

# STATE APPELLATE DEFENDER OFFICE

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May 4, 2012

Clerk  
Cass County Circuit Court  
Law & Courts Building  
60296 M-62  
Cassopolis, MI 49031

Re: **People v Erica Lane Thomas**  
Circuit Court No. 11-10164 FH

Dear Clerk:

Enclosed please find the original of the following: Praecipe; Notice of Hearing; Motion to Correct Invalid Sentence; Brief in Support of Motion to Correct Invalid Sentence; and Proof of Service for filing.

Thank you for your cooperation.

Sincerely,

Anne Yantus  
Managing Attorney  
Special Unit, Pleas/Early Releases

AMY/jad  
Enclosure(s)

cc: Cass County Prosecutor  
Hon. Michael E. Dodge  
Assignment Clerk  
Ms. Erica Lane Thomas  
File

**STATE OF MICHIGAN**

**IN THE CASS COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff,

-vs-

**ERICA LANE THOMAS**

Defendant.

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**CASS COUNTY PROSECUTOR**

Attorney for Plaintiff

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**ANNE YANTUS (P 39445)**

Attorney for Defendant

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**Court of Appeals No.**

**Circuit Court No. 11-10164 FH**

**Honorable Michael E. Dodge**

**BRIEF IN SUPPORT OF MOTION TO CORRECT INVALID SENTENCE**

**STATE APPELLATE DEFENDER OFFICE**

**BY: ANNE YANTUS (P 39445)**  
**Managing Attorney**  
**Special Unit, Pleas/Early Releases**  
3300 Penobscot Building  
645 Griswold  
Detroit, Michigan 48226  
(313) 256-9833

STATE OF MICHIGAN

IN THE CASS COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs-

ERICA LANE THOMAS,

Defendant.

Court of Appeals No.

Circuit Court No. 11-10164 FH

Honorable Michael E. Dodge

**PRAECIPE FOR MOTION AND ORDER/JUDGMENT**

TO THE ASSIGNMENT CLERK: Please place Defendant's

**MOTION TO CORRECT INVALID SENTENCE**

On the motion calendar for **Monday, June 4, 2012, at 1:30 p.m.** This motion is to be heard by JUDGE MICHAEL E. DODGE.

TO COURT CLERK: Have the following Order/Judgment completed and signed by Judge and check 1 or 2 below, whichever is applicable.

**ORDER/JUDGMENT**

DATED: \_\_\_\_\_

1. IT IS HEREBY ORDERED THAT the aforesaid motion be and the same is hereby \_\_\_\_\_ DENIED/ \_\_\_\_\_ GRANTED, and it is FURTHER ORDERED AND ADJUDGED

\_\_\_\_\_  
 Honorable Michael E. Dodge  
 Cass County Circuit Court Judge

Date: \_\_\_\_\_

**APPROVED AS TO FORM AND SUBSTANCE BY COUNSEL FOR:**

**ANNE YANTUS (P 39445)**  
 Defendant's Attorney  
 Telephone No. (313) 256-9833

\_\_\_\_\_  
 CASS COUNTY PROSECUTOR  
 Plaintiff's Attorney  
 Telephone No.

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_

**STATE OF MICHIGAN**

**IN THE CASS COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff,

-vs-

**ERICA LANE THOMAS**

Defendant.

**Court of Appeals No.**

**Circuit Court No. 11-10164 FH**

**Honorable Michael E. Dodge**

**NOTICE OF HEARING**

TO:  
**CASS COUNTY PROSECUTOR**  
Law & Courts Building  
Suite 6  
60296 M-62  
Cassopolis, MI 49031

**PLEASE TAKE NOTICE** that on **Monday, June 4, 2012 at 1:30 p.m.**, the undersigned will move this Honorable Court to grant the within

**MOTION TO CORRECT INVALID SENTENCE**

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: \_\_\_\_\_  
**ANNE YANTUS (P 39445)**  
**Managing Attorney**  
**Special Unit, Pleas/Early Releases**  
3300 Penobscot Building  
645 Griswold  
Detroit, Michigan 48226  
(313) 256-9833

Date: May 4, 2012

**STATE OF MICHIGAN**

**IN THE CASS COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff,

-vs-

**ERICA LANE THOMAS**

Defendant.

---

**Court of Appeals No.**

**Circuit Court No. 11-10164 FH**

**Honorable Michael E. Dodge**

**MOTION TO CORRECT INVALID SENTENCE**

NOW COMES Defendant ERICA LANE THOMAS, by and through hers attorney, the STATE APPELLATE DEFENDER OFFICE, by ANNE YANTUS, and moves this Honorable Court to grant resentencing in this case and says in support thereof that:

1. Defendant Erica Thomas pled guilty to maintaining or operating a meth lab, possession of methamphetamine and maintaining a drug house on September 16, 2011, in the Cass County Circuit Court.

2. On November 18, 2011, the Honorable Michael E. Dodge sentenced Ms. Thomas to concurrent terms of 51 months to 20 years, 136 days jail and 136 days jail, respectively.

3. The State Appellate Defender Office was appointed to perfect an appeal and/or pursue post-conviction remedies on December 13, 2011.

4. This motion is properly filed within six months of the sentencing date. MCR 6.429(B)(3). 5. Ms. Thomas is entitled to resentencing for three reasons. First, the Court erred in scoring ten points under Offense Variable 12 (contemporaneous felonious criminal conduct) in response to the prosecutor's request to increase the scoring for this variable. The Court

found “three or more contemporaneous criminal acts involving other crimes that were committed, specifically: Manufacturing methamphetamine, possession with intent to deliver and conspiracy are all supported in the Court’s opinion by the information contained on pages two and three in the presentence report.” (ST 5). But to score OV 12, the Court must find separate criminal *acts*. *People v Light*, 290 Mich App 717; 803 NW2d 720 (2010). As there was no evidence the dismissed charge of possession with intent to deliver methamphetamine was separate from the conviction offense of possession of methamphetamine, and because there was at best an implied agreement with no overt act for purposes of the conspiracy allegation, these offenses cannot be used to support the scoring of OV 12. A reduction of even one point under OV 12 reduces the sentencing guidelines range from 57 to 95 months to 51 to 85 months. *See Supporting Brief*.

6. The Court should also find error in the scoring of Offense Variable 15 (aggravated controlled substance offense). The probation agent scored five points under this variable “due to the defendant trafficking methamphetamine, which she admitted to sharing drugs with Melinda.” (PSI 1). But trafficking for purposes of scoring OV 15 is defined as “the sale or delivery of controlled substances or counterfeit controlled substances on a continuing basis to 1 or more other individuals for further distribution.” MCL 777.45(2)(c). There is nothing in the file or the presentence report to indicate this defendant was selling or delivering drugs to another person *for further distribution*. A reduction of one point under any offense variable, including OV 15, reduces the sentencing guidelines range from 57 to 95 months to 51 to 85 months. *See Supporting Brief*.

7. Finally, the Court should conclude that defense counsel provided ineffective assistance of counsel at sentencing by a) not objecting to OV 15 and objecting to OV 12 for other reasons, and b) providing false information to the Court regarding camp eligibility. *See Supporting Brief*.

**WHEREFORE**, Defendant respectfully requests that this Honorable Court grant resentencing.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: \_\_\_\_\_  
**ANNE YANTUS (P 39445)**  
**Managing Attorney**  
**Special Unit, Pleas/Early Releases**  
3300 Penobscot Building  
645 Griswold  
Detroit, Michigan 48226  
(313) 256-9833

Date: May 4, 2012

## STATEMENT OF FACTS

Defendant Erica Thomas pled guilty to operating or maintaining a meth lab, MCL 333.7401c(2)(f), possession of methamphetamine, MCL 333.7403(2)(b)(i), and maintaining a drug house, MCL 333.7405(1)(d), on September 16, 2011, in the Cass County Circuit Court. On November 18, 2011, the Honorable Michael E. Dodge sentenced Ms. Thomas to concurrent terms of 51 months to twenty years, 136 days in jail and 136 days in jail, respectively.

The plea bargain provided for dismissal of a charge of manufacturing methamphetamine and a charge of possession with intent to deliver methamphetamine (9/16/12 T 5). The prosecutor acknowledged that an additional charge of operating/maintaining a laboratory involving a firearm or other harmful device (Count I) was charged incorrectly and would be dismissed administratively (9/16/12 T 5). Ms. Thomas also agreed to cooperate with law enforcement and testify against her co-defendant, Christopher Ruth. *Id.*

According to Ms. Thomas's plea admissions and the information contained within the presentence report, a meth lab was found in the home that Ms. Thomas and her husband were purchasing on land contract (9/16/12 T 7; PSI 2-3). Ms. Thomas admitted supplying "equipment" to co-defendant Ruth, who purportedly operated the meth lab in the home, and she admitted supplying him with pseudo-ephedrine pills three days before the instant offense (9/16/12 T 8; PSI 2). Ms. Thomas also admitted possessing methamphetamine (9/16/12 T 7-8).

At sentencing, the Court increased the scoring of Offense Variable 12 at the prosecutor's request and found ten points to be appropriate for three or more contemporaneous criminal acts (11/18/11 T 3-5). Using a corrected sentencing guidelines range of 57 to 95 months, the Court imposed a 51-month minimum term using the defendant's cooperation and the prosecutor's request for a six-month departure as reasons for the departure from the sentencing guidelines



range (11/18/11 T 9, 13-14). The Court also “agree[d] with your attorney; that when you do become eligible for bootcamp participation, if the Department of Corrections notifies me of that fact, I will indicate at that point that I have no objection to it.” (11/18/11 T 15-16).

**I. MS. THOMAS IS ENTITLED TO RESENTENCING WHERE OFFENSE VARIABLE 12 WAS MISSCORED IN VIOLATION OF THE STATE AND FEDERAL DUE PROCESS RIGHT TO SENTENCING BASED UPON ACCURATE INFORMATION.**

Ms. Thomas is permitted to challenge the scoring of the sentencing guidelines by means of a timely motion to correct the sentence. MCL 769.34(10). This motion is timely under MCR 6.429(B)(3).

The Court should find error in the scoring of Offense Variable 12 (contemporaneous felonious criminal acts). The probation department initially scored five points under this variable “due to the dismissed delivery/manufacture charge and conspiracy charges that could have arisen from this offense.” (PSI 1). The prosecutor proposed increasing the score to ten points as “there are a number of felonies that fall within this category. First of all, a possession with intent to deliver methamphetamine, a manufacture of methamphetamine, also a conspiracy to manufacture meth, conspiracy to maintain a meth lab and also conspiracy to possess meth. So for those reasons, your Honor, we’d ask that that be scored at ten.” (11/18/11 T 4). Defense counsel opposed the scoring of either five or ten points as “[w]e don’t believe that, even though there are charges that could be, I don’t think there’s any factual basis in the description of the offense that would say that there was any conspiracy or that there was any possession with intent to deliver.” Defense counsel added: “Any of those [charges] that were dismissed here should have been dismissed because there was no proof of those, even though that was part of the agreement. So we don’t believe that this scoring would be supported by the agent’s description of the offense.” (11/18/11 T 4).

The Court concluded ten points would be appropriate based on the information contained in the presentence report.” The Court concluded there was sufficient evidence to support the

scoring of ten points for “Manufacturing methamphetamine, possession with intent to deliver and conspiracy are all supported in the Court’s opinion by the information contained on pages two and three in the presentence report.” (11/18/11 T 5).

Ms. Thomas objects to the assessment of ten points under OV 12 for a slightly different reason: that there must be a separate criminal *act* in order to score points under OV 12. *People v Light*, 290 Mich App 717; 803 NW2d 720 (2010).

In the *Light* decision, the Court of Appeals construed the language of OV 12 and concluded there must be “separate acts or behavior that did not establish the sentencing offense”:

As stated, MCL 777.42 establishes the scoring guidelines to determine a defendant's OV 12 sentencing score for any “contemporaneous felonious criminal acts.” [Footnote omitted.] “A felonious criminal act is defined to be contemporaneous if the *act* occurred within 24 hours of the *sentencing offense* and will not result in a separate conviction.” [Footnote omitted.] According to the Michigan Supreme Court, “ ‘the Legislature unambiguously made it known when *behavior outside the offense* being scored is to be taken into account.’ ” [Footnote omitted.] Significantly, OV 12 distinguishes within the same sentence between the “act” that occurred and the “sentencing offense.” [Footnote omitted.] This indicates that the Legislature specifically intended to draw a distinction between the two words. [Footnote omitted.] There is support for this rationale within the language of two other offense variables, OV 11 and OV 13. OV 11 states, “Multiple sexual penetrations of the victim by the offender *extending beyond the sentencing offense* may be scored in offense variables 12 or 13.” [Footnote omitted.] Thus, the language of OV 11 suggests that the Legislature did not intend for contemporaneous felonious criminal acts to be the same acts that established the sentencing offense. Likewise, the language of OV 13 indicates that a trial court should allocate points when the “[sentencing] *offense was part of a pattern of felonious criminal activity....*” [Footnote omitted.] OV 13 clearly distinguishes the offense from the activity. Therefore, when scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense. [*People v Light*, 290 Mich App at 722-723; emphasis in original.]

The holding in *Light* was that it was improper to assess points for either larceny from a person or larceny in a building because these offenses were not separate acts and were lesser-included offenses of the sentencing offense of unarmed robbery. 290 Mich App at 724-726.

Applying *Light* to the case at bar, it was improper to assess points for the dismissed charge of possession with intent to deliver methamphetamine when the sentencing offense included conviction of possession of methamphetamine. The possession offense is a lesser-included offense of the “possession with intent to deliver” charge. *People v Torres*, 222 Mich App 411, 416-417; 564 NW2d 149 (1997).

Likewise, it was improper to assess points for the alleged conspiracy between Ms. Thomas and Christopher Ruth because there was no separate *act* that occurred within 24 hours of the sentencing offense. If there was a conspiracy at all, it likely began days before the instant offense as Ms. Thomas admitted obtaining methamphetamine from co-defendant Ruth three days before the instant offense (PSI 2). But more importantly, there has been no showing of a separate *act* that establishes the conspiracy allegations. At best, the evidence might suggest an implied agreement between the parties.

Ms. Thomas would therefore contest the Court’s assessment of ten points under OV 12. As to the proper (reduced) scoring of this variable, it is difficult to determine from this record whether there were separate felonious acts that occurred within 24 hours of the sentencing offense. The charges contained within the felony information tend to overlap, and the

presentence report is vague on the dates, acts and individual responsibility of each party.<sup>1</sup>

Accordingly, it is difficult to determine the proper number of points under OV 12. If the Court finds responsibility for the dismissed manufacturing charge under Count II, one point would be appropriate for “one contemporaneous felonious criminal act involving any other crime was committed.” MCL 777.42(1)(f).

A reduction of any points under OV 12 (whether from ten points to one or possibly zero points) reduces the sentencing guidelines range from 57 to 95 months to **51 to 85 months**. *Sentencing Information Report*, Appendix A. As the sentencing range will change, Ms. Thomas is entitled to resentencing. *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006). There is a due process right to sentencing based upon accurate information. *Townsend v Burke*, 344 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948); *People v Malkowski*, 385 Mich 244; 188 NW2d 559 (1971); US Const Amends V & XIV; Const 1963, art 1, § 17. The benchmark for the Court’s departure decision has changed and the Court should reconsider the sentence.

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<sup>1</sup> Of particular note, there was dispute between Ms. Thomas and her co-defendant as to who was responsible for the active meth lab in the black duffel bag (PSI 2-3). On this latter point, the police found items related to the manufacture of methamphetamine in the co-defendant’s room and the prosecutor chose to allow Ms. Thomas to testify against her co-defendant (PSI 3; 9/15/11 T 5). The record, reviewed in its entirety, would suggest Ms. Thomas was not the primary party in the manufacturing process. This is consistent with defense counsel’s comments at sentencing that Ms. Thomas was a poorly educated woman with a drug problem who was working hard in the meth class at the jail (11/18/11 T 11). The Court in fact expressed sympathy for Ms. Thomas at sentencing (“Those reasons [for departure] have to be things that are objective and verifiable, not things that are simply in the mind of a judge, like ‘I feel sorry for you,’ and I do.” 11/18/11 T 13-14).

**II. MS. THOMAS IS ENTITLED TO RESENTENCING WHERE OFFENSE VARIABLE 15 WAS SCORED IN ERROR FOR TRAFFICKING, AND THIS ERROR INCREASED THE RECOMMENDED RANGE RESULTING IN A SENTENCE THAT WAS BASED ON INACCURATE INFORMATION IN VIOLATION OF THE STATE AND FEDERAL DUE PROCESS CLAUSES.**

Ms. Thomas is permitted to challenge the scoring of the sentencing guidelines by means of a timely motion to correct the sentence. MCL 769.34(10). This motion is timely under MCR 6.429(B)(3).

The Court should find error in the scoring of Offense Variable 15 (aggravated controlled substance offense) in this case. The probation department scored five points under this variable “due to the defendant trafficking [in] methamphetamine, which she admitted to sharing drugs with Melinda.” (PSI 1). But “trafficking” for purposes of scoring OV 15 refers to “the sale or delivery of controlled substances or counterfeit controlled substances on a continuing basis to 1 or more other individuals for further distribution.” MCL 777.45(2)(c).

There is nothing in the file or the presentence report to suggest this defendant was selling or delivering drugs to another person *for further distribution*. The information relied upon by the presentence investigator, namely the “defendant admitted to sometimes giving or sharing methamphetamine with Mindy,” PSI 2, does not reflect an instance of delivering drugs to another person for further distribution.

Defendant would further posit a *McGraw* challenge to any proposed scoring of OV 15. *See People v McGraw*, 484 Mich 120, 123; 771 NW2d 655 (2009). The Michigan Supreme Court’s order remanding for resentencing in *People v Gray*, 485 Mich 934; 773 NW2d 911 (2009), wherein the Court directed the trial court to “reconsider the scoring of offense variable 15 in light of this

According to the *McGraw* decision, “Offense variables are properly scored by reference *only to the sentencing offense* except when the language of a particular offense variable statute specifically provides otherwise.” 484 Mich at 135 (emphasis added). The *McGraw* Court repeated several times that “offense variables are generally offense-specific,” the guidelines are “offense specific by default,” “the default procedure is to score the offense variables using an offense-specific approach,” the guidelines have an “offense-specific orientation,” it was “the Legislature that chose to limit the scoring for offense variables to the sentencing offense,” “the offense variables are scored by reference only to the sentencing offense, except where specifically provided otherwise,” and “[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable.” *McGraw* at 124, 125, 126, 127, 129, 133.

Applying the *McGraw* decision, it is clear that Offense Variable 15 was meant to be “offense specific.” Nothing in the language of OV 15 suggests otherwise:

**777.45. Scoring offense variable 15, aggravated controlled substance offenses**

Sec. 45(1) Offense variable 15 is aggravated controlled substance offenses. Score offense variable 15 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

- (a) The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 1, 000 or more grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) [footnote omitted] . . .  
100 points

(b) The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 450 grams or more but less than 1,000 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) . . . 75 points

(c) The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 50 or more grams but less than 450 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) . . . 50 points

(d) The offense involved the sale or delivery of a controlled substance other than marihuana or a mixture containing a controlled substance other than marihuana by the offender who was 18 years of age or older to a minor who was 3 or more years younger than the offender . . .10 points

(e) The offense involved the sale, delivery, or possession with intent to sell or deliver 45 kilograms or more of marihuana or 200 or more of marihuana plants . . . 10 points

(f) The offense is a violation of section 7401(2)(a)(i) to (iii) [footnote omitted] pertaining to a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and was committed in a minor's abode, settled home, or domicile, regardless of whether the minor was present . . . 10 points

(g) The offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking . . . 5 points

(h) The offense was not an offense described in subdivisions (a) through (g) . . . 0 points [MCL 777.45(1)].

While there are several instructions to OV 15, they address only the meaning of certain words used in the statute:

(2) As used in this section:

(a) “Deliver” means the actual or constructive transfer of a controlled



substance from 1 individual to another regardless of remuneration.

(b) “Minor” means an individual 17 years of age or less.

(c) “Trafficking” means the sale or delivery of controlled substances or counterfeit controlled substances on a continuing basis to 1 or more other individuals for distribution [MCL 777.45(2)].

As applied to Ms. Thomas’s case, the sentencing offense was the operation/maintaining of a meth lab on July 6, 2011, with additional convictions for possession of meth and maintaining a drug house on this same date. As to the possession of meth offense, appellate counsel can find no allegation that Ms. Thomas was in possession of meth on her person at the time of the offense, but there were claims some meth was found in the co-defendant’s duffel bag in the attic (PSI 3). The amount of the substance found was not identified. While Ms. Thomas admitted “sometimes giving or sharing methamphetamine with Mindy” (PSI 2), it was unclear whether the meth found in the co-defendant’s duffel bag was destined for Mindy on this occasion. Accordingly, the record does not support a conclusion that “[t]he offense involved the . . . possession with intent to deliver . . . any other controlled substance . . .” MCL 777.45(1)(g).

A reduction of five points under OV 15 (i.e., from five points to zero points) reduces the sentencing guidelines range from 57 to 95 months to **51 to 85 months**. *Sentencing Information Report*, Appendix A. As the sentencing range will change, Ms. Thomas is entitled to resentencing. *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006). There is a due process right to sentencing based upon accurate information. *Townsend v Burke*, 344 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948); *People v Malkowski*, 385 Mich 244; 188 NW2d 559 (1971); US Const Amends V & XIV; Const 1963, art 1, § 17. The benchmark for the Court’s departure decision has changed and the Court should reconsider the sentence.

**III. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO OBJECT TO THE SENTENCING GUIDELINES AND IN OFFERING INCORRECT INFORMATION TO THE COURT ON THE BOOT CAMP PROGRAM, THEREBY VIOLATING THE STATE AND FEDERAL CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.**

To the extent that defense counsel voiced no objection to the scoring of Offense Variable 15 at sentencing, and did not object to the scoring of OV 12 based on the decision in *People v Light*, 290 Mich App 717; 803 NW2d 720 (2010), defense counsel failed to provide the effective assistance of counsel at sentencing. The right to counsel at sentencing includes the right to the effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996); *United States v Washington*, 619 F3d 1252 (CA 10, 2010); US Const Amends XI & XIV; Const 1963, art 1, § 20. See also *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 88 L Ed 2d 674 (1984). Where counsel fails to object to an erroneous scoring of the sentencing guidelines, the Court may find ineffective assistance of counsel. *People v Kimble*, 470 Mich 305; 684 NW2d 669 (2004). See also *Glover v United States*, 531 US 198; 121 S Ct 696; 148 L Ed 2d 604 (2001) (any increase in sentence due to guidelines error is sufficient to show prejudice under *Strickland*).

Moreover, defense counsel provided incorrect information to the Court regarding this defendant's eligibility for the boot camp program. Defense counsel argued at sentencing for a departure below the sentencing guidelines range and requested approval for placement in the boot camp program on the theory that the Court could give a sentence that was short enough for immediate eligibility or the Court could permit boot camp placement "when she becomes eligible":

[DEFENSE COUNSEL:] Obviously the sentences that you're going to give is [sic] required to be with the Department of Corrections. We're asking that you consider deviating below the guidelines even more than six months so that she would be eligible for bootcamp right away. I also note from my experience that, in dealing with the Department of Corrections that if you give her more than three years, when she gets down to that three-year period, then I believe she would be eligible for bootcamp treatment. So first we're asking that you go below the minimum guideline so that she can go to bootcamp right away. If not, that you do deviate below, and then when she becomes eligible you have no objection to a bootcamp situation. [11/18/11 T 11-12.]

In response to counsel's suggestion, the Court agreed with the proposal and stated it would have no objection to the program "when you do become eligible for bootcamp participation":

[THE COURT:] I agree with your attorney; that when you do become eligible for bootcamp participation, if the Department of Corrections notifies me of that fact, I will indicate at that point that I have no objection to it. [11/18/11 T 15-16.]

Ms. Thomas will never become eligible for the boot camp program. She is not eligible with the current sentence of 51 months to twenty years, MCL 791.234a(2)(a)(ii), and she will not be eligible when she has served enough of her sentence that only 36 months or less remain on the minimum term. *MDOC Memorandum*, Appendix B (to be forwarded shortly).<sup>2</sup>

In order to provide effective assistance of counsel, an attorney needs to understand the basic structure of the sentencing guidelines and also the statutory limits on the court's sentencing decision. *See United States v Washington, supra*. Here, and particularly with reference to the boot camp decision, defense counsel did not understand the statutory limits on the sentencing decision. Defense counsel used his opportunity for allocution to argue for a departure below the sentencing guidelines range to allow immediate boot camp eligibility or alternatively the court's

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<sup>2</sup> Appellate counsel has verified this information through multiple parties in the Michigan Department of Corrections including boot camp personnel and also legal counsel for the MDOC.

approval for the boot camp program “when she becomes eligible.” As these comments reflect a basic misunderstanding of the statutory requirements for the boot camp program under MCL 791.234a, this attorney did not adequately represent Ms. Thomas at sentencing. And because the Court was misled by defense counsel’s comments, resentencing is necessary. There is a due process right to sentencing based upon accurate information. *Townsend v Burke*, 344 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948); *People v Malkowski*, 385 Mich 244; 188 NW2d 559 (1971); US Const Amends V & XIV; Const 1963, art 1, § 17.

For the above reasons, the Court should grant resentencing.

**SUMMARY AND RELIEF REQUESTED**

**WHEREFORE**, Defendant respectfully requests that this Honorable Court grant resentencing.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY:

\_\_\_\_\_  
**ANNE YANTUS (P 39445)**  
**Managing Attorney**  
**Special Unit, Pleas/Early Releases**  
3300 Penobscot Building  
645 Griswold  
Detroit, Michigan 48226  
(313) 256-9833

Date: May 4, 2012