding jurisdictional defects was obviously recognized when MCR 6.508(D)(3)(a) and (b) was promulgated. It was to continue to uphold this principle that jurisdictional defects are exempted from the technical reasons for which a motion for relief from judgment may be denied. "Jurisdictional error has historically been recognized as fundamental, and for which collateral relief has accordingly been available. The doctrine of procedural default does not apply." United States v. Peter, 310 F.3d 709 (11th Cir. 2002); 2002 U.S. App. LEXIS 22422. "Because subject-matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived." U.S. v. Cotton, 535 U.S. 625, 155 L.Ed.2d 860, 122 S. Ct. 1781, 1782 (2002).

Therefore, the Circuit Court did not have jurisdiction to preside over the resentencing

hearing conducted on October 4, 2006. This resentencing hearing was improperly conducted, and the the sentences imposed at that hearing are null and void. This Court should affirm the November 29, 2016 Opinion of the Circuit Court acknowledging this error; affirm the holding of the Court of Appeals, and remand this case to the Circuit Court so that a proper resentencing Hearing can be held.

RELIEF REQUESTED

THEREFORE, for all the above reasons, the Circuit Court correctly found that it did not have jurisdiction to resentence Mr. Washington on October 4, 2006. This jurisdictional defect can be raised at any time, and was properly raised by Mr. Washington in his successive Motion for Relief From Judgment. This issue has not been waived or forfeited by Mr. Washington's prior Motion for Relief from Judgment. Even if Mr. Washington improperly used the Motion for Relief From Judgement as a procedural vehicle to bring this issue to the Circuit Court's attention, the Circuit Court properly recognized that it had erred in conducting a resentencing hearing on October 4, 2006, and properly ordered that a resentencing hearing be held. The Opinion of the Circuit Court should be upheld in all respects, and the holding of the Court of Appeals should be affirmed. Or this Court should grant such other relief as is just and proper.

Respectfully submitted,

s/John F. Royal
JOHN F. ROYAL (P27800)
Attorney for Defendant
The Ford Building
615 Griswold St., Suite 1724
Detroit, Michigan 48226
(313) 962-3738
johnroyal@ameritech.net

DATED: March 29, 2018

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant, **MSC No. 156648**

vs. **COA No. 336050**

GREGORY CARL WASHINGTON, **3rd Circuit No. 04-004270**

Defendant-Appellee.
_____/

APPELLEE'S SUPPLEMENTAL APPENDIX

(Defendant-Appellee accepts the Appendix submitted by the Plaintiff-Appellant, and submits the following additional documents as the Appellee's Supplemental Appendix)

Submitted by:

John F. Royal (P27800)
Attorney for Defendant-Appellee
The Ford Building
615 Griswold, Suite 1724
Detroit, MI 48226
(313) 962-3738

Table of Contents to Appellee's Supplemental Appendix

Case Search

Case Docket Number Search Results - 260155

Appellate Docket Sheet
COA Case Number: 260155
MSC Case Number: 131820
PEOPLE OF MI V GREGORY CARL WASHINGTON

1	PEOPLE OF MI Oral Argument: Y Timely: Y	PL-AE	PRS	(51503) **WILLIAMS JASON W**
2	WASHINGTON GREGORY CARL Oral Argument: Y Timely: Y	DF-AT	RET	(16801) **LORENCE GERALD M**

COA Status: Case Concluded; File Archived **MSC Status:** Closed

01/10/2005 1 Claim of Appeal - Criminal
Proof of Service Date: 01/07/2005
Register of Actions: Y
Fee Code: PI
Attorney: 40297 - LERG ROBIN M

12/13/2004 2 Order Appealed From
From: WAYNE CIRCUIT COURT
Case Number: 04-004270-01
Trial Court Judge: 39787 FRESARD PATRICIA
Nature of Case:
Murder Two
Assault w/intent to Murder 2 Counts
Felony Firearm
Felon in Possession of a Firearm
Habitual Offender 2nd

01/10/2005 5 Transcript Ordered By Trial Court
Date: 01/07/2005
Timely: Y
Reporter: 5119 - CONNERS ALFREDA R
For Event #: 1
Hearings:
12/13/2004 sentence

01/10/2005 6 Transcript Ordered By Trial Court
Date: 01/07/2005
Timely: Y
Reporter: 4640 - SCOTT SHERRY A
For Event #: 1
Hearings:

83b

11/10/2004 jury trial

01/10/2005 7 Transcript Ordered By Trial Court
Date: 01/07/2005
Timely: Y
Reporter: 2509 - DREGER MATTHEW A
For Event #: 1
Hearings:
11/01/2004 jury trial
11/02/2004 jury trial
11/03/2004 jury trial
11/08/2004 jury trial
11/09/2004 jury trial

01/12/2005 9 Steno Certificate - Tr Request Received
Date: 01/07/2005
Timely: Y
Reporter: 5119 - CONNERS ALFREDA R
For Event #: 5
Comments: no hrg dates listed

01/14/2005 8 Steno Certificate - Tr Request Received
Date: 01/07/2005
Timely: Y
Reporter: 4640 - SCOTT SHERRY A
For Event #: 6
Hearings:
11/10/2004 jury trial

01/14/2005 10 Steno Certificate - Tr Request Received
Date: 01/07/2005
Timely: Y
Reporter: 2509 - DREGER MATTHEW A
For Event #: 7
Hearings:
11/01/2004 jury trial
11/02/2004 jury trial
11/03/2004 jury trial
11/08/2004 jury trial
11/09/2004 jury trial

01/31/2005 11 Transcript Ordered By Trial Court
Date: 01/27/2005
Timely: Y
Reporter: 2509 - DREGER MATTHEW A
For Event #: 1
Hearings:
04/27/2004
05/26/2004
09/03/2004
Comments: amend ord for addl trans

01/31/2005 12 Transcript Ordered By Trial Court

Date: 01/27/2005
Timely: Y
Reporter: 30 - MARTIN PAULETTE Y
For Event #: 1
Hearings:
12/02/2003
Comments: amend ord for addl trans

01/31/2005 13 Transcript Ordered By Trial Court
Date: 01/27/2005
Timely: Y
Reporter: 2259 - MAZYCK LINDA J
For Event #: 1
Hearings:
02/18/2004
Comments: amend ord for addl trans

01/31/2005 14 Transcript Ordered By Trial Court
Date: 01/27/2005
Timely: Y
Reporter: 2326 - JACKSON HELEN R
For Event #: 1
Hearings:
06/18/2004
Comments: amend ord for addl trans

02/03/2005 15 Notice Of Filing Transcript
Date: 02/01/2005
Timely: Y
Reporter: 5119 - CONNERS ALFREDA R
For Event #: 5
Hearings:
12/13/2004 sentence

02/07/2005 16 Steno Certificate - Tr Request Received
Date: 01/27/2005
Timely: Y
Reporter: 2326 - JACKSON HELEN R
For Event #: 14
Hearings:
06/18/2004

02/25/2005 17 Notice Of Filing Transcript
Date: 02/23/2005
Timely: Y
Reporter: 2326 - JACKSON HELEN R
For Event #: 16
Hearings:
06/18/2004

03/14/2005 18 Notice Of Filing Transcript
Date: 03/10/2005
Timely: Y

Reporter: 2509 - DREGER MATTHEW A
For Event #: 7
Hearings:
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11/02/2004 jury trial
11/03/2004 jury trial
11/08/2004 jury trial
11/09/2004 jury trial

03/22/2005 19 Transcript Ordered By Trial Court
Date: 03/21/2005
Timely: Y
Reporter: 2509 - DREGER MATTHEW A
For Event #: 1
Hearings:
05/28/2004
Comments: amend trans ord to correct final conf date from 5/26/04 to 05/28/04

03/22/2005 20 Steno Affidavit - No Notes
Date: 03/21/2005
Timely: Y
Reporter: 2509 - DREGER MATTHEW A
For Event #: 11
Hearings:
05/26/2004

03/23/2005 21 LCt Order
Date: 03/18/2005
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Attorney: 16801 - LORENCE GERALD M
Comments: order of substitution;atty G. Lorence sub for atty R. Lerg

03/31/2005 22 Notice Of Filing Transcript
Date: 03/29/2005
Timely: Y
Reporter: 2509 - DREGER MATTHEW A
For Event #: 11
Hearings:
04/27/2004
05/28/2004
09/03/2004

04/14/2005 23 Transcript Overdue - Notice to Reporter
Mail Date: 04/14/2005
Reporter: 4640 - SCOTT SHERRY A
Comments: pertaining to 1/7/05 transcript order

04/15/2005 24 Invol Dismissal Warning - No Steno Cert
Attorney: 16801 - LORENCE GERALD M
Due Date: 05/06/2005

04/26/2005 25 Notice Of Filing Transcript
Date: 04/21/2005
Timely: Y

Reporter: 4640 - SCOTT SHERRY A
For Event #: 8
Hearings:
11/10/2004 jury trial

04/27/2005 26 Correspondence Received
Date: 04/26/2005
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Attorney: 16801 - LORENCE GERALD M
Comments: LTR TO CT REP SERVICES REQ STENO CERT

05/03/2005 28 LCt Order
Date: 04/29/2005
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Attorney: 16801 - LORENCE GERALD M
Comments: lct order for trans of 2/18/04 (competency hrg) by ct rep Cheryl Moore due by 5/27/05

05/10/2005 27 Telephone Contact
Reporter: 2995 - MCGINNIS DEBRA D
Comments: Martin & Mazyck are 36th Dist Rptrs who don't fl certs & ntc's; McGinnis will send paperwk to (

05/10/2005 29 Notice Of Filing Transcript
Date: 02/25/2005
Timely: Y
Reporter: 30 - MARTIN PAULETTE Y
For Event #: 12
Hearings:
12/02/2003

05/10/2005 30 Transcript Not Taken By Steno
Date: 05/09/2005
Timely: Y
Reporter: 2259 - MAZYCK LINDA J
For Event #: 13
Hearings:
02/18/2004
Comments: by stno W Cockrell

05/11/2005 31 Steno Certificate - Tr Request Received
Date: 05/10/2005
Timely: Y
Reporter: 2153 - MOORE CHERYL A
For Event #: 1
Hearings:
02/18/2004

05/16/2005 32 Proof of Service - Generic
Date: 05/12/2005
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Attorney: 16801 - LORENCE GERALD M
Comments: p/s of steno cert

05/26/2005 33 Notice Of Filing Transcript
Date: 05/24/2005
Timely: Y

Reporter: 2153 - MOORE CHERYL A
For Event #: 31
Hearings:
02/18/2004

07/11/2005 34 Stips: Extend Time - AT Brief
Extend Until: 07/12/2005
Filed By Attorney: 16801 - LORENCE GERALD M
For Party: 2 WASHINGTON GREGORY CARL DF-AT

07/11/2005 35 Brief: Appellant
Proof of Service Date: 07/10/2005
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 16801 - LORENCE GERALD M
For Party: 2 WASHINGTON GREGORY CARL DF-AT

07/12/2005 36 Motion: Remand
Proof of Service Date: 07/12/2005
Check #: 5562
Fee: $100.00
Receipt #: 2601551
Filed By Attorney: 16801 - LORENCE GERALD M
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Answer Due: 08/02/2005
Comments: FOR GINTHER HEARING

07/19/2005 38 Stips: Extend Time - AE Brief
Extend Until: 09/11/2005
Filed By Attorney: 51503 - WILLIAMS JASON W
For Party: 1 PEOPLE OF MI PL-AE

07/29/2005 39 Answer - Motion
Proof of Service Date: 07/29/2005
Event No: 36 Remand
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Filed By Attorney: 16801 - LORENCE GERALD M

08/09/2005 41 Submitted On Motion Docket
Event: 36 Remand
District: D
Item #: 9

08/17/2005 42 Order: Remand - Motion - Grant - Retain Juris
View document in PDF format
Event: 36 Remand
Panel: HNW,BKZ,KFK
Attorney: 16801 - LORENCE GERALD M
Extension Date: 11/16/2005
Comments: DF-AT to move for new trial grounds verdict is against weight of evi;see order

08/30/2005 43 Brief: Appellee
Proof of Service Date: 08/30/2005
Oral Argument Requested: Y
Timely Filed: Y

88b

Filed By Attorney: 51503 - WILLIAMS JASON W
For Party: 1 PEOPLE OF MI PL-AE

09/14/2005 44 LCt Pleading
Date: 09/12/2005
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Attorney: 16801 - LORENCE GERALD M
Comments: MTN FOR NEW TRIAL ON REMAND

10/25/2005 45 Notice Of Filing Remand Transcript
Date: 10/24/2005
Timely: Y
Reporter: 2509 - DREGER MATTHEW A
Hearings:
09/30/2005

10/31/2005 46 Brief: Supplemental Brief - AT
Proof of Service Date: 10/31/2005
Filed By Attorney: 16801 - LORENCE GERALD M
For Party: 2 WASHINGTON GREGORY CARL DF-AT

11/15/2005 47 Brief: Supplemental Brief - AE
Proof of Service Date: 11/15/2005
Filed By Attorney: 51503 - WILLIAMS JASON W
For Party: 1 PEOPLE OF MI PL-AE

12/05/2005 48 Correspondence Sent
Date: 12/05/2005
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Attorney: 16801 - LORENCE GERALD M
Comments: Request for remand order sent to aty Lorence

12/12/2005 49 LCt Order - Remand
Date: 09/30/2005
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Attorney: 16801 - LORENCE GERALD M
Comments: judgment of acquittal notwithstanding verdict of the jury-denied

01/06/2006 50 Interlocutory Remand Concluded
Date: 10/24/2005
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Attorney: 16801 - LORENCE GERALD M
Comments: Remand order filed 9/30/05; Remand transcript filed 10/24/05

01/06/2006 51 Noticed
Record: REQST
Mail Date: 01/09/2006

01/18/2006 52 Record Filed
Comments: FILE;TRS(17)

04/13/2006 57 Correspondence Sent
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Attorney: 16801 - LORENCE GERALD M
Comments: Req psi(level 3)

04/18/2006 63 Presentence Investigation Report - Confidential

Date: 04/17/2006
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Attorney: 16801 - LORENCE GERALD M

06/06/2006 64 Submitted on Case Call
District: D
Item #: 2
Panel: WCW,BKZ,PMD

06/13/2006 72 Opinion - Per Curiam - Unpublished
View document in PDF format
Pages: 9
Panel: WCW,BKZ,PMD
Result: Affirmed But Remanded
Comments: Remanded for resentencing

08/08/2006 73 SCt: Application for Leave to SCt
Supreme Court No: 131820
Notice Date: 09/05/2006
Fee: Paid
Check No: 30048
For Party: 2
Attorney: 16801 - LORENCE GERALD M

08/22/2006 74 SCt: Answer - SCt Application/Complaint
Filing Date: 08/22/2006
For Party: 1 PEOPLE OF MI PL-AE
Filed By Attorney: 51503 - WILLIAMS JASON W
Comments: by PROS

08/29/2006 75 Supreme Court - File & Record Sent To
File Location: Z
Comments: SC#131820 LCF;17 TR

08/30/2006 76 SCt: COA and TCt Received
17 tr; 1 files

11/06/2006 77 Pleadings Returned
For Party: 2 WASHINGTON GREGORY CARL DF-AT
Attorney: 16801 - LORENCE GERALD M
Comments: Chf Clk Ret'd Appellant Brief After Remand - Case Concluded in COA When 6/13/06 Opn Issue

12/05/2006 78 SCt Motion: Miscellaneous
Notice Date: 12/12/2006
Check No: 39827
Party: 2
Filed by Attorney: 16801 - LORENCE GERALD M
Comments: to file suppl brief w/ attached brief

12/28/2006 79 SCt Order: Deny Application/Complaint
View document in PDF format
Comments: grnt motion re suppl brief

12/28/2006 80 Supreme Court - File Ret`d By - Close Out
File Location: F

10/15/2010 81 Copy Request Fulfilled - Habeas

04/11/2016 82 SCt Correspondence Received
Proof Of Service Date: 04/11/2016
Filed By Pro Per
Comments: Sent online register of actions per request.

Case Listing Complete

STATE OF MICHIGAN

IN THE WAYNE CIRCUIT COURT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Wayne County Circuit Court
No. 2004-004270-01

-vs-

GREGORY CARL WASHINGTON,

Defendant.

Hon. Sharon Nicole Walker
Circuit Court Judge
Successor Judge

/

GREGORY CARL WASHINGTON, #517403
Pro Se

/

WAYNE COUNTY PROSECUTOR,
Attorney for Plaintiff

/

- JURISDICTIONAL DEFECT -
MOTION FOR RELIEF FROM JUDGMENT
BECAUSE THE SENTENCING JUDGE
IN DEFENDANT'S RESENTENCING
WAS WITHOUT AUTHORITY TO SENTENCE DEFENDANT
AT THE TIME OF HIS RESENTENCING
WITH INCORPORATED BRIEF IN SUPPORT

Defendant GREGORY CARL WASHINGTON, pro se, files this Motion for Relief from Judgment pursuant to MCR 6.508 (D) (3). While this Motion is technically a successive motion under MCR 6.502 (G), MCR 6.508 (D) (3) exempts jurisdictional defects from the technical reasons by which a motion for relief from judgment may be denied.

"'Jurisdictional' error has historically been recognized as fundamental, and for which collateral relief has accordingly been available. The doctrine of procedural default does not apply." *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002); 2002 U.S. App. LEXIS 22442.

HN6.

"Because subject-matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived." *U.S. Cotton*, 535 U.S. 625, 152 L.Ed.2d 860, 122 S.Ct. 1781, 1782 (2002). In support of his claim, Defendant says:

1. On November 10, 2004, Defendant Washington was convicted in the Wayne County Circuit Court -- Criminal Division -- of second-degree murder [MCL 750.317]; two counts of assault with intent to commit murder [MCL 750.83]; possession of a firearm by a felon [MCL 750.224]; and possession of a firearm during the commission of a felony [MCL 750.227b].

2. On December 13, 2004, Trial Judge Patricia Fresard, sentenced Defendant as an habitual offender, second offense [MCL 769.10] to concurrent terms of 40 to 60 years for the second degree murder, life in prison for each assault conviction, 2 to 7 years for the felon in possession of a firearm conviction; all to be served consecutive to a 2-year sentence for the felony-firearm conviction. 441 days of jail credit time was granted.

3. On June 13, 2006, the Michigan Court of Appeals vacated Defendant's sentences and remanded to the trial court for resentencing. [See APPENDIX A, Case Search Docket Number Results, page 7, Entry 8; see also APPENDIX B, MCOA No. 260155, Per curiam Opinion, attached.]

4. On August 08, 2006, Defendant filed an Application for Leave to Appeal with the Michigan Supreme Court. [See APPENDIX A, page 7, Entry 9.]

5. While the Application to the Michigan Supreme Court was pending, on October 4, 2006, Defendant was resentenced by Trial Judge Fresard to the same sentences she imposed on December 13, 2004. [See EXHIBIT C, Post-Conviction Resentencing transcript.]

6. It was not until December 28, 2006 that Defendant's Application to the Michigan Supreme Court was denied. [See APPENDIX A, Case Search Docket, page 8, Entry 4.]

7. The multitudinous previous post-conviction filings in this case are not germane to the claim presented herein; consequently compliance with MCR 6.502 (9) would serve no

purpose. The only relevant question, which has not been raised previously at any level, to Defendant's present claim, is whether or not the resentencing court had authority to sentence Defendant while his application for leave to appeal was pending in the Michigan Supreme Court. To that question, Defendant argues as follows:

8. **Grounds for relief, supporting facts, and argument with applicable Court Rules and controlling case law:**

Defendant argues that he is entitled to vacation of his current sentences and remand to be resentenced for the reason that the trial court was without authority to sentence him on the 2006 remand while his application to our Supreme Court was pending.

JURISDICTIONAL DEFECT FACTS

In this case, in Per Curiam Opinion No. 260155, dated **June 13, 2006**, the Michigan Court of Appeals vacated Defendant's sentences and remanded to the trial court for resentencing. [See APPENDIX B, MCOA Per curiam Opinion.]

On **August 8, 2006**, Defendant filed Application for Leave to the Michigan Supreme Court, Sup. Court No. 131820. [See APPENDIX A, page 7, Entry 9.]

On **October 4, 2006**, the trial court sentenced Defendant to the same sentences she imposed on December 13, 2004. [See EXHIBIT C, Post-Conviction Resentencing transcript.]

It was not until **December 28, 2006** that Defendant's Application to the Michigan Supreme Court was denied. [See APPENDIX A, Case Search Docket, page 8, Entry 4.]

JURISDICTIONAL DEFECT ARGUMENT

The Judgment and Order of the Michigan Court of Appeals is stayed when a timely Application for Leave to Appeal to the Michigan Supreme Court has been filed. MCR 7.215 (E) (1) (a) [2016 MCR 7.215 (F) (1) (a)]. *Detroit v. General Motors Corp*, 233 Mich App 132, 140; 592 NW2d 732 (1998); cited in *People v. Arthur Massenburg*, 2001 Mich. App. LEXIS 544, MCOA Unpublished No. 218196. [See APPENDIX D.]

Because Defendant's Application to the Michigan Supreme Court was still pending at the time of Defendant's resentencing, **Defendant's resentencing judge was without authority**

to sentence him until the Supreme Court had disposed of the application for leave to appeal from the Michigan Court of Appeals' decision in Docket No. 260155. *People v. Massenburg, supra*, page 2, see APPENDIX D for copy of unpublished case; see also *Detroit v General Motors Corp*, 233 Mich App @ 140.

Therefore, because of this fact situation, the sentences imposed by the trial court on October 4, 2006 (the sentences Defendant is currently serving) **are invalid**, must be vacated, and Defendant is entitled to resentencing.

SCORING OF GUIDELINES BEFORE RESENTENCING

In its June 13, 2006, Per curiam Opinion vacating Defendant's sentences and remanding to the trial court for resentencing, the Michigan Court of Appeals noted that on remand, the trial court would only be required to complete a sentencing information report (SIR) for the highest crime class felony conviction, which in this case was the second-degree murder conviction, citing *People v. Mack*, 265 Mich App 122, 127; 695 NW2d 342 (2005). [See APPENDIX B, MCOA No. 260155, page 8, V. Sentencing Guidelines.]

Defendant believes in his case this direction was misguiding and incorrect. In the first place, second-degree murder and assault with intent to murder (AWIM) are both Class A felonies, AWIM carrying a higher intent (the same intent as first-degree murder) than second-degree murder. "The elements of assault with intent to commit murder are (1) an assault, (2) **with an actual intent to kill**, (3) which, if successful, would make the killing murder." *People v. Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010).

Furthermore, in *Mack*, discussing proportionally, the MCOA stated:

> We question (but do not expressly decide today) whether a sentence for a conviction of the lesser class felony that is not scored under the guidelines . . . could permissibly exceed the sentence imposed on the highest crime class felony and remain proportional.

At his October 4, 2006, invalid resentencing, Defendant herein was sentenced to a term of years for his second-degree murder conviction for which a SIR was prepared and to LIFE for his AWIM convictions for which no SIR was prepared; consequently, Defendant

respectfully argues his AWIM sentences were not proportional to his second-degree murder sentence.

THE EFFECTS OF PEOPLE V. LOCKRIDGE ON THIS CASE

In *People v. Lockridge*, 498 Mich 358, 364; 870 NW2d 502 (2015), the Supreme Court held that Michigan's sentencing guidelines are constitutionally deficient under the Sixth Amendment to the extent that "the guidelines require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that mandatorily increase the floor of the guidelines minimum sentence range, i.e. the 'mandatory minimum' sentence under *Alleyne*." As a remedy, the Supreme Court "sever[ed] MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." Id. The Court also struck "down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guideline range must articulate a substantial and compelling reason for that departure." Id. at 364-365. The Court held that the "guidelines minimum sentence range" is advisory only and "that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness." Id. at 365. **Courts must continue to determine the applicable guidelines range and take it into account when sentencing a defendant.** Id. [Emphasis added.]

Per *Lockridge*, Defendant requests that the guidelines ranges for both second-degree murder and assault with intent to commit murder be scored and taken into account when sentencing Defendant at his resentencing.

STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

No. 04-004270-01
Hon. Patricia Perez Fresard

GREGORY WASHINGTON,

Defendant.

PLAINTIFF'S ANSWER TO DEFENDANT'S SECOND MOTION FOR RELIEF FROM JUDGMENT

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS (P-51503)
Chief of Research, Training and Appeals
1441 St. Antoine, 11th Floor
Detroit, MI 48226
(313) 224-5794

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COUNTER-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. Defendant raises no claims of new evidence or claims based on retroactive changes in the law. Is defendant's second motion for relief from judgment barred?

The People answer: Yes.
Defendant would answer: No.

COUNTER-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.[1] 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

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[1] Transcripts are cited throughout this answer in the following form: month/day of proceedings, page numbers.

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 livingroom 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 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 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 Gloch 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 livingroom. 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 Gloch 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 Gloch 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 is 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 involves 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,[2] and felony-firearm. 11/10, 4. On December 13, 2004, the Court sentenced defendant to terms of

[2] 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.

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, the Court of Appeals remanded this 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 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 pattem 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, the Court of Appeals 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.[3] 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.[4]

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.[5]

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

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

[5] *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.[6]

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.[7]

On remand, a resentencing hearing was held on October 4, 2006. The 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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[6] *Id.* at 8.

[7] Docket No. 131820.

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."

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

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

On July 9, 2008, the 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 must 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, the Court of Appeals denied defendant's delayed application for leave to appeal from the order denying relief from judgment.

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

In June, 2016, defendant filed a second motion for relief from judgment raising three claims: (1) this 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 is entitled to resentencing under *People v Lockridge*.[8]

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

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

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. Defendant raises no claims of new evidence or claims based on retroactive changes in the law. Defendant's second motion for relief from judgment is barred.

Discussion

Defendant's motion for relief from judgment is barred by MCR 6.502(G). Under that court rule, a defendant generally is permitted "one and only one" motion for relief from judgment.[9] 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 form judgment or a claim of new evidence that was not discovered before the first such motion."[10] Because defendant's claims do not fall within those exceptions, the Court must deny defendant's motion.

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. The claims are based on the existing record and could have been raised in defendant's first motion for relief from judgment. The claims therefore are barred by MCR 6.502(G).

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

[10] MCR 6.502(G)(2). See *People v Swain*, 288 Mich App 609, 632-633; 794 NW2d 92 (2010) ("We hold that MCR 6.502(G)(2) provides the only two exceptions to the prohibition of successive motions").

Defendant's claim that *People v Lockridge* applies to his case is also barred because the Court of Appeals has held that *Lockridge* does not retroactively apply to sentences on collateral review (motions for relief from judgment).[11] Moreover, defendant would not be entitled to relief under *Lockridge* because he did not raise the constitutional argument at sentencing and the Court departed upward from the guidelines.[12]

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[11] *People v Edward Burley*, unpublished order of the Court of Appeals, entered June 15, 2016 (Docket No. 331939) (attached as an appendix). *Burley* relied on the decisions of federal courts holding that *Alleyne v United States*, 570 US __; 133 S Ct 2151; 186 L Ed 2d 314 (2013), on which *Lockridge* is predicated, does not apply retroactively on collateral review. See e.g. *Walker v United States*, 810 F3d 568, 573-575 (CA 8, 2016).

[12] *Lockridge*, 498 Mich at 395 n 31: "In cases such as this one that involve a minimum sentence that is an upward departure, a defendant necessarily cannot show plain error because the sentencing court has already clearly exercised its discretion to impose a harsher sentence than allowed by the guidelines and expressed its reasons for doing so on the record. It defies logic that the court in those circumstances would impose a lesser sentence had it been aware that the guidelines were merely advisory. Thus, we conclude that as a matter of law, a defendant receiving a sentence that is an upward departure cannot show prejudice and therefore cannot establish plain error."

RELIEF

WHEREFORE, the People request that this Court deny defendant's motion for relief from judgment because it is barred by MCR 6.502(G).

Respectfully Submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS (P-51503)
Chief of Research, Training and Appeals
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-5794

Dated: September 8, 2016.

APPENDIX

Court of Appeals, State of Michigan

ORDER

People of MI v Edward Burley

Docket No. 331939

LC No. 04-013795-FC

Mark J. Cavanagh
Presiding Judge

Kathleen Jansen

Henry William Saad
Judges

The Court orders that the motion to file a sur-reply brief is GRANTED.

Pursuant to MCR 7.205(E)(2), in lieu of granting the application for leave to appeal, the Court orders that the March 9, 2016, order granting defendant's motion for relief from judgment is REVERSED because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.502(G)(2). The rule announced in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), has no retroactive application to sentences on collateral review. *Walker v United States*, 810 F3d 568, 575 (CA 8, 2016); *Crayton v United States*, 799 F3d 623, 624 (CA 7, 2015); *Butterworth v United States*, 775 F3d 459, 468 (CA 1, 2015); *Jeanty v Warden, FCI-Miami*, 757 F3d 1283, 1286 (CA 11, 2014); *In re Mazzio*, 756 F3d 487, 491 (CA 6, 2014); *United States v Reyes*, 755 F3d 210, 213 (CA 3, 2014).

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUN 15 2016
Date

Chief Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

v Hon. Patricia Fresard

GREGORY CARL WASHINGTON
Defendant.

Third Circuit Court No. 04-004270

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE)ss

The undersigned deponent, being duly sworn, deposes and says that she caused to have served a true copy of: **Plaintiff's Answer in Opposition to Defendant's Motion for Relief from Judgment**

Upon: Gregory Carl Washington (In Pro Per)

the within named defendant DEPOSITING SAID PLEADING IN THE U.S. MAIL IN THE CITY OF DETROIT, enclosed in an envelope bearing postage fully prepaid on **September 9, 2016**, plainly addressed as follows:

Gregory Carl Washington - #517403
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036

and said pleadings were filed in the Circuit Court, by PERSONAL SERVICE at the following address:

Clerk's Office
909 FMHJ
1441 St. Antoine
Detroit, MI 48226

Hon. Patricia Fresard
Circuit Court, Judge
1707 CAYMC
Detroit, MI 48226

FILED
CATHY M. GARRETT
WAYNE COUNTY CLERK
2016 SEP -9 P 2:00

Subscribed and sworn to before me
this 9 th day of **September, 2016.**

Joyce A. Hall
Notary Public, Wayne County, MI.
My Commission Expires: 12/23/2019

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant, **MSC No. 156648**

vs. **COA No. 336050**

GREGORY CARL WASHINGTON, **3rd Circuit No. 04-004270**

Defendant-Appellee.
_____/

JASON W. WILLIAMS (P51503)
Chief of Research, Training and Appeals
Frank Murphy Hall of Justice

JOHN F. ROYAL (P27800)
Attorney for Defendant-Appellee

_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
)
SS COUNTY OF WAYNE)

John F. Royal, being first duly sworn, deposes and says that on 29th day of March, 2018, he served a copy of the attached papers upon the Wayne County Prosecuting Attorney, in the above-entitled matter via the Truefiling System directed to: wcpaappeals@waynecounty.com.

s/John F. Royal
JOHN F. ROYAL

Subscribed and sworn to before me
this 29th day of March, 2018

s/Dolores M. Goldbetter
Dolores M. Goldbetter
Notary Public
County of Wayne
My Commission Expires: April 17, 2023