

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

DAVID CHARLES ROARK

Defendant-Appellant.

_____ /

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

STATE APPELLATE DEFENDER OFFICE

Attorney for Defendant-Appellant

Supreme Court No. 152562

Court of Appeals No. 316467

Lower Court No. 08-9312-01

SUPPLEMENTAL RESPONSE BRIEF ON APPEAL

CERTIFICATE OF SERVICE

STATE APPELLATE DEFENDER OFFICE

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STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

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/s/Jacqueline C. Ouvry

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28247

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STATEMENT OF QUESTIONS PRESENTED

I. Did the judge fail to advise Mr. Roark of the severe consequence of lifetime electronic monitoring, a direct consequence of the plea? Must a defendant be fully advised of the direct consequences of the plea under long-standing precedent deriving from constitutional due process?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

II. Did Mr. Roark demonstrate actual prejudice pursuant to MCR 6.508(d)(3)(b) because the defect in the plea proceedings rendered the plea involuntary?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

III. Must defendant demonstrate that he would not have pleaded guilty if he had known about lifetime electronic monitoring?

Court of Appeals answers, "No".

Defendant-Appellant answers, "No".

IV. If this court should disagree that Mr. Roark has met the standards of MCR 6.508, as an alternative remedy, does Mr. Roark's assertion of ineffective assistance of prior appellate counsel require reinstatement of his direct appeal?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Introduction

This case involves the penalty of Lifetime Electronic Monitoring - a GPS tether device applied to a citizen for the remainder of his natural life when convicted of criminal sexual conduct in the first degree. And, in this case, the mandatory lifetime penalty was applied to Mr. Roark's sentence without notice at the time of his plea, despite the facts that he possesses below average intelligence and requires treatment for mental illness.

The Plea

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. On December 17, 2008, the Honorable Brian R. Sullivan sentenced Mr. Roark to concurrent terms of 14 to 25 years and 10 to 20 years imprisonment, including lifetime electronic monitoring (LEM). *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. These charges arose from events between January 2005 and May 2008 and Mr. Roark acknowledged that he sexually penetrated his nephew, aged between 13-16, involving digital anal penetration and various restraints PL 16-23.

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 minors 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.

Mandatory lifetime electronic monitoring was not mentioned at all 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. CLARK¹: I'm sorry?

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

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

The Appeal

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 LEM and that LEM does not apply when the victim is older than 13 years old. 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. *Defendant's Motion for Relief from Judgment, Appendix E; Trial Court Order, Appendix F*.

¹ Defense counsel.

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 G.*

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. He further asserted that he failed to file an application for leave to appeal in the Court of Appeals because he could not first preserve the issue in the trial court, and he believed that the issue was thus precluded. *Supplemental Brief of Paul Stablein, Appendix H, pp8-9.* He did not seek to withdraw from representation nor did he file a motion for relief from judgment on Mr. Roark's behalf.

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, for which he was also ordered to pay costs. *Order Michigan Supreme Court, Appendix I.* The State Appellate Defender was then appointed to represent Mr. Roark.

The Court of Appeals reversed the trial court's denial of Mr. Roark's pro per motions for relief from judgment. It relied on this Court's finding that lifetime electronic monitoring is a direct consequence of the plea in *People v Cole*, 491 Mich 325; 817 NW2d 497 (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, Appendix J, pg. 3.*

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

Arguments:

The following statements apply to each of the Court's questions:

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 him of lifetime electronic monitoring prior to the entry of his plea, which the trial court denied. *Appendix D, E, F.*

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 could not first preserve the issue in the trial court and he believed that the issue was thus precluded. *Appendix H, 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).

The Court of Appeals remanded for an opportunity to withdraw the plea. *Appendix J.* The Prosecutor appealed and this Court granted mini orals on the application.

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). A discretionary decision based on a faulty answer to a preliminary question of law is by definition an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An appellate court reviewing a trial court's decision on a

motion for relief from judgment reviews the trial court's findings of fact for clear error. *People v McSwain*, 259 Mich App 654 (2003).

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 should not be allowed to stand regardless of its effect on the outcome of the case[.] [*Fonville*, supra 376-77.]

I. The judge failed to advise Mr. Roark of the severe consequence of lifetime electronic monitoring, a direct consequence of the plea. A defendant must be fully advised of the direct consequences of the plea under long-standing precedent deriving from constitutional due process.

Mr. Roark is entitled to plea withdrawal because the trial court failed to advise him of mandatory lifetime electronic monitoring (LEM) at the time of the plea proceeding. The People acknowledge that the judge did not advise Mr. Roark that he would be subject to LEM prior to the entry of the plea. *Plaintiff-Appellee's Court of Appeals Brief on Appeal*, pp 6-7; *Application for Leave to Appeal*, p 6.

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).

Mr. Roark's plea was invalid.

The circuit court failed to advise Mr. Roark regarding lifetime electronic monitoring prior to the entry of his plea.

In this case, the parties agreed to concurrent terms of 14 to 25 and 10 to 20 years imprisonment, and plea agreement encompassed the sex offender registration (SORA) requirements, but there was no agreement regarding the LEM consequences of the plea. Only at the very conclusion of the sentencing hearing, did the judge mention LEM. ST 13-14. There, LEM was only given cursory treatment when the court mentioned it after sentence was imposed, as an after-thought which received no verbal response from the defendant. *Id.*

The notation regarding SORA on the plea form does not cure the error. SORA is distinct from LEM – it is not punishment and is not imposed as part of the sentence itself. *Smith v Doe*, 538 US 84; 123 S Ct 1104; 155 L Ed 2d 164 (2003). See MCL 750.520b(1); MCL 750.520n. The suggestion from the People that Mr. Roark indicated affirmation following the passing mention

of LEM at the conclusion of the sentencing transcripts is misplaced. Nothing can be inferred from the non-verbal response. Such non-verbal responses can be nothing more than an acknowledgment of having heard what was said. Here, the record of the plea proceeding demonstrates that the parties had some questions regarding Mr. Roark's competency and that he possesses lower levels of education. Thus, even less can be inferred from Mr. Roark's non-verbal response. Therefore, the trial court clearly erred by finding otherwise when it denied the motion for relief from judgment. *Trial Court Order, Appendix F.*

The People concede that the defendant was not informed of LEM, but argue that Mr. Roark is not entitled to collateral relief because his plea was entered prior to this Court's decision in *People v Cole, supra*.

Lifetime electronic monitoring is a direct consequence of the plea.

This Court held in *People v Cole, supra*, that mandatory LEM is punishment and a direct consequence of the plea, and thus, the court must inform the defendant of this consequence before accepting a guilty plea. This Court explained:

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 this case, the Court of Appeals held that this Court's decision in *People v Cole*, *supra* should be applied retroactively because it does not announce a new rule. See *People v Carp*, 496 Mich 440, 472; 852 NW2d 801 (2014). The *Cole* decision rests on the long-standing principle that defendant be apprised of the direct consequences of his plea. *Brady*, 397 US at 748.

And this Court has made clear that a judicial decision interpreting a statute is granted full retroactivity. See *Lincoln v General Motors Corp*, 461 Mich 483, 491-492; 607 NW2d 73 (2000)

(“we see no sound reason to depart from the normal course of granting full retroactivity to a judicial decision that interprets a statute” and “the interpretation of the WDCA in *Wozniak I* was always the “true law” and it must therefore be given full retroactive effect”). In *Cole*, this Court interpreted MCL 750.520b(2)(d), MCL 750.520c(2)(b), and MCL 750.520n(1), to find that LEM is part of the sentence itself given its location in the penalty section of the offense statutes, its location in the Penal Code and the Legislature’s use of the phrase “shall sentence” in reference to LEM. *Cole, supra* at 336. In other words, the fact that LEM is part of the sentence itself is the “true law” in place since its enactment in 2006.

In light of *Cole*, federal case law and US Const Amend XIV and Const 1963, art 1, § 17, LEM is a direct consequence of the plea, requiring advice at the time of the plea. The Court of Appeals correctly remanded given the lack of advice in Mr. Roark’s case.

II. Mr. Roark demonstrated actual prejudice pursuant to MCR 6.508(d)(3)(b) because the defect in the plea proceedings rendered the plea involuntary.

The Court of Appeals correctly reversed and remanded to allow for the withdrawal of Mr. Roark's involuntary plea as it was manifestly unjust, demonstrating actual prejudice under MCR 6.508(D)(3)(b). The Court of Appeals correctly found that Mr. Roark's plea was involuntary to such an extent that it would be manifestly unjust to allow Mr. Roark's convictions to stand because of the severity of the direct consequence involved (wearing a device and being electronically tracked from release upon parole until death) of which he was not informed. *Court of Appeals Opinion, Appendix J*, p 4; quoting *Cole, supra* at 337-338. This Court should not disturb its holding.

The general rule set forth in MCR 6.310(D) is that Mr. Roark cannot raise a challenge to his plea 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.

(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 should not be allowed to stand regardless of its effect on the outcome of the case[.] [MCR 6.508(D)(3); *Fonville, supra* 376-77.]

The Court of Appeals found that Mr. Roark demonstrated good cause due to ineffective assistance of appellate counsel and found actual prejudice in the involuntary nature of the plea. This Court should find the same.

Mr. Roark demonstrated actual prejudice under 6.500 because the defect in the plea proceedings rendered the plea involuntary.

Mr. Roark suffered actual prejudice and his plea was rendered involuntary by the lack notice of the penalty of LEM at the time of the plea.

The Due Process Clause of the Fourteenth Amendment requires that a guilty plea be voluntary and knowing. *McCarthy v United States*, 394 US 459, 466; 89 S Ct 1166; 22 L Ed 2d 418 (1969). 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 provides not only that a court cannot accept a plea “unless it is convinced that the plea is understanding, voluntary and knowing,” but also 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[.]” See also *People v Brown*, 492 Mich 684, 688-689; 822 NW2d 208 (2012).

This Court has interpreted MCR 6.302(B)(2) to require that the trial court ensure that defendant is informed of any condition that creates “a definite, immediate and largely automatic effect on the range of defendant’s punishment.” *Cole, supra* at 333-334. In the same opinion, this Court recognized the LEM is such a consequence, and established that a defendant who has not been informed of his exposure to LEM is entitled to withdraw his guilty plea. *Id.* at 333-334, 338.

The Court of Appeals held that the defect in Mr. Roark's plea proceeding (the lack of notice of LEM) rendered his plea involuntary and established actual prejudice:

The defect in defendant's plea proceedings was such that it rendered the plea an involuntary one, and it would be manifestly unjust to allow the convictions to stand. This holding is mandated by due process and the severity of lifetime electronic monitoring as a sentencing requirement. *Roark, slip op 4.*

The Court of Appeals correctly found a defect in the plea proceeding to render the plea involuntary and reversible under MCR 6.508 because LEM is such a severe consequence.

The Court of Appeals correctly held that Mr. Roark established actual prejudice pursuant to MCR 6.508(D), which can be established one of two ways. Under MCR 6.508(D), a defendant demonstrates actual prejudice by: a) establishing that the plea was involuntary to an extent that is manifestly unjust to allow the plea to stand; and 2) that the result is so offensive to sound judicial process that the conviction must be overturned.

In Mr. Roark's case, he established actual prejudice in the defective and involuntary plea process due to the lack of information of LEM. Due process required the court to inform Mr. Roark of this direct consequence. LEM is part of the sentence itself, and it is severe – a GPS monitor of Mr. Roark's movements until death. The court failed to inform Mr. Roark of the ultimate (and in this case far)-reach of the State's jurisdiction. The State will know Mr. Roark's movement until he dies, but he did not know that until after sentencing. The Court of Appeals recognized that the severity of wearing a tether until death warranted information at the time of the plea, as this Court acknowledged in *Cole*:

Without information about a consequence of a sentence 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 individuals 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. [*Cole*, 491 Mich at 337-338,]

And, United States Supreme Court also recognized the severity of this particular consequence when it found that the “State...conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements” *Grady v. N. Carolina*, 135 S Ct 1368, 1370, 1371; 191 L Ed 2d 459 (2015).²

Without this knowledge of this severe consequence (that the State would monitor his movements until death), Mr. Roark’s plea was not understanding and was involuntary. Nothing in the record establishes any advice of LEM at the time of the plea. This procedural error is actual prejudice because it renders the proceeding involuntary to such a degree that it would be manifestly unjust to allow it to stand. The involuntary plea is manifest injustice.

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

² The Supreme Court has recognized in that other lifetime consequences are severe. See *Miller v. Alabama* 132 S Ct 2455, 183 L Ed 2d 407(2012) (life without parole sentence violates the 8th Amendment when imposed on juvenile offenders without consideration of their youth).

III. Whether defendant must demonstrate that he would not have pleaded guilty if he had known about lifetime electronic monitoring

Mr. Roark is not required to demonstrate that he would not have pleaded guilty if he had known about lifetime electronic monitoring under MCR 6.508. Additionally, his case can be distinguished from the cases cited by this Court: *United States v Timmreck* 441 US 780, 783-784 (1979) and *Williams v Smith*, 591 F 2d 169 (1979). The prejudice prong of MCR 6.508(D)(3) does not convert all claims of an involuntary plea into ineffective assistance of counsel claims.

MCR 6.508 does not require a showing that the outcome would have been different, rather that the outcome is “manifestly unjust.”

Under MCR 6.508, however, Defendant does not need to show that the outcome would have been different had he known of the error, rather that the outcome (or the plea) is “manifestly unjust” because of the degree of involuntariness involved, or that the conviction cannot stand because the error is so offensive to sound judicial process. A defendant can show that the plea was manifestly unjust by establishing serious procedural defects. Defendant can otherwise establish that the conviction is so offensive to sound judicial process it must be overturned. Thus, the inquiry for purposes of MCR 6.508 is not on defendant’s actions but the voluntariness and soundness of the process.

Actual prejudice under MCR 6.508(D)(3)(b) is distinct from the prejudice inquiry of an ineffective assistance of counsel claim. Prejudice in an ineffective assistance of counsel claim requires a reasonable probability that the outcome would be different (similar to prejudice involving ineffective assistance in a trial) and in this context, the outcome of the advice is the plea – thereby defendant must show a reasonable probability that he would not have entered the plea but for the ineffective assistance.

Under *Brady, supra* and MCR 6.302, the obligation to inform Mr. Roark of LEM at the time of the plea rested with the court and not with counsel. Thus, while ineffective assistance of counsel established good cause in this case (for failing to raise the court's failure to advise earlier), it does not apply to the actual prejudice inquiry. This is because LEM is a direct and serious consequence – part of the sentence itself and punishment. Because the obligation to inform rested with the court, the failure to provide the information creates a serious procedural defect that renders the plea involuntary.

The distinction between actual prejudice involving ineffective assistance of counsel claims and actual prejudice under MCR 6.508 is evidenced in appellate decisions. This Court remanded, in *People v Walker*, 497 Mich 894; 855 NW2d 744 (2014) for a finding of *Strickland* prejudice whereby defendant would be required to show that the outcome would have been different (i.e. he would have accepted the never-conveyed plea) pursuant to *Lafler v Cooper*, 566 US ___; 132 S Ct 1376, 1385; 182 L Ed 2d 398 (2012). The never-conveyed plea is an off-record error, not a direct consequence. But, the Court then required the trial court to separately determine if defendant would be entitled to relief under MCR 6.508(D).

The Court of Appeals used the *Strickland/Hill* analysis in *Fonville, supra* because the error involved counsel's off-record advice. The Court of Appeals, in *People v Fonville, supra*, also required a different outcome under ineffective assistance of counsel. There, the Court 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. But for counsel's failure, the result of the proceeding would have been different, as evidenced by Defendant's repeatedly informed the trial court that he would not have entered the plea. *Fonville, supra* 393-94.

But, where the court has made a procedural error, a defendant may establish prejudice by showing that defendant's waiver of rights was not understanding, nor voluntary. *People v Mosly*, 259 Mich App 90; 672 NW2d 897 (2003). In *Mosly*, the trial court failed to comply with MCR 6.402(B) regarding jury trial rights but the defendant had executed a written waiver of rights. The Court required a showing of prejudice but this defendant could not meet the standard because the written form, among other things, established an understanding and voluntary waiver. 259 Mich App at 96-97. The Court recognized that prejudice is established in the absence of an understanding or voluntary waiver.

The separate application of MCR 6.508(D) for counsel's advice and information provided by the court make sense given the actors involved. Counsel's advice largely occurs outside the courtroom-known only to defendant and defense counsel. A requirement that off-record advice impact the outcome of the proceeding before the proceeding will be invalidated is a necessary protection of finality in the criminal justice system. But the court's advice is different and more limited. In the context of a plea, the advice provided by the court is the proceeding itself. That advice is focused, concentrating on trial rights, appellate rights and the limits of the State's jurisdiction (i.e. maximum sentence and LEM). Higher standards of accuracy must apply. When the court fails to inform and there are not other record indicia of receiving and understanding information, the proceeding itself is lacking understanding and therefore involuntary.

In Mr. Roark's case, nothing in the record establishes any advice regarding LEM at the time of the plea, distinguishing this case from *Mosly*. This procedural error renders the plea involuntary. An involuntary plea of this nature is manifest injustice, rendering the plea invalid.

Only severe consequences of a plea are reserved to the trial court to provide advice: jury trial rights, the maximum sentence and LEM. Most importantly the maximum penalty is given to the court because this advice is the explanation of the State's jurisdiction over the defendant. And, this singular irregularity (failure to advise of the State's ultimate reach of authority) is offensive to sound justice.

Thus, by the nature of the error in Mr. Roark's case, he has established actual prejudice under both MCR 6.508(D)(3)(b)(i) and (ii), and he is not further required to show that the outcome would have been different had he received the missing advice.

Both *Timmreck* and *Williams* are distinguishable in important ways, and do not require a different result.

MCR 6.508(D) is identical to the federal standards for habeas corpus relief under 28 U.S.C. § 2255. Postconviction relief is provided for the extraordinary case in which a conviction constitutes a miscarriage of justice. *People v Reed*, 449 Mich 375, 381; 535 NW2d 496, 500 (1995). So, it is appropriate to look to the application of federal standards.

In *Timmreck, supra*, the Court considered whether a defendant could collaterally attack a guilty plea for a formal violation of Rule 11 which was neither constitutional, nor jurisdictional. The Court held that such a violation was not subject to collateral attack. The specific violation there involved a mandatory minimum parole term (note: not a mandatory minimum sentence) of which defendant did not receive advice at the time of the plea. 441 US at 782. The sentence imposed was within the maximum allowed. The Court reasoned that a Rule 11 violation was not constitutional, was not jurisdictional, did not create a miscarriage justice nor create a result

inconsistent with the rudimentary demands of fair procedure. 441 US at 784. In part, this holding was based on the finding that Defendant did not claim that he was unaware of the parole consequence and had not established good cause for failing to raise the issue on direct appeal. *Id.* The Court also noted that special consideration should be given to collateral attacks on pleas, which comprise the majority of convictions, increase judicial workload and rarely involve an innocent defendant. *Id.*

In *Williams v Smith*, the Court considered whether defendant may collaterally attack a conviction because he did not receive advice regarding consequences under New York's persistent offender law. 591 F2d at 170. The record reveals that neither Mr. Williams nor the attorney involved were aware of Mr. Williams's status as a persistent offender at the time of the plea. The record also reveals that the court had discretion whether to impose the persistent offender penalties because the court conducted a separate hearing to determine if that penalty was appropriate. *Id.* at 170-171. A separate sentencing hearing followed the persistent offender determination. *Id.* at 171. When Mr. Williams challenged the validity of his plea on direct appeal, the appellate court noted that he was aware of persistent offender penalty at the time of sentence and made no objection then. In a hearing as part of collateral review, the court later found that Mr. Williams would have entered the same plea, even if he had the persistent offender information at the time of the plea. *Id.* The persistent offender penalty significantly increased his maximum sentence (from four to 15 years) but Mr. Williams also entered his plea to avoid more serious charges. Ultimately, the Court decided that since the penalty was discretionary and neither Mr. Williams nor his attorney could know at the time of the plea whether the court would impose it, Mr. Williams would not have relied on the absence of persistent offender information in making his plea. The Court denied relief.

Mr. Roark's case is distinguishable from both the *Timmreck* and *Williams* cases in important ways. The error here was constitutional, concerning a direct consequence – part of the sentence itself. LEM is not a collateral consequence as the parole consequence at issue in *Timmreck* was. Additionally, LEM is a mandatory consequence, unlike the discretionary application of the persistent offender laws at issue in *Williams*. The trial court had no option but to apply LEM in Mr. Roark's case. Mr. Roark was unaware of the possibility of LEM at the time of his plea and it only received a cursory mention at the conclusion of his sentence. The plea was constitutionally invalid given the severity of the LEM consequence. The plea was involuntary to such a degree that it would be manifestly unjust to allow it stand. MCR 6.508(D)(3)(b)(ii).

Thus, the inquiry for purposes of MCR 6.508 is not on defendant's actions but the voluntariness and soundness of the process. Here the process did not comport with the rudimentary demands of fair procedure because Mr. Roark was not informed of a mandatory lifetime severe consequence at the time of his plea.

A procedural error of this magnitude renders the plea itself involuntary and Mr. Roark is not required to demonstrate additionally that he would not have entered the plea if the advice had been given. Nonetheless Mr. Roark's pro per pleadings indicate record support for dissatisfaction with his plea³, but should this Court disagree, it should at a minimum remand for a finding of whether Mr. Roark would have entered his plea with the proper advice, pursuant to *Hill v Lockhart, supra*.

This Court should remand under MCR 6.310 for a proceeding where Mr. Roark will be advised of LEM and have the opportunity to withdraw his plea.

³ See *Appendix E*.

IV. Regardless, this case should not be reviewed under MCR 6.500, as an alternative remedy, Mr. Roark asserts ineffective assistance of prior appellate counsel requires reinstatement of his direct appeal.

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). 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.

Mr. Roark requested the appointment of appellate counsel within six months of his sentence date on May 7, 2009. Prior appellate counsel was appointed on June 25, 2009. *Appendix D*. Under 7.205(G)(4)(a)&(c), because Mr. Roark requested counsel within six months of his date of sentence, Mr. Stablein could have filed an application for leave to appeal within 42 days of the order of appointment or filing of the transcripts (whichever is later). In a delayed application in the Court of Appeals, Mr. Stablein could have requested a remand to file a motion for plea withdrawal, or if leave was granted, filed the same motion within the time for filing the brief on appeal. See MCR 7.208(B), MCR 7.212(1)(a)(iii), and MCR 7.216(A). Thus, it was ineffective assistance of counsel that cost Mr. Roark the ability to raise his issues in a direct appeal.

Following this Court's Order directing this case be treated as an appeal under the provisions of 6.500, the State Appellate Defender Office (SADO) was not appointed as substitute appellate counsel until February 10, 2015 - outside the time in which to ask for reconsideration of the Court's order remanding to the Court of Appeals and ask that this case be treated as a direct appeal.

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).

The defendant must demonstrate 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. Deficient performance which deprives defendant of his entire direct appeal is per se ineffective assistance of counsel, which requires no showing of prejudice. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *People v Jovan Mills*, 485 Mich 960; 774 NW2d 524 (2009).

Mr. Roark asserts that prior appellate counsel provided ineffective assistance which denied him a direct appeal. Prior appellate counsel failed to file an application in the Court of Appeals under MCR 7.205(G)(4)(a)&(c), and thereby deprived Mr. Roark of an entire proceeding (his 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 ineffective assistance of counsel which deprived him of his direct appeal. 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.

RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court deny leave to appeal and/or affirm the Court of Appeals decision. Mr. Roark is entitled to remand under MCR 6.310 for a proceeding where he will be given the advice regarding LEM and be given an opportunity to withdraw his plea.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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