

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-vs-

**DAVID CHARLES ROARK**

Defendant-Appellant.

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**Supreme Court No. 152562**

**Court of Appeals No. 316467**

**Lower Court No. 08-9312-01**

**WAYNE COUNTY PROSECUTOR**

Attorney for Plaintiff-Appellee

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**JACQUELIN C. OUVRY (P71214)**

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**ANSWER TO APPLICATION FOR LEAVE TO APPEAL**

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**STATEMENT OF QUESTIONS PRESENTED**

**I. Due process requires that a defendant be fully advised of the direct consequences of a plea. Lifetime electronic monitoring is a direct consequence of the plea, yet the trial court failed to advise of this severe consequence at the time of Mr. Roark's plea. The Court of Appeals correctly found Mr. Roark's plea was involuntary made and his convictions manifestly unjust. Should this court deny leave to appeal?**

Court of Appeals answers, "Yes".

Defendant-Appellee answers, "Yes".

## STATEMENT OF FACTS

Defendant-Appellant David Charles Roark pled guilty to criminal sexual conduct in the first-degree, MCL 750.520b, and child sexually abusive material, MCL 750.145c (2) on September 19, 2008, in the Wayne County Circuit Court. The Honorable Brian R. Sullivan sentenced Mr. Roark to concurrent terms of 14 to 25 years and 10 to 20 years imprisonment on December 17, 2008. *Judgment of Sentence*, Appendix A.

Mr. Roark initially was charged in four separate cases. In Case No. 08-9311, the charges were kidnapping, two counts of child sexual abusive activity, and criminal sexual conduct (CSC), second degree. In Case No. 08-9312, the charges were first degree criminal sexual conduct, three counts of child sexual abusive activity and kidnapping. In Case No. 08-9313, the charges were three counts of child sexual abusive activity. In Case No. 08-0315, the charges involved two counts of child sexual abusive activity and unlawful imprisonment. *Plea transcript, September 19, 2008*, (PL) 7.

Mr. Roark entered his plea of guilty to one count of CSC, first degree, and one count of child sexually abusive activity in exchange for dismissal of all other charges. PL 8. The prosecutor agreed not to bring charges involving four other victims nor any charges for the creation or distribution of child pornography. PL 8. The bargain also included a sentence agreement calling for 14 to 25 years imprisonment on the CSC, first degree, and 10 to 20 years on the child sexually abusive material, to run concurrent. PL 9-10. The prosecutor noted that the bargain would also include “sex offender registration...required by statute.” PL 12.

At the time of the plea, defense counsel requested that the court order a competency examination, and “if in fact he’s incompetent, defense can withdraw the plea.” PL 4. With no objection from the prosecutor, the trial court agreed.

Mr. Roark informed the court that he had trouble reading and writing the English language and although he completed tenth grade, “teacher told me I had only a sixth grade education.” Defense counsel informed the court that he had received letters from Mr. Roark, indicating that he could actually read and write. PL 6.

Nothing was said about mandatory lifetime electronic monitoring during the plea proceeding nor is it mentioned on the plea form signed by the parties. *Plea Form, Appendix B.*

The presentence investigator recommended a sentence consistent with the plea agreement with mandatory lifetime electronic monitoring as a condition of parole. *Presentence Investigation Report, Evaluation and Plan.*

At sentencing, December 17, 2008, the court took note of a report completed by Thomas Shazer which found the defendant competent, as well as the parties stipulation to the same, and the court found the defendant competent to proceed. *Sentencing transcript, December 17, 2008,* (ST) 5.

After hearing allocution of the parties and one of the victims, the judge imposed prison terms in accordance with the plea agreement, ordered sex offender registration and ordered lifetime electronic monitoring following the advice of appellate rights as the proceedings were closing:

COURT REPORTER: Did you say SORA?

THE COURT: S-O-R-A.

THE COURT: That includes lifetime electronic monitoring. You understand that, Mr. Clark?

MR. CLARK: I'm sorry?

THE COURT: You also understand that includes lifetime electronic monitoring?

(No verbal response – indicating). [ST 13-14.]

Mr. Roark requested the appointment of appellate counsel on May 1, 2009. The trial court appointed appellate counsel on June 25, 2009, more than six months after the sentence

date. *Order Regarding Appointment of Appellate Counsel and Transcript, Appendix C.* Appellate counsel, Paul J. Stablein, did not file any trial court motion or application in the Court of Appeals.

Mr. Roark, in pro per, filed a motion for relief from judgment in the trial court on December 18, 2012. *Register of Action, Appendix D.* He asserted that his plea was invalid because he was not advised that he would be subject to lifetime electronic monitoring. The trial court denied the motion on March 1, 2013 by finding that both the plea form and the record of the plea advised defendant of the lifetime electronic monitoring requirement. *Trial Court Order, Appendix E.*

Mr. Roark sought leave to appeal in the Court of Appeals, which was denied. When Mr. Roark sought leave to appeal that decision to this Court, it directed supplemental briefing from appellate counsel. *Order Court of Appeals, Appendix F.*

Prior appellate counsel, asserted that he failed to file a motion for plea withdrawal in the trial court because he was appointed beyond the six month deadline and that he failed to file an application for leave to appeal in this Court because he had not first preserved the issue of plea withdrawal in the trial court. *Supplemental Brief of Paul Stablien, Appendix G, pp8-9.*

On November 19, 2014, this Court remanded to the Court of Appeals as on leave granted pursuant to MCR 7.302(H)(1), and found that defendant was not entitled to review under the standard applicable to direct appeals and that prior appellate counsel failed to comply with the standards for indigent defense by failing to seek to withdraw. *Order Michigan Supreme Court, Appendix H.*

The Court of Appeals reversed. The Court of Appeals relied on this Court's finding that lifetime electronic monitoring is a direct consequence of the plea in *People v Cole*, 491 Mich 325

(2012), noted that Mr. Roark was not informed of this consequence, and found that *Cole* could be applied retroactively in Mr. Roark's case, because that decision did not announce a "new rule" rather applied the existing rule that a defendant must be advised of the direct consequences of his plea. *Court of Appeals Opinion, attached.*

Presently incarcerated, Mr. Roark asks this Honorable Court to deny leave to appeal and/or to affirm the decision of the Court of Appeals.

- I. **Due process requires that a defendant be fully advised of the direct consequences of a plea. Lifetime electronic monitoring is a direct consequence of the plea, yet the trial court failed to advise of this severe consequence at the time of Mr. Roark's plea. The Court of Appeals correctly found Mr. Roark's plea was involuntary made and his convictions manifestly unjust. This court should deny leave to appeal.**

### **Issue Preservation**

Defendant filed a motion for relief from judgment on December 18, 2012 asserting that his plea was invalid where the trial court failed to advise his of lifetime electronic monitoring prior to the entry of his plea, which the trial court denied. *Appendix D, Appendix E.*

Prior appellate counsel filed a supplemental brief in this Court asserting that he failed to file a motion for plea withdrawal because he was appointed beyond the six month deadline for such a motion and he did not file an application to this Court because he had not first preserved the issue in the trial court. *Appendix G, pp8-9.*

This Court remanded as on leave granted and specifically found that prior appellate counsel provided ineffective assistance of counsel by abandoning defendant's appeal without withdrawing from representation. *People v Roark*, 497 Mich 895; 855 NW2d 743 (2014).

### **Standard of Review**

This Court reviews for an abuse of discretion a trial court's denial of a defendant's motion for relief from judgment. An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *People v Fonville*, 291 Mich App 363, 375-76; 804 NW2d 878, 885-86 (2011). Moreover, this Court reviews de novo constitutional issues, in particular the failure to secure a voluntary plea under due process by failing to advise of lifetime electronic monitoring. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

Additionally, according to MCR 6.508(D), a defendant seeking relief from judgment has the burden of establishing entitlement to such relief. Under MCR 6.508(D)(3) a court may not grant that relief if, among other things, the motion:

alleges grounds for relief ... 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. As used in this subrule, “actual prejudice” means that,

\* \* \*

(ii) in a conviction entered on a plea of guilty, ... the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction \*377 should not be allowed to stand regardless of its effect on the outcome of the case[.] [*Fonville*, supra 376-77.]

## Argument

Mr. Roark is entitled to plea withdrawal because the trial court failed to advise him of mandatory lifetime electronic monitoring at the time of the plea proceeding. Both *People v Cole*, supra and MCR 6.302(B)(2) require this advice, and the holding in *People v Cole*, supra should be applied retroactively. The failure to object to the lack of advice on direct appeal is not dispositive as Mr. Roark received admitted ineffective assistance from appellate counsel, and Mr. Roark was prejudiced by entry of an involuntary plea in violation of constitutional due process.

### **Lifetime electronic monitoring is a direct consequence of the plea, requiring advice by the trial court prior to the entry of the plea.**

For a plea to be understanding and voluntary, a defendant must be “fully aware of the direct consequences” of the plea. *Brady v United States*, 397 US 742, 755; 90 S Ct 1463; 25 L Ed

2d 747 (1970). And, MCR 6.302(B)(2) provides that “the court must advise the defendant or defendants of . . . “the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or MCL 750.520c[.]”

As this Court explained in *People v Cole, supra*, mandatory lifetime electronic monitoring is part of the sentence itself and the trial court *must* inform the defendant of this consequence before accepting a guilty plea:

We hold that mandatory lifetime electronic monitoring for convictions of CSC-I and CSC-II is part of the sentence itself and is therefore a direct consequence of a defendant’s guilty or no-contest plea. As a result, at the time a defendant enters a guilty or no-contest plea, the trial court must inform the defendant if he or she will be subject to lifetime electronic monitoring. Accordingly, we affirm the judgment of the Court of Appeals and remand this case to the trial court to allow defendant the opportunity to withdraw his plea. [491 Mich at 338.]

The opinion in the *Cole* case made clear that a failure to advise of lifetime monitoring violates due process:

We hold, therefore, that mandatory lifetime electronic monitoring is a direct consequence of a plea. Accordingly, when the governing criminal statute mandates that a trial court sentence a defendant to lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring. And because MCR 6.302(B) is premised on constitutional due-process requirements, a defendant who will be subject to mandatory lifetime electronic monitoring must be so advised by the trial court at the time of the plea hearing in order to satisfy the court rule’s requirement that the plea be understanding and voluntary.

To hold otherwise would not only offend Due Process, but would be inconsonant with the practical rationale underlying the requirement that a plea be knowing and voluntary. When a defendant agrees to plead guilty, he or she is making a bargain, giving up trial rights in exchange for some perceived benefit. In order for a defendant to accurately assess the benefits of the bargain being

considered, the defendant must be aware of the immediate consequences that will flow directly from his or her decision. Without information about a consequence of a plea deemed by our Legislature to be punishment, which here entails having to wear a device and be electronically tracked “from the time the individual is released on parole or from prison until the time of the individual’s death,” MCL 791.285(1)(a), it cannot be said that a defendant was aware of the critical information necessary to assess the bargain being considered. [491 Mich at 337-338.]

The federal courts have likewise held that in order for a guilty plea to be voluntary “the defendant must be aware of the maximum sentence to which he is exposed.” *Ruelas v Wolfenbarger*, 580 F3d 403, 408 (CA 6, 2009); *King v Dutton*, 17 F3d 151, 154 (CA 6, 1994). The same is true as to any mandatory minimum sentence. *Hunter v Fogg*, 616 F2d 55, 60 (CA 2, 1980); *Jamison v Flem*, 544 F3d 266 (CA 3, 2008).

In Michigan, the rule of automatic reversal applies to a trial court’s failure to advise of mandatory lifetime monitoring. Remand with an offer of plea withdrawal was the remedy in *Cole* (*Cole* was decided May 31, 2012). Three weeks later, the Court amended MCR 6.302(B)(2) to require advice of mandatory lifetime monitoring for guilty pleas to first- and second-degree CSC. MCR 6.302(B)(2)(as amended June 20, 2012). Just a little under two months later, the Court made clear that automatic reversal is the remedy for a failure to follow MCR 6.302(B)(2) *People v Brown*, 492 Mich 684, 695-699; 822 NW2d 208 (2012) (“proper remedy for a plea that is defective under MCR 6.302(B)(2) . . . is to allow the defendant the opportunity to withdraw his or her plea.”). *Brown* was decided August 16, 2012. And, according to the *Cole* decision, an offer of plea withdrawal is necessary even where there has been agreement as to the minimum sentence. *Cole*, 491 Mich at 328 (noting trial court’s promise to impose five-year minimum sentence).

In this case, there was agreement as the concurrent terms of 14 to 25 and 10 to 20 years

imprisonment and the plea agreement encompassed the sex offender registration requirements, but no agreement as to the lifetime tether consequences of the guilty plea. Lifetime electronic monitoring was not ever mentioned until the conclusion of the sentencing hearing. ST 13-14. There, it was only given cursory treatment when the court mentioned lifetime electronic monitoring after sentence was imposed, as an after-thought, and received no verbal response from the defendant. *Id.* Thus, the trial court clearly erred by finding otherwise when it denied the motion for relief from judgment. *Appendix E.*

In light of *Cole, Brown*, MCR 6.302(B)(2), federal case law and US Const Amend XIV and Const 1963, art 1, s 17, Mr. Roark is entitled to remand to the trial court with an offer of plea withdrawal.

**Because lifetime electronic monitoring is a direct consequence, the requirement to advise of this consequence prior to the entry of a plea is not a “new rule” but rather application of Constitutional precedent which may be applied retroactively in this case.**

When Mr. Roark entered his plea in 2008, *People v Cole, supra* had not been decided but the requirement for lifetime electronic monitoring had been enacted and clearly applied to Mr. Roark’s case. The Court of Appeals correctly applied the holding in the *Cole* case retroactively to the present case because that decision did not announce a new rule, rather extended the rule of *Brady, supra* that a defendant must be advised of the direct consequences of his plea. Alternatively, even if this Court finds that *People v Cole, supra* announced a new rule, it should have retroactive application under *People v Maxson*.

In *Teague v Lane*, 489 US 288, 311; 109 S Ct 1060; 103 L Ed 2d 334 (1989), the Supreme Court held that there is a general rule of non-retroactivity for cases on collateral review when it comes to applying new constitutional rules to cases that became final before the new rule was announced. *People v Carp*, 496 Mich 440, 470, 852 NW2d 801 (2014). A rule is “new” if

the rule announces a principle of law not previously articulated or recognized by the courts, which “falls outside [the] universe of federal law” in place at the time defendant's conviction became final. *Williams v Taylor*, 529 U.S. 362, 381, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (opinion by Stevens, J.). If a rule is not “new,” then the general rule of non-retroactivity is inapplicable and the rule will be applied retroactively even to cases that became final for purposes of direct appellate review before the case on which the defendant relies for the rule was decided. *Whorton v Bockting*, 549 US 406, 416, 127 S Ct 1173, 167 L Ed 2d 1 (2007); *Carp*, *supra* at 471. Under *Teague*, a “new rule,” “‘breaks new ground,’ ‘imposes a new obligation on the States or the Federal Government,’ or was not ‘dictated by precedent existing at the time the defendant's conviction became final.’” *Teague, supra* at 301. When the Supreme Court applies a prior, well-established rule of law in a new way based on specific facts of a particular case, it generally does not establish a new rule. *Stringer v Black*, 503 US 222, 228-9; 112 S Ct 1130, 117 L Ed 2d 367 (1992).

The rule in *People v Cole, supra*, as noted in the decision itself, was dictated by *Brady v United States*, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970) and its progeny. This Court considered whether lifetime electronic monitoring was a direct or collateral consequence of the plea and held that this particular consequence was a direct consequence of the plea (as noted above.) Therefore, under the rule that a defendant must be “fully aware of the direct consequences of the plea,” the Court concluded that a defendant must be advised of lifetime electronic monitoring at the time of the plea. *Cole supra* at 333, quoting *Shelton v United States*, 246 F.2d 571, 572 n2 (CA 5 1957). Thus, *People v Cole, supra* did not establish a new rule, rather applied the rule regarding advice of direct consequences in a new way.

Appellant’s reliance on *Padilaa v Kentucky*, 559 US 356, 130 S Ct. 1473, 176 L Ed 2d

284 (2010) and *Chaidez v United States*, \_\_\_ US \_\_\_; 133 S Ct 1103, 1107; 185 L Ed 2d 149 (2013) to conclude otherwise is misplaced. In *Padilla*, the United States Supreme Court held that a defense attorney provided ineffective assistance by not advising of immigration consequences at the time of the plea, but the decision did not clearly establish whether immigration consequences are a direct or indirect consequence of the conviction. In *Chaidez*, the Supreme Court held that *Padilla* is not retroactive on collateral attack. And, in *People v Gomez*, 295 Mich App 411; 820 NW2d 217 (2012) came to the same conclusion in Michigan. The decision in *Gomez, supra* largely turned on the characterization of the consequence in *Padilla, supra* as collateral, rather than direct. *Gomez, supra* at 416. Thus, the *Padilla* line of cases is distinguishable both because the consequence involved is an indirect consequence, and because the obligation to advise rested with defense counsel, rather than an obligation imposed by clear court rule upon the trial court.

Even if this Court were to find that *People v Cole, supra* announced a new rule and not find retroactive application under federal analysis, this Court should find retroactive application under this State's own precedent. "A state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords." *People v Maxson*, 482 Mich 385, 392; 759 NW2d 817 (2008).

In *Maxson, supra*, this Court found that three factors govern the Michigan retroactivity analysis: 1) the purpose of the new rule; 2) the general reliance on the old rule; and 3) the effect of retroactive application of the new rule on the administration of justice. *Maxson, supra* at 393. See also *People v Sexton*, 458 Mich 43, 60–61; 580 NW2d 404 (1998). The Court held that these factors precluded retroactive application of a new procedural rule that affected appeals from guilty pleas. *Id.* at 393–399 (requiring advice of the right to counsel for an appeal from a

guilty plea).

Application of these three factors requires retroactive application here. Under the “purpose” prong, a law may be applied retroactively when it “concerns the ascertainment of guilt or innocence;” however, “a new rule of procedure ... which does not affect the integrity of the fact-finding process should be given prospective effect.” *Maxson, supra* at 385, 393. Here, the purpose involves the penalty defendants face by giving up their right to a trial, the integrity of the finding that bargain was knowing and voluntary as guaranteed by the Constitution is at issue. Thus, the first prong favors retroactivity.

The second prong, “general reliance on the old rule,” requires this Court to consider whether individuals have been adversely positioned in reliance on the old rule. *Maxson, supra*; quoting *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 221; 731 NW2d 41 (2007). A defendant must have relied on the old rule in not pursuing an appeal, suffering harm as a result of that reliance. *Maxson, supra* at 395. Such is the case here as made clear in prior appellate counsel’s Supplemental Brief in this Court – he failed to pursue plea withdrawal for Mr. Roark in reliance on the old rule (“I did not believe that a trial court failed to comply with the court rules regarding the taking of pleas when it did not first advise the defendant of the lifetime electronic monitoring provision of the statute. I was wrong...”) *Appendix G, p9*. This prong also favors retroactivity.

The third prong, “effect of the rule on the administration of justice,” favors retroactivity as well because the numbers of persons affected will be small, unlike *Maxson* which affected nearly every plea between 1994 and 2005. *Maxson, supra* at 395. Here, the “new” rule would apply only to those who pled to CSC, first degree, received lifetime electronic monitoring as part of the sentence and were not advised at the time of the plea that they would receive the penalty.

In addition, this small class of defendants would also need to be willing to assume the risk involved in plea withdrawal to pursue the relief (often involving trials on additional charges and risk of higher sentences). Thus, even those to whom the rule applies may not seek relief, creating a relatively small impact.

Therefore, this Court should find retroactive application under state law as well.

**The Court of Appeals correctly reversed Mr. Roark’s involuntary plea as manifestly unjust and, for this reason, this Court should deny leave.**

The general rule set forth in MCR 6.310(D) is that Mr. Roark cannot raise this argument on appeal unless he first filed a “motion to withdraw the plea in the trial court raising as a basis for withdrawal the claim sought to be raised on appeal.” And, here, Mr. Roark must establish good cause for failure to raise this issue in direct appeal and actual prejudice rendering the plea involuntary. MCR 6.508(D)(3).

The Court of Appeals found that Mr. Roark’s was involuntary to such an extent that it would be manifestly unjust to allow Mr. Roark’s convictions to stand because the severity of the consequence involved – wearing a device and being electronically tracked from release upon parole until death. *Court of Appeals Opinion, slip op 4, attached*; quoting *Cole, supra* at 337-338. Thus, Mr. Roark met the standards of good cause and prejudice.

First, the record demonstrates ineffective assistance of trial and appellate counsel, which is good cause for failure to raise an issue on direct appeal. *People v Reed*, 449 Mich 375, 535 NW2d 496 (1995). Trial counsel did not advance the error asserted here. Likewise, Mr. Roark’s first appellate attorney failed to identify the meritorious basis for plea withdrawal and received the appointment beyond the six months deadline within which to file a motion for plea withdrawal under MCR 6.310(C) in any case. *Appendix G*. Additionally, the State Appellate Defender Office (SADO) was not appointed as substitute appellate counsel until February 10,

2015 well outside the time limit for filing a post-conviction motion to withdraw the plea.<sup>1</sup> In sum, the Court should find ineffective assistance of counsel vis-à-vis the request for plea withdrawal.

The federal and state constitutions guarantee the right to the assistance of counsel. US Const Am VI; Mich Const 1963, art 1, § 20. And, the effective assistance of counsel during defendant's first appeal is due process right. *Evitts v Lucey*, 469 US 387; 105 S Ct 830; 83 L Ed 2d 821 (1985).

To establish a claim of ineffective assistance of counsel, the defendant must show deficient performance of counsel and prejudice. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38; 826 NW2d 136 (2012); US Const Amends VI & XIV; Const 1963, art 1, § 20. Prejudice in the context of a guilty plea normally refers to a showing the defendant would not have entered the plea. *Hill v Lockhart*, 474 US 52; 106 S Ct 366; 88 L Ed 2d 203 (1995). *See e.g., Missouri v Frye*, 132 S Ct 1399; 182 L Ed 2d 379 (2012) (ineffective assistance of counsel for failure to communicate plea offer); *Lafler v Cooper*, 132 S Ct 1376; 182 L Ed 398 (2012) (ineffective assistance of counsel where counsel erroneously informed defendant he could not be convicted of the higher charge and defendant rejected a plea offer); *People v McCauley*, 493 Mich 872; 821 NW2d 569 (2012) (reasonable probability defendant would have accepted the prosecutor's plea offer but for deficient advice of counsel.).

Mr. Roark can meet any test of error and prejudice. Had his trial attorney pursued plea withdrawal at the time of sentencing based on the trial judge's failure to advise of mandatory lifetime monitoring, the trial judge would have been obligated to grant the request. According to

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<sup>1</sup> Mr. Roark was not able to file a motion for plea withdrawal during the concurrent jurisdiction period under MCR 7.208 because the under-signed counsel had not yet received the court file or prior pleadings prior to the expiration of 56 days from the Order of Appointment.

*People v Cole*, 491 Mich 325; 817 NW2d 497 (2012), and *People v Brown*, 492 Mich 684, 695-699; 822 NW2d 208 (2012), the trial court's failure to advise of mandatory lifetime electronic monitoring requires an offer of plea withdrawal.

The Court may also overlook the lack of issue preservation on appeal in the interests of justice. *People v Gioglio*, 296 Mich App 12, 17-18; 815 NW2d 589 (2012), *vacated in part on other grds* 493 Mich 864; 820 NW2d 922 (2012). Prior appellate counsel in this case failed to file any pleading within the six month deadline for plea withdrawal and thereby deprived Mr. Roark of an entire proceeding (his direct appeal). This form of deficient performance is *per se* ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *People v Jovan Mills*, 485 Mich 960, 774 NW2d 524 (2009). The plea here was plainly defective under *Cole* and MCR 6.302(B)(2).

Second, Mr. Roark suffered actual prejudice and his plea was rendered involuntary by the lack of advice. By analogy, in *People v Fonville, supra*, the Court of Appeals invalidated a plea for failure to advise of the requirements of sex offender registration despite "concerns for finality [which] caution that the validity of guilty pleas not be called into question when entered under the law applicable on the day the plea is taken." But the Court noted that the sex offender registration was "on the books" at the time of the plea and by establishing that counsel failed to advise of the consequence Defendant Fonville established for purposes of a motion for relief from judgment that his plea was not a knowing and intelligent act. *Fonville, supra* 393-94.

In Mr. Roark's case, his plea was involuntary because he did not receive the required advice prior to its acceptance by the court. Lifetime electronic monitoring was similarly "on the books" when Mr. Roark entered his plea. Mr. Roark has established that the outcome would have

been different in his continual demand for a trial in his pro per pleadings before the appellate courts.

In addition to good cause and prejudice for failing to raise the present issue on direct appeal, the forfeiture of Mr. Roark's entire direct appeal independently violated his right to due process. "Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage of the proceedings." *Rodriguez v United States*, 395 US 327, 330; 89 S Ct 1715; 23 L Ed 2d 340 (1969). This Court has found that the remedy for forfeiture of the direct appeal via ineffective assistance of counsel is reinstatement of the direct appeal. *Mills, supra*.

Thus, Mr. Roark established actual prejudice in the plea process and is entitled to an opportunity for plea withdrawal. Alternatively, Mr. Roark has established ineffective assistance of counsel which deprived him of his direct appeal, and he is entitled to reinstatement of that direct appeal, where he can then challenge the validity of the plea without the procedural hurdles of MCR 6.500 or retroactivity.

For the above reasons, this Court should deny leave to appeal and Mr. Roark is entitled to remand to the trial court for an offer of plea withdrawal.

**WHEREFORE**, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court deny leave to appeal and/or affirm the Court of Appeals decision.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: /s/ J. Ouvry

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Dated: November 25, 2015