# Michigan Appellate Assigned Counsel System

## Fall Orientation

### October 14, 2015

# Materials for New MAACS Roster Attorneys

**Michigan Appellate Assigned Counsel System (MAACS)**
200 N. Washington Sq. Suite 250 Lansing, Michigan, 48933 (517) 334-1200

**Compiled by: Marilena David-Martin, State Appellate Defender Office, mdavid@sado.org and Brad Hall, MAACS, HallB@mimaacs.org**

# MICHIGAN
# APPELLATE ASSIGNED COUNSEL SYSTEM
# REGULATIONS

*Adopted by the*
*Appellate Defender Commission*
*effective November 15, 1985*
*amended through March 19, 2014*

**Section 1. Establishment of the Appellate Assigned Counsel System.**

(1) The Appellate Defender Commission shall establish an Appellate Assigned Counsel System which shall be coordinated with but separate from the State Appellate Defender Office. The duty of this office shall be to compile and maintain a statewide roster of attorneys eligible and willing to accept criminal appellate defense assignments and to engage in activities designed to enhance the capacity of the private bar to render effective assistance of appellate counsel to indigent defendants.

(2) An appellate assigned counsel administrator shall be appointed by and serve at the pleasure of the Appellate Defender Commission.

(3) The appellate assigned counsel administrator shall:

(a) be an attorney licensed to practice law in this state,

(b) take and subscribe the oath required by the constitution before taking office,

(c) perform duties as hereinafter provided, and

(d) not engage in the practice of law or act as an attorney or counselor in a court of this state except in the exercise of his or her duties under these rules, or as permitted by the commission.

(4) The appellate assigned counsel administrator and supporting personnel shall be court employees, not classified civil service employees.

(5) The salaries of the appellate assigned counsel administrator and supporting personnel shall be established by the Appellate Defender Commission.

(6) The appellate assigned counsel administrator and supporting personnel shall be reimbursed for their reasonable actual and necessary expenses by the state treasurer upon the warrant of the state treasurer.

(7) Salaries and expenses attributable to the Appellate Assigned Counsel System shall be paid out of funds available for those purposes in accordance with the accounting laws of this state. The auditor general, under authority of Michigan Const 1963, art 4, Sec. 53, shall perform audits utilizing the same policies and criteria that are used to audit executive branch agencies.

(8) Within appropriations provided by law, the Appellate Defender Commission shall

provide the Appellate Assigned Counsel System with suitable space and equipment at such locations as the commission considers necessary.

**Section 2. Duties of the Appellate Assigned Counsel Administrator.**

The appellate assigned counsel administrator, with such supporting staff as the commission deems appropriate, shall:

(1) After reasonable notice has been given to the members of the State Bar of Michigan, compile a roster of attorneys eligible under Sec. 4 of these regulations and willing to accept appointments to serve as appellate counsel for indigent criminal defendants.

(a) The roster shall contain an alphabetized listing by name of all attorneys in the state who are eligible and willing to accept criminal appellate assignments. The roster shall further contain the following information regarding each attorney listed: bar number, firm's name, business address and telephone, level of assignments for which the attorney is eligible, and jurisdictions from which the attorney desires assignments.

(b) The roster shall be continuously updated to reflect the addition and deletion of attorney names, and changes in eligibility levels and jurisdiction choices.

(c) Copies of the roster shall be provided to the clerks of the appellate courts and, upon request, to any interested party.

(d) An announcement specifying the procedure and eligibility criteria for placement on the roster shall be placed in the Michigan Bar Journal.

(2) Provide to each circuit court a local list of attorneys eligible and willing to accept appellate assignments from that jurisdiction.

(a) Each local list shall contain the names, bar numbers, business addresses, telephone numbers and eligibility levels of all attorneys on the state-wide roster who have indicated a desire to receive assignments from the jurisdiction in question, except as local list membership may be limited by the Appellate Defender Commission, in its discretion, for the efficient administration of the system.

(b) Attorneys' names shall be placed on the local lists in the order in which the requests for such placement were received by the appellate assigned counsel administrator.

(c) Copies of the applications for the statewide roster filed by attorneys on each local list shall be provided with the list to each trial court.

(d) In each circuit court, appellate assignments shall be made to the State Appellate Defender Office in a specified sequence.

(i) The frequency with which assignments are made to the State Appellate

Defender Office shall be determined annually by a formula approved by the Appellate Defender Commission which shall account for the number of indigent criminal appeals of each level and type and the total number of assignments the State Appellate Defender Office is funded to accept.

(ii) Upon request by the chief judge of a circuit, the Appellate Defender Commission may, in its discretion, temporarily increase the circuit's assignment rate to the State Appellate Defender Office.

(3) Periodically review the eligibility of each attorney on the roster.

(a) Review shall be based on the criteria for continuing eligibility listed in Sec. 4(6) of these regulations.

(b) Where a periodic review reveals deficiencies in complying with any requirement for continuing eligibility, the administrator shall notify the affected attorney in writing of such deficiencies. The names of all attorneys who fail to correct deficiencies in their continuing eligibility within 60 days after the issuance of notice shall be removed from the roster, except that the administrator shall have the discretion to extend the deadline for correcting deficiencies by an additional 60 days where good cause is shown. Such extensions shall be requested and granted only in writing and shall include a summary of the pertinent facts.

(4) Notify each jurisdiction of any change in the eligibility of any attorney on its local list within 20 days after the date on which a change occurs.

(5) Investigate allegations of noncompliance by roster attorneys with the Minimum Standards for Indigent Criminal Appellate Defense Services and take appropriate action.

(6) In conformance with MCL 18.1284-1292, maintain a file for each case in which private counsel is appointed which shall contain:

(a) the order of appointment and the defendant's request for counsel,

(b) a case summary which shall be completed by counsel on forms provided by the administrator and which shall contain information about filing dates, oral arguments, case disposition, fees requested and awarded, and such other pertinent matters as the administrator may require for statistical purposes.

(7) Provide to the Legal Resources Project briefs filed by assigned counsel which have been selected for copying and placement in a centralized brief bank.

(8) Select an attorney to be appointed for an appeal when requested to do so by an appellate court or by a local designating authority pursuant to Sec. 3(7).

(9) Compile data regarding the fees paid to assigned counsel and take steps to promote the payment of reasonable fees which are commensurate with the provision of effective assistance of appellate counsel.

(10) Provide, on request of an assigned attorney or an appointing authority, information regarding the range of fees paid within the state to assigned counsel.

(11) Provide continuing legal education programs for all roster members, and an orientation training program for attorneys seeking to join the roster when the number of roster members falls below that necessary to provide effective representation in all the appeals assigned to roster attorneys. In determining the appropriate size of the roster, the administrator shall consider the total appointments available at each level, the number assigned to the State Appellate Defender Office, and the distribution of cases among roster members.

(12) Take steps to promote the development and delivery of support services to appointed counsel.

(13) Present to the commission within 90 days after the end of the fiscal year an annual report on the operation of the assigned counsel system which shall include an accounting of all funds received and disbursed, an evaluation of the cost-effectiveness of the system, and recommendations for improvement.

(14) Perform other duties in connection with the administration of the assigned counsel system as the commission shall direct.

**Section 3. Selection of Assigned Counsel.**

(1) The judges of each circuit court shall appoint a local designating authority who may be responsible for the selection of assigned appellate counsel from the local list provided by the appellate assigned counsel administrator pursuant to Sec. 2(2) of these regulations and who shall perform such other tasks in connection with the operation of the list as may be necessary at the trial court level.

(a) The designating authority may not be a judge, prosecutor or member of the prosecutor's staff, public defender or member of the public defender's staff, or any attorney in private practice who currently accepts trial or appellate criminal assignments within the jurisdiction.

(b) Circuits which have contracted with an attorney or group of attorneys to provide representation on appeal for indigent defendants shall comply with these regulations within one year after the statewide roster becomes operational.

(2) Appellate assignments shall be made by each trial court only from its local list or to the State Appellate Defender Office except pursuant to Sec. 3(7) of these regulations or an order of an appellate court.

(a) Each trial bench shall review its local list and, within 56 days of an attorney's appearance on that list, shall notify the appellate assigned counsel administrator if it has actual knowledge that the attorney has, within the last three years, substantially violated the Minimum Standards for Indigent Criminal Appellate Defense Services or the Rules of Professional Conduct. Each bench shall

thereafter notify the administrator of such violations by attorneys on its list within 56 days of learning that a violation has occurred.

(b) Upon receiving notice from a trial court that an attorney has substantially violated the Minimum Standards or the Rules of Professional Conduct, the administrator shall promptly review the allegations and take appropriate action. Any determination that an attorney should be removed from the roster shall be made in compliance with Sec. 4(9) of these regulations.

(3) Appellate counsel shall be assigned within 14 days after a defendant submits a timely request.

(4) In each circuit court, the chief judge shall determine whether appellate assigned counsel are to be selected by the chief judge or by the local designating authority.

(a) If the chief judge chooses to retain the discretion to select counsel, he or she shall personally exercise that discretion in all cases as described in Sec. 3(5).

(b) If the chief judge chooses to delegate the selection of counsel, the local designating authority shall, in all cases, rotate the local list as described in Sec. 3(6).

(5) The chief judge may exercise discretion in selecting counsel, subject to the following conditions:

(a) Pursuant to Sec. 2(2)(d), every third, fourth, or fifth assignment, or such other number of assignments as the Appellate Defender Commission may determine, shall be made to the State Appellate Defender Office. That office may also be assigned out of sequence pursuant to Sec. 3(13) or 3(15).

(b) All other assignments must be made to attorneys whose names appear on the trial court's local list.

(i) The attorney must be eligible for assignment to the particular case, pursuant to Sec. 4(2).

(ii) Where a Level I attorney has received an even-numbered amount of assignments and any other Level I attorney has less than half that number, an assignment shall be offered to each of the latter attorneys before any additional assignments are offered to the former.

(iii) Where a Level II or Level III attorney has received an even-numbered amount of assignments and any other Level II or Level III attorney has less than half that number, an assignment shall be offered to each of the eligible latter attorneys before any additional assignments are offered to the former.

(iv) If an order of appointment is issued and the attorney selected refuses the appointment for any reason not constituting a pass for cause as defined in Sec. 3(6)(c), the assignment shall be counted in the attorney's total.

(6) When directed to select counsel by the chief judge, the local designating authority shall select the attorney to be assigned in the following manner:

(a) The local designating authority shall first determine whether assignment is to be made to the State Appellate Defender Office, to a particular attorney on the local list pursuant to Sec. 3(6)(f), 3(12), or 3(13), or by rotation of the local list.

(i) Pursuant to Sec. 2(2)(d), every third, fourth, or fifth assignment, or such other number of assignments as the Appellate Defender Commission may determine, shall be made to the State Appellate Defender Office. That office may also be assigned out of sequence pursuant to Sec. 3(13) or 3(15).

(ii) An attorney whose name appears on the local list may be selected out of sequence pursuant to Sec. 3(6)(f), 3(12), or 3(13). That attorney's name shall then be rotated to the bottom of the list.

(iii) All other assignments shall be made by rotating the local list.

(b) Local lists shall be rotated in the following manner:

(i) The local designating authority shall identify the first attorney on the list who does not have to be passed for cause and shall obtain an order appointing that attorney from the appropriate trial judge.

(ii) The name of the attorney appointed shall be rotated to the bottom of the local list.

(iii) The names of any attorneys passed by the local designating authority for cause shall remain in place at the top of the list and shall be considered for the next available appointment.

(c) An attorney's name must be passed for cause in any of the following circumstances:

(i) The attorney is not qualified at the eligibility level appropriate to the offense as described in Sec. 4(2). A Level II or III attorney may be assigned a Level I case only if no Level I attorney is available or when the attorney represents the defendant on a currently pending appeal of another conviction.

(ii) The attorney represented the defendant at trial or plea and no exception for continued representation as specified in Sec. 3(12) is to be made.

(iii) Representation of the defendant would create a conflict of interest for the attorney. Conflicts of interest shall be deemed to exist between codefendants whether they were jointly or separately tried. Codefendants may, however, be represented by the same attorney if they express a preference for such representation under Sec. 3(6)(f) of these regulations, provided that there is no apparent conflict of interest.

(d) An attorney's name may be passed for cause if the defendant has been sentenced only to probation or incarceration in the county jail, and the attorney's office is located more than 100 miles from the trial court.

(e) If the attorney selected thereafter declines appointment for reasons which constitute a pass for cause, the attorney's name shall be reinstated at the top of the list. If the attorney selected declines the appointment for any other reason, his or her name shall remain at the point in the rotation order where it was placed when the order of appointment was issued.

(f) When the defendant expresses a preference for counsel whose name appears on the local list, and who is eligible and willing to accept the appointment, the local designating authority shall honor it.

(7) Where a complete review of the local list fails to produce the name of an attorney eligible and willing to accept appointment in a particular case, the local designating authority shall refer the case to the appellate assigned counsel administrator for selection of counsel to be assigned from the statewide roster.

(8) When an attorney has declined to accept three consecutive assignments for which the attorney was eligible under these regulations, the local designating authority may request the appellate assigned counsel administrator to remove the attorney's name from the jurisdiction's local list.

(9) The trial court shall maintain, on forms provided by the Appellate Assigned Counsel System, records which accurately reflect the basis on which all assignments have been made, whether by the chief judge or the local designating authority, and shall provide duplicates of those records to the Appellate Assigned Counsel System at regular intervals specified by the administrator.

(10) The local designating authority shall provide copies of:

(a) each order appointing appellate counsel,

(b) written evidence of each defendant's request for counsel, including any waiver executed pursuant to Sec. 3(12), and

(c) each case summary submitted by appellate assigned counsel, after the order for payment has been signed.

(11) All assignments other than those made to the State Appellate Defender Office shall be considered personal to the individual attorney named in the order of appointment and shall not be attributed to a partnership or firm.

(12) When the defendant specifically requests the appointment of his or her trial attorney for purposes of appeal and the trial attorney is otherwise eligible and willing to accept the assignment, the defendant shall be advised by the trial judge of the potential consequences of continuous representation. If the defendant thereafter maintains a preference for appellate representation by trial counsel, the advice given and the

defendant's waiver of the opportunity to receive new counsel on appeal shall appear on a form signed by the defendant. Appropriate forms shall be supplied to the trial courts by the Appellate Assigned Counsel System.

(13) Where counsel represents the defendant on a currently pending appeal of another conviction, or represented the defendant on appeal of a prior conviction for the same offense, the designating authority may select that attorney out of sequence to conduct a subsequent appeal on the defendant's behalf if that attorney is otherwise eligible and willing to accept the additional appointment.

(14) Where the trial judge determines that a Level I or II case is sufficiently more complex than the average case of its type to warrant appointment of an attorney classified at a higher level than required by Sec. 4(2), the judge shall provide to the chief judge or the local designating authority a written statement of the level believed to be appropriate and the reasons for that determination. The local designating authority shall, and the chief judge in his or her discretion may, select counsel accordingly.

(15) When, in exceptional circumstances, the complexity of the case or the economic hardship the appeal would cause the county makes the selection of private assigned counsel impractical, the State Appellate Defender Office may, after confirmation of that office's ability to accept the assignment, be selected for appointment out of sequence. When such an out-of-sequence assignment is made, it shall be treated as a substitute for the next in-sequence assignment the State Appellate Defender Office would have otherwise received.

**Section 4. Attorney Eligibility for Assignments**.

(1) An attorney who wishes to receive appointments as appellate counsel for indigent defendants shall file with the Appellate Assigned Counsel System an application for the statewide roster. Beginning September 1 - October 31, 2002, and every three years thereafter, those attorneys already on the roster shall be required to re-apply to remain on the roster. Both the initial and renewal applications shall be on forms promulgated by the appellate assigned counsel administrator.

(a) The initial application to join the roster shall contain information regarding the attorney’s prior criminal appellate experience, the jurisdictions from which the attorney wishes to receive appointments, a writing sample, and such other pertinent matters as the Appellate Defender Commission deems appropriate. Applicants shall verify their prior appellate experience by providing such documentation as the appellate assigned counsel administrator requests. The writing sample shall consist of a brief or memorandum of law, on any subject, personally prepared by the applicant. A writing sample prepared in law school will suffice if no other is available.

(b) The renewal application shall contain similar information but no writing sample. The appellate assigned counsel administrator may request such additional information

as deemed warranted.

(2) Based on the information contained in the applications, the assessment of any supplementary materials, and review of the applicants' work on prior felony appeals, attorneys who are members in good standing of the State Bar of Michigan will either be classified on the statewide roster at Level I, II or III or be notified by the administrator that they will not be retained on the roster for good cause to be specified on the notice or administrative reasons.

(a) A Level I attorney:

(i) must complete an orientation training program, and

(ii) may only represent a defendant who was convicted at a jury trial of an offense carrying a statutory maximum sentence of 5 years or less, or by plea or at a waiver trial of an offense carrying a statutory maximum of 10 years or less.

(b) A Level II attorney:

(i) must have conducted through submission for decision on the merits separate appeals of at least nine felony convictions, at least two of which arose from trials, including one jury trial, in Michigan or federal courts, during the three years immediately preceding the date of application, and

(ii) may, subject to the provisions of Sec. 3(6)(c) (i), only represent a defendant who was convicted at a jury trial of an offense carrying a statutory maximum sentence greater than 5 but not greater than 15 years, or by plea or at a waiver trial of an offense carrying a statutory maximum sentence greater than 10 years.

(c) A Level III attorney:

(i) must have conducted through submission for decision on the merits separate appeals of at least eighteen felony convictions, at least six of which arose from trials, including four or more jury trials, in Michigan or federal courts, during the three years immediately preceding the date of application, and

(ii) may, subject to the provisions of Sec. 3(6)(c) (i), represent defendants convicted at trial or by plea of any felony, but may elect to represent only those convicted at trial.

(d) Any attorney seeking classification at Level II or III who has conducted the requisite total number of appeals but lacks the requisite number of appeals from trial-based convictions may substitute cases in which he or she represented the defendant at trial through decision by the fact-finder. Conduct of two jury trials shall count as the equivalent of one jury trial-based appeal. Conduct of two bench trials shall count as the equivalent of one bench trial-based appeal.

Verdicts in the trials must have been entered during the three years immediately preceding the date of application.

(3) In exceptional circumstances, the Appellate Defender Commission may waive the requirements for Level II or III when it determines that an applicant has acquired comparable experience or otherwise demonstrated to the satisfaction of the Appellate Defender Commission sufficient quality for membership on the roster at either Level II or Level III. Attorneys who join or serve on the roster under this section may be required to attend an orientation program.

(4) A roster attorney who desires reclassification to a higher eligibility level shall forward a written request for reclassification to the administrator. The request shall specify the cases being relied upon to establish the relevant experience requirement.

(5) Attorneys who are employed full time by the State Appellate Defender Office at or above the status of assistant defender may not individually appear on the statewide roster as eligible for accepting assignments during the course of their employment.

(6) In addition to demonstrating eligibility for a particular level of practice, attorneys who wish to maintain their names on the roster shall, by the filing of an application, agree to comply with the following regulations:

(a) Each attorney shall meet and shall strive to exceed the Minimum Standards for Indigent Criminal Appellate Defense Services approved by the Supreme Court and adopted by the Appellate Defender Commission.

(b) Each Level II and Level III attorney shall demonstrate continued participation in the field of criminal appellate practice by conducting through submission for decision on the merits at least four assigned felony appeals in each calendar year.

(c) Each attorney appointed in an appeal by leave shall forward to the appellate assigned counsel administrator copies of the following when they are filed in the trial court:

(i) any trial court motion on the merits unless an application for leave to appeal has been filed in the Court of Appeals, and

(ii) any trial court motion to withdraw as counsel, or motion, or stipulation, to vacate the order of appointment and any trial court orders resulting from such motions or stipulations.

(d) Each attorney shall timely forward to the appellate assigned counsel administrator copies of briefs and memorandums filed in the defendant's behalf:

(i) in the first two cases with briefs filed after classification or reclassification,

(ii) in cases relied on for reclassification under Sec. 4(4),

(iii) when selection for the centralized brief bank may be appropriate, and

(iv) upon request.

(e) Each attorney shall respond promptly to notice from the appellate assigned counsel administrator that defects in the attorney's eligibility exist or that complaints about the attorney's performance have been received. Deficiencies in eligibility must be corrected within 60 days subject to the grant in writing of one 60-day extension by the administrator for good cause shown.

(f) Each attorney shall annually complete seven hours of continuing legal education in subjects relevant to criminal appellate advocacy. Attendance at training programs offered by the Appellate Assigned Counsel System shall automatically satisfy this requirement. The commission may, upon request, approve fulfillment of this requirement by proof of attendance at a comparable training program.

(g) Each attorney wishing to remain on the roster shall apply for retention every three years, effective September 1 - October 31, 2002.

(7) Subject to the provisions of Sec. 2(2), each attorney on the statewide roster will automatically be placed on the local list of the jurisdiction(s) the attorney has designated on his or her application.

(a) Upon written notice to the administrator, attorneys may leave the statewide roster at any time. To rejoin the roster, attorneys must reapply in accordance with Sec. 4(1) and may be required to complete all or part of the current orientation training program.

(b) Upon written notice to the administrator, roster attorneys in good standing may join or leave local lists at any time. Attorneys may not rejoin a particular local list sooner than six months after leaving it.

(c) Attorneys may decline to accept appointments in particular cases, subject to the provisions of Sec. 3(8). An attorney who has not declined three consecutive appointments from any single jurisdiction but who has consistently declined appointments from multiple jurisdictions for more than six months may be removed from the roster.

(8) The administrator shall temporarily suspend all future assignments to a roster attorney, pending a complete review of the attorney's performance on past assignments and final resolution of any removal proceedings, where:

(a) it appears that, during the preceding 18 months, the attorney has substantially violated Standard 5 by:

(i) neglecting to file required pleadings in at least three cases for at least three months each, or

(ii) twice failing to meet the jurisdictional deadline in a leave case, and

(b) the attorney has received notice of the violations from MAACS and has failed

to provide a satisfactory explanation.

(9) An attorney who fails to comply with these regulations may be removed from the roster by the administrator. The administrator must give the affected attorney 30 days' notice that removal from, or non-retention on, the roster is contemplated. The attorney shall have a de novo appeal of right from the administrator's removal, or non-retention, decision to the Appellate Defender Commission. The administrator's decision and the commission's findings shall be in writing.

(10) Any attorney whose name is removed from, or who has not been retained on, the roster for a reason other than a finding of substantial violation of the Minimum Standards for Indigent Criminal Appellate Defense Services shall complete his or her work on any cases pending at the time of removal and shall be entitled to voucher for fees in those cases in the usual manner. Where removal is predicated on a finding of substantial violation of the Minimum Standards, the appellate assigned counsel administrator shall, where appropriate, move the trial court for substitution of counsel, with notice to the defendant, in any pending case assigned to the attorney affected. If substitution of counsel is granted, the trial court shall determine the amount of compensation due the attorney being replaced. No attorney may accept indigent criminal appellate defense assignments after such time as removal of his or her name from the roster has become final.

(11) Any attorney whose name has been involuntarily removed from, or who has not been retained on, the roster may apply for reinstatement at any time after a period of twelve months from the removal date has elapsed and may be reinstated. Refusals to reinstate by the administrator are appealable de novo to the commission. The reasons for the administrator's refusal and the commission's findings shall be in writing.

(12) Any attorney formerly eligible for assignments at Level II or III who has allowed his or her eligibility to lapse solely for failure to meet the continuing participation requirement of Sec. 4(6)(b) may, on application, be reinstated at the former level if the administrator finds on review of the circumstances that reinstatement at a lower level is not required to protect the quality of representation received by defendants.

(13) If, in the discretion of the MAACS Administrator, a roster attorney's number of assignments or certified hours devoted to MAACS cases raises a significant quality control concern, the MAACS Administrator may temporarily move the attorney to inactive status to receive new assignments on the MAACS roster.

(14) If, in the discretion of the MAACS Administrator, a roster attorney's number of assignments or certified hours devoted to MAACS cases raises a significant quality control concern, the MAACS Administrator may temporarily remove the attorney from membership on any circuit court local list.

**Section 5. Confidential Files and Records**

(1) Unless otherwise specified in these Regulations, the files and records of an investigation, the work-product of an investigation and/or any determination made by the Administrator or other MAACS staff in response to a complaint about, or concerning, the performance of a MAACS roster lawyer, or with regard to a decision concerning the retention or classification of a lawyer on the MAACS roster, shall be considered confidential and may not be made public or otherwise disclosed.

(2) Any final complaint determination or result of an investigation conducted in response to a complaint about the performance of a MAACS roster lawyer shall be made known, equally, to the complainant and the lawyer.

(3) Any final complaint determination(s) relied upon by the Administrator which results in either the removal from or the non-retention on the roster of a MAACS lawyer, and which removal or non-retention is thereafter appealed by that lawyer to the Appellate Defender Commission, shall be considered a public record, along with any material submitted on appeal by the lawyer and any response to such material from the Administrator or MAACS staff.

(4) At the roster lawyer's option, final disposition of a complaint or suggestion for removal or non-retention which does not result in disciplinary action, removal or non-retention may be made public.

(5) Hearings before the Commission or one of its subcommittees shall be open to the public, but not Commission or subcommittee deliberations.

(6) Any written findings made by the Commission in response to an appeal by a lawyer of a removal or non-retention of that lawyer from the MAACS roster shall be considered a public record.

(7) Notwithstanding any prohibition against disclosure set forth in these Regulations, the Administrator or MAACS staff may disclose to the Courts, by order of the Court affirmatively abrogating this confidentiality policy for a case-specific purpose, or as approved by the Appellate Defender Commission, the general substance of information in the possession of MAACS which may have relevance to any request by MAACS that:

a) a MAACS roster lawyer be removed from a circuit's list of counsel eligible to accept appellate assignments, and/or

b) a circuit court grant a MAACS request or motion to order the appointment of substitute counsel in place of a lawyer who is the subject of a MAACS investigation.

(8) Notwithstanding any prohibition against disclosure set forth in these Regulations, the Administrator or MAACS staff may disclose to the Attorney Grievance Commission, the State Bar of Michigan Client Security Fund, the State Bar of Michigan Committee on Judicial Qualifications, and to any court-authorized attorney disciplinary or admissions agency, upon request, the general substance of information in the possession of MAACS which may have relevance to an investigation being conducted regarding a current or former MAACS lawyer by such commission, fund, committee, or agency.

(9) Other files and records of the Appellate Defender Commission, MAACS, the administrator and the staff of each may not be disclosed to anyone except:

a) the Appellate Defender Commission,

b) the MAACS Administrator,

c) authorized employees of MAACS for the purpose of fulfilling their job responsibilities,

d) the Supreme Court,

e) the Office of Management and Budget, or

f) other persons who are expressly authorized by the Appellate Defender Commission or the Supreme Court. If a disclosure is made to the Supreme Court or to other persons expressly authorized by the Appellate Defender Commission, a duplicate disclosure, specific to each person, shall also be provided to persons whose confidential information has been so disclosed.

(10) On making any disclosure pursuant to subsections (7), (8), or (9)(f), a cover sheet shall be attached, indicating the otherwise confidential nature of the information, stating that the information is being provided pursuant to an exception to the Commission's confidentiality policy for a limited purpose, requesting that the information not be further disclosed except in furtherance of that limited purpose, and warning that further disclosure may result in the Commission restricting or eliminating the recipient's access to information in the Commission's possession.

(11) For purposes of evaluating the efficacy and wisdom of this Rule on an ongoing basis, upon making any disclosure under this Rule without prior express approval of the Commission, MAACS or SADO shall promptly report the disclosure to the Commission.

## Minimum Standards for Indigent Criminal Appellate Defense Services Including MAACS Comments

*Approved by the*
*Michigan Supreme Court*
*Effective January 1, 2005*

### Standard 1

Counsel shall promptly examine the trial court record and register of actions to determine the proceedings, in addition to trial, plea, and sentencing, for which transcripts or other documentation may be useful or necessary, and, in consultation with the defendant and, if possible, trial counsel, determine whether any relevant proceedings have been omitted from the register of actions, following which counsel shall request preparation and filing of such additional pertinent transcripts and review all transcripts and lower court records relevant to the appeal. Although the trial court is responsible for ordering the record pursuant to MCR 6.425(F)(2), appellate counsel is nonetheless responsible for ensuring that all useful and necessary portions of the transcript are ordered.

*MAACS Comment to Standard 1*

In order to prepare an appeal properly, and to ensure that potential issues are examined, appellate counsel must review the relevant documents to become familiar with the case. This Standard emphasizes that it is counsel's responsibility to obtain and review the record, which may consist of more than the documents that are regularly provided, such as the register of actions and transcripts of proceedings in the trial court(s), including preliminary examination, motion hearings, trial or plea, and sentencing. See MCR 6.425(F)(2)(a)(iii); MCR 6.433(A) or (B); and MCR 7.210(B). Additional documentation may include transcripts of post-conviction hearings, charging documents, warrants, court orders, presentence reports, motion papers, sentencing information reports and sentencing memoranda. Counsel should request any additional documentation within a reasonable time after appointment, consistent with MCR 7.212(A), to ensure that all issues can be researched and all facts clarified in time to prepare and file the appropriate post-conviction or appellate motion(s) or brief(s) in the appropriate court(s).

**Standard 2**

Before filing the initial postconviction or appellate motion or brief and after reviewing the relevant transcripts and lower court records, counsel must consult with the defendant about the proposed issues to be raised on appeal and advise of any foreseeable benefits or risks in pursuing the appeal generally or any particular issue specifically. At counsel's discretion, such confidential consultation may occur during an interview with the defendant in person or through an attorney agent, by a comparable video alternative, or by such other reasonable means as counsel deems sufficient, in light of all the circumstances.

*MAACS Comment to Standard 2:*

Counsel must consult with the defendant about the appeal prior to filing the initial post-conviction motion or brief in the Court of Appeals or trial court. It is left to counsel's informed professional judgment as to what form such consultation shall take. Personal interviews remain the best and thus should be deemed the preferred form in the absence of countervailing considerations, but are not the only way to fulfill this obligation. If counsel concludes that the circumstances require a visit, whether because of crime or penalty or as a function of the defendant's limitations in communicating in writing due to illiteracy, mental illness, lack of English fluency, etc., then counsel's professional judgment will require one or more personal meetings, and counsel is entitled to be paid for such visits. See In re Mulkoff, 176 Mich App 82 (1989). If counsel after duly considering all pertinent factors concludes that adequate and confidential consultation can be conducted by mail and telephone, or by tele- or video-conferencing if available (bearing in mind that all correspondence must be enclosed in envelopes plainly marked "Confidential attorney-client communication" on the outside, and that all telephone and video communication with persons incarcerated may be monitored) MAACS will generally accede to counsel's independent, informed, and considered assessment of the situation as determinative.

What is most important is that there be consultation regarding the appeal before the initial post-conviction motion or brief is filed. Counsel is responsible for advising the defendant of the potential issues that have been identified, the appellate strategies available, their relative benefits and disadvantages, and whether there are risks evident that make it advisable to forego the appeal altogether. To assist the defendant in making an informed choice about pursuit of appellate remedies, counsel must explain the types of remedies that may be obtained and the potential disadvantages such remedies may incur.

**Standard 3**

Counsel should raise those issues, recognizable by a practitioner familiar with criminal law and procedures on a current basis and who engages in diligent legal research, which offer reasonable prospects of meaningful postconviction or appellate relief, in a form that protects where possible the defendant's option to pursue collateral attacks in state or federal courts. If a potentially meritorious issue involves a matter not reflected in the trial court record, counsel should move for and conduct such evidentiary hearings as may be required.

*MAACS Comment to Standard 3:*

Appellate counsel must bring to bear the considered, informed judgment of a professional familiar with the criminal law who, after becoming appropriately familiar with the particular facts of the case and a fair assessment of the law, can with an advocate's skill and zeal bring to the attention of the reviewing court those claims of error which may entitle the defendant to meaningful relief. Competent exercise of such professional judgment is the crucial duty owed by appellate counsel to the defendant.

This Standard does not require that every conceivable issue be raised in every case. Jones v Barnes, 463 US 745; 103 SCt, 3308; 77 L Ed 2d 987 (1983); People v Reed, 449 Mich 375 (1994). However, as was noted by Justice Patricia J. Boyle for the majority in Reed, reasonable attorneys can disagree about what issues are arguable:

> "By adopting a standard of arguable merit, the Minimum Standards encourage lawyers representing indigent clients on appeal to err on the side of presenting all colorable claims for relief. Although the standard undoubtedly imposes a tax on the resources of the Court of Appeals, it is arguable that the burden is justified by the institutional need to assure that appellate attorneys paid by the taxpayers of Michigan do not err on the side of underrepresentation." Id. at 387.

To promote the goal of seeking finality in judgments, this Standard encourages counsel to raise those claims that have arguable potential for success on the direct appeal. In weighing whether to raise an issue, counsel should take into account that, because of the default rules attendant on collateral attacks, as embodied in MCR 6.508(D)(3)) and which similarly limit petitions for habeas corpus relief in federal courts, the failure to raise an issue in the direct appeal to the Michigan Court of Appeals most likely means that review of that issue in any subsequent post-conviction proceeding is likely to be held procedurally barred irrespective of its merits**.**

Since Michigan has a unified appellate process which requires that both on-record and extra-record issues be raised in the direct appeal, counsel should also be alert to the possibility of extra-record claims, which imposes on appellate counsel a corresponding duty to verify and adduce competent proof of facts significant to post-conviction relief in any form, and to investigate circumstances which a criminal lawyer would recognize as potential grounds for meaningful appellate or other post-conviction relief. If investigation reveals facts not of record which would support an issue on

appeal, motion for new trial, or other post-conviction relief, it is appellate counsel's responsibility to develop a testimonial record as the court rules permit in order to preserve the issue for appellate review. See MCR 6.425(F)(1)(C); MCR 7.208(B); MCR 7.211(C)(1).

**Standard 4**

When a defendant insists that a particular claim or claims be raised on appeal against the advice of counsel, counsel shall inform the defendant of the right to present the claim or claims *in propria persona.* Defendant's filing shall consist of one brief filed with or without an appropriate accompanying motion. Counsel shall also provide such procedural advice and clerical assistance as may be required to conform the defendant's filing for acceptability to the court. The defendant's filing *in propria persona* must be received by the Court of Appeals within 84 days after the appellant's brief is filed by the attorney, but if the case is noticed for submission within that 84-day period, the filing must be received no later than 7 days before the date of submission, or within the 84-day period, whichever is earlier. The 84-day deadline may be extended only by the Court of Appeals on counsel's motion, upon a showing of good cause for the failure to file defendant's pleading within the 84-day deadline.

*MAACS Comment to Standard 4:*

This Standard operates as a safeguard and, by its mere existence, has a positive effect on the legal services provided by counsel. By permitting a defendant to raise issues that counsel has deemed to be without arguable merit, it protects the defendant's opportunity to have meritorious claims raised if counsel's assessment was mistaken. It promotes finality of judgments and conserves judicial resources by having all issues raised in the direct appeal rather than piecemeal in a separate post-conviction proceeding. It reduces grievances by providing an outlet for the defendant to maintain a favorable attorney-client relationship rather than seeking substitution of counsel. It also reduces substitution of counsel requests and actual substitutions which can delay the appeal.

The Standard permits a defendant to file a supplemental brief *in propria persona* directly with the Court, "with or without a motion," within the specified deadline. Counsel is required to "provide such procedural advice and clerical assistance as may be required to conform the defendant's filing for acceptability to the court." Counsel is not obligated to conduct legal research in support of the issues which the client desires to raise and which, in the judgment of counsel, lack arguable merit. Counsel should ensure, however, that the client is aware of the procedural rules necessary to meet the requirement that the supplemental brief be acceptable for filing in the Court of Appeals. Counsel is not ordinarily required, but it may be occasionally necessary, to supply secretarial support to conform the brief to the applicable court rule regarding the form and contents of briefs on appeal, including the supplemental brief. Counsel should also inform the client the Court of Appeals will accept only one *pro per* supplemental brief and issues in that brief cannot be the same or overlap issues raised in the brief on appeal. And the Standard does mandate that counsel prepare and file an appropriate motion to extend the filing deadline, "upon a showing of good cause" for the client's failure to file the supplemental brief within the deadline.

**Standard 5**

An appeal may never be abandoned by counsel; an appeal may be dismissed on the basis of the defendant's informed consent, or counsel may seek withdrawal pursuant to *Anders v California,* 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967), and related constitutional principles.

*MAACS Comment to Standard 5:*

A defendant may decide, based on the advice of counsel, to voluntarily dismiss the appeal. This situation may arise where there are no arguable grounds for relief or where the defendant decides that the risks of proceeding make it advisable to forego the appeal altogether. Counsel is obligated to advise the defendant what dismissal means and why it is being recommended, or alternatively that the client appreciates the consequences of so acting against counsel's advice. The practical effect is that there is no judicial review on the merits and the appeal is abandoned. The practice of obtaining the defendant's written consent to dismissal of the appeal protects both counsel and the defendant and continues to be the preferred way to demonstrate "the defendant's informed consent." A separate, confidential document should reflect the details underlying counsel's advice and the client's understanding of the alternatives presented.

If counsel determines that there are no non-frivolous issues that can be raised, but the defendant declines to voluntarily dismiss the appeal, then counsel must file either a motion to withdraw or a motion to vacate the order of appointment. If the appeal is by right, the motion to withdraw shall be filed in the Court of Appeals pursuant to the requirements of MCR 7.211(C)(5). If the appeal is by leave and jurisdiction has not yet vested in the Court of Appeals, then the motion to vacate shall be filed in the trial court within the time for filing an application for leave to appeal. See People v Tooson, 231 Mich App 504 (1998). The effect of the Court of Appeals granting a withdrawal motion is that the conviction will be affirmed. The effect of a trial court granting a motion to vacate is that any post-conviction remedies must be pursued without the assistance of assigned counsel. If either the Court of Appeals or the trial court finds any legally arguable issue, it must deny the motion and direct counsel to file a pleading raising at least such issue.

**Standard 6**

Counsel should request oral argument, and preserve the right to oral argument by timely filing the defendant's brief on appeal. Oral argument may be waived if counsel subsequently concludes that the defendant's rights will be adequately protected by submission of the appeal on the briefs alone.

*MAACS Comment to Standard 6:*

This Standard emphasizes the need for counsel to request oral argument on the title page of the brief in accordance with MCR 7.214(A) and to preserve the right to present oral argument by filing a timely brief, MCR 7.212(A)(4). However, the standard leaves it to counsel's discretion whether to actually participate in oral argument, based on a review of all the briefs and other relevant considerations.

Oral argument provides the opportunity to present recent cases, including unpublished decisions outside the purview of MCR 7.212(F)(3), to counter the prosecution's position, and to respond to the Court's questions. In preparation for oral argument, counsel should review the briefs of both parties, file supplemental pleadings as warranted, and update the legal research. Counsel should not waive oral argument where (1) the prosecution filed a brief but a reply brief was not filed by appointed counsel or (2) where the prosecutor has not entirely waived or otherwise lost the right to oral argument. If counsel is satisfied that the defendant's rights will be adequately protected without conducting oral argument, as a matter of professional courtesy counsel should notify the Court of Appeals and opposing counsel within a reasonable time prior to submission of the case that oral argument is being waived.

**Standard 7**

Counsel must keep the defendant apprised of the status of the appeal and promptly forward copies of pleadings filed and opinions or orders issued by a court.

*MAACS Comment to Standard 7:*

This Standard reminds counsel of the responsibility to keep a defendant reasonably informed about the status of the appeal and to comply promptly with reasonable requests for information. See MRPC 1.4(a). Because most defendants are in prison and have limited access to their appellate counsel, they are dependent upon counsel for information. Counsel is obligated to send clients copies of all pleadings that are filed and court decisions rendered, and otherwise to keep them informed of the status of the appeal, and to do so with sufficient promptness that they may effectively protect and exercise their opportunities for further review with or without the assistance of appointed counsel.

**Standard 8**

Upon final disposition of the case by the court, counsel shall promptly and accurately inform the defendant of the courses of action that may be pursued as a result of that disposition, and the scope of any further representation counsel may provide. If counsel's representation terminates, counsel shall cooperate promptly and fully with the defendant and any successor counsel in the transmission of records and information.

*MAACS comment to Standard 8:*

In most cases the order of appointment authorizes appellate counsel to provide legal representation through disposition of the case by the Court of Appeals. In some situations the scope of appellate counsel's responsibilities will include representation beyond those proceedings in the Court of Appeals. See MCR 6.425(F)(1)(c). At whatever point such responsibilities terminate, counsel is obligated to notify the defendant promptly that the representation has ended and, when appropriate, to advise the defendant of potential remaining courses of action that might be pursued. Such courses of action include providing the defendant with forms for filing a pro se application for leave to appeal in the Michigan Supreme Court together with information on filing deadlines. Defendants who have had their convictions reversed and are awaiting retrial should continue to be represented by appellate counsel until it is clear that no further appeals will occur and that trial counsel has been retained, appointed, or waived.

Even after the attorney-client relationship has terminated, certain ethical obligations remain. To the extent that counsel possesses transcripts, documents or information that the defendant needs to pursue retrial, remand, or other avenues of relief, counsel has a duty to transmit them promptly at the request of the defendant or successor counsel.

**Standard 9**

Upon acceptance of the assignment, counsel is prohibited from seeking or accepting fees from the defendant or any other source beyond those authorized by the appointing authority.

*MAACS Comment to Standard 9:*

Occasionally individuals interested in a defendant's welfare will approach appellate counsel offering supplemental fees, beyond those to be paid by the appointing court. In other situations, counsel may be asked to withdraw as assigned counsel outright and take over the case on a retained basis. Recognizing the inevitable temptation such offers might present, MAACS is emphatic in its position that no compensation may be solicited or accepted for any reason for representation which is included within the scope of the order of appointment.

It is permissible, however, for counsel to be retained for additional representation once the work performed under the order of appointment has been completed. For example, counsel could be retained to file an application for leave to appeal in the Michigan Supreme Court once the appeal to the Court of Appeals is concluded, provided counsel's attendant responsibilities under the order of appointment have been completed.

# APPELLATE ASSIGNED COUNSEL FEES BY CIRCUIT
# 2014

| CIRCUIT | BASIS | FEE SET | RATE | EXPENSES/COMMENTS |
|---|---|---|---|---|
| **1st Hillsdale** | Schedule | 2009 | Plea: $550<br>Trial: $750 | |
| **2nd Berrien** | Hourly | 2000 | $50/hr<br>Travel: $10/hr<br><br>Plea: $700 maximum<br>Trial: $1,500 maximum | Expenses are additional.<br><br>Extraordinary fees by motion |
| **3rd Wayne** | Schedule | 1998 | Plea: Transcript - $100; claim, brief all proceedings: $350<br><br>Prison Visit: Wayne County Facilities - $75; UP facilities - $400; all others $200.<br><br>Appeal to higher court, each ½ day in trial court: $75; Appearance at Habeas Corpus: $50<br><br>Trial: Transcript - $200 every 400 pages; claim, brief all proceedings: $500; Prison Visit: Wayne County Facilities: $75; UP facilities: $400, all others: $200; non-frivolous Motion for New trial w/memorandum of law by trial counsel: $125; Appeal to higher court, each ½ day in trial court: $75; Appearance at Habeas Corpus: $50 | |
| **4th Jackson** | Hourly | 2008 | Basic Rate: $50/hr<br><br>Plea: $750 maximum<br>Non-cap Trial: $1,600 maximum<br>Cap. Trial: $2,300 max.<br><br>*Billing: submit the MAACS statement of service form and specify: total fee requested; total must be detailed and broken down by hours to the nearest 1/10th of an hour; the date which the time was expended and the nature of the work done.* | Reasonable reimbursement of long-distance calls; postage, copies (actual costs) with itemized billing.<br><br>Mileage: IRS rate<br><br>Any travel over 300 miles (roundtrip) must be approved by Court.<br><br>Must return copies of transcripts, etc. to defendant. |

# APPELLATE ASSIGNED COUNSEL FEES BY CIRCUIT
# 2014

| CIRCUIT | BASIS | FEE SET | RATE | EXPENSES/COMMENTS |
|---|---|---|---|---|
| **5th Barry** | Schedule | 1999 | $40/hr<br><br>Plea: $400 maximum<br>Trial: $1,000 maximum | Expenses are additional.<br><br>Extraordinary fees by motion. |
| **6th Oakland** | Hourly | 1998 | $45/hr<br><br>Plea: $800 maximum<br>Trial: $1,320 maximum | Expenses are included.<br><br><u>Prison Visits paid by region</u>:<br>Region 1: $75<br>Region 2: $100<br>Region 3: $150<br>Region 4: $175<br>Region 5: $350<br><br>All requests for extraordinary fees on any appeal will go before a three-judge panel. |
| **7th Genesee** | Hourly | 2000 | $40/hr<br><br>Guilty Plea w/o filing brief: $350 max<br>Guilty Plea, brief filed: $450 maximum<br>Oral Argument, COA: $150 flat fee<br><br>Trial Appeals: No flat fee maximum<br>The maximum fee is determined by a multiplier of 5. Start with the length of the trial transcript; divide that number by 100, then multiply the number by 5 to equal the maximum fee to be paid. *Example, 1000 page transcript, divided by 100 = 10 hours to review. 10 x 5=50 hours. The maximum fee would be 50 hours x $40 per hour or $2,000* | Reasonable costs, such as copies at $0.10 per page and postage will be compensated.<br><br>Mileage covered: Office to Prison or Office to 7th Cir Ct (whichever is closer). If office closer to 7th Cir Ct than the prison where client lodged, then must video conference. Contact Rob Gifford, Ct Tech Coord @ 810-424-4436 to schedule. Mileage reimbursement for a prison visit that does not adhere to this policy will not be approved, absent advance permission from the trial judge. |
| **8th Ionia Montcalm** | Hourly | 2009 | <br><br>Plea based: $500 CAP<br>Trial: $1,500 CAP | Mileage: ONE round trip<br><br>Extraordinary fees for good cause. |
| **9th Kalamazoo** | Hourly | 2000 | $45/hr.<br><br>Plea: $500 maximum<br>Trial: $1,600 maximum | Mileage: $0.30/mile<br><br>Travel time: $12/hour |

# APPELLATE ASSIGNED COUNSEL FEES BY CIRCUIT
# 2014

| CIRCUIT | BASIS | FEE SET | RATE | EXPENSES/COMMENTS |
|---|---|---|---|---|
| **10th Saginaw** | Hourly | 1985 | Judicial discretion – Between $35 and $40/hr | Expenses: Additional |
| **11th Alger/Luce Mackinaw Schoolcraft** | Hourly | 1987 | $40/hr | Expenses: Additional<br><br>Mileage varies by county |
| **12th Baraga/Houghton Keweenaw** | Hourly | 2005 | $55/hr | Expenses: Additional |
| **13th Antrim Grand Traverse Leelanau** | Schedule | 2007 | Plea w/o brief: $750<br>Plea w/brief: $1000<br>Oral Argument if ordered: $500<br><br>Trials: transcript length ÷ 100 x 5 x $70 with a **$3,500 maximum**.<br>Oral Argument, if ordered: $500 | Mileage: $0.485/mile (roundtrip from office to prison)<br><br>Copies: $0.05/page<br>Postage: Actual |
| **14th Muskegon** | Hourly | 1989 | $40/hr<br><br>Plea: $500 maximum<br>Trial: $1,000 maximum | Expenses: Additional<br>Mileage: $0.55/mile<br>Copies: $0.15/page<br><br>Extraordinary fees by motion |
| **15th Branch** | Schedule | 1987 | Plea: $400<br>Trial: $700 | Travel: $50 maximum |
| **16th Macomb** | Hourly | 1974 | $25/hr<br><br>Travel: $25/hr; no mileage | Reasonable office and administrative expenses.<br><br>May cover lodging to UP if reasonable with documentation. |
| **17th Kent** | Hourly | 2008 | $55/hr; Flat fee includes oral argument.<br><br>Plea: $660 maximum<br>Non-CAP Trial: $1,100 maximum<br>CAP Trial: $2,205 maximum<br><br>The appellate appointment by the court includes appointment to the COA only. | Prison visit: $13/hr (travel time) plus mileage: $0.45/mile.<br>File proof of visit w/voucher.<br>Expenses reimbursed at actual costs and itemized. Extra fees with written justification & approval.<br><br>Payment request may not be submitted prior to filing the brief with the COA & must include proof of mailing transcripts to defendant. |

# APPELLATE ASSIGNED COUNSEL FEES BY CIRCUIT
# 2014

| CIRCUIT | BASIS | FEE SET | RATE | EXPENSES/COMMENTS |
|---|---|---|---|---|
| **18th Bay** | Hourly | 2007 | Judicial discretion: $50/hr | Expenses: Additional<br>Detailed time sheets must be submitted with voucher.<br>Attorneys may bill when brief if filed with COA. |
| **19th Benzie Manistee** | Hourly | 2002 | $75/hour | Expenses: Additional |
| **20th Ottawa** | Hourly | 1998 | $45/hour<br><br>Plea: $500 maximum<br>Trial: $1,000 maximum | Expenses: Additional |
| **21st Isabella** | Hourly | 1986 | $50 hour<br>Travel: $0 | Expenses: Additional |
| **22nd Washtenaw** | Schedule | 1998 | $75/hour<br><br>Plea: $1,000 maximum<br>Trial: $2,250 maximum | Expenses: Additional<br><br>Extraordinary fees at $75/hour and expenses exceeding $100 cap with letter of explanation |
| **23rd Iosco/Oscoda Alcona/Arenac** | Schedule | 2007 | $60/hour | Expenses: Additional<br><br>Extraordinary fees by motion |
| **24th Sanilac** | Hourly | 1991 | $50/hour | Expenses: Additional<br><br>Court will pay mileage but will not cover phone or copying costs |
| **25th Marquette** | Hourly | 2002 | $50/hour | Expenses: Additional |
| **26th Alpena Montmorency** | Schedule | 2001 | Plea: $350<br>Trial: $500<br>Trial Ct Motion: $150<br>COA Orals: $200<br>Jail Visit (one time only): $60<br>Prison Visit (one time only): $120 | Mileage: $0.31/mile |
| **27th Newaygo Oceana** | Schedule | 1998 | Plea: $500<br>Trial: $40/hour | Expenses: Additional<br>Mileage: $0.555/mile<br><br>Unusual or costly expenses require prior approval |

# APPELLATE ASSIGNED COUNSEL FEES BY CIRCUIT
# 2014

| CIRCUIT | BASIS | FEE SET | RATE | EXPENSES/COMMENTS |
|---|---|---|---|---|
| **28th Missaukee Wexford** | Hourly | 1985 | $45/hour | Expenses: Additional |
| **29th Clinton Gratiot** | Schedule | 1997 | Plea: $40/hour, $500 maximum<br>Trial: $50/hour, $1,250 maximum<br><br>If dismissed without brief, submit itemized statement detailing services provided & time devoted.<br>Compensation will be equal to or lesser of that determined by flat fee or hourly method. | Actual costs; if necessary and reasonable.<br><br>Extraordinary fees by motion |
| **30th Ingham** | Schedule | 2008 | Plea: $48/hour, $625 CAP<br>Trial (non-capital offenses): $48/hour, $1400 CAP<br>Trial (capital offenses): $48/hour, $2000 CAP<br><br>Case dismissed after initial consult:<br>Plea: $250 Trial: $300<br><br>Counsel Substitutes out for any reason:<br>Plea: $250 Trial: $300<br><br>*Vouchers must be submitted no later than six months after either conclusion of the case or the granting of a motion to withdraw*. | Mileage: $0.56/mile<br>(IRS stds effective 1/1/2014)<br><br>Copies: $0.10/copy<br>Copies of transcripts must be sent to defendant at the conclusion of the appeal and a certificate of mailing must be filed with the circuit court.<br><br>All other expenses need approval. Postage with receipt for mailing transcripts will be reimbursed. Effective May, 2010<br><br>Appointments made prior to 1/17/2008 will be paid using prior fee schedule. |
| **31st St. Clair** | Hourly | 2011 | $50/hour<br><br>Fees over $2,500 by motion. | Mileage: $0.362/mile<br>Copies: $0.15/page |
| **32nd Gogebic Ontonagon** | Hourly | 2007 | $75/hour if defendant is located in a DOC facility<br><br>$50/hour if defendant is in the county jail or not incarcerated. | Expenses: Additional |
| **33rd Charlevoix** | Hourly | 2005 | $40/hour | Expenses: Not included |

# APPELLATE ASSIGNED COUNSEL FEES BY CIRCUIT
# 2014

| CIRCUIT | BASIS | FEE SET | RATE | EXPENSES/COMMENTS |
|---|---|---|---|---|
| **34th Ogemaw Roscommon** | Hourly | 2000 | $50/hour | Expenses: Additional |
| **35th Shiawassee** | Hourly | 2007 | $50/hour<br><br>Plea: $500 maximum<br>Trial: $1,500 maximum | Expenses: Additional |
| **36th Van Buren** | Hourly | 2001 | Guilty Plea: $50/hr up to $700<br>Trials: $55/hr up to $1,500<br>Cases with mandatory life no parole: $60/hr up to $2,500 expenses not to exceed $400 | Mileage: County Rate<br>Expenses in Guilty Pleas: $12/hour travel time; expenses not to exceed $125<br><br>Expenses in Trials: $12/hour travel time; expenses not to exceed $250 |
| **37th Calhoun** | Hourly | 2005 | Guilty Plea: $300 maximum<br>Non-cap cases: $600 maximum<br>Cap cases: $800 maximum<br>Murder conviction: $950 maximum<br><br>Non Court: $30/hour<br>In Court: $50/hour<br>(Waiting for oral argument is not "in-court" and will be paid at lower rate. | Mileage: County Rate<br>Copies: $0.05/page<br>Actual costs: postage & phone (must include receipts)<br><br>Travel time is not a reimbursable expense.<br><br>Requests for payment must be accompanied by proof of mailing all transcripts to the defendant or return to the clerk. |
| **38th Monroe** | Hourly | 1991 | $52/ hour | Expenses: Additional with judicial approval |
| **39th Lenawaee** | Schedule | 2009 | Plea: $500<br>Other criminal appeals: $40/hour<br>Secretary: $10/hour | Expenses: Additional<br>Mileage: IRS reimburse rate<br>Actual costs: Postage, copies & phone |
| **40th Lapeer** | Hourly | | Preparing appeal (including brief writing, interviews, travel time etc.): $50/hour<br><br>Oral Arguments: COA $60/hour; SCt $75/hour; Circuit Court $50/hour | Extraordinary expenses by motion. |
| **41st Dickinson/Iron Menominee** | Hourly | 2007 | $50/hour | Expenses: Additional |

# APPELLATE ASSIGNED COUNSEL FEES BY CIRCUIT
# 2014

| CIRCUIT | BASIS | FEE SET | RATE | EXPENSES/COMMENTS |
|---|---|---|---|---|
| **42nd Midland** | Hourly | 1987 | $45/hour | Expenses: Additional |
| **43rd Cass** | Hourly | 1992 | $50/hour<br><br>Plea: $500 maximum<br>Trial $1,500 maximum | Expenses: Additional<br>Mileage: $0.50/mile<br>Extraordinary fees require prior approval |
| **44th Livingston** | Hourly | 2009 | $45/hour with billings to reflect work by the tenths of an hour; Along with MAACS detailed statement of services, attach a copy of proof of prison visit. Attorneys will be appointed in strict compliance w/current statute & case law; any request to extend the time of appeal must adhere to the criteria for such requests & will be decided by the assigned judge. Attorneys must certify that they have returned copies of the court transcripts to the defendant or the cost of a new copy may be deducted from their reimbursement. | Travel - $10/hr ($1/tenth of hr) of driving as measured by driving time determined by MapQuest from attorney's office to 44th Cir Ct; any trip in excess of 150 miles requires documentation.<br>Copies- $0.15/page<br>Phone calls<br><br>Billings will be submitted in timely manner and processed as follows: **30 hrs or less may be processed by designated court personnel & forwarded to assigning judge for approval. **More than 30 hrs will be forwarded to the judge for review & amendment, if appropriate. **Work in excess of 40hrs must be brought to the attention of the judge for approval. Time spent preparing requests for extended time are not to be billed.<br>Extraordinary expenses must be approved before incurred. Billings may be amended by judge in the best interests of the administration of justice. |
| **45th St. Joseph** | Hourly | 1987 | $40/hour<br><br>Plea: $550 maximum<br>Bench: $900 maximum<br>Jury: $1,200 maximum | Expenses: Additional |

# APPELLATE ASSIGNED COUNSEL FEES BY CIRCUIT
# 2014

| CIRCUIT | BASIS | FEE SET | RATE | EXPENSES/COMMENTS |
|---|---|---|---|---|
| **46th Crawford Kalkaska Otsego** | Hourly | 1988 | $40/hour | Expenses: Additional<br>Mileage: Per county allowance |
| **47th Delta** | Hourly | 2002 | $45/hour | Expenses: Additional |
| **48th Allegan** | Hourly | 1987 | Judicial discretion<br><br>Non-cap cases: $40/hour (20 hrs max)<br>Cap cases: $50/hour (40 hrs max) | Expenses: Additional |
| **49th Mecosta Osceola** | Hourly | 1981 | $40/hour | Expenses: Additional |
| **50th Chippewa** | Hourly | 2005 | Non-prison offense: $50/hour<br>In-prison offense: $70/hour | Expenses: Additional |
| **51st Lake/Mason** | Hourly | 2009 | $60/hour<br><br>Plea: $700 maximum<br>Trial: $1,000 maximum<br>Jury: $1,500 maximum | Expenses: Additional |
| **52nd Huron** | Hourly | 2001 | $55/ hour | Expenses: Additional<br>Unusual number of hours and/or expenses must have prior approval. |

# APPELLATE ASSIGNED COUNSEL FEES BY CIRCUIT
# 2014

| | | | | |
|---|---|---|---|---|
| **53rd Cheboygan Presque Isle** | Schedule | 2014 | Conviction by Plea: $700<br>Conviction by Trial: $850<br><br>Oral Argument COA: $240<br><br>ONE Jail Interview: $125 or<br>ONE out-of-county prison Visit: $250 | Mileage: $.485/mile<br><br>In all post-sentence motions in the trial court, defendant shall be represented by the local trial attorney, except where the Court orders otherwise.<br><br>No attorney appointed by this Court to defend any indigent defendant shall receive a fee in excess of those expressed herein or shall incur any expense chargeable to the county in conduct of such defense, except ordinary witness fees, without written permission of the trial judge. |
| **54th Tuscola** | Hourly | 2013 | **$700 max - -** Pleas<br><br>**$1000 max** – Non-capital felony conviction by trial<br><br>**$1500 max** – Capital felony conviction by trial<br><br>Attorney time will be reimbursed at $60/hr. Time spent for travel included to and from court and from prison/jail is not allowed. | Mileage: current county rate<br>Copying: not exceed 10¢/pg<br>Phone: Actual costs<br>Postage: Actual costs (express mail; fed ex etc allowed **only** when necessary & could not be avoided.)<br>Transcripts not to exceed the statutory rate.<br>All support memo, receipts, etc must be included. |
| *The Chief Judge may approve reimbursement for fees in excess of the max if the atty submits a written request which sets out excess fees and states the issues that made case "unusual" or "complex". Must be submitted to Court Administrator 30 days after a decision on the appeal has been rendered.* | | | New fees effective in new assignments as of September 1, 2013. | |
| **55th Clare Gladwin** | Hourly | 2005 | Trial: $50/hour<br>Plea: $400<br>All Cases:<br>Oral Argument: $150 max<br>Jail Visit: $60 max Prison Visit: $120 max | Expenses: Included |
| **56th Eaton** | Schedule | 1978 | $40/hour | |
| **57th Emmet** | Hourly | 1995 | $40/hour | Expenses: Included<br>Extraordinary expenses with judicial approval. |

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

August 19, 2014

CLERK OF THE COURT
MONROE COUNTY CIRCUIT COURT
COURTHOUSE
106 EAST FIRST STREET
MONROE, MI 48161

**Re: People v Lonnie James Arnold**
**Lower Court No. 13-40406FH**

Dear Clerk:

This office has been appointed appellate counsel in the above case. To effectively represent Defendant Arnold, it is necessary for us to obtain a copy of the **complete circuit court record**.

If you have already sent one or more of these documents, you don't have to send a duplicate copy. Therefore, pursuant to MCR 7.210(A) and (D), we ask that you forward to us one copy of the entire file, including, but not limited to, the following documents:

Judgment of Sentence
Original Order of Probation
Request for Appellate Counsel
List of Docket Entries
Information
Copy of Complaint
Recommendation for Warrant
Return of Examining Justice on Preliminary Examination
Notice Concerning Confession-Admission
Sentencing Information Report
Forensic Report
Affidavit of Financial Condition
Order Appointing Previous Appellate Counsel
Copy of Warrant

Any **transcripts** filed with the clerk, including, but not limited to:

Preliminary Examination
Arraignment
Entire Trial or Plea
Sentencing Proceedings
Competency Hearing
Probation Violation Hearing
Waiver of Jury Trial
Motions/Hearings: Pre-trial and Post-trial
Sentencing Disposition Hearing

The Court of Appeals charges all delay in obtaining these records against counsel, unless counsel has filed a motion to compel production of the missing records in their court. Therefore, to avoid the need to file such a motion, your prompt attention and full compliance with this request is very important. Please contact Pamala Ross, Case Control Administrative Assistant, if you have any suggestions or problems. Thank you for your cooperation.

Sincerely,

Jonathan Sacks
Deputy Director

/plr
Iden No. 27775T-J

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

August 19, 2014

LINDA HAMMAC
COURTHOUSE
106 EAST FIRST STREET
MONROE, MI 48161

**Re: People v Lonnie James Arnold**
**Circuit Court No. 13-40406FH**

Dear Ms. Hammac:

On August 11, 2014, this office was appointed as appellate counsel in the above case. The order of appointment listed you as the reporter responsible for transcribing the proceedings in this case and ordered their preparation. The transcripts are due for filing **Monday, November 10, 2014,** 91 days from the order.

Pursuant to MCR 7.210(B)(3)(a), we request that you immediately furnish us with a stenographer's certificate, if you have not already done so. If a stenographer's certificate is not filed in accordance with the court rule we may, without further notice to you, file a motion to show cause. In addition, please understand that if you do not timely file the transcripts or file a motion for extension of time, we must immediately file a motion for an order to show cause under MCR 7.210(B)(3)(f) and MCR 7.211(A).

Please contact Pamala Ross, Case Control Administrative Assistant, if you have any questions or if we can be of any help. Thank you for your cooperation.

Sincerely,

Jonathan Sacks
Deputy Director

/plr
Iden No. 27775T-J

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

August 19, 2014

Steven M. Hyder
Attorney at Law
19 1/2 E. 1st Street
P.O. Box 2243
Monroe, MI 48161

Re: **People v Lonnie James Arnold**
**Lower Court No. 13-40406FH**

Dear Attorney Hyder:

The State Appellate Defender Office has been assigned to handle the appeal of **Lonnie James Arnold**, whom you represented at trial in **Monroe County Circuit Court**. An attorney has not yet been assigned the case, but I wanted to let you know that an appeal has been taken.

I am writing to request that you forward copies of the police reports, medical and psychological reports, school records, and any other discovery materials as soon as possible. See MCR 6.005(H)(5). If copying or mailing is a problem, we will be pleased to copy the documents, return the originals, and reimburse any reasonable expenses. The materials can also be emailed to ao@sado.org. The discovery material can significantly affect the strategy of an appeal and make it easier to understand what happened at trial. It is critical to get this material at the earliest stage of the appeal.

Thanks in advance for your prompt cooperation in forwarding this material. If you have any questions, or need further information, please call.

Sincerely,

Jonathan Sacks
Deputy Director

/plr
Iden No. 27775T-J

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965-0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

August 19, 2014

MONROE ADULT PROBATION DEPARTMENT
LORI LEHMANN, SUPERVISOR
29 WASHINGTON STREET
MONROE MI, 48161

**Re: People v Lonnie James Arnold**
**Lower Court No. 13-40406FH**
**DOB: 05/08/1967**
**MDOC No. 215400**

Dear Sir/Madam:

Our office has been appointed to represent the above-named Defendant on appeal. By statute and court rule, and upon written request of the appellate attorney, you must provide a copy "of the presentence investigation report and *any attachments to the report*" MCL 771.14 (7); MCR 6.425(C).

In order to provide effective representation on appeal, we must have the original report, any updated reports (including those prepared for a probation violation), all attachments, the sentencing guidelines scoring (the sentencing information report), the basic information report, and any report, letter, notes, comments, recommendation or other information that was provided to the sentencing judge. *See People v* Frohriep, 403 Mich 820 (1978).

We would ask you to provide a copy of the presentence report and the attachments, guidelines and other documents to us at our **Detroit** address.

Thank you for your anticipated cooperation.

Sincerely,

Jonathan Sacks
Deputy Director

/plr
Iden No. 27775T-J

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
ACTING DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING OFFICE:**
101 N. WASHINGTON, 14TH FLOOR
LANSING, MI 48913-0001
Phone: 517.334.6069 • Fax: 517.334.6987

August 19, 2014

Honorable Michael A. Weipert
38th Judicial Circuit Court
106 East First Street
Monroe, MI 48161

**Re: People v Lonnie James Arnold**
**Court No. 13-40406FH**

Dear Judge Weipert:

On August 11, 2014, your Honor appointed this office as appellate counsel in the above-entitled cause.

Enclosed please find an original and two copies of a form order for production of transcript(s), which I have prepared for your signature. Please sign the enclosed order, serve a copy on the court reporter, keep a copy for the court file, and return to me a true copy of the same.

**Pursuant to MCR 7.210(B)(3)(a), I ask that the court reporter file a Stenographer's Certificate of this request.**

Thank you for your cooperation in this matter.

Sincerely,

Jonathan Sacks
Deputy Director

Enclosures
cc: Court of Appeals
Iden No. 27775T

SADO 27775T/PR

Copies to: Trial Court, Court Reporter(s) Recorder(s), Assigned Counsel, Defendant, Prosecutor, Court of Appeals

| STATE OF MICHIGAN<br>JUDICIAL CIRCUIT<br>MONROE COUNTY | ORDER FOR PRODUCTION OF TRANSCRIPT(S) | LC NO. 13-48406FH<br>CA NO. |
|---|---|---|

Court Address: Monroe County Circuit Court, Courthouse, 106 East First Street, Monroe, MI 48161

Court telephone no.

| PEOPLE OF THE STATE OF MICHIGAN | OFFENSE NAME | MCL CITATION | SENTENCE(S) |
|---|---|---|---|
| v | | | |
| Defendant name, address, date of birth, and inmate no. (if known)<br>LONNIE JAMES ARNOLD | MCL ___.___ | | |

1. On August 11, 2014, The State Appellate Defender Office, 3300 Penobscot Building, 645 Griswold, Detroit, MI 48226, (313) 256-9833, was appointed counsel for defendant in post-conviction proceedings.

IT IS ORDERED:

2. The court reporter(s)/recorder(s) shall file with the trial court clerk the transcripts checked below and any other transcripts requested by counsel in this case not previously transcribed. Transcripts shall be filed within 28 days for pleas or 91 days for trials from the date ordered or requested. (MCR 7.210(B)). Reporter(s)/recorder(s) shall be paid as provided by law.

| TRANSCRIPT ORDERED | REPORTER/RECORDER NAME | DATE(S) OF PROCEEDINGS |
|---|---|---|
| Arraignment | Nicole Long | May 17, 2013 |
| Pretrial Hearing | Nicole Long | May 31, 2013 |
| Pretrial Hearing | Nicole Long | June 21, 2013 |
| Hearing | Nicole Long | July 25, 2014 |
| Motion Hearing | Nicole Long | October 25, 2013 |
| Previous Sentence | Nicole Long | January 9, 2014 |
| Sentencing | Nicole Long | April 3, 2014 |
| | | |

3. The clerk shall immediately send to counsel a copy of the transcripts ordered above or requested by counsel as they become available. The clerk shall also forward documents upon request by counsel. [MCR 6.433].

Date

Judge Michael A. Weipert

Bar No.

*CERTIFICATE OF MAILING*

***I certify that on this date I mailed a copy of this order to appointed counsel, court reporter(s)/recorder(s), prosecutor, Court of Appeals.***

*DATED:* _____

*Signature*

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

{Date_for_Pleading}

{Client_Mr_Ms} {client_name_lower}
No. {Prison_No}
{Client_Address}

Dear {Client_Mr_Ms} {Client_Last_Name}

I am sorry to inform you that the Supreme Court has denied the Application for Leave to Appeal. Enclosed is a copy of the order. I must also inform you that I can no longer represent you should you desire to pursue further appeals. Although I remain sympathetic to your effort to gain early release, I must give my attention to other clients whose appeals are just beginning.

In the event you decide to appeal further by yourself, you have these options:

1. Appeal any exhausted federal issues directly to the United States Supreme Court by filing with that court a Petition for Writ of Certiorari **within 90 days** of the Michigan Supreme Court order denying leave.

2. Appeal any exhausted federal issues to federal court via a petition for federal habeas corpus in United States District Court. Please note that a recent change in federal habeas corpus law now requires a person to file any petition for habeas corpus **within one year.** You should be aware of the procedural requirements of 28 USC 2254, which should be available in the prison library.

Forms for use in federal habeas corpus actions are available from the United States District Court, either in Detroit or Grand Rapids, depending on where you are incarcerated, or I will send you some forms upon your request.

3. If there are additional issues which you believe you should raise in the state courts, you may go back to the trial court with a motion for relief from judgment under Michigan Court Rules Subchapter 6.500, and if denied, appeal it through the state court system. A person is allowed to file only one Motion for Relief from judgment, so if you do decide to file one, make sure that it is complete and done correctly. There are no time limits for filing a Motion for Relief from Judgment, but once you file it there will be numerous time limits.

I make no judgment as to whether you should go further with appeal, but the information may be of use if you so decide. Of course, if you can afford an attorney, you are entitled to hire another attorney for further appeals.

Your case will now be closed in our office. If you would like the transcripts and lower court records that were provided to this office in connection with your appeal, please write and I will have them sent to you free of charge if I have not already done so. Otherwise, they will be placed in storage by this office for the next 25 years, after which they may be destroyed. Please bear in mind that once your file is closed, it may take several weeks to retrieve it. I wish you the best of luck in your future endeavors.

Sincerely,

Marilena David-Martin
Assistant Defender

Enclosure
cc: File {IDEN_No}

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

{Date_for_Pleading}

{client_name_lower}
No. {Prison_No}
{Client_Address}

Dear {Client_Mr_Ms} {Client_Last_Name}:

The Court of Appeals has scheduled your case for oral argument on _____ at 10:00 a.m. in _____ located at _____. A copy of the notice is enclosed. I will be there to argue your case to the court.

You cannot attend the argument, but it is open to the public and any family members or friends are welcome to attend. The Judges will not decide the case at the argument but will issue a written opinion, most likely within the next few weeks to a few months after the argument. I will send you a copy of the opinion when I receive it and I will discuss next steps based on the opinion.

Sincerely,

Marilena David-Martin
Assistant Defender

Enclosure
cc: File {IDEN_No}

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

{Date_for_Pleading}

{client_name_lower}
No. {Prison_No}
{Client_Address}

Dear {Client_Mr_Ms} {Client_Last_Name}:

I write with good news. The Court of Appeals has granted leave in your case. This means that the court wants to take a closer look at your appeal and will decide the appeal on the merits. The court's order is enclosed.

The next step is for me to file a Brief on Appeal, which will be the same as the Application for Leave to Appeal that I previously filed. I will do this as soon as possible, likely within the next two weeks. The prosecutor is then able to file a response brief. Then, your case will be set for oral argument. This entire process may take a year or more. I will continue to keep you posted.

Please feel free to contact me with any questions.

Sincerely,

Marilena David-Martin
Assistant Defender

Enclosure
cc: File {IDEN_No}

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

{Date_for_Pleading}

{client_name_lower}
No. {Prison_No}
{Client_Address}

Dear {Client_Mr_Ms} {Client_Last_Name}:

I am sorry to inform you that the Court of Appeals has affirmed your convictions. I am enclosing a copy of the Court's opinion.

If you would like, I can continue to represent you and file an application for leave to appeal this decision with the Michigan Supreme Court. Unless you tell me that you do not want me to do so, I will file this application *by* _____, 56 days from the Court of Appeals decision. ADDRESS SUPPLEMENTAL BRIEF IF APPROPRIATE.

If you have any questions or concerns, feel free to write.

Sincerely,

Marilena David-Martin
Assistant Defender

Enclosure
Cc: File {IDEN_No}

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

{Date_for_Pleading}

{client_name_lower}
No. {Prison_No}
{Client_Address}

Dear {Client_Mr_Ms} {Client_Last_Name}:

I am sorry to inform you that the Court of Appeals has affirmed your conviction and sentence. Enclosed is a copy of that opinion dated _____.

I am also sorry to inform you that this office can no longer represent you in the event that you choose to further appeal your conviction and sentence. This brings our attorney-client relationship to an end. If you can afford to hire a private lawyer to help you, you may of course do that instead.

If you wish to seek review in the Supreme Court, you may also proceed on your own. I am enclosing an *in pro per* application packet if you choose to file yourself. Be aware that an application for leave to appeal must be filed, if at all, within 56 days of the day the Court of Appeals issued its decision. Since the Court of Appeals issued its decision in your case on _____, then your application to the Supreme Court must reach that court by _____ at the latest.

I will soon close your file. If there is anything from your file that you would like for your records, please request it now. We will maintain an electronic copy of your file and anything that cannot be stored electronically will be placed in storage for 25 years. At the end of 25 years, it will be destroyed.

I am truly sorry I couldn't have helped you more.

Sincerely,

Marilena David-Martin
Assistant Defender

Enclosure
cc: File {IDEN_No}

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

{Date_for_Pleading}

{client_name_lower}
No. {Prison_No}
{Client_Address}

Dear{Client_Mr_Ms}{Client_Last_Name}:

Enclosed for your records is a copy of the prosecutor's brief on appeal. The next step is for the Court of Appeals to schedule oral arguments. I will let you know when that is scheduled.

Sincerely,

{Attorney_Name_Lower}
Assistant Defender

Enclosure
Cc: File {IDEN_No}

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

{Date_for_Pleading}

{client_name_lower}
No. {Prison_No}
{Client_Address}

Dear {Client_Mr_Ms} {Client_Last_Name}:

Enclosed, for your personal records, please find a copy of the Brief on Appeal that I have filed on your behalf in the Court of Appeals.

I have raised all of the issues in your case that appear to have merit. If you believe there are issues which should have been, but were not raised, you have the right to file a supplemental brief in the Court of Appeals. I am able to provide clerical and procedural assistance to you (See Administrative Order 2004-6, Standard 4, adopted by the Michigan Supreme Court) in preparing such a supplemental brief. This means that if you write it, my office will type it and file it. Your supplemental brief must be received by the Court within 84 days after the date of SADO's brief, which would fall on _____. That means you must mail it to me at least a week in advance of that date.

If you have any questions about this brief, please write. The next step will be for the prosecution to file their response brief. I will contact you as soon as there are any further developments in the appeal.

Sincerely,

{Attorney_Name_Lower}
Assistant Defender

Enclosure
cc: File

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

{Date_for_Pleading}

{client_name_lower}
No. {Prison_No}
{Client_Address}

Dear {Client_Mr_Ms}{Client_Last_Name}:

I am the attorney who has been designated to prepare your appeal in circuit court case {LC_No}. I am in the process of reading the transcripts and other documents in your file. As soon as I am completely familiar with your case, I will make arrangements to visit you. At our visit we will discuss the background of the case as well as possible issues to raise on appeal. I will try to give you advance notice of our visit so that you will have time to prepare.

You probably already know a little about how the court system and appeals work. However, in case you don't, I will go over the appellate process a little bit here. You can also write me if you still have any questions or wait until I visit you to ask them.

Your appeal is to the Michigan Court of Appeals, the court above the Circuit Court, the court that convicted you. The Court of Appeals will not retry the facts of your case. They do not function like a jury to decide whether you are guilty or whether the witnesses told the truth. The appellate court looks only at the process by which you got convicted and sentenced to make sure that the process was fair and by the rules. The Court of Appeals reviews such legal issues as the admissibility of evidence, the correctness of jury instructions, the proper length of sentences, and so on.

We file a brief in the Court of Appeals saying why you deserve a new trial and/or a new sentencing. The prosecutor will most likely answer with a brief that says you don't deserve anything. The Court of Appeals schedules a formal date for your appeal to be heard and then several months after that date the Court issues its written opinion giving the result of your appeal. The entire appeal process takes a long time, but I will keep you informed all during the appeal, including sending you copies of the briefs, orders, and opinions.

Only a small percentage of appeals actually win. I cannot guarantee you that we will win anything, but I will try my best. My office and I are very experienced in appeals and we win a higher than average percentage of appeals.

The law protects the confidence between a lawyer and a client. Nothing you and I talk about can be used as evidence in a court of law. However, if you discuss your case with fellow inmates or jailhouse lawyers, the privilege of confidential status does not apply. Also, if you tell someone else what you told your lawyer, you are waiving or giving up the attorney-client privilege.

Also, I have enclosed a flyer about an event that your family and friends may be interested in attending. If you know anyone who might be interested in attending the event, you can send them the enclosed flyer, or write to me with their contact information and I will send them a flyer.

I will need you to keep me informed of your location. If you are moved or an emergency arises, I will accept a collect call from you.

If questions arise prior to our meeting, please feel free to write.

Sincerely,

Marilena David-Martin
Assistant Defender

cc: File {IDEN_No}

# STATE APPELLATE DEFENDER OFFICE
## Detroit

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING OFFICE:**
101 N. WASHINGTON, 14TH FLOOR
LANSING, MI 48913-0001
Phone: 517.334.6069 • Fax: 517.334.6987

{Date_for_Pleading}

{client_name_lower}
No. {Prison_No}
{Client_Address}

Dear Mr. {Client_Last_Name}:

I am the staff attorney recently assigned to handle your appeal from your conviction(s) in {county_Lower} County Circuit Court. After I have read the transcripts in your case and reviewed the court records, I will arrange a time to come visit you. I will try to write you in advance to let you know when I plan to come visit you so that you can have some time to prepare.

In case you are not familiar with the appellate process in Michigan, I will briefly explain it. A plea appeal is different than an appeal following a jury trial. By pleading no contest or guilty, you generally waive your right to have the Court of Appeals automatically review your conviction or sentence. However, you may still ask the Court of Appeals if it is willing to hear your appeal.

In general, an appeal is based upon matters that are part of the record in the trial court. My job as your appellate attorney is to look for any errors in the trial court proceedings and to bring them before the Court. If there are errors, I will write a brief, setting out the facts, the law and why I believe you are entitled to relief, generally plea withdrawal or resentencing. The prosecutor will also file a brief, generally saying that we are wrong and that there were no errors. According to the present court rules, any errors in the plea proceeding must first be "raised" or brought to the attention of the trial judge by way of a motion to withdraw guilty plea. If the trial court denies the motion then I would file an application for leave to appeal in the Court of Appeals.

If the trial judge or Court of Appeals grants plea withdrawal, you will then face all of the original charges in your case, plus any charges the prosecutor agreed not to bring against you as part of the plea deal. The prosecutor could also add charges that could have been made but were not. If you withdraw your plea and are convicted of any higher charges it is possible that you could be sentenced to a longer sentence.

When we meet we can discuss the particulars of your case and the possible alternatives for appeal. I will want to hear why you want to appeal. Before we visit, I want you to think about the risk, if any, of plea withdrawal in your case. You may want to consider appealing only your sentence, if there are any legal challenges to be raised.

As you may already know, most sentences are governed by the Michigan Sentencing Guidelines. We will discuss the scoring of your guidelines when we visit.

Sentencing appeals also have some risk. Generally, the only avenue by which to request a sentence reduction (i.e., "time cut"), is through the resentencing process. In the decision of People v Spangler and Mazzie, 429 Mich 29 (1987), the Michigan Supreme Court held that at a resentencing, the trial court can consider any conduct that it was not aware of at the time of defendant's original sentencing including conduct (and a defendant's incarceration record) between sentencing and resentencing or more details about the crime. Thus, in rare circumstances, a trial court may increase a defendant's sentence at a resentencing proceeding.

Most sentencing errors must be raised in a similar fashion to plea withdrawal claims. That is, we will often proceed first with a motion in the trial court. If the motion for resentencing is granted in the trial court, you will be resentenced - probably in approximately four to six weeks. The entire motion process in the trial court is **much** shorter than the standard appeal by right in the Court of Appeals.

It is my responsibility to be as honest as I can about assessing the strength or weakness of your case and to explain, as best I can, the choices you must make and any risks you face if you successfully appeal your conviction and/or sentence. It is your responsibility to answer my questions fully and question me openly when you feel that something is not clear. An attorney's job is to advise. As you are doing the time, the ultimate decision regarding whether or not to go forward with moving to withdraw your plea or for resentencing are up to you. But we must work together.

Only a small percentage of appeals actually win. I cannot guarantee you that we will win anything, but I will try my best.

The law protects the confidence between a lawyer and a client. Nothing you and I talk about can be used as evidence in a court of law. However, if you discuss your case with anyone else, the privilege of confidential status does not apply. Also, if you tell someone else what you and your lawyer told each other or wrote to each other, you are waiving or giving up the attorney-client privilege. Do not discuss your case with other people because you might say something that could be used against you later.

Also, I have enclosed a flyer about an event that your family and friends may be interested in attending. If you know anyone who might be interested in attending the event, you can send them the enclosed flyer, or write to me with their contact information and I will send them a flyer.

I will be in contact with you soon. Please remember to keep me updated on your location and contact information.

Sincerely,

Marilena David-Martin
Assistant Defender

C: File - 26673

# STATE APPELLATE DEFENDER OFFICE

DAWN VAN HOEK
DIRECTOR

JONATHAN SACKS
DEPUTY DIRECTOR

www.sado.org
Client calls: 313.256.9822

MAIN OFFICE:
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

LANSING AREA:
Phone: 517.334.6069 • Fax: 517.334.6987

July 29, 2014

Clerk
Wayne County Circuit Court
Criminal Division
Frank Murphy Hall of Justice
1441 St Antoine
Detroit, MI 48226

Re: **People** v **Kenneth Earl Starkey**
Lower Court No. 04-9495

Dear Clerk:

Enclosed please find the original of the following: Praecipe and Notice of Hearing for Thursday August 14th at 9am; Motion to Vacate Probation Violation Plea and Sentence; Motion for Indigency Determination Hearing; Motion to Vacate Restitution; Certificate of Service for filing in your Court.

Thank you for your cooperation.

Sincerely,

Marilena David-Martin
Assistant Defender

Enclosure

cc: Wayne County Prosecutor
Hon. James R. Chylinski
Mr. Kenneth Earl Starkey
File

**STATE OF MICHIGAN**

**IN THE WAYNE COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

**Lower Court Nos.** 04-9495

**Honorable James R. Chylinski**

-vs-

**KENNETH EARL STARKEY**

Defendant-Appellant.

_____/

TO THE ASSIGNMENT CLERK:

Please place a MOTION TO VACATE PROBATION VIOLATION PLEA AND SENTENCE, MOTION FOR INDIGENCY DETERMINATION HEARING AND MOTION TO VACATE RESTITUTION on the Motion Docket for **Thursday August 14th at 9 am** before Judge James R. Chylinski.

Date: July 29, 2014

STATE APPELLATE DEFENDER OFFICE
MARILENA DAVID-MARTIN (P73175)
3300 Penobscot Building, 645 Griswold
Detroit, MI 48226
(313) 256-9833

NOTE: SEE RECORDER'S COURT RULE 18

**PROOF OF SERVICE**

I swear that on July 29, 2014 I served a copy of the attached praecipe upon the Wayne County Prosecutor by: personal service

Attorney for Defendant

Subscribed and sworn to before me
July 29, 2014.

Joanne M Mortiz

JOANNE M. MORTIZ
Notary Public, Wayne County, Michigan
My commission expires: 9/2/2019

**STATE OF MICHIGAN**

**IN THE WAYNE COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

**Lower Court Nos.** 04-9495

**Honorable James R. Chylinski**

-vs-

**KENNETH EARL STARKEY**

Defendant-Appellant.
_____/

**CERTIFICATE OF SERVICE**

STATE OF MICHIGAN )
) ss.
COUNTY OF WAYNE )

**MARILENA DAVID-MARTIN**, certifies that on July 29, 2014, she hand filed one copy of:

PRAECIPE AND NOTICE OF HEARING

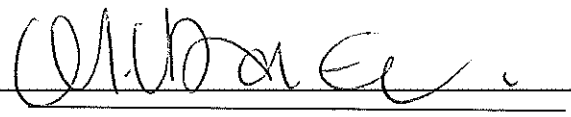
**MOTION TO VACATE PROBATION VIOLATION PLEA AND SENTENCE**

**MOTION FOR INDIGENCY DETERMINATION HEARING**

**MOTION TO VACATE RESTITUTION**

with the circuit court clerk for filing and hand delivered one copy of same to:

WAYNE COUNTY PROSECUTOR
Appellate Division
1100 Frank Murphy Hall of Justice
1441 St Antoine Detroit, MI 48226



**MARILENA DAVID-MARTIN (P73175)**

**STATE OF MICHIGAN**

**IN THE WAYNE COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

**Lower Court Nos.** 04-9495

**Honorable James R. Chylinski**

-vs-

**KENNETH EARL STARKEY**

Defendant-Appellant.
_____/

**WAYNE COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee

**MARILENA DAVID-MARTIN (P73175)**
Attorney for Defendant-Appellant

**MOTION TO VACATE PROBATION VIOLATION PLEA AND SENTENCE**

**MOTION FOR INDIGENCY DETERMINATION HEARING**

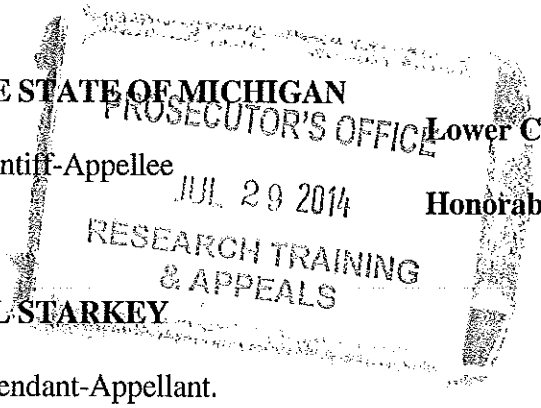
**MOTION TO VACATE RESTITUTION**

**STATE APPELLATE DEFENDER OFFICE**

**BY: MARILENA DAVID-MARTIN (P73175)**
**Assistant Defender**
645 Griswold
~~3300 Penobscot Building~~
Detroit, Michigan 48226
(313) 256-9833

**STATE OF MICHIGAN**

**IN THE WAYNE COUNTY CIRCUIT COURT**




**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-vs-

**KENNETH EARL STARKEY**

Defendant-Appellant.

_____/

**Lower Court Nos.** 04-9495

**Honorable James R. Chylinski**

**MOTION TO VACATE PROBATION VIOLATION PLEA AND SENTENCE**
**MOTION FOR INDIGENCY DETERMINATION HEARING**
**MOTION TO VACATE RESTITUTION**

**NOW COMES** Defendant **KENNETH EARL STARKEY**, by and through his attorney, the **STATE APPELLATE DEFENDER OFFICE**, by **MARILENA DAVID-MARTIN (P73175),** and in support of the within motions says as follows:

1. On January 14, 2014, Mr. Starkey appeared before Your Honor for a probation violation for failing to pay restitution stemming from a 2004 plea conviction to attempted breaking and entering a building with intent, MCL 750.110. Mr. Starkey informed the Court that he had no ability to pay the restitution as he was unemployed, addicted to drugs and generally struggling to survive. (1/14/14, 3-4). He did not plead guilty to the violation and did not have a hearing on the violation as required by MCR 6.445.

5. Sentencing took place on January 30, 2014. The Court found that Mr. Starkey either "couldn't or wouldn't pay" restitution over the years that he was on probation and stated that it did not "have anymore time on probation" to give to Mr. Starkey. (1/30/14, 4). Mr. Starkey explained that he had no ability to pay the restitution. Mr. Starkey's son died

unexpectedly, which sent him into a depressed state where he turned to drugs and lost his job. (1/30/14, 3-4). The Court stated that it had no other choice but to sentence Mr. Starkey to prison and to recommend that payment of the $33,000 restitution be made a condition of parole. (1/30/14, 4). Mr. Starkey was sentenced to 3 months to 5 years imprisonment with 34 days credit.

6. The State Appellate Defender Office was appointed to perfect an appeal and/or pursue post-conviction remedies on March 6, 2014.

8. This motion is properly filed within six months of the sentencing date, which falls on July 30, 2014. MCR 6.310(C); MCR 6.429(B)(3).

9. Mr. Starkey's raises the following issues in this motion and the accompanying brief in support:[1]

a. Mr. Starkey's probation violation plea and sentence must be vacated as none of the required procedures set forth in MCR 6.445 took place at the probation violation hearing.

b. Mr. Starkey is entitled to an indigency determination hearing before being imprisoned for failure to pay restitution consistent with *Bearden v Georgia,* 461 US 660 (1983).

c. The restitution in this case must be vacated where it has never been verified despite the Court's order and where the amount extends beyond the offense for

[1] Mr. Starkey has also filed a concurrent Application for Leave to Appeal in the Court of Appeals on the grounds that the sentence imposed on January 30, 2014 was an improper departure sentence. His guideline range was 0 to 9 months, an intermediate sanction cell, which called for a sentence of anything but prison absent substantial and compelling reasons for a departure. MCL 769.34(3) & (4)(a). The Court did not acknowledge that its January 30, 2014 prison sentence was a departure and did not state any reasons on the record for departing. Mr. Starkey has currently served 7 months in the MDOC and has not yet been granted parole because they were not able to fit him into the proper programing before he reached his minimum 3 month sentence. The parole board will not review him again until March of 2015 when he has had an opportunity to complete that programming. (Counsel confirmed this information with the Legislative Ombudsman's Office on June 27, 2014).

which Mr. Starkey was charged and convicted in violation of *People v McKinley*, __ Mich __ (Decided June 26, 2014).

**WHEREFORE**, Mr. Starkey respectfully requests that this Honorable Court vacate his probation violation plea and sentence, grant him an indigency determination hearing if the court is inclined to continue his custody for failure to pay, and vacate restitution or alternatively, to set a hearing to verify the amount.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: 

**MARILENA DAVID-MARTIN (P73175)**
Assistant Defender
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Date: July 29, 2014

**STATE OF MICHIGAN**

**IN THE WAYNE COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

**Lower Court Nos.** 04-9495

**Honorable James R. Chylinski**

-vs-

**KENNETH EARL STARKEY**

Defendant-Appellant.
_____/

**WAYNE COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee

**MARILENA DAVID-MARTIN (P73175)**
Attorney for Defendant-Appellant

# BRIEF IN SUPPORT

**STATE APPELLATE DEFENDER OFFICE**

**BY: MARILENA DAVID-MARTIN (P73175)**
**Assistant Defender**
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

## STATEMENT OF FACTS

On October 6, 2004, Defendant Kenneth Earl Starkey pled guilty to one count of attempted breaking and entering with intent, MCL 750.110. (Plea 10/6/04, 5, 7-9). The circumstances of the offense involved Mr. Starkey and two other men entering a building that used to be a hospital and being caught by a witness. Police were called and the defendants were arrested on the scene. (10/6/04, 7; See Excerpt of Presentence Report (PSR), Appendix A). On December 3, 2004, the Honorable James R. Chylinski sentenced Mr. Starkey in accordance with the sentence agreement to 4 years probation. (Sentence 12/3/04, 4-5).

In dis cussing restitution at the time of sentencing, the prosecutor informed the Court that "[t]his was the case where the ceiling was stripped of the copper, and it's still being determined what the damage was before" and that the estimate from the building owner was a round figure of $33,000 per defendant. (12/3/04, 4). Defense counsel objected that there was no verification of that amount. (12/3/04, 4). The Court ordered Mr. Starkey to pay $33,000 in restitution with and ordered "that it should be verified." (12/3/04, 4). The restitution amount has never been verified.

On February 7, 2007, Mr. Starkey went before the Court for a probation violation for failing to report to probation. Mr. Starkey explained that he stopped reporting to probation because he could not afford to pay probation the seven hundred dollars a month they were requiring because he was unemployed and was in drug rehab. (Probation Violation 2/7/07, 5). He turned himself into the court because he had just gotten off of drugs and was trying to get his life together. (2/7/07, 6). He did not plead guilty to the violation and did not have a hearing on the violation as required by MCR 6.445.

Sentencing took place on April 5, 2007 and Mr. Starkey again explained that he could not afford to comply with probation. (Probation Violation Sentence, 4/5/07, 4). He "stopped goin' to probation 'cause I couldn't afford it, seven hundred and somethin' dollars a month." (4/5/07, 4). He was sentenced to a continued two years of probation and the Court indicated it would sentence him to prison if he violated probation again for failing to pay restitution. (4/5/07, 6).

Three months later, in July 2007, probation issued a violation warrant for failure to make restitution payments. (Warrant, Appendix B). Mr. Starkey absconded from probation and was not picked up on the warrant until January 2014 when he was pulled over for a traffic violation. (1/14/14, 4).

On January 14, 2014, Mr. Starkey appeared before Your Honor for the instant probation violation for failing to pay restitution. Trial counsel informed the court that Mr. Starkey had no ability to pay the restitution as he was unemployed and generally struggling to survive. (Probation Violation 1/14/14, 3-4). Mr. Starkey did not plead guilty to the violation and did not have a hearing on the violation as required by MCR 6.445.

Sentencing took place on January 30, 2014. The Court stated that Mr. Starkey either "couldn't or wouldn't pay" restitution over the years that he was on probation and stated that it did not "have anymore time on probation" to give to Mr. Starkey. (1/30/14, 4). Mr. Starkey explained that he had no ability to pay the restitution and that his son died unexpectedly, which sent him into a depressed state where he turned back to drugs and lost his job. (1/30/14, 3-4). The Court stated that it had no other choice but to sentence Mr. Starkey to prison and to recommend that payment of the $33,000 restitution be made a condition of parole. (1/30/14, 4). Mr. Starkey was sentenced to 3 months to 5 years imprisonment with 34 days credit.

Currently incarcerated, Mr. Starkey files the within motion and requests relief.

## I. MR. STARKEY'S PROBATION VIOLATION PLEA AND SENTENCE MUST BE VACATED WHERE NO PROBATION VIOLATION HEARING OR PLEA OCCURRED AND WHERE THE COURT DID NOT COMPLY WITH MCR 6.445.

Mr. Starkey's probation violation plea in this case must be vacated as none of the procedures set forth in MCR 6.445 took place at the probation violation hearing on January 14, 2014. Mr. Starkey was not arraigned or advised of his right to contest the charge or advised of his right to an attorney at the hearing. MCR 6.445(B); (1/14/14, 3-6). No hearing was held and there was no subsequent judicial fact finding regarding Mr. Starkey's guilt. MCR 6.445(E); (1/14/14, 3-6). Mr. Starkey did not enter into a plea to the probation violation and certainly was not advised of the rights he waived if he entered a plea or advised of the maximum sentence for the offense. MCR 6.445(F); (1/14/14, 3-6).

Mr. Starkey's conviction of this probation violation must be vacated where no factual determination supported by a preponderance of the evidence that a probation violation took place was made, *People v Buckner,* 103 Mich App 301 (1980); *People v Pillar*, 233 Mich App 267 (1988), and where the Court failed to comply in all respects with MCR 6.445. *People v Burbank*, 461 Mich 870 (1999). *People v Alame*, 129 Mich App 686 (1983).

Just recently, the Court of Appeals vacated the conviction and sentence in *People v Columbus Wayne Thompson*, Docket No. 318143, where similar circumstances presented:

> In lieu of granting the delayed application for leave to appeal, the judgment of sentence entered in this case on March 13, 2013 is VACATED and this case is REMANDED to the trial court to conduct a proper probation violation hearing and any other appropriate proceedings. The trial court did not conduct a proper probation violation hearing as required by MCR 6.445(E)(1), and its determination that defendant violated his probation was not supported by proper factual findings under MCR 6.445(E)(2). We note that the contents of the police report relied on by the trial court did not constitute verified facts in the record to support a finding of a probation violation by a preponderance of the

evidence. *People v Pillar*, 233 Mich App 267, 269-270; 590 NW2d 622 (1998). [Order, Appendix C].

Accordingly, Mr. Starkey's conviction and sentence must be vacated and he is entitled to an appropriate probation violation hearing.

## II. MR. STARKEY'S PRISON SENTENCE FOR FAILING TO PAY RESTITUTION MUST BE VACATED IN ACCORDANCE WITH *BEARDEN V GEORGIA,* 461 US 660 (1983) WHERE HE WAS IMPROPERLY IMPRISONED WITHOUT AN INDIGENCY DETERMINATION HEARING AND WHERE THE RECORD SUPPORTED HIS INABILITY TO PAY DUE TO INDIGENCY.

The United States Supreme Court has long held that depriving a person of liberty for failure to pay a fine, costs or restitution that he or she cannot afford violates fundamental equal protection and due process principles. *Bearden v Georgia*, 461 US 660, 672-673 (1983). Indeed, the U.S. and Michigan Constitutions, as well as state laws and court rules, require that a sentencing judge conduct an indigency determination for each defendant before jailing him or her for failure to pay costs and fines.

In *Bearden,* the U.S. Supreme Court found that a court, prior to jailing a defendant "for failure to pay a fine or restitution . . . must inquire into the reasons for the failure to pay." *Bearden*, 461 US at 672. Where an individual willfully refuses to pay or fails to make sufficient bona fide efforts to pay, the court may jail him or her. *Id.* But where an individual "[can]not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measure of punishment other than imprisonment," such as extending the time for making payments, reducing the fine, or requiring community service. *Id.* "To do otherwise would deprive the [defendant] of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 673; *see also Alkire v Irving*, 330 F3d 802, 816 (CA 6, 2003) (imprisonment for failure to pay debt violates both the Thirteenth and Fourteenth Amendments).

Michigan state laws also prohibit jailing individuals who cannot pay certain court obligations because they are too poor. *See* MCL 780.766(14); MCL 769.1f(7); MCL 769.1a(14); MCL 771.3(8); *People v Ford*, 410 Mich 902 (1981) ("Probation shall not be revoked for failure to pay ... court costs absent appropriate findings of fact and conclusions of law on defendant's claim of indigency."). Similarly, the Michigan Court Rules permit exceptions to the payment of court fines and costs for good cause. *See* MCR 1.110 ("Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown."). If "good cause" in MCR 1.110 is interpreted consistently with the U.S. and Michigan Constitutions, it must include an exception for an indigent person who is unable to pay court fines and costs.

Mr. Starkey was consistent at every court appearance that he did not have the funds to pay restitution in this case. In fact, when he was originally sentenced for the underlying offense, probation recommended a one year term of probation, but Mr. Starkey himself expressed concern that he would never be able to pay off that amount in that time:

> THE COURT: The thirty-three thousand three hundred restitution.
>
> How long will it take you to pay that, sir, **assuming that's right?**
>
> [DEFENSE COUNSEL]: We've discussed that, Your Honor, and I understand they recommended one year probation.
>
> **But he's indicated to me that there's no possibility that he can honestly make that within one year.**
>
> **He thinks he's going to need five years, in order to, to come up with that amount of restitution.**
>
> THE COURT: All right.
>
> Well, let's, let's do it this way.
> Let's make it four years. And then if you need an extension, as long as you're current and everything, you should be okay.

But the four years probation.

Well keep your probationary costs minimal. It will be one sixty—five a year, plus fifteen dollars a month.

And restitution has to be paid by consistent installments, okay?

DEFENDANT: Okay. [12/3/04, 5 (emphasis added)].

In order to pay off $33,000 in restitution in four years, Mr. Starkey would have had to pay approximately $687 per month. And while that time period was Mr. Starkey's suggestion, the impossibility of that payment scheme should have raised red flags for all parties.

In imposing a prison sentence in this case, the Court noted that Mr. Starkey either "couldn't or wouldn't pay" restitution. (1/30/14, 4). It made no inquiry into Mr. Starkey's indigency and made no finding that his nonpayment was willful. Each time Mr. Starkey came before the Court, he expressed that he wanted to make restitution payments but that he simply could not afford it. Over the course of probation in this case, Mr. Starkey did not have consistent employment, was addicted to drugs, got cleaned up, suffered the loss of a son, fell into a depression and back into the drug habit, and lost his job. (PV 2/7/07, 5-6; PV Sentence 4/5/07, 4; PV 1/14/14, 3-4; PV Sentence 1/30/14, 3-4). He was unable to make the near $700 monthly payment for restitution and the only way he knew to deal with that problem was to quit reporting to probation. (4/5/07, 4).

The Court imposed a prison sentence because it believed that making the payment of the $33,000 in restitution a condition of parole was the only way it could assure that payment was made. (1/30/14, 4). However, the Court was obligated to do just the opposite. Where an individual "[can]not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measure of punishment other than imprisonment," such as

extending the time for making payments, reducing the fine, or requiring community service. *Bearden, supra* at 672.

Mr. Starkey's current prison sentence was imposed without the due process and equal protection clause protections afforded to him under the Constitution, and his sentence must be vacated and an indigency determination hearing must take place if the court is inclined to continue his custody for his failure to pay. *Bearden, supra.*

## III. THE $33,000 RESTITUTION ORDER MUST BE VACATED WHERE THE AMOUNT WAS NEVER VERIFIED AND WHERE THE AMOUNT IS NOT CONSISTENT WITH THE OFFENSE TO WHICH MR. STARKEY WAS CHARGED AND CONVICTED IN VIOLATION OF *PEOPLE V MCKINLEY*, __ MICH __ (2014). ALTERNATIVELY, MR. STARKEY IS ENTITLED TO A RESTITUTION HEARING WHERE THE AMOUNT MUST BE VERIFIED.

Mr. Starkey was originally charged with breaking and entering a building with the intent to commit a larceny for an offense that occurred on September 4, 2004. (Information, Appendix D). He pled guilty to attempted breaking and entering with intent. The building he entered along with two co-defendants was a former hospital. Mr. Starkey and two co-defendants were arrested on the date of the offense while trying to leave the building after police had been called. (See Appendix A, PSR Excerpt).

One of the owners of the building told probation that "the damage done to the building amounts in excess of $100,000.00" and that "the offenders extensively damage[d] the property in an effort to remove copper piping and tubing." (See Appendix A, PSR Excerpt). At the time of sentencing, the prosecutor informed the Court that "[t]his was the case where the ceiling was stripped of the copper, and **it's still being determined what the damage was before**" and that the building owner estimated the damage of the building to be approximately $100,000 or $33,000 per defendant. (12/3/04, 4). Defense counsel objected that there was no verification of that amount. (12/3/04, 4). The Court ordered Mr. Starkey to pay $33,000 in restitution with "an order that it should be verified." (12/3/04, 4).

The prosecution has not supported the $33,000 restituiton amount by a preponderance of evidence as required by MCL 780.767(4). To counsel's knowledge, the restitution amount has never been verified. There is no record evidence to support the fact that Mr. Starkey committed

any damage to the property or that he stole anything of value from the property and the restitution order cannot be sustained.

Further, the Michigan Supreme Court's recent decision in *People v McKinley,* __ Mich __ (Decided June 26, 2014) requires that the restitution amount be vacated. In *McKinley*, the Michigan Supreme Court held that an order of restitution for uncharged conduct was not authorized by statute and would not be upheld. In *McKinley,* the defendant was convicted by a jury of malicious destruction of property exceeding $20,000. The trial court imposed a restitution order in the amount of $158,180.44, which covered restitution for the victims of the offenses of which the defendant was convicted and restitution for the victims of offenses that the defendant was not charged with or convicted. Slip op. at 2. The Court vacated the $158,180.44 restitution order and ordered that the trial court assess restitution only as it related to the charged conduct. *Id.* at 13.

The *McKinley* Court held that "any course of conduct that does not give rise to a conviction may not be relied on as a basis for assessing restitution against a defendant." *Id.* at 8. The Court clarified this point by pointing out that a plain reading of MCL 780.767 required this result:

> MCL 780.767, for example, sets forth the factors for consideration and the burden of proof in setting the amount of restitution. MCL 780.767(1) provides that "[i]n determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim *as a result of the offense.*" (Emphasis added). Similarly, MCL 780.767(4) provides that "[t]he burden of demonstrating the amount of the loss sustained by a victim *as a result of the offense* shall be on the prosecuting attorney." (Emphasis added). "[T]he offense" in MCL 780.767 can only refer to the offense of which the defendant was convicted, because it is that "offense" that makes him subject to being ordered to pay restitution in the first place. **Thus, these provisions further reinforce our conclusion that MCL 780.766(2) requires a direct, causal relationship between the**

> **conduct underlying the convicted offense and the amount of restitution to be awarded.** See, e.g., *Paroline v United States*, 572 US ___,___; 134 S Ct 1710, 1720; 188 L Ed 2d 714 (2014) ("The words 'as a result of' plainly suggest causation."). [*Id.* at 9-10 (emphasis in original) (emphasis added)].

Here, the presentence report indicates that there was an allegation by a witness that on **August 28, 2004,** Mr. Starkey and his co-defendants were seen leaving the same building with copper pipes and wires. (PSR Excerpt, Appendix A). However, Mr. Starkey was never charged with such an offense. He was never charged with malicious destruction of property or with larceny or with any other offense related to the removal or damage of property or any other offenses. The only offense for which he was charged was the **September 4, 2004** breaking and entering a building with intent and he ultimately pled to attempt of that offense. (Information, Appendix D). "[C]onduct for which a defendant is *not* criminally charged and convicted is necessarily *not* part of a course of conduct that gives rise to the conviction" and is not properly the basis for a restitution order. *Id.* (emphasis in original).

Finally, there is no question of retroactivity here. The *McKinley* decision was released during the direct appeal period. Criminal cases become final once the direct appeal period has expired. *People v Gomez,* 295 Mich App 411, 414 (2012). This case is on direct appeal as the time for filing an application for leave to appeal or timely post-conviction motion has not expired. *See* MCL 7.205(G)(3); MCR 6.429(B)(3). Judicial decisions are generally given full retroactive effect. *Lincoln v General Motors Corp.*, 461 Mich 483, 491 (2000).

## SUMMARY AND RELIEF

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant Kenneth Starkey asks that this Honorable Court to vacate his probation violation plea and sentence, grant him an indigency determination hearing if the Court is inclined to continue custody for failure to pay, and vacate restitution or alternatively, to set a hearing to verify the amount.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: _____

**MARILENA DAVID-MARTIN (P73175)**
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: July 29, 2014

**STATE OF MICHIGAN**

**IN THE COURT OF APPEALS**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

**Court of Appeals No.** 320895

**Lower Court No.** 13-8535-01

-vs-

**FRANK NICOLAS TURNER**

Defendant-Appellant

_____/

**WAYNE COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee

_____

**MARILENA DAVID-MARTIN (P73175)**
Attorney for Defendant-Appellant

_____

# MOTION TO REMAND

**STATE APPELLATE DEFENDER OFFICE**

**BY: MARILENA DAVID-MARTIN (P73175)**
**Assistant Defender**
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

**STATE OF MICHIGAN**

**IN THE COURT OF APPEALS**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

**Court of Appeals No.** 320895

**Lower Court No.** 13-8535-01

-vs-

**FRANK NICOLAS TURNER**

Defendant-Appellant.
_____/

**MOTION TO REMAND**

**NOW COMES** Defendant-Appellant **FRANK NICOLAS TURNER**, through his attorneys, the **STATE APPELLATE DEFENDER OFFICE**, by **MARILENA DAVID-MARTIN**, and respectfully moves this Honorable Court to remand the case to the trial court, stating:

1. On February 13, 2014, Mr. Turner was convicted of torture, unlawful imprisonment, felonious assault and felony firearm following a bench trial in the Wayne County Circuit Court, the Honorable Daniel A. Hathaway presiding. On February 28, 2014, Mr. Turner was sentenced to concurrent prison terms of 18 years to 30 years, 4 years to 15 years, 1 year to 4 years and a consecutive 2 year term.

2. Mr. Turner appealed as of right, and now brings this timely Motion to Remand pursuant to MCR 7.211(C)(1).

3. The issue which Mr. Turner seeks to raise on remand is as follows:

**I. MR. TURNER IS ENTITLED TO RESENTENCING WHERE PRIOR RECORD VARIABLE 2 WAS ERRONEOUSLY SCORED AT FIVE POINTS AND WHERE A PROPER SCORING OF PRV 2 AT ZERO POINTS WOULD REDUCE HIS GUIDELINE RANGE FROM 171 TO 285 MONTHS TO 135 TO 225 MONTHS. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ERRONEOUS SCORING OF PRV 2 AT THE TIME OF SENTENCING.**

See Brief in Support.

4. MCR 7.211(C)(1)(a) states that a motion to remand must identify an issue sought to be reviewed on appeal and show:

> "(i) that the issue should be initially decided by the trial court; or
>
> (ii) that development of a factual record is required for appellate consideration of the issue. A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at the hearing."

5. MCR 6.429(C) requires that challenges to the scoring of the sentencing guidelines that have not been raised at sentencing or in a timely motion for resentencing must be raised in this Court by the filing of the within motion to remand.

6. Pursuant to MCR 7.211(C)(1)(a), as an Offer of Proof counsel states as follows:

a. Mr. Turner does not have a prior criminal history that would allow for the scoring of Prior Record Variable 2 at 5 points. (See Presentence Report).

b. Trial counsel did not object to the scoring of PRV 2 at 5 points at the time of sentencing.

c. A proper scoring of PRV 2 at zero points would reduce Mr. Turner's current guideline range of 171 to 285 months down to 135 to 225 months.

d. There can be no strategic reason for failing to ensure that PRV 2 was properly scored and that Mr. Turner be sentenced under his appropriate sentencing guideline range.

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant Frank Nicolas Turner respectfully requests that this Honorable Court remand this case to the trial court for resentencing, or alternatively, for an evidentiary hearing pursuant to *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: /s/ Marilena David-Martin
**MARILENA DAVID-MARTIN (P73175)**
**Assistant Defender**
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Date: November 7, 2014

# STATE APPELLATE DEFENDER OFFICE

**DAWN VAN HOEK**
DIRECTOR

**JONATHAN SACKS**
DEPUTY DIRECTOR

**www.sado.org**
Client calls: 313.256.9822

**MAIN OFFICE:**
PENOBSCOT BLDG., STE 3300
645 GRISWOLD
DETROIT, MI 48226-4281
Phone: 313.256.9833 • Fax: 313.965.0372

**LANSING AREA:**
Phone: 517.334.6069 • Fax: 517.334.6987

September 24, 2014

Clerk
Wayne County Circuit Court
Frank Murphy Hall of Justice
1441 St. Antoine
Detroit, MI 48226

Re: **People v Hasheem Beamon**
Lower Court No. 13-10999-01-FC

Dear Clerk:

Enclosed please find the original of the following: Praecipe/Proof of Service; Notice of Hearing and Motion for Resentencing for filing in your Court.

Thank you for your cooperation.

Sincerely,

Marilena David-Martin
Assistant Defender

Enclosure

cc: Wayne County Prosecutor
Hon. Gregory D. Bill
Mr. Hasheem Beamon
File

**STATE OF MICHIGAN**

**IN THE WAYNE COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff,

**Circuit Court No.** 13-10999-01

-vs-

**Honorable Gregory D. Bill**

**HASHEEM BEAMON**

Defendant.
_____/

TO THE ASSIGNMENT CLERK:

Please place a Motion for Resentencing on the Motion Docket for Friday October 24, 2014 at 9:00 a.m. before Judge Gregory A. Bill

Date: September 24, 2014

STATE APPELLATE DEFENDER OFFICE
MARILENA DAVID-MARTIN (P73175)
Attorney for Defendant/MICH. STATE BAR #P73175
3300 Penobscot Building, 645 Griswold
Detroit, MI 48226
(313) 256-9833

NOTE: SEE RECORDER'S COURT RULE 18

**PROOF OF SERVICE**

I swear that on September 24, 2014 I served a copy of the attached motion and praecipe upon the Wayne County Prosecutor, Appellate Section by: (mail) (personal) service. (Cross out One)

Sworn and subscribed before me on:
September 24, 2014
Notary Public: _____
Wayne County
My Commission Expires:

_____
Attorney for Defendant

PRAECIPE FOR MOTION
RC Form #1

C of D-26-PR (Rev. 10-74)

**STATE OF MICHIGAN**

**IN THE WAYNE COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff,

**Circuit Court No.** 13-10999-01

-vs-

**Honorable Gregory D. Bill**

**HASHEEM BEAMON**

Defendant.
_____/

**WAYNE COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee
_____

**MARILENA DAVID-MARTIN (P73175)**
Attorney for Defendant-Appellant
_____

**MOTION FOR RESENTENCING**

**STATE APPELLATE DEFENDER OFFICE**

**BY: MARILENA DAVID-MARTIN (P73175)**
**Assistant Defender**
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

**STATE OF MICHIGAN**

**IN THE WAYNE COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff,

**Circuit Court No.** 13-10999-01

-vs-

**Honorable Gregory D. Bill**

**HASHEEM BEAMON**

Defendant.
_____/

**WAYNE COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee
_____

**MARILENA DAVID-MARTIN (P73175)**
Attorney for Defendant-Appellant
_____

# BRIEF IN SUPPORT OF MOTION FOR RESENTENCING

**STATE APPELLATE DEFENDER OFFICE**

**BY: MARILENA DAVID-MARTIN (P73175)**
**Assistant Defender**
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

**STATE OF MICHIGAN**

**IN THE WAYNE COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff,

**Circuit Court No.** 13-10999-01

-vs-

**Honorable Gregory D. Bill**

**HASHEEM BEAMON**

Defendant.
_____/

**MOTION FOR RESENTENCING**

NOW COMES Defendant **HASHEEM BEAMON**, by and through his attorneys, the **STATE APPELLATE DEFENDER OFFICE,** by **MARILENA DAVID-MARTIN**, and moves this Honorable Court to grant resentencing and says in support thereof that:

1. Defendant-Appellant Hasheem Beamon was convicted by guilty plea of manslaughter, MCL 750.329, and felony firearm, MCL 750.227b, before the Honorable Gregory D. Bill in the Wayne County Circuit Court.

2. On March 24, 2014, Mr. Beamon was sentenced to 7 to 15 years imprisonment plus a mandatory two-year consecutive term.

3. The State Appellate Defender Office (SADO) was appointed as appellate counsel on April 7, 2014.

4. This motion is being timely filed within 6 months of sentencing, which falls on September 24, 2014. MCR 6.429(B)(3).

5. Mr. Beamon requests resentencing in this case so that he may be sentenced in accordance with his sentence agreement. The prosecutor offered Mr. Beamon a sentence agreement

to the low end of the guidelines, specifically "two years above the bottom" of the guideline range, which the prosecution calculated at 58 to 228 months at the time of the plea offer, for a seven year minimum sentence. By the time of sentencing, it was determined that Mr. Beamon's guideline range was properly calculated at 43 to 86 months. No one said anything about this decreased range and Mr. Beamon received a minimum sentence of 84 months, at the very top of his guidelines. Mr. Beamon is entitled to specific performance of the bargain and must be resentenced according to his sentence agreement to the low end of his properly scored guideline range. *People v Killebrew*, 416 Mich 189, 200 (1982).

6. Alternatively, due to the involuntary nature of his plea, an offer of plea withdrawal is an appropriate remedy for such an error. *Killebrew, supra.*

7. Defense counsel was ineffective for failing to ensure that Mr. Beamon received the benefit of his plea. *Strickland v Washington*, 466 US 668 (1984).

8. Lastly, Mr. Beamon is entitled to have his Presentence Report corrected as it contains inaccurate information. MCL 777.14(6); MCR 6.425(E)(2)(a); *People v Lloyd*, 284 Mich App 703, 705 (2009).

9. These arguments are fully addressed in the attached Brief in Support, which is incorporated herein.

**WHEREFORE**, Mr. Beamon respectfully requests that this Honorable Court grant resentencing and order correction to his presentence report.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: _____

**MARILENA DAVID-MARTIN (P73175)**
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: September 24, 2014

**STATE OF MICHIGAN**

**IN THE COURT OF APPEALS**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

**Court of Appeals No.**

-vs-

**Circuit Court No.** 13-10999-01

**HASHEEM NATE-ABDUL BEAMON**

Defendant-Appellant
_____/

**WAYNE COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee
_____

**MARILENA DAVID-MARTIN (P73175)**
Attorney for Defendant-Appellant
_____

**DELAYED APPLICATION FOR LEAVE TO APPEAL**

**STATE APPELLATE DEFENDER OFFICE**

**BY: MARILENA DAVID-MARTIN (P73175)**
**Assistant Defender**
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

# TABLE OF CONTENTS

## Judgment Appealed From, Relief Sought, and Concise Allegations Of Error

Defendant-Appellant Hasheem Nate-Abdul Beamon appeals from the trial court's October 31, 2014 order denying his motion for resentencing.

Mr. Beamon pled guilty to manslaughter with the understanding that he was receiving a lenient sentence at the bottom of his sentencing guideline range. At the time of the plea offer, the prosecutor stated that the guideline range was calculated at 58 months to 228 months (4.8 years to 19 years) and that the parties agreed to a sentence "two years above the bottom" of the guideline range for a minimum sentence of seven years (84 months). (3/6/14, 5-6). At the time of sentencing, Mr. Beamon's guideline range was properly scored at 43 to 86 months. None of the parties mentioned this significant decrease in his guideline range at any point during the proceedings. Mr. Beamon was given a minimum sentence of seven years (84 months), which is at the high end of the properly scored guideline range of 43 to 86 months (3.5 years to 7.2 years).

Mr. Beamon is entitled to specific enforcement of the bargain and is entitled to be resentenced to a sentence at the bottom of his properly scored guideline range.

## Statement of Appellate Jurisdiction and Statement Explaining Delay

Defendant-Appellant Hasheem Nate-Abdul Beamon pled guilty to manslaughter without malice, MCL 750.329, and to felony firearm, MCL 750.227b, on March 7, 2014. On March 24, 2014, he was sentenced by the Honorable Gregory D. Bill of the Wayne County Circuit Court to seven to fifteen years imprisonment plus a two year consecutive prison term.

The State Appellate Defender Office (SADO) was appointed as appellate counsel on April 7, 2014. On September 24, 2014, SADO filed a timely Motion for Resentencing within the six month time period allotted by MCR 6.429(B)(3)&(C). The trial court heard the motion on October 31, 2014 and denied relief. (Order, Appendix A; Updated Dockets, Order of Appointment, Judgment of Sentence, Appendix B).

This Honorable Court has jurisdiction to hear this appeal as it is being filed within 21 days of the trial court's October 31, 2014 order, which falls on November 21, 2014. MCR 7.205(F)(4). This application is being filed as soon as possible given counsel's caseload. MCR 7.205(F)(4).

# TABLE OF AUTHORITIES

CASES



STATUTES & COURT RULES

## STATEMENT OF QUESTIONS PRESENTED

I. IS MR. BEAMON ENTITLED TO RESENTENCING WHERE THE PARTIES NEGOTIATED FOR A SENTENCE "TWO YEARS ABOVE THE BOTTOM" OF THE GUIDELINE RANGE, BUT WHERE THE RANGE WAS INCORRECTLY SCORED DURING PLEA NEGOTIATIONS BY A SIGNIFICANT MARGIN AND WHERE HE ACTUALLY RECEIVED A SENTENCE AT THE VERY TOP OF THE PROPERLY SCORED GUIDELINE RANGE?

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

II. WAS DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO ENSURE THAT MR. BEAMON RECEIVED THE DEAL THAT HE BARGAINED FOR?

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

## STATEMENT OF FACTS

On November 3, 2013, Defendant-Appellant Hasheem Beamon tragically shot and killed his friend, Duane Haywood. The shooting was accidental by all accounts.

Roslyn Haywood, the wife of Mr. Haywood, testified at the preliminary examination. She stated that Mr. Haywood and Mr. Beamon were friends, and that she had known Mr. Beamon for eight years. (Preliminary Examination 12/4/13, 6-7).

On the night of the incident, her husband and Mr. Beamon were talking outside of the house. (12/4/13, 10). Her husband and Mr. Beamon came into the house and she saw her husband give Mr. Beamon a handgun and the men went back outside. (12/4/13, 11-12). Sometime later, Ms. Haywood heard a gunshot. She could not recall when the shot occurred and stated that it could have been anywhere from 30 seconds after the men left her house up to 15 minutes afterward. (12/4/13, 12-13). She looked out the window to see Mr. Haywood lying on the porch of their friend Bill's house, which was across the street. (12/4/13, 14). She saw Mr. Beamon facing the doorway of the house and saw him walk into the house. (12/4/13, 14). She got dressed and ran outside and saw that Bill and another man were putting her husband into Mr. Beamon's car. (12/4/13, 15). No one told her what happened and they drove off to the hospital.

She could not recall who, but someone came back to her house and handed her the same gun that she earlier saw her husband give to Mr. Beamon. (12/4/13, 17).

Ms. Haywood went up to the hospital as soon as she secured a babysitter for her children who were asleep at the time. (12/4/13, 17). Once at the hospital, Mr. Beamon told Ms. Haywood that "he did it and it was an accident" and "I'm sorry, I did it, it was an accident." (12/4/13, 18). Mr. Beamon could not explain anything further. (12/4/13, 20). She heard Mr. Beamon tell police an alternate story that her husband was shot while walking to the gas station, which was not true. (12/4/13, 20).

Ms. Haywood was later informed by the doctors that her husband did not make it. She, Mr. Beamon and her mother viewed Mr. Haywood's body and she recalled that Mr. Beamon was distraught and apologizing and asking God to forgive him. (12/4/13, 21).

Defense counsel opposed the bind-over on the second-degree murder count given that the evidence highly indicated that this was not an intentional shooting. (12/4/13, 37). The court found there was enough evidence to bind Mr. Beamon over, but took note of Mr. Beamon's evident grief:

> [*The Court*]: Quite frankly I can state from looking at Beamon in the courtroom today and I've been doing this for a number of years now. That this is one of the few times where I've seen someone who actually looked generally distraught and actually cried real, copious tears while they heard the testimony today. [12/4/13, 39).

Mr. Beamon was bound-over as charged for second-degree murder, felon in possession of a firearm, and felony firearm.

On March 7, 2014, Mr. Beamon pled guilty to the lesser offense of manslaughter, MCL 750.329, and felony firearm, MCL 750.227b, in exchange for the dismissal of the second-degree murder and felon in possession charges. (Pretrial 3/6/14, 4-5; Plea 3/7/14, 2-4). The plea bargain included an agreement for special consideration in which Mr. Beamon was required to testify as a witness for the prosecution in a separate and unrelated case. (3/6/14, 5-6; 3/7/14, 2-4). For his cooperation, the prosecution offered a sentence agreement that Mr. Beamon be sentenced to "two years above the bottom" of the guideline range, which the prosecution calculated at 58 months to 228 months (4.8 years to 19 years), which would result in a minimum sentence of seven years for the manslaughter offense plus a mandatory two-year consecutive term for the felony firearm. (3/6/14, 5-6).

The Terms of the Offer – March 6, 2014

On March 6, 2014, the court granted Mr. Beamon's request to substitute his court-appointed trial counsel, James Schlaff, with retained attorney, Kiana Franulic. (3/6/14, 3-4). Ms. Franulic requested a trial adjournment as the trial was scheduled for the following week and she had just been retained the day prior, on March 5th. However due to docket constraints, the court was unable to honor her request. (3/6/14, 3-4, 6-7).

The prosecution put the plea offer on the record and indicated that this was its final offer. (3/6/14, 10). The court noted that the prosecution was agreeing to go to the low end of the guideline range and the prosecution confirmed that it was offering leniency due to Mr. Beamon's cooperation with the prosecution:

> [*The Prosecutor*]: If he's convicted only of manslaughter which is count two, which is the alternative theory on this case, then he would – his guideline range from **58 months**, **which is just two months shy of five years up to 19 years** as a habitual fourth offender. Taking all of that into account, we have offered the Defendant to plead the manslaughter count and felony firearm for a **seven to fifteen year sentence** on the manslaughter and plus two years for the felony firearm.
>
> [*The Court*]: **So you're going to the low end of the guidelines.**
>
> [*The Prosecutor*]: **Two years above the bottom, yes, sir. And the main reason for that, Judge,** and so the Court's aware is that there is – the courtroom is relatively quiet so I can say this openly, there is information the Defendant has regarding an unrelated case, a separate case altogether, and what were' asking is that Mr. Beamon, as part of this plea, would be required to testify in that case for the People. [3/6/14, 5-6.]

Ms. Franulic requested that the plea offer remain open until Monday March 10th as she did not yet have a copy of the full discovery or of the preliminary examination testimony. (3/6/14, 7). The prosecution indicated that this offer was conveyed to Mr. Schlaff for the first time only two days prior, on March 4, 2014, and that it was willing to keep the offer open. (3/6/14, 9). The court agreed to leave the offer open until noon the next day, which would allow Ms. Franulic time to obtain and review the discovery from Mr. Schlaff. (3/6/14, 10). The prosecution again confirmed that this was its final offer and that the offer would not change. (3/6/14, 10, 12).

The Plea – March 7, 2014

The next day, on March 7, 2014, Mr. Beamon accepted the plea offer and pled guilty according to the terms of the plea agreement. (Plea 3/7/14, 2-3). Ms. Franulic stated that the plea was for "seven to fifteen for the manslaughter and two for the felony fireman with a dismissal of the murder two, felon in possession and habitual fourth." (3/7/14, 2).

The court referred to the Settlement Offer and Notice of Acceptance form and stated that, "[i]t tells me you wish to plead guilty to one count of manslaughter . . . and a count of felony firearm," and that the "sentence agreement says you will serve seven years to fifteen years in the Michigan Department of Corrections on the manslaughter count, plus two years consecutive." (3/7/14, 3-4).

As a factual basis, Mr. Beamon stated that his friend and victim, Mr. Haywood, gave him a gun on the night of the incident. At some point, Mr. Beamon was inside of the house holding the gun while Mr. Haywood was outside on the front porch. The gun discharged and a bullet went through the wall and Mr. Beamon heard someone yell for help. He went outside and discovered that Mr. Haywood had been shot. Mr. Haywood was taken to the hospital and later died as a result of the gunshot. (3/7/4, 7-10).

Sentencing – March 24, 2014

On the day of sentencing, Mr. Haywood's wife, Roslyn Haywood, and his mother, Robin Haywood, spoke to the court. Roslyn expressed that she felt at peace knowing that her husband was not killed out of malice, but that his killing was an accident. (Sentence 3/24/14, 4-6). She indicated that although the killing was an accident, she believed Mr. Beamon should be held accountable for what happened. (3/24/14, 5-6). Roslyn recognized that Mr. Beamon will have to live with the fact that he unintentionally killed his best friend. (3/24/14, 5-6).

Robin Haywood stated how tragic this situation has been for their family and expressed forgiveness toward Mr. Beamon. (3/24/11, 9-11).

The prosecution informed the court that Mr. Beamon helped to drive Mr. Haywood to the hospital after the incident and that he apologized to Ms. Haywood while at the hospital and told her that the shooting was accidental. (3/24/14, 8).

In accordance with the plea bargain, the second-degree murder and felon in possession counts were dismissed at the time of sentencing and the habitual offender enhancement was withdrawn. (3/24/18, 12). The court sentenced Mr. Beamon "[p]er the sentence agreement" to seven to fifteen years for the manslaughter count plus two-years consecutive for the felony firearm. (3/24/14, 14).

There was no mention of the sentencing guidelines at the time of sentencing, which were properly scored at 43 to 86 months. This is a significant decrease from the range discussed by the parties at the time of the plea offer, which was 58 months to 228 months. (3/6/14, 5).

Motion for Resentencing – October 31, 2014

Mr. Beamon filed a post-conviction motion for resentencing and argued to the trial court that he was entitled to resentencing to a sentence at the bottom of his properly scored guidelines in accordance with his plea bargain. Mr. Beamon argued that the prosecutor's offer to a seven year minimum sentence was intimately tied to the parties' belief as to the sentencing guideline range and that the offer was always meant to be one of leniency to the bottom of his guidelines. (MH 10/31/14, __).[1] The prosecutor argued that the seven year sentence agreement had no relation to the guideline range and that Mr. Beamon was not entitled to resentencing, despite that the seven year sentence is actually at the top of his properly scored guideline range. (MH 10/31/14, __). The trial court agreed with the prosecutor and found that the sentencing guideliens were not a relevant part of Mr. Beamon's plea agreement and that he would have entered into the seven year sentence agreement even if he knew it was at the top of his guideline range. (MH 10/31/14, __). The trial court denied Mr. Beamon's request for resentencing. (Order, Appendix A).

This is Mr. Beamon's application for leave to appeal the trial court's October 31, 2014 order.

[1] The transcript of the October 31, 2014 motion hearing has been ordered, but has not yet been filed. Once SADO receives a copy of the transcript, it will file a copy with this Court.

## I. MR. BEAMON IS ENTITLED TO RESENTENCING WHERE THE PARTIES NEGOTIATED FOR A SENTENCE "TWO YEARS ABOVE THE BOTTOM" OF THE GUIDELINE RANGE, BUT WHERE THE RANGE WAS INCORRECTLY SCORED DURING PLEA NEGOTIATIONS BY A SIGNIFICANT MARGIN AND WHERE HE ACTUALLY RECEIVED A SENTENCE AT THE VERY TOP OF THE PROPERLY SCORED GUIDELINE RANGE.

**Issue Preservation/Standard of Review**

This issue was persevered by Mr. Beamon's timely filed motion for resentencing. This Court reviews for clear error a trial court's findings of facts and reviews questions of law de novo. *People v Trakhtenberg,* 493 Mich 38, 47 (2012).

**Discussion**

Mr. Beamon pled guilty to manslaughter with the understanding that he was receiving a lenient sentence at the bottom of his sentencing guideline range. At the time of the plea offer, the prosecutor stated that the guideline range was calculated at 58 months to 228 months (4.8 years to 19 years) and that the parties agreed to a sentence "two years above the bottom" of the guideline range for a minimum sentence of seven years (84 months). (3/6/14, 5-6). At the time of sentencing, Mr. Beamon's guideline range was properly scored at 43 to 86 months. None of the parties mentioned this significant decrease in his guideline range at any point during the proceedings. Mr. Beamon was given a minimum sentence of seven years (84 months), which is at the high end of the properly scored guideline range of 43 to 86 months (3.5 years to 7.2 years). (Appendix C, Sentencing Information). He is entitled to specific performance and a resentencing where the court may impose a

sentence at the bottom of his sentencing guidelines in accordance with the bargain.

A defendant who is not sentenced in accordance with his sentence agreement is entitled to resentencing in accordance with the plea agreement or to an offer of plea withdrawal. *People v Killebrew,* 416 Mich 189 (1983). Mr. Beamon was not sentenced in accordance with the sentence agreement in this case, which called for a sentence at the low end of his guideline range. He must be resentenced to a minimum sentence of five and a half years, which is "two years above the bottom" of his properly scored guideline range of 43 to 86 months.

In opposition to this motion, the prosecution argued that Mr. Beamon entered into a sentence agreement for a minimum sentence to a term of seven years regardless of the sentencing guidelines and therefore that he waives any challenge to his sentence. (MH 10/31/14, __). The prosecution argued that Mr. Beamon's sentence agreement was not at all related to the sentencing guideline range and that the parties agreed to a sentence of seven years irrespective of where it fell on the guideline range. (MH 10/31/14, __).

The trial court agreed with the prosecution and denied any relief for Mr. Beamon, finding that the sentencing guideline range was irrelevant to the terms of the sentence agreement. (Order, Appendix A; MH 10/31/14, __).

That might be true if there were no connection between the negotiated seven year term and the sentencing guidelines, but it is clear from the record that there was such a connection. Mr. Beamon acknowledges that on the day of the plea, the parties referenced a "sentence agreement" for "seven years to fifteen years" and that

the plea form also indicates such a deal and that there was no mention of an agreement to the "low end of the guidelines." (Plea 3/7/14, 2, 3). But reference to "seven years" as a minimum sentence cannot be read in a vacuum and must be read in context. While there was no discussion about the "low end of the guidelines" on the day the plea was entered, there certainly was such a discussion just one day prior when the offer was put on the record. (3/6/14, 5). There is nothing to indicate that the terms of the original plea bargain as placed on the record just the day before had changed, and in fact the prosecution confirmed at the time of the offer that the offer would not change. (3/6/14, 10). At the time of the offer, it was made clear that the agreement to a seven year minimum term was reached because seven years was just "two years above the bottom" of the perceived guideline range of 58 to 228 months. (3/6/14, 5-6). The court took note of this stating, "So you're going to the low end of the guidelines." (3/6/14, 5). The prosecution explained that it was doing so because there was an agreement for special consideration in this case in that Mr. Beamon agreed to testify for the prosecution in an unrelated case. (3/6/14, 5-6). The sentence agreement for a seven year minimum sentence was reached *because* seven years was "two years above the bottom" of the guidelines as scored by the prosecutor prior to the plea. The connection between the sentence agreement and the sentencing guideline range here cannot be ignored.

Additionally, a unique circumstance existed in this case where the prosecution entered into an agreement for special consideration with Mr. Beamon that he would testify for the prosecution in a separate and unrelated case. This

evidences that a promise of leniency was a part of the plea bargain. If the parties had known that his guideline range was 43 to 86 months, it would not have been logical to enter into an agreement that ensured Mr. Beamon get the very top of his guideline range for a minimum sentence of 84 months. This is especially true given the highly evident accidental nature of this case.

The prosecutor confirmed that the sentence agreement provided for a lenient sentence at the low end of the sentencing guidelines range, in part because of the agreement for special consideration that Mr. Beamon entered into with the prosecutor's office:

> [*The Prosecutor*]: If he's convicted only of manslaughter which is count two, which is the alternative theory on this case, then he would – his guideline range from **58 months, which is just two months shy of five years up to 19 years** as a habitual fourth offender. **Taking all of that into account,** we have offered the Defendant to plead the manslaughter count and felony firearm for a **seven to fifteen year sentence** on the manslaughter and plus two years for the felony firearm.
>
> [*The Court*]: **So you're going to the low end of the guidelines.**
>
> [*The Prosecutor*]: **Two years above the bottom, yes, sir. And the main reason for that, Judge,** and so the Court's aware is that there is – the courtroom is relatively quiet so I can say this openly, there is information the Defendant has regarding an unrelated case, a separate case altogether, and what were' asking is that Mr. Beamon, as part of this plea, would be required to testify in that case for the People. [3/6/14, 5-6.]

It should first be noted that that there is no way that the perceived guideline range of 58 to 228 months could have applied to Mr. Beamon. Mr. Beamon's prior record total was 32 points, Level D and his offense variable total was 55 points, Level V. For a guideline range of 58 to 228 months to come into play, Mr. Beamon would have to be assessed either 43 additional PRV points, or 18 additional PRV points **and** 20 additional OV points. The record simply does not support such a score.

**Sentencing Grid for Class C Offenses—MCL 777.64**

*Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)-(c))*

| OV Level | PRV Level A 0 Points | | B 1-9 Points | | C 10-24 Points | | D 25-49 Points | | E 50-74 Points | | F 75+ Points | | Offender Status |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 48 | | 76 | | 114 | | 142 | | 172 | | 200 | HO4† |
| V 50-74 Points | 19 | 38 | 29 | 57 | 36 | 71 | 43 | 86 | 50 | 100 | 58 | 114 | |
| | | 47 | | 71 | | 88 | | 107 | | 125 | | 142 | HO2 |
| | | 57 | | 85 | | 106 | | 129 | | 150 | | 171 | HO3 |
| | | 76 | | 114 | | 142 | | 172 | | 200 | | 228 | HO4† |
| VI 75+ Points | 29 | 57 | 36 | 71 | 43 | 86 | 50 | 100 | 58 | 114 | 62 | 114 | |
| | | 71 | | 88 | | 107 | | 125 | | 142 | | 142 | HO2 |
| | | 85 | | 106 | | 129 | | 150 | | 171 | | 171 | HO3 |
| | | 114 | | 142 | | 172 | | 200 | | 228 | | 228 | HO4† |

† Certain fourth habitual offenders may be subject to a mandatory minimum sentence of 25 years or [illegible] 769.12(1)(a).

It should also be noted that this is not a case where there is any dispute as to the appropriately scored guideline range. Probation properly scored the guideline range at 43 to 86 months in this case.[2] Neither party objected to this scoring as there was absolutely no discussion of the sentencing guideline range at the time of

[2] Part of the plea agreement was that the habitual offender enhancement would be withdrawn. 43 to 86 months is Mr. Beamon's sentencing guideline range without the habitual enhancement. With the habitual enhancement, his guideline range would have been 43 to 172 months. Either way, a sentence of 84 months is not at the low end of either of those ranges.

sentencing. Yet, the parties relied on the very inflated guideline range of 58 to 228 months to reach an agreement that he be sentenced at the low end of the guideline range, and specifically, "two years above the bottom" of the perceived guideline range. (3/6/14, 5).

This is a classic case of bargaining based upon inaccurate information. There is a due process right to be sentenced using and relying upon accurate information. *Townsend v Burke,* 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948); *People v Francisco,* 474 Mich 82; 711 NW2D 48 (2006); *People v Malkowski*, 385 Mich 244; 188 NW2d 559 (1971); US Const Amends V & XIV; Const 1963, art 1, § 17. It is clear that the parties bargained for a sentence agreement to seven years because seven years was at the low end of the sentencing guideline range of 58 to 228 months as calculated by the prosecutor at the time of the offer. That guideline range was significantly inflated and Mr. Beamon's current 84 month minimum sentence is actually at the top of his properly scored guideline range, he is entitled to resentencing in accordance with the agreement. (See *People v Kitchen III,* 493 Mich 901 (2012), recognizing that the remedy available to a defendant when not sentenced in accordance with the sentence agreement may be a remand for imposition of a sentence within the sentence agreement or a resentencing or an offer of plea withdrawal).

Accordingly, this Court should conclude that the sentencing guidelines range was relevant to the terms of the sentence bargain and therefore the existence of a sentence agreement under these specific facts does not foreclose a resentencing.

*Killebrew, supra; See also People v Caschera,* 477 Mich 892; 722 NW2d 422 (2006) (challenge to offense variable 11 not waived where there was a *Cobbs* evaluation for a sentence at the bottom of the sentencing guidelines range and the parties believed the range would start at 84 months, but the guidelines were inaccurately calculated); *People v Price,* 477 Mich 1; 723 NW2d 201 (2006) (defendant did not waive a challenge to the scoring of the sentencing guidelines where he bargained for a sentence falling within the sentencing guidelines however they might be scored).

## II. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ENSURE THAT MR. BEAMON RECEIVED THE DEAL THAT HE BARGAINED FOR.

**Issue Preservation/Standard of Review**

Mr. Beamon preserved this issue in a timely post-conviction motion.

Whether the defendant received the effective assistance of counsel guaranteed to him under the United States and Michigan Constitutions is a mixed question of fact and law. *People v Trakhtenberg,* 493 Mich 38, 47 (2012). This Court reviews questions of constitutional law de novo and findings of facts for clear error. *Id.*

**Discussion**

Attorney James Schlaff represented Mr. Beamon for four months, up until the day before the plea was entered on March 7, 2014. Plea negotiations were conducted by Mr. Schlaff, who was substituted out of the case by Attorney Kiana Franulic on the day the plea offer was put on the record, March 6, 2014. (3/6/14, 3-4, 9). Ms. Franulic was retained on March 5, 2014 and represented Mr. Beamon for a total of two days before he entered into the plea. (3/6/14, 3).

Mr. Beamon was provided with the ineffective assistance of counsel when substitute retained counsel either completely failed to understand the benefit of the plea bargain that had been negotiated by prior counsel, or if counsel did understand the bargain, counsel was ineffective for failing to object to a sentence falling at the top of Mr. Beamon's guideline range in contrast to the sentence agreement, which provided for a sentence "two years above the bottom" of the range.

A defendant is entitled to the effective assistance of counsel during all critical phases of a criminal proceeding, including during plea proceedings and at sentencing. US Const, Am VI; Mich Const 1963, art 1, § 20; *Lafler v Cooper,* ___ US ___; 132 S Ct 1376 (2012); *Strickland v Washington*, 466 US 668 (1984); *McMann v Richardson*, 397 US 759, 771 (1970); *People v Stammer*, 179 Mich App 432, 440 (1989). Sentencing is a critical phase of a criminal proceeding where counsel is afforded the opportunity to present facts in mitigation of the offense and to appeal to the equity of the court. *People v Dye,* 6 Mich App 217 (1967); *People v Theodorou,* 10 Mich App 409 (1968).

In order to prevail on an ineffective assistance of counsel claim, a defendant must show (1) that the attorney's performance fell below an objective standard of reasonableness and (2) that the performance was prejudicial. *Strickland, supra* at 687-688; *People v Pickens*, 446 Mich 298, 309, 312-313 (1994).

*Deficient Performance.* Mr. Beamon had a sentence agreement to be sentenced at the low end of his guideline range, and specifically to "two years above the bottom." At the time the offer was made, the prosecutor had calculated the guidelines at 58 to 228 months. By the time of sentencing, the guideline range had decreased significantly to 43 to 86 months, but defense counsel said nothing about the decreased range, and failed to at least acknowledge that the parties had expected a significantly higher range during the plea hearing and made a promise of leniency based on the inflated range. Further, counsel said nothing about the fact that Mr. Beamon would now be sentenced to the very top of his properly scored

guideline range.

By failing to request that Mr. Beamon be sentenced to the low end of his sentencing guideline range, and by failing to even mention that such an agreement had been made, counsel failed to ensure that Mr. Beamon receive the leniency in sentencing that he bargained for and was ineffective.

*Prejudice.* Mr. Beamon was induced by the promise of leniency, specifically a promise that he would be sentenced to the low end of his sentencing guideline range. Mr. Beamon's minimum sentence for the manslaughter conviction should be no higher than five and a half years, which is "two years above the bottom" of the properly scored guideline range of 43 to 86 months. His attorney's failure to object to the imposition of a sentence at the very top of his sentencing guideline range amounted to deficient performance and prejudiced him as he is currently serving a minimum sentence one and a half years higher than he should be serving in accordance with the plea bargain.

Mr. Beamon asks this Court to allow him to develop the record of his ineffective assistance of counsel claim if the Court finds it is not clear from the record. *People v Ginther,* 390 Mich 436 (1973).

## SUMMARY AND REQUEST FOR RELIEF

**WHEREFORE**, for the foregoing reasons, Mr. Beamon respectfully requests that this Honorable Court grant leave to appeal, or alternatively, grant resentencing and direct the trial court to impose a sentence at the low end of his properly scored guideline range of 43 to 86 months.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: /s/ Marilena David-Martin

**MARILENA DAVID-MARTIN (P73175)**
Assistant Defender
645 Griswold
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Dated: November 19, 2014

Approved, Michigan Court of Appeals

| LOWER COURT | Electronically Filed | CASE NO. |
|---|---|---|
| | | Lower Court 13-8535-01 |
| Wayne County Circuit Court | BRIEF COVER PAGE | Court of Appeals 320895 |

(Short title of case)
Case Name: **People v. Frank Nicolas Turner**

1. Brief Type (select one):
☒ APPELLANT(S) ☐ APPELLEE(S) ☐ REPLY
☐ CROSS-APPELLANT(S) ☐ CROSS-APPELLEE(S) ☐ AMICUS
☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **Frank Nicolas Turner**

3. ☐ This brief is in response to a brief filed on by .

4. ORAL ARGUMENT: ☒ REQUESTED ☐ NOT REQUESTED

5. ☐ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
[See MCR 7.212(C)(12) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]

- ☒ Table of Contents [MCR 7.212(C)(2)]
- ☒ Index of Authorities [MCR 7.212(C)(3)]
- ☒ Jurisdictional Statement [MCR 7.212(C)(4)]
- ☒ Statement of Questions [MCR 7.212(C)(5)]
- ☒ Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
- ☒ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
- ☒ Relief Requested [MCR 7.212(C)(9)]
- ☒ Signature [MCR 7.212(C)(9)]

7. This brief is signed by [type name]: **Marilena David-Martin**
Signing Attorney's Bar No. [if any]: **(P73175)**

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES



STATUTES & COURT RULES

## STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court by jury trial or bench trial, and a Judgment of Sentence was entered on February 28, 2014. A Claim of Appeal was filed on March 18, 2014 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated March 12, 2014, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

## STATEMENT OF QUESTIONS PRESENTED

I. TRIAL COUNSEL CONCEDED DURING CLOSING ARGUMENT THAT THE COMPLAINANT HAD BEEN TORTURED, AND THAT THE DEFENDANT WAS INVOLVED IN THE TORTURE, BUT ARGUED THAT THE DEFENDANT SHOULD NOT BE FOUND GUILTY BECAUSE HE DID NOT ALLOW THE OTHER PARTICIPANTS TO "GO ANY FURTHER THAN THAT." WAS TRIAL COUNSEL INEFFECTIVE WHERE HE CONCEDED MR. TURNER'S INVOLVEMENT IN THE TORTURE WHILE ATTEMPTING TO DIMINISH HIS CULPABILITY WITH A DEFENSE THAT WAS NOT GROUNDED IN LAW?

Trial Court made no answer.

Defendant-Appellant answers, "Yes".

II. IS MR. TURNER ENTITLED TO RESENTENCING WHERE PRIOR RECORD VARIABLE 2 WAS ERRONEOUSLY SCORED AT FIVE POINTS AND WHERE A PROPER SCORING OF PRV 2 AT ZERO POINTS WOULD REDUCE HIS GUIDELINE RANGE FROM 171 TO 285 MONTHS TO 135 TO 225 MONTHS? WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE ERRONEOUS SCORING OF PRV 2 AT THE TIME OF SENTENCING?

Trial Court made no answer.

Defendant-Appellant answers, "Yes".

III. IS MR. TURNER ENTITLED TO AN ADDITIONAL 10 DAYS OF JAIL CREDIT WHERE HE WAS ARRESTED ON SEPTEMBER 6, 2013 AND REMAINED CONTINUOUSLY INCARCERATED UNTIL THE DAY OF SENTENCING, FEBRUARY 28, 2014, FOR A TOTAL OF 175 DAYS AND WHERE HE ONLY RECEIVED 165 DAYS OF CREDIT AT SENTENCING?

Trial Court made no answer.

Defendant-Appellant answers, "Yes".

IV. MUST MR. TURNER'S PRESENTENCE REPORT BE CORRECTED WHERE ALL PARTIES, INCLUDING THE COURT, AGREED THAT THE "AGENT'S DESCRIPTION OF THE OFFENSE" WAS INACCURATE, BUT WHERE NO ONE FOLLOWED THROUGH WITH HAVING THE REPORT UPDATED?

Trial Court made no answer.
Defendant-Appellant answers, "Yes".

## STATEMENT OF FACTS

Dontez Boykins is the complainant and only witness in this case and supplied the only information leading to Frank Turner's arrest and conviction. The trial court, sitting as fact finder, characterized Boykins' testimony as "puzzling," "lacking in credibility," and rampant with "obvious problems and inconsistences," and indicated that his story "doesn't make sense logically." (2/13/14, 11, 12).

Boykins told various stories about what happened to him on the night of the incident, ranging from being kidnapped by a group of unnamed men who took his money and his gun, burned him with an iron and threatened to set him on fire, (2/10/14, 26, 40-41), to being lured into a house, tied down to a bed and beaten, (2/10/14, 46), to being robbed of $4,500 cash by brothers Tion and Frank Turner (2/11/14, 155-156).

Police recovered no physical evidence relating to this case as they failed to timely execute a search warrant of the alleged crime scene, the home of Richard Allen, a neighbor and friend of Boykins'. (2/11/14, 171). Police also failed to question or apprehend the two men whom Boykins testified were responsible for physically burning him with a clothing iron, Tae Tae and Fat Boy.

Frank Turner, a 29 year old male with no prior record, is currently serving a 20 year minimum sentence for torture, unlawful imprisonment, felonious assault and felony firearm arising out of this incident.

The Incident

Twenty-year-old Dontez Boykins testified that he knew Richard Allen and brothers Frank Turner and Tion Turner from around the neighborhood; they all lived within a block of each other on Riopelle Street in the City of Detroit. (2/11/14, 20-21). Richard Allen's house was a place where people from the neighborhood commonly hung out.

On the day of the incident, Boykins was at Allen's house along with Frank, Tion and others. (Trial 2/10/14, 57-60). Everyone present was "friends" or at least acquaintances of one another. (2/10/14, 60, 77, 127).

Boykins testified that he was sitting around when Frank directed him, Tion, Allen and "Duke" upstairs. Once upstairs, Allen gave Frank his gun, a .40 caliber that Boykins knew Allen was licensed to carry. (2/14/14, 75). Frank fired a shot in the direction of Boykins but did not hit him. (2/14/14, 76, 78). Allen and Duke left once the shot was fired and Frank and Tion began hitting Boykins with their guns. (2/10/14, 78, 81, 82). Boykins testified that Frank was armed with Allen's .40 caliber Glock and Tion with a 9 millimeter firearm. (2/10/14, 83). Boykins testified that he had "no clue" what prompted this assault, but speculated that it was because Frank thought that Boykins was being smart with Tion. (2/10/14, 66-67, 73, 81; 2/11/14, 40-41). About a half an hour later, Tae Tae and Fat Boy arrived. (2/10/14, 85-86). Tae Tae asked what was going on and Frank told Tae Tae that Boykins had a smart mouth and to "get this nigga." (2/10/14, 87). Tae Tae and Fat Boy were both armed and began hitting him with their guns. (2/10/14, 87-88).

Out of nowhere, Tae Tae asked Frank for an iron. (2/10/14, 90). At the preliminary examination, Boykins testified that Frank yelled out loud for an iron but at trial testified that Frank called Allen on the phone and asked for him to bring them an iron. (2/10/14, 91-92). Allen brought an iron upstairs and handed it to Tae Tae through the door. (2/10/14, 95). Boykins did not see Allen, but assumed it was him because of the complexion of his arm. (2/10/14, 96). Tae Tae plugged the iron in and Frank told Boykins to take his clothes off. (2/10/14, 93, 98). Tae Tae began burning him with the iron while Fat Boy held him down. (2/10/14, 99-102).

Boykins testified that he was then allowed to get dressed and that Frank directed everyone to go into the basement. (2/10/14, 1045). Boykins stated that when he put his pants back on before going to the basement, he noticed that the $1,500 that he previously had in his pocket was no longer there. (2/10/14, 104-105). At the preliminary examination, Boykins testified that he saw Tion reach into his pockets and take the $1500 out of his pants. (2/11/14, 48; 9/19/13, 29). At trial, the prosecution asked, "Did you see anyone take anything out of your pockets?" and Boykins replied, "Not at all." (2/10/14, 105). When later asked by the defense, "You didn't see anyone take the money out of your pants pocket, correct," Boykins refused to answer the question stating, "I don't want to answer that question," and "[i]t's a question I don't want to answer." (2/11/14, 47-48). The defense attempted to clarify whether Boykins saw anyone take the money from his pockets or not and Boykins stated, "I'm going to tell you what I got in my statements." (2/11/14, 49).

The Court asked Boykins to "tell us the truth" and he replied, "I saw him take it out the pockets," and explained that his previous answer that he did not see anyone take anything out of his pockets "wasn't accurate." (2/11/14, 49-50; 2/10/14, 105). The first time Boykins spoke to police, he told Officer Zamarripa that Frank and Tion robbed him of $4,500. (2/11/14, 45, 155).

On the way downstairs to the basement, Fat Boy snatched Tion's gun from him and fired a shot at Boykins and missed. (2/10/14, 106). Boykins believed that Fat Boy was drunk as he was yelling and smelled like liquor. (2/10/14, 107-108). Frank ordered Tae Tae and Fat Boy to leave the house and they did. (2/10/14, 111). Frank, Tion and Boykins went into the basement where they remained for about an hour. (2/10/14, 111, 112, 115, 118).

Tae Tae and Fat Boy returned at some point and said that they wanted to put Boykins in the trunk of a car. (2/11/14, 71). Frank again told them to leave and that he could handle it. (2/11/14, 71-72).

Boykins testified that Frank told Boykins that he had to burn down his own mother's house; Boykins had no idea why Frank wanted him to do that. (2/10/14, 119, 120; 2/11/14, 74). Frank left Tion alone with Boykins in the basement to go out to get gas. (2/10/14, 121). While Frank was gone, Boykins was alone in the basement with Tion who was holding him at gunpoint. (2/10/14, 115, 122). At some point, emergency response lights appeared outside and Boykins told Tion that the police were outside. (2/10/14, 122).

Tion panicked and went upstairs to get rid of the guns; Tion reappeared in the basement without the guns and the two of them went upstairs to the ground floor. (2/10/14, 123). When they went upstairs, Boykins approached the front door to look out the window and told Tion that police were surrounding the house. (2/10/14, 124). Tion begged him not to go outside, but Boykins unlocked the door and ran out of the house. (2/10/14, 124). He ran around to various houses in the neighborhood and banged on doors for help, but ultimately wound up at a nearby Rite Aid where employees called police. (2/10/14, 124-125, 136-138).

He arrived at the Rite Aid at about 4:40 a.m. on August 19, 2014. Daniel Roy and Isaac Ogunbola were working at the Rite Aid that morning and Roy called police right away. (2/10/14, 24, 26; 44).

Roy testified that Boykins' face was puffy and he looked as if he had been beaten up. (2/10/14, 26). Boykins told him that he had been kidnapped and was in a basement where some guys threatened to kill him and set him on fire. (2/10/14, 26). They took his money, his gun and burned him with an iron. (2/10/14, 40-41).

Ogungbola testified that Boykins told him that a group of boys that he knew lured him into a house, took his gun, tied him down to the bed, striped him naked and beat him. (2/10/14, 46). He told Ogungbola that one of the men went out to get gas and he tricked the other guy so that he could escape. (2/10/14, 46).

He told Roy and Ogungbola that he escaped through the basement window. (2/10/14, 41; 46). Roy and Ogungbola suspected that there were people following Boykins and moved him to the back of the store for safety. (2/10/14, 36, 46-47)

Boykins denied telling Roy and Ogungbola that he had a gun that was taken away from him and denied that he ever told them that he was in the basement or that he escaped through the basement window. (2/11/14, 59, 60).

Boykins remained in the Rite Aid for about two and a half hours before Officer Todd Zamarripa arrived at about 7:15 a.m. (2/11/14, 149). Boykins told Officer Zamarripa that "Tion" and "Frank" were responsible. (2/11/14, 151). He stated that he was at a house drinking and smoking with them when he tried to leave. (2/11/14, 155). One of them stopped him at the door with a gun and demanded money. He gave them the $4,500 in cash that he had on him at the time. (2/11/14, 155). Officer Zamarripa testified that Boykins told him that Tion was armed with a Glock 45 and that Frank Turner "walked up behind [him]. . . holding a MAC-10." (2/11/14, 63, 156). Boykins did not mention Tae Tae or any other participants to Officer Zamarripa.

At trial, Boykins denied telling the officer that Frank had a MAC-10 and that Tion had a Glock. (2/11/14, 61, 62). Boykins also denied that he drank or smoked marijuana on the day of the incident and testified that he only had a sip of cough syrup. (2/11/14, 104).

Boykins was treated at Detroit Receiving Hospital. He informed hospital staff that he was "drugged" by individuals he was hanging out with. He lost consciousness and "does not remember things for a period of time." (2/11/14, 116-117; 152-153; Appendix A, One Page Excerpt of Medical Records admitted at trial as People's Exhibit 26).

At trial, Boykins denied giving that information to hospital staff and claimed that the hospital staff "came up" with that story on their own. (2/11/14, 117-118).

Pictures of Boykins' burns were admitted as People's Exhibits 15 through 18 and depicted burns on his buttocks, legs, and left arm. (2/11/14, 10-15). Boykins testified that he was also burned on his genitals and under his arms. (2/11/14, 15).

The Investigation

Allen was cooperative with police and voluntarily turned himself in for questioning on the same day of the incident. (2/11/14, 161). He offered to turn over his .40 caliber registered gun, the same weapon that Boykins claimed Frank used and fired during the offense, but the police never retrieved the firearm for evidence. (2/11/14, 162; 2/10/14, 75).

Officer Treva Eaton questioned Boykins on the morning of the incident while he was at the hospital. Boykins told Officer Eaton that Frank, Tion and Richard Allen were involved in the offense. (2/11/14, 168-169). Pursuant to the information gained from Boykins, police prepared four search warrants: (1) for Tion and Frank's mother's house located at 20021 Riopelle, (2) for Richard Allen's mother's house located at 19974 Riopelle, and (3) for 20001 Riopelle, a house that Boykins described as a "play house" where people from the neighborhood hung out to drink and smoke. (2/11/14, 24; 170-171). Warrants for these three locations were authorized and executed on August 20, 2013. (2/11/14, 170). No evidence relating to the offense was recovered from any of the locations. A fourth warrant was authorized for 20015 Riopelle, Allen's house and the location where the incident was alleged to have

occurred. (2/11/14, 171). Police did not attempt to execute the warrant for Allen's house until August 28, 2013, nine days after the offense. (2/11/14, 170). However, they were not actually able to execute the warrant because a fire occurred at the house on August 26, 2013 and the home was unable to be searched. (2/10/14, 17; 2/11/14, 170-173).

The prosecution indicated that the warrant for Allen's home was authorized on August 20, 2013. (2/11/14, 170, 172-173). However, Officer Eaton explained that Boykins could not recall the address where the incident occurred and was only able to confirm the address "days" after the incident when Officer Eaton took him to Riopelle Street so that he could point out the location. (2/11/14, 169-172). On the other hand, Boykins told police on the night of the incident that the assault occurred at Allen's house and the police had Allen in custody on August 19, 2014 had they needed to confirm his address. (2/10/14, 61; 2/11/14, 161). It is also clear that police knew where Frank and Tion's mother lived as early as August 19, 2014, (2/11/14, 29-31; 83-84), and that Boykins knew that their mother's house was right next door to Allen's house where he testified the incident occurred. (2/11/14, 31).

Tae Tae and Fat Boy were never questioned for this offense. There is no indication that police ever sought to uncover their identities or that they were sought for questioning. (Trial 2/12/14, 21-22). Police and the prosecution knew that Tae Tae was the brother of Richard Allen's girlfriend and that Fat Boy was Tae Tae's brother. (2/11/14, 112). Frank and Tion Turner were arrested on September 6, 2013. (2/11/14, 163).

The Defense's Closing Argument

During closing argument, trial counsel stated that there was no doubt that Boykins had been tortured, but that his testimony was so rife with inconsistencies and missing pieces that Boykins should not be believed. (2/12/14, 21-32; Appendix B, Full Excerpt of Defense Counsel's[1] Closing Argument). Counsel went on that there was no doubt that "we do have a torture going on here," and that "[t]he question is who did that?" (2/12/14, 22). Counsel argued that if Mr. Boykins were to be believed, then Frank was actually a "hero" in this situation in that he prevented the assault against Mr. Boykins from going any further:

> **Frank Turner from the testimony of Mr. Boykin, is the one that saved his life, if you draw some assumptions in here, because Frank Turner is the one that put out Tae-tae and Fat Boy, is the one that told Tae-tae and Fat Boy you guys gotta' go,** you're either too loud or whatever. And in essence saved the life of Mr. Boykins, if you believe that that's what happened.
>
> * * *
>
> **We do know that Frank, according to Mr. Boykins, that Frank is the one who decided, that stopped them from doing more.**
>
> * * *
>
> We do know that he was, he was tortured, I have no problem with that, you can't get around that. And we do know that Tae-tae and, and Fat Boy were the ones that were involved in that. **We do know that Frank is the one that decided that he is not going, that he's not going to let it go any further than that."**

[1] Defense Counsel for Defendant-Appellant Frank Turner was Richard Nelson. Defense Counsel for co-defendant Tion Turner was Randall Upshaw. Defense counsel for co-defendant Richard Allen was Rowland Short. Only the excerpt of Attorney Nelson's closing argument is attached as Appendix B.

* * *

> **[W]e do know that young Frank Turner, he's the one that stopped it. In a lot of ways he's a hero in this thing. . . he did save what looked like something more serious was going to be done to Mr. Boykins.** [2/12/14, 22, 23, 25, 26].

Counsel also pointed out that there was no clear motive as to why Boykins would have been burned, stating:

> Why do Fat Boy and Tae-tae, why are they going after, in such a brutal way, Mr. Boykins? You don't know. You don't know. And if in fact it was, it was said, I didn't see it, I didn't hear it. We don't know why those two did what they did.
>
> * * *
>
> [T]he whole thing when you take it all together . . . is missing, he's missing some big, big chapters to this story that should have been there. What reason did Tae-tae have to go off on him in this manner? He doesn't want to let you know. He knows the reason, he doesn't want to let you know. And why doesn't he want to let you know? Because that'll tell you something about him. [2/12/14, 23, 25].

Counsel ended by urging the trial court to find Frank Turner not guilty of these offenses because "there are reasons to doubt that Boykins told you the truth." (2/12/14, 31).

The Verdict

In issuing its verdict, the trial court began by noting its concerns with Boykins' testimony, stating, "I'll state right off the bat that there were obvious problems and inconsistencies with Mr. Boykins' testimony." (2/13/14, 4-5). "I found his testimony to be partial credible because there were certain things that didn't make sense." (2/13/14, 5-6). At the same time, the court indicated that it did "believe part of his testimony." (2/13/14, 6).

The court confirmed that "there may be more to [the incident] than Mr. Boykins was willing to share with us," which "brings into question his credibility," (2/13/14, 11), but pointed out that "the Court's not required to find a motive." (2/13/14, 15).

The court found that Tae Tae was the party that burned Boykins with the iron and that Fat Boy held him down during the incident. (2/13/14, 6).

The trial court found that Richard Allen was "merely present" and found him not guilty on all counts. (2/13/14, 14-15).

The court found that Tion had no intent to participate in the torture and was "merely present." (2/13/14, 17-18). Tion Turner was found guilty of unlawful imprisonment, felonious assault and felony firearm and found not guilty of torture. (2/13/14, 17-18).

The trial court found both Tion and Frank not guilty of assault with intent to maim as there was insufficient evidence presented to meet the elements of the offense, and found them not guilty of armed robbery because of Boykins' "dramatic"

inconsistences about the incident. (2/13/14, 7-8, 16-17).

Regarding Frank Turner, the court found that the assault of Boykins was done at his direction and that it was Frank that "caused the iron to be used." (2/13/14, 7, 15-17). The court found Frank guilty of torture, unlawful imprisonment, felonious assault and felony firearm. (2/13/14, 7, 15-17).

Sentencing

On the date of sentencing, trial counsel stated that the "agent's description of the offense is so far away from what did occur, the testimony that came at trial, I'm not too sure how much benefit anybody's going to get done by reading that." (2/28/14, 5). The prosecutor agreed, stating, "And, Judge, I would agree with Mr. Nelson that several parts of it are not accurate to. . . the testimony..." (2/28/14, 5). The trial court also agreed, stating:

> And I agree that when I read it that there were inconsistencies. Here's what I would propose[], Mr. Nelson, I would propose simply writing on this pre-sentence investigation report at the top where it says "Agent's Description of the Offense," that I would write there are many instances where this is inconsistent with the evidence presented at trial and sign my name to it. [2/28/14, 5].

Defense counsel stated that was fine and the trial court replied, "Okay. I've done that." (2/28/14, 5). The version of the Presentence Report that undersigned counsel was provided does not have any handwritten notation indicating that the Agent's Description of the Offense is inaccurate. (See Presentence Report submitted under separate cover).

Mr. Turner's[2] guideline range was calculated at 171 to 285 months. (See Sentencing Information Report attached to Presentence Report). There were no objections to the guidelines by either party. The trial court sentenced Mr. Turner to 18 years (216 months) to 30 years for torture, 4 years to 15 years for unlawful imprisonment, 1 year to 4 years for felonious assault, and 2 years consecutive for felony firearm. He received 165 days of jail credit. (2/28/14, 18-19).

Currently incarcerated, Mr. Turner appeals by right.

[2] Any references to "Mr. Turner" throughout this brief refer to Frank Turner.

## I. TRIAL COUNSEL CONCEDED DURING CLOSING ARGUMENT THAT THE COMPLAINANT HAD BEEN TORTURED, AND THAT THE DEFENDANT WAS INVOLVED IN THE TORTURE, BUT ARGUED THAT THE DEFENDANT SHOULD NOT BE FOUND GUILTY BECAUSE HE DID NOT ALLOW THE OTHER PARTICIPANTS TO "GO ANY FURTHER THAN THAT." TRIAL COUNSEL WAS INEFFECTIVE WHERE HE CONCEDED MR. TURNER'S INVOLVEMENT IN THE TORTURE WHILE ATTEMPTING TO DIMINISH HIS CULPABILITY WITH A DEFENSE THAT WAS NOT GROUNDED IN LAW.

**Issue Preservation/Standard of Review**

This issue is being raised for the first time on appeal. The error is apparent from the existing record and Mr. Turner is not requesting a remand for a hearing on this issue.

This Court must find that this error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich. 750, 763-764 (1999).

Whether the defendant received the effective assistance of counsel guaranteed to him under the United States and Michigan Constitutions is a mixed question of fact and law. *People v Trakhtenberg,* 493 Mich 38, 47 (2012), citing *People v Armstrong,* 490 Mich 281, 289 (2011). This Court reviews questions of constitutional law de novo and findings of facts for clear error. *Id.*

**Discussion**

The constitution guarantees Mr. Turner the right to the effective assistance of counsel. US Const Ams VI, XIV; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 687 (1984); *People v Pickens*, 446 Mich 298, 310-11 (1994). "The right to effective assistance [of counsel] extends to closing arguments." *See Bell v Cone*, 535 US 685, 701-702 (2002): *Herring v New York*, 422 US 853, 865 (1975).

In order for Mr. Turner to establish that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that the deficient performance was prejudicial. *See Pickens, supra*; *Strickland*, *supra*. With respect to prejudice, Mr. Turner must prove "a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Pickens*, *supra* at 312-313, citing *Strickland*, *supra* at 687.

*Deficient Performance.* At trial, Mr. Turner faced charges of torture, armed robbery, assault with intent to maim, felonious assault and felony firearm. Torture is the leading charge and required the trial court to find the following: (1) that Mr. Turner (2) had the intent to cause cruel or extreme physical or mental pain and suffering, and (3) inflicted great bodily injury or severe mental pain or suffering (4) upon a person within his custody or physical control. MCL 750.85. All parties agreed that Boykins had suffered extreme physical pain and great bodily injury as evidenced by his medical records and of the photographs of his burns, both of which

were submitted as exhibits at trial. The only contested elements here were whether Mr. Turner was involved, and if so, what the extent of his involvement was. Defense counsel identified these missing elements in his closing as he stated that "we do have a torture going on here," and "[t]he question is who did that?" (2/12/14, 22).

Defense counsel went on in his closing argument to concede that Mr. Turner participated in the torture of Boykins, and even more damming, implied that Mr. Turner was the person with control over the situation:

> **Frank Turner from the testimony of Mr. Boykin, is the one that saved his life, if you draw some assumptions in here, because Frank Turner is the one that put out Tae-tae and Fat Boy, is the one that told Tae-tae and Fat Boy you guys gotta' go,** you're either too loud or whatever. And in essence saved the life of Mr. Boykins, if you believe that that's what happened.
>
> * * *
>
> **We do know that Frank, according to Mr. Boykins, that Frank is the one who decided, that stopped them from doing more.**
>
> * * *
>
> We do know that he was, he was tortured, I have no problem with that, you can't get around that. And we do know that Tae-tae and, and Fat Boy were the ones that were involved in that. **We do know that Frank is the one that decided that he is not going, that he's not going to let it go any further than that.**
>
> * * *
>
> **[W]e do know that young Frank Turner, he's the one that stopped it. In a lot of ways he's a hero in this thing. . . he did save what looked like something more serious was going to be done to Mr. Boykins.** [2/12/14, 22, 23, 25, 26; Appendix B, Excerpt of Defense Counsel's Closing Argument].

Defense counsel not only conceded in his closing argument that Mr. Turner was present during the torture, but accepted that he had pull and control over the other named participants, so much so that Mr. Turner alone was able to "stop[ ] them from doing more," and "is the one that decided that . . . he's not going to let it go any further than that," and that Mr. Turner prevented "something more serious" from occurring to Boykins. (2/12/14, 23-26).

Admittance of guilt during closing arguments may be recognized as sound strategy to an indefensible charge or element because it is "thought to build credibility with a jury by acknowledging the overwhelming evidence of guilt for that particular charge, creating goodwill and trust that can be applied towards arguments attacking the remaining charges." *States v Holman*, 314 F3d 837, 840 (CA 7, 2002); *see also People v Walker*, 167 Mich App 377, 382 (1988), overruled in part on other grounds by *People v Mitchell*, 456 Mich 693, 698 (1998) ("[w]here the evidence obviously points to defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or admit to guilt on some charges but maintain innocence on others.").

However, those rationalizations do not apply in this case for several reasons. As an initial matter, the finder of fact was the trial court itself, so the principles behind building credibility with a jury are non-existent here. Secondly, torture was the leading charge with the harshest possible potential penalty so it would not have benefitted Mr. Turner to be acquitted of the lesser charges if he were found guilty of the torture charge. Lastly, the concession to a charge or element of an offense may

only be considered sound strategy when there is overwhelming evidence in support of the element or charge. *See Walker, supra* at 382, overruled in part on other grounds by *Mitchell*, *supra* at 698. If the evidence is not overwhelming, conceding guilt achieves no justifiable and legitimate purpose other than to undermine the defendant's ability to present a proper defense. The evidence in this case was certainly not overwhelming where the only evidence came from Boykins himself who was so unbelievable that he evaded answers to simple questions ("I don't want to answer that question," (2/11/14, 47)) and had to be reminded by the trial court not to lie ("[w]e want to know. . . the truth, Mr. Boykins." (2/1/14, 49-50)).

By conceding that a torture took place and that Mr. Turner was present, counsel performed deficiently. The prosecution's evidence that Mr. Turner participated in the torture was far from overwhelming and was supported only by Boykins' word and nothing else, and his word was weak. Thus, there was no tactical advantage in counsel's concession.

Moreover, defense counsel pursued an argument largely unsupported by the law—that Mr. Turner was not criminally responsible in this case because he did not let the incident go "any further" and was a actually a "hero" for preventing any further harm to Boykins. (2/12/14, 22, 23, 25, 26). Counsel's strategy was not just unreasonable, but it was grossly lacking in any legal foundation. The argument that Mr. Turner should not be found guilty because at least he prevented the complainant from being further harmed was akin to an argument for "judge nullification." Preventing a person from being further harmed after a torture had

already occurred is absolutely not a defense to torture and counsel's implicit ask for a nullified verdict cannot be considered sound considering the particular circumstances of this case.

Defense counsel conceded the two most important elements in this case—was Frank Turner responsible, and if so, in what way?—which amounted to deficient performance to which there is no reasonable strategy explanation.

*Prejudice.* In *Strickland v Washington,* 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984), the Court recognized that lawfulness of the fact finder is an important consideration when determining prejudice to a defendant:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law...
>
> **The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.** [*Id.* At 694-695].

Counsel's closing argument here greatly prejudiced Mr. Turner as it called for some nullification on behalf of the trial court. As more fully discussed above, trial counsel argued that the torture occurred and Mr. Turner participated in the incident, but that he should not be found guilty because he was a "hero" who prevented any further injury to Boykins. Such a defense is not grounded in law, was dependent on the trial court entering a nullified verdict, and greatly harmed any chance Mr. Turner had at obtaining an acquittal.

The evidence that Mr. Turner was present during the torture is notably weak. There is no evidence outside of Boykins' testimony that establishes Mr. Turner's guilt. There is no physical evidence placing him at the scene and no physical evidence to establish that the offense actually even occurred how Boykins said it did. In issuing its verdict, the trial court noted that "counsel is well aware" that "as the trier of fact, I'm entitled to believe all, none or part of any person's testimony." (2/13/14, 6). In conceding Mr. Turners' role in the torture and going even further and admitting he had some control over the situation, an essential element of torture, MCL 750.85, trial counsel made those credibility decisions for the trial court, relieving the court from having to grapple with the most important questions in this case.

The trial court noted that Mr. Boykins' testimony was "puzzling," "lacking in credibility," and rampant with "obvious problems and inconsistences," and indicated that his story "doesn't make sense logically." (2/13/14, 11, 12). Boykins' testimony was the only evidence against Mr. Turner, and trial counsel's acceptance of Boykins' testimony as truth regarding the essential elements of the torture offense negatively impacted any defense Mr. Turner had to these charges.

Trial counsel's concession of the case during closing arguments was not sound trial strategy and greatly prejudiced Mr. Turner, depriving him of his constitutional right to the effective assistance of counsel and he must be granted a new trial.

## II. MR. TURNER IS ENTITLED TO RESENTENCING WHERE PRIOR RECORD VARIABLE 2 WAS ERRONEOUSLY SCORED AT FIVE POINTS AND WHERE A PROPER SCORING OF PRV 2 AT ZERO POINTS WOULD REDUCE HIS GUIDELINE RANGE FROM 171 TO 285 MONTHS TO 135 TO 225 MONTHS. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ERRONEOUS SCORING OF PRV 2 AT THE TIME OF SENTENCING.

**Issue Preservation/Standard of Review**

Mr. Turner is preserving this challenge to the scoring of the sentencing guidelines by filing an accompanying timely motion to remand. MCL 769.34(10); MCR 6.429(C); *People v Kimble,* 470 Mich 305, 310-311 (2004).

The proper interpretation and application of the statutory sentencing guidelines are legal questions that an appellate court reviews de novo. *People v Houston,* 473 Mich 399, 403 (2005); *People v Morson,* 471 Mich 248, 255 (2004).

The review of an ineffective assistance of counsel claim is a mixed question of law and fact and is reviewed de novo. *Strickland v Washington,* 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

**Discussion**

Prior Record Variable 2, was improperly scored at 5 points in this case for "1 prior low severity felony conviction," MCL 777.52(1)(d), where the offense used to score the variable was dismissed under 7411 status.

Charges dismissed pursuant to MCL 333.7411 may not be used to score a defendant's prior record variables. *People v James,* 267 Mich App 675, 678-680 (2005). This Court noted that "MCL 333.7411(1) specifically states that the

discharge and dismissal procedure that it authorizes is 'without adjudication of guilt' and 'is not a conviction for purposes of ... disabilities imposed by law upon conviction of a crime..." *Id.* at 679-680. Therefore, matters diverted under MCL 333.7411 may not be counted in scoring the prior record variables when there has been a successful completion of the diversionary probation. *Id.*

Nonetheless, Mr. Turner was mistakenly scored 5 points for PRV 2 for a 2011 controlled substance offense that was successfully diverted under MCL 333.7411:

NO. 1 OF 2

| | |
|---|---|
| **Offense Date:** | 06/19/2011 |
| **Status at Time of Offense:** | None |
| **Arrest Date:** | 06/19/2001 |
| **Arresting Agency:** | Detroit Police Department |
| **Charge(s) at Arrest:** | Possession L/25 Grams Cocaine, Possession L/25 Grams Marijuana |
| **Court of Jurisdiction:** | 3rd Circuit Court |
| **Final Charges:** | Possession L/25 Grams Cocaine |
| **Conviction Date/Method:** | 06/27/2011 / Plea |
| **Sentence/Disposition:** | 1 yr 6 mos probation under 7411 |
| **Sentence Date:** | 08/08/2011 |
| **Attorney Present:** | Yes |
| **Discharge Date:** | 10/30/2012 |
| **Notes:** | Dismissed under 7411 |

Mr. Turner has no other offenses in his history that could be used to score PRV 2 at 5 points. (See Conviction 1 of 2 under Criminal History section of Presentence Report submitted to the Court under separate cover, reproduced above).

Mr. Turner's PRVs are currently totaled at 25 points, Level D. A proper scoring of PRV 2 at zero points would reduce his PRV score to 20 points, Level C. Mr. Turner is entitled to resentencing where a proper scoring of PRV 2 would reduce his sentencing guideline range from 171 to 285 months to 135 to 225 months. *People v Francisco,* 474 Mich 82, 88-89 (2006); MCL 769.34(10).

## III. MR. TURNER IS ENTITLED TO AN ADDITIONAL 10 DAYS OF JAIL CREDIT WHERE HE WAS ARRESTED ON SEPTEMBER 6, 2013 AND REMAINED CONTINUOUSLY INCARCERATED UNTIL THE DAY OF SENTENCING, FEBRUARY 28, 2014, FOR A TOTAL OF 175 DAYS AND WHERE HE ONLY RECEIVED 165 DAYS OF CREDIT AT SENTENCING.

### Issue Preservation/Standard of Review

Whether a defendant is entitled to credit for time served in jail prior to sentencing is a question of law subject to de novo review. *People v Armisted*, 295 Mich App 32, 49 (2011). Alternatively, this error is plain and seriously affects the fairness, integrity or public reputation of the judicial proceedings. *People v Kimble*, 470 Mich 305, 312 (2004); *People v Carines*, 460 Mich 750, 763 (1999).

### Discussion

Mr. Turner is entitled to jail credit for the entire time period he spent incarcerated prior to his conviction and sentence in this case. MCL 769.11b. At the time of sentencing, he received 165 days of jail credit, which probation listed represented the time period from his arrest on September 16, 2013 to the day before his sentencing, February 27, 2014:

**Jail Credit:**

| DOCKET NO. | | | |
|---|---|---|---|
| Date(s) | Action | Sentence Details | Days |
| 9/16/13-2/27/14 | Arrest | for Felony Firearm only | 165 |
| | | Total Days Jail Credit | 165 |

Mr. Turner was actually arrested on September 6, 2013. This is evident from the stipulation entered into at trial that "if Eric Verbeke were here he'd testify that [defendant was arrested] on September 6, 2013." (2/11/13, 163). His September 6, 2013 arrest is also clear given that he was arraigned on September 9, 2013. (Appendix C, Docket Entries).

Mr. Turner is entitled to jail credit from the time period of September 6, 2013 (day of arrest) to February 28, 2014 (day of sentencing) for a total of 175 days credit.

## IV. MR. TURNER'S PRESENTENCE REPORT MUST BE CORRECTED WHERE ALL PARTIES, INCLUDING THE COURT, AGREED THAT THE "AGENT'S DESCRIPTION OF THE OFFENSE" WAS INACCURATE, BUT WHERE NO ONE FOLLOWED THROUGH WITH HAVING THE REPORT UPDATED.

**Issue Preservation and Standard of Review**

Trial counsel disputed the accuracy of the contents of the presentence report at the time of sentencing. (Sentence 2/28/14, 4-5).

This Court should review this issue de novo as it is a question of law and statutory interpretation. *People v. Lukity*, 460 Mich. 484 (1999).

**Discussion**

Mr. Turner is entitled to have his presentence report corrected as it contains inaccurate information. MCL 777.14(6).

On the date of sentencing, trial counsel stated that the "agent's description of the offense is so far away from what did occur, the testimony that came at trial, I'm not too sure how much benefit anybody's going to get done by reading that." (2/28/14, 5). The prosecutor agreed, stating, "I would agree with [trial counsel] that several parts of it are not accurate to. . . the testimony..." (2/28/14, 5). The trial court also agreed, stating:

> And I agree that when I read it that there were inconsistencies. Here's what I would propose[], Mr. Nelson, I would propose simply writing on this pre-sentence investigation report at the top where it says "Agent's Description of the Offense," that I would write there are many instances where this is inconsistent with the evidence presented at trial and sign my name to it. [2/28/14, 5].

Defense counsel stated that was fine and the trial court replied, "Okay. I've done that." (2/28/14, 5). The version of the presentence report that undersigned counsel was provided does not have any handwritten notation indicating that the Agent's Description of the Offense is inaccurate. (See Presentence Report submitted under separate cover). Counsel has attempted to contact the probation department inquiring into any updated version of the report but has been unsuccessful.

Nonetheless, a handwritten note that the report is inaccurate is not a sufficient solution to the inaccuracy of a presentence report. If the presentence report contains inaccurate or irrelevant information, the report "shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections." MCL 777.14(6).

The agent's description of the offense must be "objective" and **all statements** contained within the presentence report must be "clear, concise and accurate." (Appendix D, Michigan Department of Corrections Policy Directive 06.01.140, pp. 2-3). It is important that only accurate and relevant information be contained within the presentence report because the Michigan Department of Corrections heavily relies on the presentence report to determine programing needs and other critical decisions. *People v Lloyd,*284 Mich App 703, 705-706.

As currently written, the one paragraph Agent's Description of the Offense contains numerous inaccuracies, many of which involve allegations against Mr. Turner and his involvement in this offense that were directly contradictory to Boykins' testimony. Undersigned counsel numbered 15 of the most significant inaccuracies in red below:

**Agent's Description of the Offense**

The following was garnered from the Detroit Police Investigator's Report:

On August 19, 2013 at 7:00p.m. at 20001 Riopelle in the City of Detroit, MI., victim, Dontez Boykins 20, and co-defendant, Tion Turner 24, were sitting in the living room when Tion Turner asked the victim how much money he had on him. The victim asked him the reason for the question and Tion Turner became furious 1 shouting obscenities then leaving the room in order to talk to his brother, Frank Turner 28, they returned to the room and telephoned 2 defendant #3 Richard Allen 22 to the location. Frank Turner asked Richard Allen to hand him his weapon, an unknown type blue steel automatic at which time he complied.3 Frank Turner then pointed it at an unidentified black male named of "Duke" then turned the weapon at the victim while cocking the weapon's hammer back. Frank Turner asked the Boykins "what did you say smart to my brother?" He then pointed the gun laser light and fired one time at Boykins, narrowly missing. Richard Allen and Duke then left the location. Frank Turner then continued to yell and cuss at the victim.4 The victim pulled his pants up and was hit in the back of the head with the weapon. Frank and Tion Turner then continued to assault the victim in the face and head while both were armed with handguns.5 Tion Turner went through the victims pocket and removed $1,500.00 in US Currency. Frank Turner was the leader in the 6 robbery told Tion 7 to tie the victim up with his belt the assault continued at which time two more unidentified black males Tae Tae and Fat brother began to participate in the assault. Tae Tae asked "where is the mother fucking iron?' Defendant #3 8 Richard Allen gave Tae Tae the iron and he plugged it up and let the iron get hot and the assault continued. The victim was asked to put his face toward the wall at which time he complied. Tae Tae then put the iron on the victims left cheek, then he told him to turn around while he burned his dick off, Tae Tae put it on his penis burning it. Frank Turner then once again hit the victim in the face with the butt of the weapon. Frank Turner then stated 9 "I never like this nigga lets finish this nigga". Tae Tae and Fat Brother stated they where getting the car and put the nigga in the trunk of the car. The victim 10 attempted to get the gun from Fat Brother at which time the weapon went off. Frank Turner told Tae Tae and Fat Brother to leave the location. Frank and Tion Turner gave the victim a dish pan with soap and told him to clean up his own blood and the defendants continued to assault him. They ordered him downstairs and Frank plugged the iron up again and he told 11 Tion to get the marijuana and blunts that was in another part of the house Tion rolled the marijuana up while 12 Frank Turner continued to burn the victim's leg. They continued to assault him as they moved through different parts of the 13 house and they discussed burning the victim's mother's residence. Frank then went upstairs and changed clothes and told 14 Tion to reload his weapon. The victim told Tion he 15 heard emergency lights near the residence and told him the police was surrounding the house. The victim then attempted to escape from the location at which Tion was unable to stop him. The victim then ran to Rite Aide seeking shelter from the assault , he was then conveyed to the Detroit Receiving Hospital and treated for his injuries.

Given that all parties agreed that the presentence report contained numerous inaccuracies, this Court should remand the case for correction of the presentence report and give the parties the opportunity to agree upon an acceptable version of the offense in line with the testimony of the case.

For these reasons, Mr. Turner asks this Court to order correction to the presentence investigation report regarding the above inaccurate and irrelevant information.

## SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse his conviction and or grant a resentencing or other relief as this court sees appropriate.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

/s/ Marilena David-Martin

BY:_____

**MARILENA DAVID-MARTIN (P73175)**
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: November 7, 2014