

STATE OF MICHIGAN  
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

MSC No. 156648

vs.

COA No. 336050

GREGORY CARL WASHINGTON,

3<sup>rd</sup> Circuit No. 04-004270

Defendant-Appellee.

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

**PROOF OF SERVICE**

**(Oral Argument Requested)**

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**STATEMENT OF QUESTIONS PRESENTED**

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

The trial court said “Yes”

The Court of Appeals said “Yes”

The prosecutor says: “No”

The Defendant-Appellee says: “Yes”

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

The trial court said: “Yes”

The Court of Appeals said “Yes”

The prosecutor says: “No”

The Defendant-Appellee says: “Yes”



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

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

**STATEMENT OF FACTS AND PROCEEDINGS**

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

## Arguments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MCR 6.508

....

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

....

(3) alleges grounds for relief, *other than jurisdictional defects*, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. ....

(Emphasis added).

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

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

conduct the resentencing hearing on October 4, 2006.

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the above excerpt, this Court stated that the waiver/forfeiture rules apply to all: “trial participants.” Thus, these rules apply to the prosecution as well as to the defense in a criminal case.

Accord: People v Pipes, 475 Mich 267, 715 NW2d 290, 296-297 (2006).

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

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

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

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

Accord: Pipes, supra, at 297.

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

“Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” United States v Olano, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Carines, supra, at 762, n. 7.

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

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

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

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

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

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

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

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

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

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

(G) Successive Motions.

(1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.

(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

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



a prior motion for relief from judgment.:

MCR 6.508

....

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

....

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. ....

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

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

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

This Court in Swain, 288 Mich App at 632, explicitly held that "MCR 6.502(G)(2) provides the only two exceptions to the prohibition of successive motions." Swain is binding on this Court, as it is on the trial court, MCR 7.215(C)(2), and we discern no ambiguity in the language of MCR 6.502(G) to warrant reconsideration of the issue.

Defendant's successive motion for relief from judgment was predicated on a claimed "jurisdictional defect" invalidating the October 4, 2006 judgment of sentence. Defendant's successive motion for relief from judgment did not involve a retroactive change in the law or newly discovered evidence. Regardless of the merits of defendant's claim of error, the trial court lacked authority to grant defendant's motion under MCR 6.502.

People v Gregory Washington, 321 Mich App 276, \_\_\_\_; \_\_\_\_ NW2d \_\_\_\_ (2017). (77a – 78a).

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

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

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

However, a motion for relief from judgment under MCR 6.502 is merely a procedural vehicle, and our determination that relief under MCR 6.502 was unavailable to defendant here does not end our inquiry. We agree that the prosecution has failed to address the substantive issue in defendant's motion for relief from judgment, which, while brought pursuant to an inapplicable court rule, nevertheless constitutes an important and reviewable claim of error.

(78a).

...

Although the prosecution argues otherwise, the trial court's entry of the judgment of sentence without jurisdiction was not merely procedural error. "The term jurisdiction refers to the power of a court to act and the authority a court has to hear and determine a case." People v Clement, 254 Mich App 387, 394; 657 NW2d 172 (2002) (quotation marks and citation omitted). "Jurisdiction of the subject matter of a judicial proceeding is an absolute requirement." In re AMB, 248 Mich App 144, 166; 640 NW2d 262 (2001) (quotation marks and citation omitted). "When a court is without jurisdiction of the subject matter, its acts and proceedings are of no force or validity; they are a mere nullity and are void." Clement, 254 Mich App at 394 (quotation marks and citation omitted). Thus, because the trial court lacked jurisdiction to hold a resentencing hearing and enter the October 4, 2006 judgment of sentence, the resentencing hearing and the resultant judgment of sentence lack force and authority and are considered void.

"Jurisdictional defects may be raised at any time." People v Martinez, 211 Mich App 147, 149; 535 NW2d 236 (1995); see also Smith v Smith, 218 Mich App 727, 729-730; 555 NW2d 271 (1996) ("[A] challenge to subject-matter jurisdiction may be raised at any time, even if raised for the first time on appeal."). "Subject-matter jurisdiction is so critical to a court's authority that a court has an independent obligation to take notice when it lacks such jurisdiction, even when the parties do not raise the issue." AMB, 248 Mich App at 166-167; see also Clement, 254 Mich App at 394 (explaining that a court is bound to notice the limits of its authority and recognize its lack of jurisdiction sua sponte). Regardless of whether the issue was raised in an improperly supported motion, the trial court clearly had the power to consider the jurisdictional issue brought to its attention.

(79a).

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

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

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

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

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

**RELIEF REQUESTED**

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

Respectfully submitted,

s/John F. Royal

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