

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Peter D. O'Connell, PJ, Joel P. Hoekstra and Kirsten Frank Kelly, JJ.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

TYKEITH L. TURNER,

Defendant-Appellant.

Supreme Court No. 158068

Court of Appeals No. 336406

Circuit Court No. 95-10246-01

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Defendant-Appellant's Brief on Appeal

Oral Argument Requested

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Statement of Jurisdiction

The prosecution appealed as of right from the trial court's granting Tykeith Turner's motion for relief from judgment and resentencing for the conviction of assault with intent to murder. (Appendix, 3a, 213a, 260-261a). On May 17, 2019, the Court of Appeals reversed. (Appendix, 262-265a) On April 5, 2019, this Honorable Court granted Mr. Turner's application for leave to appeal that was timely filed on July 12, 2018. (Appendix, 266a). This Court has jurisdiction. MCL 600.215; MCR 7.303(B)(1).

Statement of Questions Presented

- I. As a matter of due process, does a legal misconception or inaccurate information concerning a defendant's sentence on one count render the lesser concurrent sentences arising out of the same transaction invalid?

Court of Appeals answered, "No".

Trial Court answered, "Yes".

Defendant-Appellant answers, "Yes".

- II. Once a formerly inconsequential concurrent sentence becomes consequential, is a defendant entitled to resentencing on that count? Does a defendant need to file a motion for relief from judgment to give the sentencing court authority over now consequential concurrent sentences where the court is already authorized to hold a resentencing?

Court of Appeals answered, "No" to the first part, and answered, "Yes" to the second part.

Trial Court answered, "Yes" to the first part, and answered "Yes" to the second part.

Defendant-Appellant answers, "Yes" to the first part, and answers "No" to the second part.

- III. At a resentencing, is the circuit court's exercise of its sentencing discretion on the other counts limited by defendants' constitutional rights?

Court of Appeals made no answer.

Trial Court made no answer.

Defendant-Appellant answers, "Yes".

- IV. Even if this Court finds resentencing on the other counts is only appropriate via MCR 6.500, *et seq*, did the trial court abuse its discretion in granting Mr. Turner's motion for relief from judgment as he satisfied those requirements?

Court of Appeals answered, "Yes".

Trial Court answers, "No".

Defendant-Appellant answers, "No".

Argument Summary

In Michigan, legal error in a controlling sentence renders lesser concurrent sentences invalid because sentences are imposed as a package. An error in a controlling sentence¹ renders the concurrent sentences arising from the same transaction invalid as these concurrent sentences are then premised on a legal misconception and/or inaccurate information, in violation of Due Process. US Const, Am XIV; Const 1963, art 1, § 17. This Court should clarify this rule and affirm the trial court's resentencing on Mr. Turner's assault conviction, where he was being resentenced for murder committed as a juvenile pursuant to *Miller*² and MCL 769.25a.

This Court should hold that a trial court has discretion to resentence on concurrent sentences without the defendant needing to file a motion for relief from judgment under MCR 6.500, *et seq*, where the granting of resentencing on a controlling sentence renders a formerly inconsequential sentence one of consequence. Judicial economy and Due Process require that courts be able to exercise this discretion concurrent with resentencing on a formerly controlling sentence. The trial court's exercise of this discretion is limited by defendants' Due Process rights, including the presumption of vindictiveness.

Nevertheless, Mr. Turner did file a motion for relief from judgment and the sentencing court properly granted it where he had established entitlement to relief. He suffered prejudice where his original sentence for assault was rendered invalid by *Miller* and where he had been granted resentencing for murder. MCR 6.508(D)(3)(iv). Those *post hoc*

¹ By a "controlling sentence," Mr. Turner means a sentence with the greatest minimum term and/or greatest maximum term. See *Lickfeldt v Department of Corrections*, 247 Mich App 299, 304 (2001).

² *Miller v Alabama*, 567 US 460; 132 S Ct 2455 (2012).

developments rendered the premise of Mr. Turner's assault sentence legally and factually inaccurate.³ The prosecution waived any objections to the good cause requirement and the successive motion bar by failing to make those objections in the trial court. Regardless, the retroactivity of *Miller* as decided in *Montgomery*⁴ and the granting of resentencing on the murder count allowed for the successive motion and constituted good cause for the failure to challenge the assault sentence earlier.

³ The assault sentence was also based on erroneously scored judicial sentencing guidelines and, after Mr. Turner's resentencing for murder, would be disproportionate.

⁴ *Montgomery v Louisiana*, __ US __; 136 S Ct 718, 732 (2016).

Statement of Facts

Tykeith Turner was originally sentenced to the mandatory term prison of life without the possibility of parole for participating in a murder when he was 16 years old. (Appendix, 159a, 262a). In 1995, Mr. Turner participated as one of two shooters in a drive-by shooting. Appendix, 262a; see also Presentence Report, 2/2/96 pp 2-3). In addition to first-degree murder, Mr. Turner was convicted of assault with intent to murder based on the same drive-by shooting. (Appendix, 262a). The assault victim was physically unharmed. (Appendix, 238a, 248a, 256a).

The Original Sentencing

Because he was 16 years old at the time of the offense, the trial court was required to decide whether it was more appropriate to sentence Mr. Turner as a juvenile (to five years in a juvenile facility) or an adult (to mandatory life without the possibility of parole). The original sentencing judge, the Honorable Warfield Moore Jr., observed:

...I don't see this procedure as being the best. I don't know who thought of this statute...Well, I disagree with this. I would employ [sic] the legislature to change this, the statute. My Lord, change it so it helps me because you're putting us into an almost untenable circumstances [sic]. Untenable position as we sit here now.

(Appendix, 133-134a).

The sentencing judge noted that Mr. Turner "may be amenable to treatment," but expressed concern that it would not be safe for the community if Mr. Turner were to be released in five or six years through the juvenile system. (Appendix, 154a). Judge Moore stated, "I wish there was something between life imprisonment [and a juvenile sentence]." (Appendix, 155a). He continued, "I hope that some day [sic] some benevolent governor,

maybe 20, 25, 30 years from now when you are hopefully a different person than you are today will look on you and in a benign way and allow you to return to society, sir.” (Appendix, 155a).

The judge concluded that given the limited options available, it was necessary to sentence Mr. Turner as an adult. (Appendix, 157-158a). Thus, Mr. Turner was sentenced to a mandatory prison term of life without the possibility of parole for the homicide conviction. (Appendix, 159a).

The court scored the judicial sentencing guidelines⁵ for the assault conviction to be 120 to 300 months, including a score of 100 points for Offense Variable (OV) 2, reflecting that the assault victim was killed during the offense. (Appendix, 164a). Without any discussion of the guidelines range or providing any analysis, the trial court sentenced Mr. Turner to a prison term of parolable life for the assault conviction. (Appendix, 159a). Both sentences were made consecutive to the mandatory two-year term for felony-firearm. (Appendix, 159a).

Mr. Turner’s Mandatory Life without Parole Sentence was Unconstitutional

Subsequent United States Supreme Court decisions held that Mr. Turner’s mandatory life without parole sentence was cruel and unusual in violation of his Eighth Amendment rights because he was a juvenile at the time of the offenses. *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455 (2012); *Montgomery v Louisiana*, __ US __; 136 S Ct 718, 732 (2016).

⁵ See Administrative Order 1988-4.

After the United States Supreme Court decisions in *Miller*, 567 US at 465, and *Montgomery*, 136 S Ct at 732, the Wayne County Prosecutor's Office filed a notice of its agreement that Mr. Turner should be resentenced to a term-of-years sentence for his homicide conviction in accordance with MCL 769.25a. (Appendix, 165-168a).

The Resentencing

Prior to resentencing, Mr. Turner asserted that his resentencing pursuant to *Miller* and *Montgomery* necessarily included resentencing on his assault conviction. At the prosecutor's insistence, and only as a courtesy, Mr. Turner filed a motion for relief from judgment on the same grounds. (Appendix, 187a).

In his motion, Mr. Turner asserted that the motion for relief from judgment was a proper successive motion because his entitlement to relief resulted from a retroactive change in the law. (Appendix, 187a). In addition, Mr. Turner asserted that the assault sentence was invalid because it was based upon a misconception of the law and inaccurate information of a constitutional magnitude. (Appendix, 189-192a).

In response, the prosecutor argued that *Miller* and *Montgomery* address only mandatory life without parole sentences for juveniles and have no impact upon or application to Mr. Turner's assault sentence. (Appendix, 204-212a). The prosecutor argued that Mr. Turner could not establish prejudice because the assault sentence was valid when it was imposed. (Appendix, 204-212a). The prosecutor did not assert that the motion for relief from judgment was barred by MCR 6.502. (Appendix, 204-212a).

At the resentencing, the original judge's successor, the Honorable Richard M. Skutt, first addressed Mr. Turner's sentence for murder. Mr. Turner accepted responsibility for his role in the shooting that took the life of another young man and apologized to the victim's

family for taking their loved one from them. (Appendix, 229-230a). Judge Skutt noted the significant progress Mr. Turner made over the years towards rehabilitation, including his increasingly positive disciplinary record and his excellent employment history in the Department of Corrections. (Appendix, 232-233a). Judge Skutt determined that a sentence of 25 to 60 years in prison was appropriate for Mr. Turner's murder conviction. (Appendix, 234a).

Then, the judge considered whether it was appropriate to resentence Mr. Turner for his assault conviction as well. Counsel reasserted Mr. Turner's position that a motion for relief from judgment was not necessary to put the matter before the court. (Appendix, 236-237a, 245a).

After hearing the parties' arguments, the trial court granted Mr. Turner's request and said:

In *People versus Whalen*, 412 Mich. at 166 at pages one sixty-nine through one seventy they list those conditions. In addition to the constitutionally impermissible considerations the Court also recognized situations where the sentencing court, and I quote, fails to exercise its discretion because it's laboring under a misconception of the law, and that's at page one seventy.

When I reviewed the transcript of the sentencing that was done by Judge Moore it tells me that the Defendant should prevail in this case.

...

Now, it's clear to me from Judge Moore's comments that his sentence were [sic] imposed solely on his understanding of the mandatory life without parole statutory penalty for first degree murder. From his comments it's evident that he failed to exercise any possible discretion he may of [sic] had on the assault with intent to murder charge solely because of his understanding there was no mechanism for parole unless, as he had earlier noted, some benevolent Governor granted clemency

in the far distant future. I find, therefore, the decision in *Miller* and *Montgomery* form the basis for filing of the subsequent motion for relief from judgment as well as a basis for finding that the sentence imposed for the assault with intent to murder charge was invalid or is invalid at the present time.

(Appendix, 251-253a).

Thereafter, the trial court resentenced Mr. Turner to a prison term of 20 to 27 years for his assault conviction, to be served concurrently with his sentence for murder and consecutive to a mandatory two-year prison term for felony firearm. (Appendix, 257a).

Appellate Procedural History

The prosecution appealed as of right and asserted that the trial court reversibly erred by resentencing Mr. Turner for assault concurrent with his resentencing for murder. (Prosecution's Brief on Appeal, 4/4/17). On appeal, the prosecution argued for the first time that Mr. Turner's resentencing was barred by MCR 6.502(G).

The Court of Appeals issued a per curiam opinion reversing the trial court and ordering the trial court to reinstate Mr. Turner's parolable life sentence for assault. (Appendix, 262-265a). The Court of Appeals concluded that Mr. Turner's resentencing was barred by MCR 6.502(G) because, even though *Miller v Alabama* was a retroactive change in the law, it did not apply to Mr. Turner's assault sentence. (Appendix, 264a). It went on to conclude that Mr. Turner could not establish actual prejudice under MCR 6.508(D)(3). (Appendix, 264a). The court noted that life imprisonment is a valid sentence for assault with intent to murder and concluded that *Miller* did not invalidate the sentence because "*Miller* only applies to mandatory life imprisonment without parole." (Appendix, 264a).

Mr. Turner then sought leave to appeal to this Court, which was granted. In addition to granting leave to appeal, this Court asked the parties to specifically address the following questions:

(1) whether a legal misconception concerning a defendant's sentence on one count renders the sentences for other counts arising out of the same transaction invalid;

(2) whether the requirements for a motion for relief from judgment must be satisfied before a defendant may be resentenced on other counts where a change in the law requires resentencing for one count, or whether a trial court may exercise its discretion to resentence on other counts where resentencing is required for one count; and

(3) if the latter, what parameters apply to the exercise of the court's discretion when deciding whether to resentence on other counts.

(Appendix, 266a).

In addition, while Mr. Turner is currently eligible for parole,⁶ parole board staff informed undersigned counsel that the board has delayed a decision as to whether to grant Mr. Turner parole due to the pendency of this appeal and the uncertainty over the status of his sentence for the assault conviction.

⁶ See MDOC's Offender Tracking Information (OTIS) regarding Tykeith Turner, showing his earliest release date to be April 29, 2018.

Argument

Standards of Review

Constitutional questions and questions of law are reviewed de novo. *People v Carp*, 496 Mich 440, 460; 852 NW2d 801 (2014), overruled on other grounds in *Montgomery v Louisiana*, ___ US __; 136 S Ct 718, 732 (2016)(citations omitted).

A trial court's order granting a motion for relief from judgment is reviewed for an abuse of discretion and the findings of fact are reviewed for clear error. *People v Johnson*, 502 Mich 541, 564-565; 918 NW2d 676 (2018); *People v Hewitt-El*, 501 Mich 1031; 908 NW2d 885 (2018). A trial court's decision that falls outside the range of reasoned and principled outcomes is an abuse of discretion. *Johnson*, 502 Mich at 564.

Preservation of the Issues

The issues in this brief were preserved in the trial court in Mr. Turner's motion for relief from judgment and the arguments made on the record at the resentencing. (Appendix, 185-192a, 234-247a).

The prosecution failed to make any objection in the trial court under MCR 6.502(G), resulting in waiver and/or forfeiture of that claim. C.f. *People v Swain*, 288 Mich App 609, 628 FN 4; 794 NW2d 92 (2010) (noting that the prosecution did not waive a successive motion argument because the prosecution's objection on that basis in the trial court preserved the issue for appellate review); see *Gross v Gen Motors Corp*, 448 Mich 147, 162 FN 8; 528 NW2d 707 (1995)("[A] party is bound to the theory on which the cause was prosecuted or defended in the court below."); see also *People v Hamacher*, 432 Mich 157, 167-68; 438 NW2d 43 (1989)(holding that prosecution's argument that defense waived objection to the admission

of evidence at trial was itself waived where the prosecution did not raise this claim prior to its brief in the Michigan Supreme Court).

Discussion

I. As a matter of Due Process, a legal misconception or inaccurate information concerning a defendant's sentence on one count renders the lesser concurrent sentences arising out of the same transaction invalid.

A legal misconception concerning a defendant's sentence on one count renders his lesser concurrent sentences arising from the same transaction invalid because the legal misconception necessarily undercuts the trial court's careful exercise of discretion in crafting a sentencing package. As a result, where the trial court imposes concurrent sentences and relies on a misconception of law in imposing the longest of the sentences, the appropriate remedy must be a full resentencing on all concurrent counts. The only exceptions to this general rule involve those situations where there is no discretion for the trial court to exercise in curing the error. This Court should clarify this general rule and overrule any prior decisions that suggest a "partially invalid" sentence can be remedied by a partial resentencing.

A. Michigan's circuit courts impose concurrent sentences as a package. Errors specific to one count generally infect the sentencing package and can only be remedied by a full resentencing on all concurrent convictions.

Because trial courts impose sentences as a package, a legal error specific to one sentence, particularly a controlling sentence, infects the entire sentencing package, rendering the shorter sentence terms invalid as well. A full resentencing on all convictions is thus necessary to alleviate the harm.

Michigan trial courts are vested with tremendous discretion at sentencing. E.g. *People v Sabin*, 242 Mich App 656, 661; 620 NW2d 19 (2000)(internal citations omitted). The trial courts' exercise of that discretion is guided by the sentencing guidelines and limited by defendants' constitutional rights. *People v Milbourn*, 435 Mich 630, 680-682; 461 NW2d 1 (1990). This broad discretion is necessary for courts to craft a sentencing package tailored to the offender and the offense. *People v Adams*, 430 Mich 679, 686-687; 425 NW2d 437 (1988); *Sabin*. 242 Mich App at 661 ("a trial court has been given broad discretion, within limits fixed by law, to tailor a sentence to the circumstances of each case and each offender, in an effort to balance society's need for protection against its interest in rehabilitation of the offender") (cleaned up).

Sentences for multiple convictions arising from the same transaction are generally imposed to run concurrently. *People v Morris*, 450 Mich 316, 326; 537 NW2d 842 (1995) (internal citations omitted). Because "...concurrent sentencing is the norm in this state," *id.*, trial courts practically and legally treat concurrent sentences as a package.⁷ When sentences are imposed concurrently, the trial court often focuses primarily on the defendant's longest sentence, as that sentence will determine when the defendant becomes eligible for parole and when the defendant will discharge from his sentences.⁸ See *Lickfeldt v Department of Corrections*, 247 Mich App 299, 304; 636 NW2d 272 (2001).The sentencing guidelines also

⁷ This is in contrast to consecutive sentences, which this Court has held are to be reviewed individually for proportionality purposes. See *People v Miles*, 454 Mich 90, 95; 559 NW2d 229 (1997) (internal citations omitted).

⁸ Similarly, plea bargaining generally takes a package approach to convictions arising out of the same transaction. E.g. *People v Blanton*, 317 Mich App 107, 125; 894 NW2d 613 (2016) (describing the "nature of the plea-bargaining process in Michigan" as one "where both parties often tend to negotiate a 'package deal'" (internal citations omitted). Agreements often dispose of all charges and sentences in one agreement, either discharging or setting sentences for all counts. *Id.*

reflect this “package” approach, requiring higher scores (and higher sentencing ranges) where defendants have multiple convictions arising from the same transaction. See MCL 777.61 – 777.69 (Sentencing Grids); MCL 777.57 (Prior Record Variable 7); MCL 777.22 (Offense Variable 13).⁹ The sentencing judge need only consider the guidelines scoring for the highest class offense in imposing sentences for all the convictions.¹⁰ These rules make lesser concurrent sentences of little or no consequence because they are literally subsumed within the controlling sentence. As a result, lesser concurrent sentences are often imposed without knowledge of or regard to the applicable sentencing guidelines range for those offenses and without regard to the principle of proportionality for those offenses.¹¹

Relief for constitutional errors should be tailored to cure the harm. See *United States v Morrison*, 449 US 361, 364; 101 S Ct 665 (1981). For sentencing errors, that means that an error in the controlling sentence typically will require a resentencing on all lesser concurrent terms as well. *People v Gunn*, 503 Mich 908; 1919 NW2d 402 (2018); see also, *People v Benda*,

⁹ This is true of the legislative sentencing guidelines enacted in 1999, MCL 777.1, *et seq*, as well as the judicial guidelines in effect at the time of Mr. Turner’s convictions, Michigan Sentencing Guidelines, 2d ed (1988).

¹⁰ In *People v Mack*, 265 Mich App 122; 695 NW2d 342 (2005), the Court of Appeals held that the sentencing judge need only have the guidelines scored for the highest class offense, and it rejected the defendant’s claims that he was entitled to have the guidelines scored for his lesser class conviction too and that the sentence imposed for that lesser class conviction was an unacknowledged and unsupported upward departure from the guidelines range for that lower class. The *Mack* panel did observe: “We question (but do not expressly decide today) whether a sentence for a conviction of the lesser class felony that is not scored under the guidelines pursuant to MCL § 771.14(2)(e)(ii) and (iii) could permissibly exceed the sentence imposed on the highest crime class felony and remain proportional.” *Id.* at 129. In *People v Johnigan*, 265 Mich App 463, 470-473; 696 NW2d 724 (2005), another panel criticized *Mack*, noting the tension between MCL 771.14(2)(e) and MCL 777.21(2), but did not call for a conflict panel pursuant to MCR 7.215. MCL 771.14(2)(e)(iii) provides that unless consecutive sentencing is authorized, the presentence report shall contain “the computation that determines the recommended minimum sentence range for the crime having the highest crime class.” In contrast, MCL 777.21(2) provides that that the sentencing guidelines for each conviction offense be scored.

¹¹ See prior footnote.

162 Mich App 255, 260-261; 412 NW2d 705 (1987), citing *People v Coles*, 417 Mich 523; 339 NW2d 440 (1983), overruled on other grounds by *Milbourn*, 435 Mich 630.

In its decision below, the Court of Appeals concluded that there was no need for the trial court to resentence Mr. Turner for assault because his sentence for that offense was valid when it was imposed. (Appendix, 264-265a). The Court of Appeals' analysis is overly simplistic and disregards the many situations where an error regarding one count requires a trial court to revisit sentences it imposed on lesser counts. C.f. *Gunn*, 503 Mich 908.

Our appellate courts regularly recognize that a sentence that was valid when it was imposed can become invalid based upon a subsequent change in the law or clarification of existing law that shows the original sentencing judge relied upon a misconception of law at the original sentencing. See *People v Thomas*, 223 Mich App 9, 12; 566 NW2d 13 (1997) (citing several cases remanded for resentencing where the original trial judge imposed the original sentence based upon a misconception of the law). The traditional remedy for invalid sentences imposed based on a mistake of law is resentencing. *Id.* This is because it is impossible to determine whether the judge would have exercised his discretion differently absent the misconception of law. *People v Green*, 205 Mich App 342, 347; 517 NW2d 782 (1994); see also *People v McCracken*, 172 Mich App 94; 431 NW2d 840 (1988) (remanding for resentencing and noting that "the trial court may not have put the appropriate amount of judicial effort into the sentencing decision and carefully weighed the sentencing factors because of its belief that it was essentially irrelevant what sentence was imposed.").

The remedy of a full resentencing on all counts arising from the same transaction is also consistent with Due Process, which requires that sentences be based on accurate information. US Const, Am XIV; Const 1963, art 1, § 17; see *Townsend v Burke*, 334 US 736,

741-742; 68 S Ct 1252 (1948); *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006). A sentence is invalid if it is based upon inaccurate information. *Francisco*, 474 Mich at 89.

MCR 2.613(A) provides that a court may modify a judgment due to an error where the refusal to take action would be inconsistent with “substantial justice.” As this Court has repeatedly stated, “it is difficult to imagine something ‘more inconsistent with substantial justice’ than requiring a defendant to serve a sentence that is based upon inaccurate information.” *Francisco*, 474 Mich at 91 FN 6; see also *People v Jackson*, 487 Mich 783, 800; 790 NW2d 340 (2010). Thus, a defendant is entitled to resentencing when his sentence is predicated upon an inappropriately inflated guidelines range or other inaccurate information. *Francisco*, 474 Mich at 91-92; *People v Carter*, 503 Mich 221; __ NW2d __ (2019), slip op p 2; *People v Lucker*, __ Mich __ (Docket No. 158195) (July 26, 2019) (defendant was entitled to resentencing where the sentencing judge relied upon inaccurate information regarding the number of his prior convictions).

This is particularly true when the inaccurate information is of a “constitutional magnitude.” See *United States v Tucker*, 404 US 443, 447; 92 S Ct 589 (1972); *Jackson*, 487 Mich 783, concurring opinion (where a less serious conviction count was vacated on appeal for insufficient evidence, an error of constitutional magnitude, the defendant is entitled to resentencing on the greater conviction count regardless of the restrictions of MCL 769.34(10) and MCR 6.429 because the unconstitutional conviction was a factor considered at the original sentencing).

In *Tucker*, the Supreme Court determined that the sentencing court relied upon “misinformation of a constitutional magnitude” where the “prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue,” and as

a result was constitutionally entitled to resentencing. *Id.* at 447, quoting *Townsend*, 334 US at 741. Likewise, this Court has also held that defendants are entitled to resentencing where, if the sentencing judge “had been aware of the constitutional infirmity of...the previous conviction, the factual circumstances of the respondent’s background would have appeared in a dramatically different light at the sentencing proceeding.” *People v Moore*, 391 Mich 426, 436-437; 216 NW2d 770 (1974).

The longstanding practice of Michigan’s appellate courts confronted with a sentencing error has been to remand for resentencing, which has long been viewed as a full resentencing on all counts. See *Benda*, 162 Mich App at 261 (“the underlying principle is that a partially invalid sentence is properly remedied by a remand for resentencing so that the trial court is enabled to fashion a sentence tailored to the specific circumstances of the defendant and the needs of the community”); see also *People v Lampe*, __ Mich App __ ; __ NW2d __ (2019) (Docket No. 342325) (“By ordering ‘resentencing’ without any specific instructions or any prohibitions on scoring OV’s on remand, this Court returned the case to the trial court in a presentence posture, allowing the trial court to consider every aspect of defendant’s sentence de novo.”), citing *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007) and *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994).¹²

It is true that not all legal errors at sentencing require a full resentencing. E.g. *People v Thomas*, 447 Mich 390; 523 NW2d 215 (1994). But exceptions to the general rule that resentencing is required are generally limited to situations where the sentencing court has

¹² Because resentencing returns a case to a presentence posture, a defendant in a plea case may even file a motion for plea withdrawal and it will be considered under the presentence standard for such motions. See *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994).

no discretion to exercise in correcting its error. E.g. *People v Miles*, 454 Mich 90; 559 NW2d 299 (1997) (holding that it was not necessary for the trial court to resentence Mr. Miles for felony-firearm when resentencing him for armed robbery because “the trial court had no discretion” regarding the felony-firearm sentence). These exceptions make sense, because where there is no discretion for the trial court to exercise in correcting the error (i.e. in resentencing the defendant), the correction is ministerial in nature and a resentencing would be a waste of judicial resources.¹³

B. In more recent years, some appellate courts have erroneously limited resentencing to only the sentence directly implicated by the legal error; those decisions relying on MCL 769.24 to so limit resentencings should be overruled, consistent with defendants’ Due Process rights and this Court’s more recent jurisprudence.

Beginning in *Thomas*, 447 Mich 390, this Court misconstrued MCL 769.24 in a manner inconsistent with the plain language of the statute and inconsistent with Due Process. In *Thomas*, this Court clarified that where a trial court imposes a sentence in violation of the *Tanner* rule,¹⁴ the proper remedy is not to remand for resentencing where the sentencing judge could raise the maximum term. *Id.* at 392-393. Rather, the appropriate remedy is for the appellate court to order the sentencing judge to reduce the minimum term so that

¹³ For a resentencing, the trial court must hold a hearing, order an updated presentence investigation report, MCL 777.14(1); MCR 6.425(A)(1), consider any sentencing memoranda or objections filed by the parties, MCL 777.14(6); MCR 6.425(E)(b), and hear victim impact statements, MCL 780.764; MCL 780.765(1); MCR 6.425(A)(1)(g), and the defendant’s allocution, MCR 6.425(E)(c), in addition to the arguments of the parties. Often, the trial court must also order the defendant’s transportation to the court from the Department of Corrections, consistent with the defendant’s right to be present at sentencing. See *People v Heller*, 316 Mich App 314, 319; 891 NW2d 541 (2016), citing *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984).

¹⁴ See *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972)(“any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentence act.”)

together with the maximum term, the sentence complies with *Tanner. Id.* The *Thomas* Court explained that this remedy was consistent with the long-established practice of Michigan appellate courts for correcting *Tanner* errors. *Id.* at 392.

The result of *Thomas* made sense, as to allow the judge to raise the maximum term of sentence to achieve the goal of complying with the indeterminate sentence act “would be no remedy at all.” *Tanner*, 387 Mich at 393 FN 8. It would also appear to be unconstitutionally vindictive, i.e. a violation of Due Process. See *North Carolina v Pearce*, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969); *People v Mazzie*, 429 Mich 29; 413 NW2d 1 (1987). But in the reasoning of *Thomas*, perhaps to avoid a constitutional question in favor of a statutory approach, this Court asserted that the remedy of ordering the sentencing court to reduce the maximum term was consistent with the express language of MCL 769.24. *Id.* at 393. At the same time, the *Thomas* Court characterized MCL 769.24 as providing:

Where a court imposes a sentence that is partially invalid, the Legislature has provided that the sentence is not to be “wholly reversed and annulled,” rather is to be set aside only “in respect to the unlawful excess.”

Id., quoting MCL 769.24. This portion of the *Thomas* decision misconstrues the express language of MCL 769.24 and has since been misapplied in a number of cases, resulting in confusion about the proper scope of resentencing in cases involving “partially invalid” sentences.

MCL 769.24 applies where a trial court imposes a sentence in excess of the law. Since the late-1800s it was applied to situations where appellate courts conclude that the sentence imposed by the trial court was in excess of the statutory maximum. E.g. *Elliot v People*, 13 Mich 365 (1865); *Brown v People*, 39 Mich 57 (1878).

MCL 769.24 provides:

Whenever, in any criminal case, the defendant shall be adjudged guilty and **a punishment by fine or imprisonment shall be imposed in excess of that allowed by law, the judgment shall not for that reason alone be judged altogether void**, nor be wholly reversed and annulled by any court of review, but the same shall be valid and effectual to the extent of the lawful penalty, and **shall only be reversed or annulled on writ of error or otherwise, in respect to the unlawful excess.** [emphasis added]

Consistent with the plain statutory language, Michigan courts relied on MCL 769.24 to deny defendants' requests that their convictions be set aside on the basis of sentencing errors, and did so consistently for well over a hundred years. E.g. *Elliot*, 13 Mich at 367 ("There being no error except in the judgment, there can be no new trial.").¹⁵

Prior to this Court's decision in *Thomas*, MCL 769.24 was not applied to sentencing errors other than those specifically referred to in the statutory text: "fine or imprisonment...in excess of that allowed by law." The *Thomas* Court's reference to MCL 769.24 and its characterization of the statute as establishing a rule that a "partially invalid" sentence "is not to be 'wholly reversed and annulled'" was novel and contrary to the plain text of the statute. Rather than providing that a *sentence* shall not be reversed simply because it was imposed in excess of the law, MCL 769.24 provides that a *judgment* shall not be reversed simply because the sentence was imposed in excess of the law. This distinction is important as "judgment" is a legal term of art, encompassing not simply the defendant's sentence(s), but rather his conviction(s) *and* sentence(s). See MCR 6.427; MCR 6.428; MCR

¹⁵ In addition, prior to *People v Coles*, 417 Mich 523; 339 NW2d 440 (1983) and this Court's creation of the judicial sentencing guidelines, MCL 769.24 was relied upon by appellate courts for the assertion that "The length of sentence is not subject to review if within the limits of the lawful penalty." E.g. *People v Malkowski*, 385 Mich 244, 247; 188 NW2d 559 (1971).

6.431; MCR 7.202(6)(b). While the *Thomas* Court's references to MCL 769.24 were by analogy, its mischaracterization of the purpose and language of MCL 769.24 improperly expanded the number of situations to which it would apply.

In *Miles*, this Court further expanded the scope of MCL 769.24 in its discussion of the holding in *Thomas*:

A similar issue was addressed by this Court in *People v Thomas*, 447 Mich 390, 523 N.W.2d 215 (1994), in which this Court, applying MCL § 769.24; MSA § 28.1094, held that a partially invalid sentence need not be wholly annulled, but rather may be set aside only in respect to the unlawful excess. **Although there was no "unlawful excess" at issue in this case, the principle of *Thomas*, that even the maximum and minimum terms of a sentence may be adjusted independently, is even more logical when applied to adjustments of sentences for separate convictions.**

Miles, 454 Mich at 95 FN 11 (emphasis added). Thus, the *Miles* Court applied the *Thomas* Court's misinterpretation of the language of MCL 769.24 and expressly did so even though there was no "unlawful excess." In other words, it expanded the application of MCL 769.24 to those cases where the defendant sought to wholly set aside the judgment, i.e. including the convictions, based on an excessive sentence to all those situations where a portion of the defendant's sentence might have been lawful. See, *People v Pontius*, 485 Mich 970; 774 NW2d 693 (2009) (asserting that MCL 769.24 and *Thomas* establish that "[w]here a court imposes a sentence that is partially invalid, only the invalid part of the sentence may be set aside.").

This expansion improperly introduced the idea that sentences could be assessed for "partial validity," and that the remedy of resentencing could be limited to only those parts of the sentence that were invalid. Prior to *Thomas*, it was well established that the remedy for even a "partially invalid" sentence was a full resentencing. See *Benda*, 162 Mich App at 261.

This expansion of the application of MCL 769.24 is at odds with this Court's more recent jurisprudence. In the decade following the *Thomas* and *Miles* decisions, this Court increasingly recognized the importance of accurate information at sentencing. In a series of decisions beginning with *People v Kimble*, 470 Mich 305, 313-314; 684 NW2d 669 (2004), this Court recognized that legal errors in scoring the sentencing guidelines resulted in reliance on inaccurate information at sentencing. *Id.*; *Francisco*, 474 Mich 82. These decisions, remanding for resentencing (without limiting resentencing to only those counts for which guidelines were scored) are at odds with the notion of limiting resentencing to only those portions of a sentence or the sentences directly affected by the legal errors.

Even more recently, this Court has addressed the common reality that an error in imposing one sentence often means that lesser concurrent sentences were based on inaccurate information. See *Jackson*, 487 Mich at 486 (explaining that because one of his convictions was vacated, "defendant's sentence is now based on inaccurate information."); *Gunn*, 503 Mich at 908 (holding that resentencing was required on a lesser concurrent conviction because the formerly lesser sentence was based on inaccurate information).

This Court should clarify that Due Process requires that the scope of resentencing required by a legal error in one sentence include resentencing on all discretionary counts. To the extent the decisions of this Court in *Thomas*, *Miles*, and *Pontius* suggest otherwise, they should be overruled.

C. The trial court properly resentenced Mr. Turner for assault, concurrent with resentencing him for murder.

Mr. Turner's assault sentence was invalid because it was based upon the legal misconception that a mandatory term of life without parole was a constitutionally permissible sentence for a juvenile like Mr. Turner. See *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 639 (1981). That mistake of law also caused the trial court to rely on inaccurate information about whether Mr. Turner could ever be eligible for parole or released from prison regardless of the sentence imposed for assault. See *Tucker*, 404 US at 447; *Miller*, 567 US at 465. In other words, the trial court relied on both a mistake of law and inaccurate information when it imposed the original sentences for murder and assault. (Appendix, 251-253a). The life without parole sentence for murder subsumed the concurrent assault sentence, making it of no practical consequence. [Appendix, 250-251a ("So any possibility of parole on the assault charge was essentially a meaningless determination")].

If the original sentencing judge had been aware that Mr. Turner would be eligible for parole and eventual discharge from his murder sentence, the court would likely have imposed a lesser term for the assault conviction. (Appendix, 133-134a; 154a-155a). In other words, if the judge "had been aware of the constitutional infirmity of...the previous [sentence], the factual circumstances of the respondent's [future] would have appeared in a dramatically different light at the sentencing proceeding." *Moore*, 391 Mich at 436-437. The unconstitutional sentence here is exactly the sort of circumstance that alters the framework within which trial courts fashion and impose sentencing packages.

Due Process required that Mr. Turner be resentenced for assault concurrent with his resentencing for murder so that both sentences could be valid and based on accurate information about Mr. Turner and his offense. As this Court recognized in *Francisco*, 474 Mich 82, it would be fundamentally unfair to deny the defendant the opportunity to be resentenced on the basis of accurate information and in accord with the law, and resentencing in such a situation “also respects the trial court’s interest in having defendant serve the sentence that it truly intends.” *Id.* at 92. Denial of resentencing on the assault conviction would require Mr. Turner to serve a sentence that does not reflect the careful exercise of the court’s discretion and would violate Due Process.

D. Other jurisdictions treat sentences as a package and have required resentencing on all counts post-*Miller*.

Appellate courts in other jurisdictions have found that it is appropriate to resentence on all counts in cases where juveniles are being resentenced pursuant to *Miller* and *Montgomery*. See *Sen v State*, 301 P3d 106, 127-128; 2013 WY 47 (2013); *Bear Cloud v State*, 334 P3d 132; 2014 WY 113 (Wy 2014). In *Sen v State*, the Wyoming Supreme Court held it was appropriate to vacate and remand for resentencing on all of Mr. Sen’s sentences after finding that his sentence of life imprisonment without parole for first degree felony murder violated the Eighth Amendment’s prohibition against cruel and unusual punishment. *Sen*, 301 P3d 106. The court noted that Mr. Sen’s sentence of life without the possibility of parole “may have impacted the sentencing decisions with respect to his conspiracy and aggravated burglary convictions.” *Id.* at 127.

The court in *Bear Cloud* relied in part on *Pepper v United States*, where the United States Supreme Court rejected the argument that a sentencing court on remand is required to maintain a portion of a sentence that is not challenged on appeal. *Pepper v United States*, 562 US 476; 131 S Ct 1229 (2011). In *Pepper*, the Court noted that “a criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent.” *Id.* at 507 (quoting *United States v Stinson*, 97 F 3d 466, 469 (CA 11, 1996)). The Court also reasoned that a sentencing court’s “original sentencing intent may be undermined by altering a portion of the calculus,” *id.* (quoting *United States v White*, 406 F 3d 827, 832 (CA 7, 2005)), and therefore an appellate court may vacate a defendant’s entire sentence when reversing one part of the sentence. *Id.* (citing *Greenlaw v United States*, 554 US 237, 253; 128 S Ct 2559 (2008)). This then allows the sentencing court to adjust its total sentencing package to the changes made to the part of the sentence that was reversed. *Id.*

The Sixth Circuit Court of Appeals has similarly treated concurrent convictions as resulting in a “sentencing package,” and has a general presumption of de novo resentencing. See, e.g., *United States v Faulkenberry*, 759 F Supp 2d 915, 921 (SD Ohio 2010), *aff’d*, 461 F App’x 496 (6th Cir 2012) (“When considering a multiple-count criminal judgment that produced ‘interdependent’ sentences, we may vacate all sentences even if only one is reversed on appeal.”).

II. Once a formerly inconsequential concurrent sentence becomes consequential, a defendant is entitled to resentencing on that count. A defendant need not file a motion for relief from judgment to give the sentencing court authority over now consequential concurrent sentences where the court is already authorized to hold a resentencing.

While it may make sense for appellate courts to avoid reviewing inconsequential concurrent sentences, as the Court of Appeals decided in *People v Mack*, 265 Mich App 122, 695 NW2d 342 (2005),¹⁶ the underlying logic crumbles when the controlling sentence is being reduced due to an error and the formerly inconsequential sentence becomes the controlling sentence or consequential. This was recognized by this Court in its recent order in *People v Gunn*, 503 Mich 908; 919 NW2d 402 (2018).

In *Gunn*, this Court held the “trial court erred by finding that it did not have the authority to review” the defendant’s concurrent sentence for a lesser offense. At the original sentencing, the probation department calculated her guidelines only for the higher crime class offense and not for the lesser offense. The trial court sentenced the defendant to concurrent minimum terms of 15 years for both offenses. This was departure sentence for the lesser offense, “but it had no practical effect in light of the sentence for” the greater offense at the time. This court held that after the defendant was resentenced in 2016 and her sentence for the greater offense was reduced, the sentence for lesser offense “was no longer inconsequential.” This Court held that the sentence for the lesser offense, “being based on a

¹⁶ In *Mack*, the Court of Appeals held that the sentencing judge need only have the guidelines scored for the highest class offense, and it rejected the defendant’s claims that he was entitled to have the guidelines scored for his lesser class conviction too and that the sentence imposed for that lesser class conviction was an unacknowledged and unsupported upward departure from the guidelines range for that lower class. The *Mack* panel did observe: “We question (but do not expressly decide today) whether a sentence for a conviction of the lesser class felony that is not scored under the guidelines pursuant to MCL § 771.14(2)(e)(ii) and (iii) could permissibly exceed the sentence imposed on the highest crime class felony and remain proportional.” *Id.* at 129.

higher class crime offense sentence that had been significantly reduced, was invalid because it was based on inaccurate information, and the trial court had the authority to resentence the defendant on that count,” citing *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006), and MCR 6.429(A).

The prosecutor’s reliance on *People v Comer*, 500 Mich 278; 901 NW2d 553 (2017), to support its argument that the sentencing court had no authority to resentence Mr. Turner on his concurrent count is misplaced. In *Comer*, this Court held that the trial court was without authority to *sua sponte* alter an invalid sentence under MCR 6.429 to correct a substantive error after the judgment of sentence had been entered. But here, the sentencing court was not acting on its own initiative but rather pursuant to MCL 769.25a, a retroactive statute meant to remedy a constitutional violation, which granted resentencing and did not affirmatively place any limitations on the court’s resentencing authority in regard to other counts. The situation is more analogous to *Gunn* than to *Comer*.

The purpose of the court rules is to secure justice and to be flexible enough to avoid “imposing a dubious technical requirement that serves no purpose other than elevating form over substance.” *People v Jackson*, 487 Mich 783, 800; 790 NW2d 340 (2010). To make a defendant file a motion for relief from judgment to obtain resentencing on concurrent counts where he is already being resenteded pursuant to MCL 769.25a on the most serious count to remedy a constitutional violation is elevating form over substance. It is also a waste of judicial resources and can unnecessarily prolong a process that is already emotionally

grueling on the victim's family, the defendant, the defendant's family, and the community, if it causes the resentencing hearings to be held separately.¹⁷

Similar to what this Court did in *People v Kimble*, 470 Mich 305, 313-314; 684 NW2d 669 (2004), this Court should hold that the filing of a motion for relief from judgment is unnecessary in these circumstances because a defendant would surely prevail. In *Kimble*, this Court held that the good cause requirement of MCR 6.508(D)(3) was satisfied because counsel rendered ineffective assistance by failing to preserve the scoring error.¹⁸ *Id.* at 314. This Court held that the actual prejudice requirement of MCR 6.508(D)(3) was met because the sentence was invalid where it exceeded the properly scored guidelines range without any articulated substantial and compelling reason for departure. *Id.* at 314 FN 6.

Here, the actual prejudice requirement was met because the sentence for the concurrent assault count is invalid where it was based on a misconception of law in regard to the greater count and resulted in the reliance on inaccurate information regarding the assault count. See Section (I)(C), *supra*, and Section (IV), *infra*. Good cause is satisfied and there is no bar to a successive motion because it was a retroactive change in the law that made this claim regarding the concurrent formerly inconsequential sentences ripe for adjudication and to have raised the claim earlier would have been futile. See *Jackson*, 487 Mich at 796, 798-801; MCR 6.502(G)(2). A defendant cannot be expected to "do the impossible in order to receive the relief that substantial justice requires." *Jackson*, 487 Mich at 800-801.

¹⁷ See footnote 13, *supra*.

¹⁸ Mr. Kimble was represented by the same attorney on appeal that had represented him at sentencing. *Id.* at 314.

Even if this Court were to require that a motion for relief from judgment must be filed in regard to concurrent sentences under the circumstances present in this case, Mr. Turner still prevails. He did file a motion for relief from judgment, which Judge Skutt granted. Judge Skutt did not abuse his discretion in granting the motion as the good cause and actual prejudice requirements were met. See Section (I)(C), *supra*, and Section (IV), *infra*.

III. At a resentencing, the circuit court's exercise of its sentencing discretion on the other counts is limited by defendants' constitutional rights.

While trial courts have tremendous discretion at sentencing and in many cases will have broad discretion at a resentencing, that discretion is limited by defendants' due process rights.

It is well established that when a defendant is resentenced by the same judge and the second sentence is longer than the first, there is a presumption of vindictiveness. *People v Mazzie*, 429 Mich 29, 35; 413 NW2d 1 (1987); *People v Lyons*, 222 Mich App 319, 323; 564 NW2d 114 (1997); *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). That presumption of vindictiveness may only be overcome by "objective information in the record justifying the increased sentence." *Mazzie*, 429 Mich at 42.

Therefore, trial courts are not free to give increased sentences upon resentencing without actual, objective support in the record that the increase is justified. It then follows that when resentencing on concurrent convictions, the trial court's discretion would be limited by the presumption of vindictiveness. Such vindictiveness violates the Due Process Clause of the 14th Amendment. See *South Carolina v Pearce*, 395 US 711, 723; 89 S Ct 2089 (1969), limited in part by *Alabama v Smith*, 490 US 794; 109 S Ct 2201 (1989).

It is also well established that a trial court lacks the authority to amend a judgment of sentence in situations where the defendant has already been discharged from the sentence at issue. *People v Holder*, 483 Mich 168, 173; 767 NW2d 423 (2009) (internal citations omitted). Where the defendant has already been discharged from a sentence, the imposition of a new sentence "would amount to a revocation or recalling of that discharge" and violates Due Process. *People v Gregorczyk*, 178 Mich App 1, 12; 443 NW2d 816 (1989).

These are two examples of the ways in which defendants' constitutional rights can limit the trial court's exercise of discretion at a resentencing. These examples are especially relevant to resentencings required by *Miller* and *Montgomery* due to the passage of time in many cases between the original sentencing and the resentencing.

IV. Even if this Court finds resentencing on the other counts is only appropriate via MCR 6.500, *et seq*, the trial court did not abuse its discretion in granting Mr. Turner's motion for relief from judgment as he satisfied those requirements.

Mr. Turner established his entitlement to resentencing for his assault conviction, even under the heightened review standards of MCR 6.500, *et seq*. The trial court properly found Mr. Turner established good cause and prejudice.

A. Mr. Turner's Motion for Relief from Judgment is not barred by MCR 6.502(G).

While Mr. Turner previously filed a motion for relief from judgment in 2009, he was not barred from filing this successive motion for relief from judgment because his entitlement to relief was the result of the change in the law brought about by the *Miller*¹⁹ decision that applies retroactively to Mr. Turner under *Montgomery*²⁰ and MCL 769.25a. See 6.502(G)(2); *Montgomery*, 136 S Ct at 732. While the *Montgomery* decision did not directly address sentences like Mr. Turner's sentence for assault, the decision rendered invalid Mr. Turner's sentence of life without the possibility of parole. Further, the trial court relied on inaccurate information in imposing both sentences where it operated under the belief that Mr. Turner could never be eligible for parole. Thus, the errors that render the assault sentence invalid are a consequence of the *Miller* decision, which, the prosecution agrees, applies retroactively to Mr. Turner. (Prosecution's Brief on Appeal, 4/4/17, p 10).

The prosecution's assertion that *Miller* and *Montgomery* have no impact on Mr. Turner's assault sentence fails to account for the fact that the now-unconstitutional mandatory sentence of life without the possibility of parole was a necessary part of the

¹⁹ *Miller v Alabama*, 567 US 460; 132 S Ct 2455 (2012).

²⁰ *Montgomery v Louisiana*, ___ US __; 136 S Ct 718, 732 (2016).

court's consideration, factually and legally, when it imposed the sentence for assault. (Appendix, 133-134a, 154-155a, 157-158a).

The prosecution asserted for the first time on appeal that Mr. Turner's motion for relief from judgment was barred by MCR 6.502(G)(2). (Prosecution's Brief on Appeal, 4/4/17, pp 8-9). The prosecution's argument is meritless for the reasons discussed above. Further, the prosecution failed to make any objection in the trial court on the basis of MCR 6.502(G)(2). Thus, any objection raised for the first time on appeal is waived. C.f. *People v Swain*, 288 Mich App 609, 628 FN 4; 794 NW2d 92 (2010)(noting that the prosecution did not waive a successive motion argument because the prosecution's objection on that basis in the trial court preserved the issue for appellate review); see *Gross v General Motors*, 448 Mich 147, 162 FN 8; 528 NW2d 707 (1995)("[A] party is bound to the theory on which the cause was prosecuted or defended in the court below."); see also *People v Hamacher*, 432 Mich 157, 167-68; 438 NW2d 43 (1989)(holding that prosecution's argument that defense waived objection to the admission of evidence at trial was itself waived where the prosecution did not raise this claim prior to its brief in the Michigan Supreme Court).. The trial court did not abuse its discretion by failing to consider an objection that was never made.

In short, Mr. Turner's entitlement to relief was triggered by *Miller* and the retroactive application of that decision to his case. Thus, Mr. Turner satisfied the requirements of MCR 6.502(G)(2).

B. Mr. Turner established good cause.

Good cause was established where Mr. Turner could not have challenged the original sentencing court's mistake of law in his appeal of right, as discussed in Section (I), *supra*, because it did not become apparent until the United States Supreme Court's decisions in *Miller* and *Montgomery*. See MCR 6.508(D)(3)(a). Similarly, the original sentencing court's related reliance on inaccurate information did not become apparent until after *Miller* and *Montgomery* were decided. Along those same lines, it was not until he was resentenced for murder that the errors in his assault sentence became apparent and consequential.

In the trial court, the prosecution made no objection to Mr. Turner's assertions that he satisfied the good cause requirement. (Appendix, 204-212a). Similarly, in the Court of Appeals, the prosecution agreed that if *Montgomery* "is the trigger-point for defendant's claim that his assault sentence is invalid," then good cause is established. (Prosecution's Brief on Appeal, 4/4/17, p 13).

C. Mr. Turner established prejudice on at least three distinct bases.

Mr. Turner suffered actual prejudice because the sentence for the concurrent assault count is invalid where it was based on a misconception of law and inaccurate information in regard to the punishment for the greater count. (See Sections (I) and (II), *supra*).

In addition to the misconception of law and reliance on inaccurate information, Mr. Turner's assault conviction was invalid because it was based upon inaccurate information as reflected in the erroneous scoring of the guidelines at the original sentencing. (Appendix, 164a, 247-248a). The trial court at resentencing noted that at the original sentencing, Offense Variable (OV) 2 under the judicial guidelines was improperly scored at 100 points,

reflecting the victim of the assault was killed during the offense.²¹ The scoring error represented additional inaccurate information relied upon by the trial court at the original sentencing, as the victim of the assault was not physically injured in any way. (Appendix, 238a, 248a, 256a).

At the resentencing, the trial court properly concluded that the original sentencing judge relied upon additional inaccurate information at the original sentencing in violation of Mr. Turner's Due Process rights. See *People v Raby*, 456 Mich 487, 496-498; 572 NW2d 655 (1998) (noting that a scoring error under the judicial guidelines warrants resentencing where the error shows the trial court relied on inaccurate information in violation of a defendant's due process rights) (citations omitted).²²

D. Left uncorrected, Mr. Turner's parolable life sentence would be cruel and/or unusual under the state and federal constitutions and would also be disproportionate.

The Court of Appeals' decision in this case, that Mr. Turner's parolable life sentence for assault remained valid in light of his constitutionally mandated resentencing to a term of years for his murder conviction, leads to unjust and unconstitutional results. Left uncorrected, Mr. Turner's parolable life sentence would be unreasonable and

²¹ While the prosecution objected to the judge's ruling related to the scoring of OV 2 at the resentencing, (Appendix, 254-255a), it did not reassert any of these arguments in its brief on appeal. (Prosecution's Brief on Appeal, 4/4/17). Thus, the prosecution abandoned any issue related to this independent basis for the trial court's ruling. *People v Iannucci*, 314 Mich App 542, 545; 887 NW2d 817, 819 (2016) ("The failure to brief the merits of an allegation of error constitutes an abandonment of the issue.") (citation omitted).

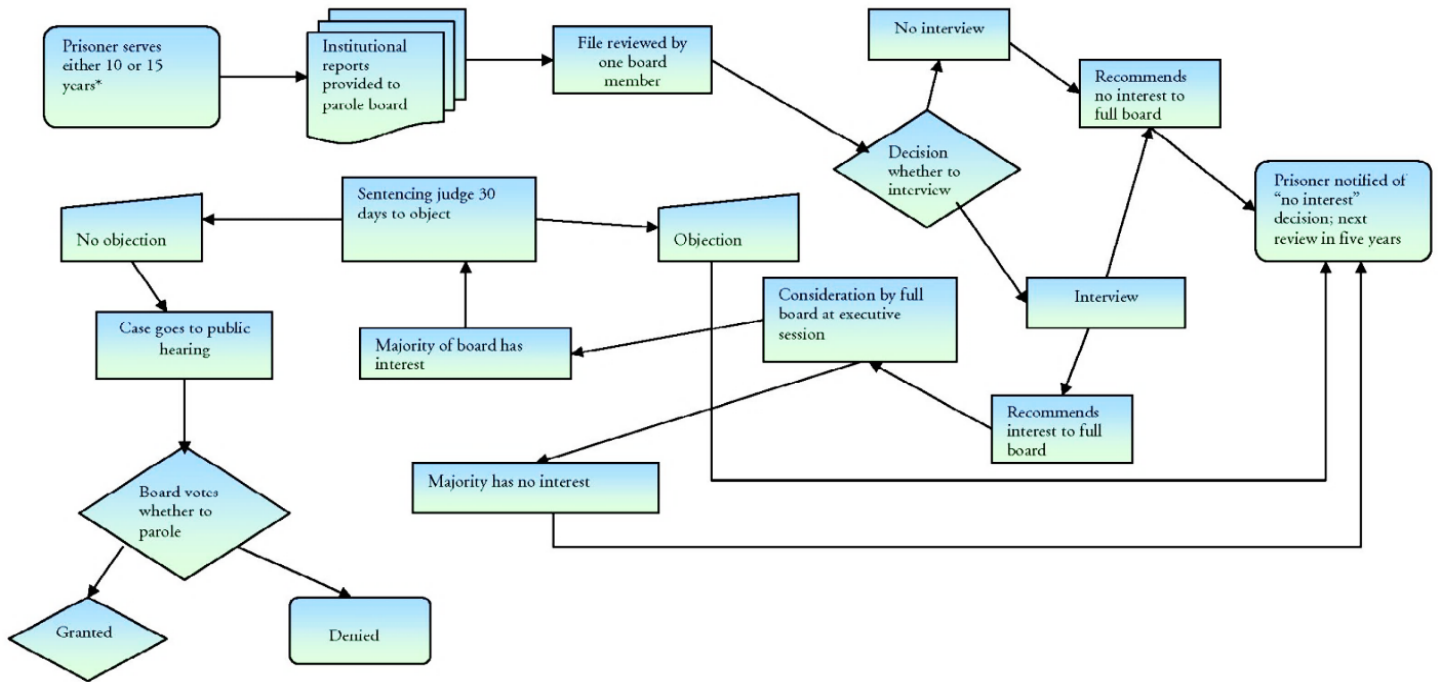
²² The Court of Appeals' opinion erroneously dismissed this independent basis for finding Mr. Turner's assault conviction invalid because "life is and was a valid sentence for an AWIM conviction." (Appendix, 264a). The Court of Appeals stated, "[b]ecause we conclude that the original life sentence for the AWIM conviction was valid and should be reinstated, we do not address this argument." (Appendix, 265a). This portion of the Court of Appeals' analysis is also clearly erroneous as it would serve as a basis to ignore all guidelines errors so long as the sentenced imposed is within the statutory maximum, contrary to this Court's well-established authorities. See *Raby*, 456 Mich at 496-498.

disproportionate both for the assault offense in which the victim was uninjured and compared to his sentence for murder. *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017); *People v Milbourn*, 435 Mich 630, 680-682; 461 NW2d 1 (1990). It also would have served as an additional barrier and potential hindrance to the meaningful opportunity for release mandated by *Miller*, in violation of Mr. Turner's Eighth Amendment rights.

Left uncorrected, Mr. Turner's parolable life sentence for assault would be, for all practical purposes, a harsher sentence than his 25-to-60-year prison term for murder. Under the murder sentence, Mr. Turner is eligible for parole after serving 25 years. Were the parole board to deny him parole indefinitely, Mr. Turner would be entitled to release after serving 60 years.

Under the original assault sentence, Mr. Turner would have been eligible for parole after serving 15 years, but would have been subject to a much more burdensome parole process. The parole process for lifers is markedly different and more complex than the process for those serving term of years sentences. A chart summarizing the process lifers must go through appears below.²³

²³ This chart is an updated version of a chart originally created by Citizens Alliance on Prisons & Public Spending available at <http://www.capps-mi.org/wp-content/uploads/2013/03/5.4-Michigan-parole-process-for-lifers.pdf>.



*Years of service required by Lifer Law for parole eligibility depends on whether offense was committed before or after Oct. 1, 1992.

While an individual serving a parolable life term is eligible for parole after serving 10 or 15 years in prison, in reality, individuals serving parolable life terms in Michigan are rarely, if ever released on parole. *Foster v Booker*, 595 F 3d 353, 366 (CA 6 2010) (finding that the percentage of parole-eligible lifers who were released was only 0.15% on average in recent years). A former chairperson of the parole board testified before the State Legislature: “It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that – life in prison.” Michigan Department of Corrections, Office of the Michigan Parole Board, Testimony in support of Proposed Legislation (Lansing, September 28, 1999).

Further, the parolable life term could prevent Mr. Turner from being discharged from the MDOC even after he has served the statutorily imposed maximum term of 60 years for his murder conviction. In other words, Mr. Turner could continue to be imprisoned for an

offense in which no one was physically injured long after he is discharged from a sentence imposed for murder.

The practical effect of the parolable life term would violate Mr. Turner's constitutional right to be free from cruel and/or unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. In *Graham v Florida*, 560 US 48; 130 S Ct 2011 (2010), *Miller*, 567 US 460, and *Montgomery*, 136 S Ct 718, the United States Supreme Court placed constitutional limits on the sentences that may be imposed on children. *Graham* barred sentences of life without parole for children convicted of nonhomicide offenses and held that such offenders must have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 US at 75, 82.

Miller and *Montgomery* established that children must have this same meaningful opportunity for release even in homicide cases—except in the rarest of cases where it is determined that the particular child "exhibits such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 136 S Ct at 733. Not only that, but in *Montgomery*, the United States Supreme Court clarified that, "*Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Id.* (internal citations omitted).

Numerous state supreme courts have concluded that sentences not technically labeled "life without parole" violate the Eighth Amendment as applied to children if those sentences do not provide a realistic opportunity to obtain release at a meaningful point in an individual's life as required by *Graham*, *Miller* and *Montgomery*. See, e.g., *State v Ramos*, 187 Wash 2d 420; 387 P 3d 650 (Wash 2017) (applying *Miller* to defendant's aggregate 85-year

sentence, concluding that the case “clearly” applies to “any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation”); *State v Zuber*, 227 NJ 422; 152 A 3d 197 (NJ 2017) (applying *Miller* and *Graham* to 110-year and 75-year sentences); *State v Moore*, 149 Ohio St 3d 557; 76 NE 3d 1127 (Ohio 2016) (holding that *Graham* applies to 112-year aggregate sentence for multiple nonhomicide offenses); *People v Reyes*, 407 Ill Dec 452; 63 NE3d 884 (Ill 2016) (concluding that a mandatory aggregate sentence of 97 years’ imprisonment violates *Miller*); *Henry v State*, 40 Fla L Wkly S147; 175 So 3d 675 (Fla 2015) (remanding a 90-year aggregate sentence for multiple nonhomicide offenses because *Graham* is not limited to the “exclusive term of ‘life in prison’” and a juvenile offender must have a meaningful opportunity to obtain release during his or her natural life); *State v Boston*, 121 Nev Adv Op 98; 363 P3d 453 (Nev 2015) (concluding that aggregate sentence requiring 100 years in prison before parole violates *Graham*); *Casiano v Commissioner*, 317 Conn 52; 115 A3d 1031 (Conn 2015) (holding *Miller* applicable to a sentence of 50 years without parole); *Brown v State*, 10 NE3d 1 (Ind 2014) (holding that defendant’s aggregate sentence of 150 years’ imprisonment “forfeits altogether the rehabilitative ideal” and exercising state constitutional authority to impose a lesser sentence); *People v Caballero*, 55 Cal 4th 262; 282 P3d 291 (Cal 2012) (holding that total effective term of 110 years-to-life for nonhomicide offense is prohibited under *Graham*).

The Eighth Amendment is not triggered by the magic words “life without parole,” but rather by any sentence that does not allow a person convicted as a child to have the opportunity to obtain release upon demonstrating he or she is not irreparably corrupt. *Montgomery*, 136 S Ct at 736. Once Mr. Turner was resentenced to a term of years for murder,

the parolable life term would have diminished Mr. Turner's likelihood of obtaining release on parole for both offenses, potentially for the rest of his life, in violation of his Eighth Amendment rights. Compare *Miller*, 567 US at 479-480, quoting *Graham*, 560 US at 48, 75.

The trial court recognized this when it stated:

The Defendant could serve the full sixty years and not be granted parole on the life – or on the term of years sentence and still not be granted parole on the less serious charge of assault with intent to commit murder and as defense counsel indicated that means he could die in prison which is contrary to both the decision to proceed with by [sic] the Prosecutor's Office and the decision of this Court on resentencing.

(Appendix, 250a).

For these reasons, the original parolable life sentence would have delayed and hindered Mr. Turner's meaningful opportunity for release, in violation of the Eighth Amendment.

Request for Relief

Defendant-Appellant Tykeith Turner asks this Honorable Court to reverse the Court of Appeals' decision in this case, clarify the appropriate scope of resentencings, affirm the trial court's grant of resentencing for the assault conviction in this case, and reinstate the trial court's December 21, 2016 judgment of sentence.

Respectfully submitted,

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Date: August 9, 2019