

TITLE PAGE

INSTRUCTIONS: This application is for use in *criminal appeals* only. If you are appealing a Court of Appeals decision involving a civil action, use the form designed for that appeal type. Answer each question completely and add more pages if necessary.

**IN THE MICHIGAN SUPREME COURT
PRO PER CRIMINAL APPLICATION FOR LEAVE TO APPEAL**

I am appealing a Court of Appeals decision that affirmed my conviction(s) and sentence(s) in whole or in part, affirmed the trial court's denial of my motion for relief from judgment, or denied my application for leave to appeal in that court.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. _____
(Leave blank)

v

Court of Appeals No. 344603
(See Court of Appeals decision)

ROBERTO MARCELLO DUPREE
(Print your name)

Trial Court No. 2015-003884-FC
(See Court of Appeals decision or PSIR report)

Defendant-Appellant.

I am currently incarcerated in a Michigan, federal, or other state correctional facility. Yes No

If Yes, provide the name and address of the correctional facility:

Michigan Reformatory
(Print name of correctional facility)
1342 West Main Street
(Print street address of correctional facility)
Ionia, MI 48846
(Print city, state and zip code of correctional facility)



FILING DEADLINE: For incarcerated persons, the application will be accepted as timely filed by the Supreme Court if received on or before the 56-day filing deadline or if it bears a date stamp from the correctional facility's mailroom on or before the filing deadline and (1) the case involves a criminal appeal, (2) you are incarcerated, (3) you are acting without an attorney, and (4) you include a sworn statement identifying the date the papers were given to the correctional facility for mailing to the Court and indicating that first-class postage was prepaid. MCR 7.305(C)(4).

For persons who are not incarcerated, the application must be received by the Supreme Court on or before the 56-day deadline or it will be rejected as untimely. No extensions can be given to the filing deadline.

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

ROBERTO MARCELLO DUPREE, Appellant Court of Appeals No. 344603

(Print your name)

INSTRUCTIONS: In the sections below, write out those issues you want to raise in the Supreme Court that were raised in the Court of Appeals in either a brief prepared by your attorney or a supplemental brief that you prepared. To raise new issues, go to page 8.

ISSUES RAISED IN COURT OF APPEALS

ISSUE I:

A. (Write the issue exactly as it was phrased in the Court of Appeals brief.)

Michigan law requires that in cases where tracking-dog evidence is used, there must be direct evidence demonstrating that Defendant was involved in the robbery. Also, because no corroborating evidence was introduced, the evidence was insufficient to support the conviction for armed robbery. People v Perryman, 89 Mich App 516, 523-524 (1979).

It was in violation of US Const Ams V, VI, & XIV; Const 1963, Art 1, section 17, and it requires reversal of the conviction.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle that is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.)

Fundamental due process rights required the prosecution to prove every element of the charge beyond a reasonable doubt. US Const Ams V, XIV; Const 1963, Art 1, sec. 17; In re Winship, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970); People v Hampton, 407 Mich 354; 285 NW2d 284 (1979). Because of the unreliability of tracking-dog evidence and the danger of the jury placing undue weight on such evidence, this Court has explicitly stated that the conviction must rest on direct evidence of guilt. People v Perryman, 89 Mich App 516, 524; 280 NW2d 579 (1979). In People v McPherson, 85 Mich App 341, 341; 271 NW2d 228, 229 (1978), this Court held that evidence of identification relying solely on the actions of a police tracking-dog was insufficient to find defendant guilty beyond a reasonable doubt. In this case, the victim did not identify the Defendant. Neither Defendant's DNA evidence or his fingerprints were found at the crime scene. There was no corroborating evidence presented that showed a perpetrator as Defendant who wore the glove. However, a police tracking dog found DNA evidence on a glove in a field approximately 80 yards from the scene of the crime. Again, there was no direct evidence or corroborating evidence that Defendant committed the crime of armed robbery. Therefore, the tracking dog evidence, standing alone, was insufficient evidence to support the Defendant-Appellant's conviction. As a result, reversal is required. People v Perryman supra at 523-524.

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

ROBERTO MARCELLO DUPREE

Appellant

Court of Appeals No. 344603

(Print your name)

ISSUE II:

A. (Write the issue exactly as it was phrased in the Court of Appeals brief.)

Defendant was denied his constitutional right to a properly instructed jury because M Crim JI 4.14 (Tracking-Dog Evidence) was inconsistent with Michigan law, which required direct evidence of guilt in cases where tracking-dog evidence is used. The trial court erred in giving the instruction.

In the alternative, if this Court finds that trial counsel waived the issue of the instructional error, then trial counsel rendered ineffective assistance.

In addition, despite trial counsel's ineffective assistance, the instructional error pertained to a basic and controlling issue in Defendant's case.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle that is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.)

A defendant accused of a crime has the right under the federal and state constitutions to the effective assistance of counsel. US Const Amend VI; Const 1963, Art 1, sec. 20; Strickland v Washington, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). It has been consistently held that defense counsel's failure to take the proper and evident steps to protect his client's constitutional rights during criminal prosecution constitutes ineffective assistance, and/or denies the defendant a fair trial. Kimmelman v Morrison, 477 US 635 (1986). Defendant's attorney should have objected to M Crim JI 4.14 because the jury instructions were not accurate and appropriate for Defendant's case. The Michigan Supreme Court has held that the Michigan Criminal Jury Instructions do not have the official sanction of the Court. People v Petrella, 424 Mich 221, 277 (1985). The case of People v Perryman, 89 Mich App 516 (1979) is mandatory authority. Therefore, the trial court should have instructed the jury on the law applicable to Defendant's case. MCL 768.29; People v Perryman, supra. Defendant was entitled to have a properly instructed jury consider the evidence against him. Manifest injustice occurred because the erroneous jury instruction pertained to a basic and controlling issue in Defendant's case. People v Federico, 146 Mich App 776, 784; 381 NW2d 819 (1985). Additionally, for all the reasons set forth in the preceding argument, People v Perryman held that tracking-dog evidence, if found reliable, cannot support a conviction in the absence of other direct evidence of guilt. Perryman, 89 Mich App at 524. M Crim JI 4.14 does not require a finding of "direct evidence." Therefore, the trial judge was required to examine the jury instructions carefully before using them in order to ensure their accuracy and appropriateness for Defendant's case. People v Petrella, 424 Mich 221, 277 (1985). As a result, Defendant's conviction must be reversed.

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

ROBERTO MARCELLO DUPREE

Appellant

Court of Appeals No. 344603

(Print your name)

ISSUE III:

A. (Write the issue exactly as it was phrased in the Court of Appeals brief.)

The trial court violated Defendant's due process rights at sentencing by mis-scoring offense variables 1, 2, and 4 of the sentencing guidelines. If the errors are corrected, the advisory guidelines are reduced from 135-450 months to 108-360 months and resentencing is required. OV-1 was errantly scored at 15 points. OV-2 was errantly scored at 5 points. OV-4 was errantly scored at 10 points. Altogether, the Court relied upon inaccurate information. Therefore, resentencing is required.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle that is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.)

Defendant was entitled to be sentenced by the trial court on the basis of accurate information. Townsend v Burke, 334 US 736 (1948); People v Francisco, 474 Mich 82, 88 (2006). The trial court erred in assessing 15 points for OV 1 because Defendant did not have a gun and no else had been charged or convicted for the the armed robbery (Michigan Court of Appeals Opinion, pg. 5, dated 2/6/20). In response, the Michigan Court of Appeals agreed that the evidence showed that Defendant did not possess a weapon during the offense of armed robbery (Court of Appeals Opinion, pg. 6, dated 2/6/20). In addition, Defendant raised a similar claim for the trial court's assessment of five points for OV 2. However, the Court of Appeals relied upon the same reasons and inaccurate information. Also, Defendant contended that the trial court erred by scoring 10 points for OV 4, which considered the psychological injury to the victim. MCL 777.34(1)(a). The instructions stated "score ten points if the victim's serious psychological injury may require professional treatment. The fact that treatment has not been sought is not conclusive." MCL 777.34(2). The victim did not testify at the sentencing hearing. However, the victim impact statement in the PSIR states that the victim was adamant about keeping his store open for business. This fact was not sufficient evidence of psychological injury on the record to justify a 10-point score. People v Hicks, 259 Mich App 518, 535; 675 NW2d 599 (2003). In the case of People v Lockett, 295 Mich App 165, 183; 814 NW2d 295 (2012), the court was not allowed to assume that the victim suffered psychological harm because MCL 777.34 required serious psychological injury to the victim. In the case herein, the court also relied upon inaccurate information. Therefore, Defendant should be entitled to resentencing. Townsend v Burke, 334 US 736 (1948); People v Francisco, 474 Mich 82, 86 (2006).

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

ROBERTO MARCELLO DUPREE

Appellant

Court of Appeals No. 344603

(Print your name)

ISSUE IV:

A. (Write the issue exactly as it was phrased in the Court of Appeals brief.)

Defendant was denied due process and a fair trial when the police deliberately failed to preserve known exculpatory evidence.

Defendant was denied his right and ability to confront the evidence against him or the ability to impeach witnesses.

In addition, the prosecutor's deliberate failure to preserve the entire video evidence and material exculpatory evidence severely impaired Defendant's ability to confront his accusers. Therefore, bad faith is not required to be shown.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle that is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.)

Defendant contends that there was bad faith on behalf of the police because of their failure to preserve material known exculpatory evidence. It constituted a denial of due process. Arizona v Youngblood, 488 US 51, 58 (1988). On December 15, 2012, an armed robbery took place, and the robbery was captured on surveillance cameras. The store owner/victim informed the police that the videos could be copied with a memory stick (USB drive). A week later, the police returned to the store to copy the video. Rather than using a USB drive, officers chose to record selected portions of the video with an I-Phone. The selected portions were then copied to a computer before being copied onto a DVD (Trial Transcripts, pgs. 72, 76; 5/22/18). None of the recorded or unrecorded portions showed Defendant being present during the robbery, nor did they show any of the robbers wearing latex gloves which the police believed were linked to the crime, and thereby linked to Defendant. The officer knew that the evidence in his possession would play a substantive role in Defendant's defense. California v Trombetta, 467 US 479, 488 (1984). Further, under the rule of Brady v Maryland, 373 US 83 (1963), the prosecution had a constitutional obligation to provide the defense with exculpatory evidence in its possession. The destroyed material video evidence pertained to a basic and controlling issue in the case. There is a reasonable probability that had the material evidence been preserved and disclosed to the defense, the result of the proceedings would have been different. United States v Bagley, 473 US 667, 682 (1985). Detective Terzo testified that the destroyed video evidence showed that a light skinned suspect wore gloves (Trial Transcripts, pgs. 125-126, 5/18/18). However, trial counsel could not view the video evidence prior to cross examination of the witness because this evidence had been destroyed. Therefore, reversal is required.

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

ROBERTO MARCELLO DUPREE

Appellant

Court of Appeals No. 344603

(Print your name)

ISSUE V:

A. (Write the issue exactly as it was phrased in the Court of Appeals brief.)

The trial court denied Defendant a fair trial when it: 1) determined the dog handler was not an expert witness, and 2) when the trial court concluded that the prosecutor did not err in failing to produce discovery until trial. In addition, the trial court denied Defendant a fair trial when the Court refused to declare the dog handler an expert in front of the jury. Also, the prosecutor's refusal to provide discovery deprived Defendant the opportunity to confront the state's evidence.

B. The Court should review the Court of Appeals decision on this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle that is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.)

Prior to trial, the defense moved to exclude evidence of the dog-tracking--and subsequently the suppression of of the glove--on grounds that the prosecution had continually failed to provide discovery regarding the dog's reliability. A hearing was held on April 30, 2018, wherein the judge denied the motion. However, the trial judge ordered the prosecution to provide the requested documents (Hearing, pg. 35, dated 4/30/18). After violating discovery rules and the trial court's order, the prosecution provided portions of the foundational evidence for the dog-tracking--six days before trial began. Defendant is requesting for this Court to resolve two questions which have not previously been posed in this State: 1) Whether a dog handler is an expert witness within the meaning of MRE 702, and 2) whether the defense was entitled to any records, statistics or factual data regarding the dog or the handler under MCR 6.201(A)(3). Defendant-Appellant asserts both answers are yes. People v Laidlaw, 169 Mich App 84, 94 (1988). The trial court admitted that Quartuccio's testimony met the requirements of MRE 702, and that there was caselaw supporting a ruling that the dog handler was an expert (Trial Transcripts, Pgs. 170-173, 5/18/18). Altogether, trial counsel explained that without the timely disclosure of the documents and evidence related to the dog-tracking reliability and being declared an expert, it would prejudice the defense's ability to defend against the charge. In addition, it would prevent the defense's ability to call a defense expert to rebut Quartuccio's anticipated testimony. As set forth in People v Harper, 43 Mich App 500, 508 (1972), the reliability of dog tracking must be shown prior to it being admissible. Although the prosecutor produced portions of the documents, there was never any disclosure of records concerning the accuracy of the dog's tracking ability. Therefore, reversal is required. Florida v Harris, 568 US 237, 246-247 (2013).

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont).

ROBERTO MARCELLO DUPREE

, Appellant

Court of Appeals No. 344603

(Print your name)

NEW ISSUE INSTRUCTIONS: If you want the Supreme Court to look at errors that were not raised in the Court of Appeals, check **Yes** in the checkbox below and answer parts **A**, **B**, and **C** for each new issue you raise. There are pages provided for 2 new issues. You may include more pages to raise additional new issues. If you do not have new issues, go to the Relief Requested section on page 10.

- YES**, I want the Supreme Court to consider the additional grounds for relief contained in the following issues. The issues were not raised in my Court of Appeals brief.

NEW ISSUE I:

A. (Write the new issue you want the Court to consider.) Trial Counsel was ineffective by his failure to object to Detective Gilbert's testimony, and the admission of the identification testimony affected Defendant's constitutional rights. United States v Dixon, 413 F3d 540, 545 (CA 6, 2005); United States v Calhoun, 544 F2d 291 (CA 6, 1976); People v Fomby, 300 Mich App 46 (2013). More than two years had elapsed between the crime and Detective Gilbert being assigned to the case and his first observation of one of the alleged perpetrators.

B. The Court should review this issue because: (Check all the boxes you think apply to this issue, but you must check at least 1.)

- 1. The issue raises a serious question about the legality of a law passed by the legislature.
- 2. The issue raises a legal principle that is very important to Michigan law.
- 3. The Court of Appeals decision is clearly wrong and will cause material injustice to me.
- 4. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases and citations, laws, or court rules, etc. that support your argument and explain how they apply to this issue. State the facts that support and explain this issue. If any facts were not presented in the Court of Appeals, explain why. You may add more pages.)

It was not shown during the trial that Detective Gilbert had any "special familiarity" with the Defendant which would have made him better suited to make the identification than the jurors. Therefore, Detective Gilbert's identification was admitted in error. Officer Gilbert invaded the province of the jury when he identified the Defendant as the same person in the video through the reference to his driver's license photograph. As shown, the victim was unable to identify the Defendant as the perpetrator of the armed robbery. Initially, the officer in charge of the investigation was Detective Friese. He retired shortly after receiving the case. Then, Detective Gilbert was assigned the case in 2014 (Trial Transcripts, pg. 153; 5/22/18). Two and one-half years after the crime was committed. Detective Gilbert was in no position of familiarity with the Defendant to be able to identify the Defendant at anytime (Trial Transcripts, pg. 156; 5/22/18). In addition, where the witness is in no better position than the jury to make an identification, such testimony does not meet the requirements of MRE 701 or FRE 701. United States v Dixon, 413 F3d 540, 545 (CA 6, 2005); People v Fomby, 300 Mich App 46 (2013). The Sixth Circuit has noted several factors that are relevant to this analysis. United States v Dixon, 413 F3d at 545. No evidence supports applying any of the factors to Defendant's case. Therefore, reversal is required.

CRIMINAL PRO PER APPLICATION FOR LEAVE TO APPEAL (cont.)

ROBERTO MARCELLO DUPREE, Appellant

Court of Appeals No. 344603

ISSUE VI:

A. (Write the issue exactly as it was phrased in the Court of Appeals brief.)

Defendant-Appellant Dupree is entitled to dismissal of the charge where: 1) there was an unreasonable delay in his arrest, and 2) his constitutional right to a speedy trial was violated. The unreasonable delay in his arrest denied Defendant his constitutional right to due process of law. Most importantly, the delay of nearly two and a half years in bringing Defendant Dupree to trial violated his right to a speedy trial.

B. The Court should review the Court of Appeals decision on this issue because:

1. The issue raises a legal principle that is very important to Michigan law. MCR 7.305(B)(3)
2. The Court of Appeals decision is clearly wrong and will cause material injustice to me. MCR 7.305(B)(5)(a)
3. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals. MCR 7.305(B)(5)(b)

C. (Explain why you think the choices you checked in "B" apply to this issue. List any cases and state any facts that you want the Supreme Court to consider even if they were not included in your Court of Appeals brief. If you think the Court of Appeals mixed up any facts about this issue, explain below. If you need more space, you may add more pages.)

The Michigan Court of Appeals determined that the first and third Barker factors favored the Defendant-Appellant (see Court of Appeals decision, page 11, dated 2/6/20). US Const Am VI; *Barker v Wingo*, 407 US 514, 532 (1972). However, the Michigan Court of Appeals erroneously concluded that Defendant was responsible for the delay. For instance, there was no explanation for the ten-month delay in analyzing DNA evidence found on the glove of one of the suspected perpetrators of the armed robbery. On September 1, 2016, the trial court granted the defense motion for independent DNA testing. However, by September 26, 2016, trial counsel explained to the court that the initial test swabs from the gloves were "no longer" available to send for independent testing and later for cross examination of key prosecution witnesses (Hearing, page 6, 9/1/16). As a result, Defendant contended that the prosecutor impaired his defense to the armed robbery charge.

Additionally, Defendant-Appellant Dupree contends that his defense was substantially prejudiced because he could not obtain discovery regarding the complete video of the robbery. Specifically, Defendant contended that this evidence would show Detective Gilbert's misidentification of Defendant Dupree and that Defendant was not one of the perpetrators of the crime. Altogether, the destroyed video evidence and other material DNA exculpatory evidence was reviewed and tested by the prosecutor and the detectives. However, Defense Counsel could not review and/or test this material evidence prior to Defense Counsel's cross examination of key prosecution witnesses because the prosecutor and/or the detectives destroyed this material evidence. As a result, it impaired Defendant's defense. It was the only evidence from which Defendant could develop his trial strategy and defense. Therefore, the Court of Appeals should have vacated the conviction and ordered the dismissal of the charge.

Further, the length of the delay is the triggering mechanism for consideration of other factors in a speedy trial analysis, but it is not in itself determinative. *People v Missouri*, 100 Mich App 310, 320 (1980). Unexplained delays are charged against the prosecution. *People v Davis (After Remand)*, 129 Mich App 622, 625 (1983). Also, normal docket congestion is charged against the prosecution. *People v Jones*, 121 Mich App 484, 486 (1982). Most recently, the Supreme Court explained in *Vermont v Brillion*, 516 US 81, 94 (2009), that "institutional problems" and other "[d]elay resulting from a systemic breakdown ... could be charged to the State."

When balancing the four factors, the relative weight of the factors does not require even distribution or any particular formula at all. Instead, the important question is whether the prosecution adhered to its constitutional duty to provide a speedy trial or adequately explained why it did not. *Barker*, 407 US at 514; *Strunk v United States*, supra.

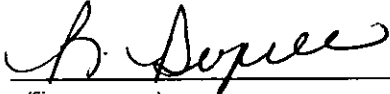
In conclusion, trial counsel explained to the court that the initial test swabs from the gloves were "no longer available" to send for independent testing and cross examination of key prosecution witnesses. The prosecutor and the police had reviewed and tested the evidence. However, trial counsel could not review this evidence and/or test this evidence before it was lost and/or destroyed (Hearing, Pg. 6; 9/1/16). It was the only evidence from which Defendant could prepare his defense and trial strategy. As a result, the prosecutor impaired his defense. Therefore, the only possible remedy is to vacate the conviction and dismiss with prejudice the charge. US Const Ams 5, 6, & 14; *Barker v Wingo*, 407 US 514, 532 (1972).

RELIEF REQUESTED

9. For the above reasons I request that the Supreme Court grant my application for leave to appeal or order any other relief that it decides I am entitled to receive.

July 6, 2020

(Date)



(Sign your name)
Roberto Marcello Dupree #215179

(Print your name and MDOC number)
Michigan Reformatory

(Print the name of the correctional facility if still incarcerated)
1342 West Main Street

(Print your address or address of the correctional facility)
IONIA, MICHIGAN 48846

After this page, you should attach copies of the trial court and Court of Appeals decisions, the PSI Report (if you are raising an issue related to the sentence imposed on your conviction), the jury instructions (if you are raising an issue regarding the instructions), and other documents you want the Supreme Court to consider.

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v
ROBERTO MARCELLO DUPREE
(Print your name)
Defendant-Appellant.

Supreme Court No. _____
(Leave blank)
Court of Appeals No. 344603
(See Court of Appeals decision)
Trial Court No. 2015-003884-FC
(See Court of Appeals brief or PSI Report.)

MOTION TO WAIVE FEES

For the reasons stated in the affidavit of indigency below, I request that this Court GRANT a waiver pursuant to MCR 7.319(C) of all fees required for filing the attached pleading because I am indigent and the provisions of MCL 600.2963 requiring prisoners to pay filing fees do not apply to appeals from a decision involving a criminal conviction.

July 6, 2020
(Date)

R. Dupree
(Sign your name)
Roberto Marcello Dupree #215179
(Print your name and MDOC number)

AFFIDAVIT OF INDIGENCY

My name and MDOC number are Roberto Marcello Dupree #215179

I am incarcerated at Michigan Reformatory in Ionia, Michigan 48846
(Name of correctional facility) (City, state and zip code)

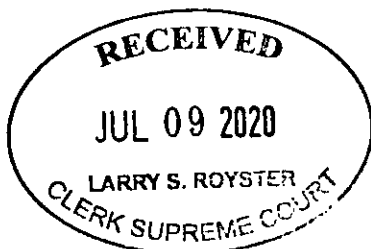
I attest that I cannot pay the filing fee. (Check the boxes that apply to you.)

- My only source of income is from my prison job and I make \$ _____ per day.
- I have no income.
- I have no assets that can be converted to cash.
- The Court of Appeals waived my fees in that court.

I declare that the statements above are true to the best of my knowledge, information and belief.

July 6, 2020
(Date)

R. Dupree
(Sign your name)
Roberto Marcello Dupree #215179
(Print your name and MDOC number)
Michigan Reformatory
(Print name of correctional facility if incarcerated)
1342 West Main Street
(Print your address or address of correctional facility)
Ionia, MI 48846



IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
v
Plaintiff-Appellee,
ROBERTO MARCELLO DUPREE
(Print your name)
Defendant-Appellant.

Supreme Court No. _____
(Leave blank)
Court of Appeals No. 344603
(See Court of Appeals decision)
Trial Court No. 2015-003884-FC
(See Court of Appeals brief or PSI Report)

PROOF OF SERVICE

On July 6, 2020, I mailed by U.S. mail 1 copy of the documents checked below:

- Application for Leave to Appeal
- Copy of Trial Court decision
- Copy of Court of Appeals decision
- PSI Report (if you are raising an issue related to the sentence imposed on your conviction)
- Transcript of jury instructions (if you are raising an issue related to a jury instruction at trial)
- Motion to Waive Fees / Affidavit of Indigency
- Proof of Service
- Other: _____

You do not have to provide any briefs filed in the trial court or Court of Appeals

TO: Macomb County Prosecutor
(Name of county)
One South Main Street
(Street address)
Mt. Clemens, MI 48043-2306
(City) (Zip Code)

I declare that the statements above are true to the best of my knowledge, information and belief.

July 6, 2020
(Date)

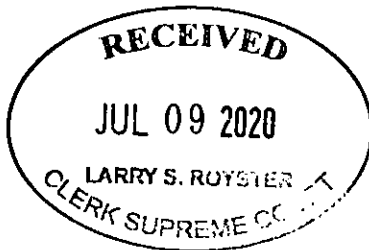
Roberto Dupree
(Sign your name)

Roberto Marcello Dupree #215179
(Print your name and MDOC number)

Michigan Reformatory
(Print name of correctional facility if still incarcerated)

1342 West Main Street
(Print your address or address of correctional facility)

Ionia, MI 48846



COVER LETTER

July 6, 2020

(Date of mailing to the Supreme Court)

Clerk's Office
Michigan Supreme Court
Hall of Justice
P.O. Box 30052
Lansing, MI 48909



RE: PEOPLE OF THE STATE OF MICHIGAN v ROBERTO MARCELLO DUPREE
(Print your name)

Supreme Court No. (Leave blank - the Clerk will assign a number for you.)
Court of Appeals No. 344603 (Get this number from the Court of Appeals decision.)
Trial Court No. 2015-003884-FC (Get this number from Court of Appeals brief or the PSI Report.)

Dear Clerk:

Enclosed please find the originals of the documents checked below. (Put a check mark in the boxes of the documents you are sending.) I am indigent and cannot provide four copies.

- Application for Leave to Appeal
Copy of Trial Court decision
Copy of Court of Appeals decision
PSI Report (required only if you raise an issue related to the sentence imposed on your conviction)
Transcript of jury instructions (required only if you are challenging an instruction on appeal)
Motion to Waive Fees / Affidavit of Indigency
Proof of Service
Other Michigan Court of Appeals Brief and Standard 4 Brief attached hereto.

You do not have to provide any briefs filed in the trial court or Court of Appeals

Handwritten signature of Roberto Marcello Dupree

(Sign your name)

Roberto Marcello Dupree #215179

(Print your name and MDOC number)

Michigan Reformatory

(Print name of correctional facility if still incarcerated)

1342 West Main Street

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INSTRUCTIONS

- 1. You will need 2 copies and the originals of this letter and the pleadings listed above.
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STATE OF MICHIGAN
IN THE SUPREME COURT



PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

V

ROBERTO MARCELLO DUPREE
Defendant-Appellant.

Supreme Court No.
Court of Appeals No. 344603
Lower Court No. 2015-003884-FC

JUDGMENT APPEALED FROM, CONCISE ALLEGATIONS OF ERROR, AND RELIEF SOUGHT

Now comes Defendant-Appellant Roberto Marcello Dupree, pursuant to *MCR 7.305(B)(C)(8)* for the grant of leave to appeal and appellate relief. In addition, Defendant-Appellant states in support the following:

1. On May 24, 2018, Defendant-Appellant Roberto Marcello Dupree was convicted after a jury trial of armed robbery (*MCL 750.529*). On June 28, 2018, Defendant Dupree was sentenced to 30-60 years. Then, Defendant-Appellant appeal by right in the Court of Appeals. Next, Defendant filed a motion to remand. On March 26, 2019, the Court of Appeals denied the Motion to Remand.

2. Further, on February 6, 2020, the Court of Appeals' findings of facts were incorrect when the Court denied Defendant-Appellant appellate relief. Then, Defendant-Appellant requested reconsideration of the Court of Appeals' decision. On March 13, 2020, the Court denied reconsideration.

3. Defendant-Appellant contends that his application shows that the issues involve legal principles of major significance to the state's jurisprudence. *MCR 7.305(B)(3)*. Further, the Court of Appeals decision is clearly erroneous and will cause material injustice to Defendant-Appellant. *MCR 7.305(B)(5)(a)*. Also, the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals. *MCR 7.305(B)(5)(b)*.

4. *MCR 7.305(C)(8)*, provides that if the Court of Appeals has denied a motion to remand, the appellant may raise issues relating to that denial in an application for leave to appeal the decision on the merits. Within the Michigan Court of Appeals Motion to Remand, Defendant-Appellant asserted that he did not receive effective assistance of counsel and was denied a fair trial because trial counsel did not object to the sentencing guidelines or the instruction regarding tracking dog evidence. *US Const Am VI; Strickland v Washington, 466 US 668 (1984)*.

5. On February 6, 2020, the Court of Appeals' findings of facts were incorrect when the Court denied Defendant-Appellant appellate relief. The Court of Appeals stated that Julie Anne Howenstine, a biology and DNA specialist, "[A]greed that defendant's DNA was a major donor of the DNA collected from the glove found near the scene of the robbery" (Court of Appeals Opinion, Pg. 2). However, at trial, Howenstine actually stated, "I wouldn't say his DNA is present" (Trial Transcripts, page 39, 5/24/18). She also testified that she concluded it was an insufficient quantity of DNA for conclusive association (Trial Transcripts, pg. 41, 5/24/18). Clearly by the DNA Specialist's trial testimony, she established that Defendant's DNA could not be conclusively associated with the DNA collected from the glove. As a result, the prosecution did not meet its burden of proof beyond a reasonable doubt that Defendant committed the armed robbery nor did the prosecution prove that Defendant was at the scene of the crime.

6. First, pursuant to *MCR 7.316(A)(3)*, this Court may permit the grounds to be amended or new grounds to be added (see Defendant-Appellant's MSC Pro Per Application for Leave to Appeal, New Issue I, page 8).

7. Specifically, in its COA Opinion, the Court of Appeals stated that Detective Gilbert testified, "The Video image of the heavysset robber matched that on the Defendant's driver license" (COA Opinion, pgs. 12-13). Detective Gilbert's testimony regarding the identification of Defendant opined about Defendant's guilt in the crime. However, it had no special relevant familiarity with the Defendant that would make him better suited to make the identification than the jurors (Trial Transcripts, pg. 156, 5/22/2018). *United*

States v Dixon, 413 F3d 540, 545 (CA 6, 2005); *United States v Calhoun*, 544 F2d 291, 295-296 (CA 6, 1976); *People v Fomby*, 300 Mich App 46, 52-53; 831 NW2d 889 (2013).

8. In the case herein, Defendant contends that there was a misidentification of Defendant-Appellant by Detective Gilbert, and it invaded the province of the jury. *United States v Dixon*, 413 F3d at 545; *United States v Calhoun*, 544 F2d at 295-296; *People v Fomby*, *supra* at 52-53.

9. The initial officer in charge of the case was Detective Friese. He retired shortly after he received Defendant's case. Then, Detective Gilbert was assigned the case in 2014 (Trial Transcripts, pg. 153, 5/22/2018). It was approximately two and one-half (2 ½) years after the crime had been committed by the perpetrators. As a result, the lack of corroborating evidence by Detective Gilbert showed that he had no "special familiarity" with the Defendant which would have made him better suited rather than the jurors to make the identification of Defendant as one of the alleged perpetrators. *United States v Dixon*, 413 F3d at 545; *United States v Calhoun*, 544 F2d at 295-296; *People v Fomby*, *supra* at 40. In fact, there was a misidentification by Detective Gilbert. *United States v Dixon*, 413 F3d at 545; *People v Fomby*, *supra*.

10. Because the officer was in no better position than the jury to make an identification from a video or photograph, such testimony does not meet the requirements of "MRE 701 which is essentially the same as FRE 701. Altogether, Detective Gilbert's testimony was admitted in error, infected the proceedings, and prejudiced the defendant. *United States v Dixon*, 413 F3d at 545; *United States v Calhoun*, 544 F2d at 295-296; *People v Fomby*, *supra* at 52-53.

11. In addition, the victim was unable to identify the Defendant as one of the perpetrators of this crime. Specifically, the victim stated the "bald" person who robbed him was a "white male" not a "black male." That he had "nothing covering his face" preventing identification. Three times during the trial he identified the perpetrator as a "bald white male" (Trial Transcripts, pgs. 137, 140, 142; 5/17/2018). However, Defendant is an African American "black male."

12. As a result, Defendant-Appellant contends that his trial counsel was ineffective because trial counsel did not object to the admissibility of Detective Gilbert's identification testimony and/or point out the above contradictory compelling facts. *US Const Am VI; Strickland v Washington, 466 US 668 (1984)*. Also, Defendant-Appellant is contending that the admission of Detective Gilbert's testimony regarding the identification was plain error. Therefore, this Court can also review this unpreserved *Fomby* claim for plain error affecting Defendant's substantial rights because it was a basic and controlling issue in Defendant's case. *People v Carines, 460 Mich 750, 763-764 (1999)*. This Court's review would require this Court to grant leave and ultimately appellate relief.

13. Second, a person accused of a criminal offense has the constitutional right to the effective assistance of counsel at his sentencing proceedings. *US Const. Am VI; Const 1963, Art 1, Sec. 20; Strickland v Washington, 446 US 668 (1984); People v Pickens, 446 Mich 298, 302-303; 521 NW2d 797 (1994)*. Defendant-Appellant asserts that counsel was ineffective for failing to object to inaccurate information. *US Const Ams VI, XIV; Strickland v Washington, supra*.

14. Third, the Due Process Clause of *US Const Am XIV* still requires that a trial court impose a sentence based on accurate information. *Townsend v Burke, 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948); Const 1963, art 1, sec. 17; People v Francisco, 474 Mich 82, 89; 711 NW2d 44 (2006)*.

15. Specifically, Defendant Dupree contends that the trial court violated his due process rights at sentencing by considering inaccurate information regarding the Offense Variables and related matters. If the inaccurate information is corrected, the advisory guidelines are reduced from 135-450 months to 108-360 months. As a result, resentencing is required despite Defendant Dupree counsel's failure to object to the inaccurate information. *US Const Ams VI, XIV; Strickland v Washington, supra*.

16. Defendant Dupree was assessed 15 points under OV-1 which requires a finding that a "firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon." *MCL 777.31(1)(c)*. Mr. Zamzami

testified that it was the first man who entered the store that pointed a gun at him. The officers testified that there was no video footage showing Defendant Dupree with a gun. Defendant Dupree should have received zero points under OV-1.

17. Then, Defendant Dupree was assessed 5 points under OV-2 which requires a finding that "The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." *MCL 777.32(1)(d)*. There was no evidence showing that Defendant Dupree possessed any weapon. The arguments presented in the preceding argument apply equally here. Defendant Dupree cannot be vicariously assessed 5 points under OV-2.

18. Then, Defendant Dupree was assessed 10 points under OV-4, which requires a finding that serious psychological injury requiring professional treatment occurred to a victim. *MCL 777.34(1)(a)*. The instructions state "score ten points if the victim's serious psychological injury may require professional treatment. The fact that treatment has not been sought is not conclusive." *MCL 777.34(2)*. Mr. Zamzami did not testify at the sentencing hearing. However, the victim impact statement in the PSIR states that the victim was adamant about keeping his store open for business.

19. OV-4 asks the court to determine whether a serious psychological injury requiring professional treatment occurred to a victim. "The court properly assesses 10 points when a victim suffers a serious psychological injury that might require professional treatment." However, there must be some evidence of psychological injury on the record to justify a 10-point score. *People v Hicks, 259 Mich App 518, 535; 675 NW2d 599 (2003)*.

20. In conclusion, the trial court violated Defendant-Appellant Dupree's due process rights at sentencing by mis-scoring offense variables 1, 2, and 4 of the sentencing guidelines. If the errors are corrected, the advisory guidelines are reduced from 135-450 months to 108-360 months and resentencing is required. OV- 1 was errantly scored at 15 points. OV-2 was errantly scored at 5 points. OV-4 was errantly scored at 10 points. Altogether, the Court relied upon inaccurate information. *Townsend v Burke,*

334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948); *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006).

Therefore, resentencing is required.

21. Fourth, Defendant Dupree also asserts that his attorney was ineffective for failing to object to *M Crim JI 4.14* because the instruction does not and stated that if tracking dog evidence is found reliable, it cannot support a conviction in the absence of other direct evidence of guilt. *People v Perryman*, 89 Mich App 516, 524; 280 NW2d 579 (1979). The instruction errantly does not specify that there must be direct evidence of guilt, which was lacking in this case. *People v Perryman*, *supra* at 524. These Michigan Criminal Jury Instructions did not have the official sanction of the Michigan Supreme Court. *People v Petrella*, 424 Mich 221, 277 (1985). Still, despite Trial Counsel's objection, this issue can be reviewed because it pertains to a basic and controlling issue in Defendant's case. This Court's review would require this Court to grant leave and ultimately appellate relief.

22. Fifth, Defendant-Appellant Dupree contends that he is entitled to dismissal with prejudice of the charges where: 1) there was an unreasonable delay in his arrest, and 2) his constitutional right to a speedy trial was violated. The unreasonable delay in his arrest denied Defendant-Appellant Dupree his constitutional right to due process of law. Most importantly, the delay of nearly two and a half years in bringing Defendant-Appellant Dupree to trial violated his right to a speedy trial.

23. The Michigan Court of Appeals determined that the first and third *Barker* factors favored the Defendant-Appellant (see Court of Appeals decision, page 11, dated February 6, 2020). *US Const Am VI; Barker v Wingo*, 407 US 514, 532 (1972). Also, the Michigan Court of Appeals should have concluded that the second and fourth *Barker* factors favored the Defendant, and they required appellate relief. Defendant-Appellant contended that the prosecutor and police impaired and prejudiced his defense to the armed robbery charge.

24. Specifically, Defendant-Appellant Dupree contends that his defense was substantially prejudiced because he could not obtain discovery regarding the complete video of the robbery. This evidence

would have shown Detective Gilbert's misidentification of Defendant Dupree, and that Defendant was not one of the perpetrators of the crime. The destroyed video evidence and other material DNA exculpatory evidence was reviewed and tested by the prosecution and the detectives before they destroyed it.

25. Specifically, trial counsel explained to the court that the initial test swabs from the gloves were "no longer available" to send for independent testing and for cross examination of key prosecution witnesses. The prosecution and the police had reviewed and tested the evidence. However, trial counsel could not review this evidence and/or test this evidence before the prosecutor and/or the police lost and/or destroyed this evidence (Hearing, pg. 6; 9/1/16). It was the only evidence from which Defendant-Appellant could prepare his defense and trial strategy. As a result, Defendant-Appellant contends that the prosecutor impaired and prejudiced his defense to the armed robbery charge. Therefore, the only possible remedy where the right to a speedy trial has been violated is to vacate the conviction and dismiss with prejudice the charge. *US Const Ams 5, 6, & 14; Barker v Wingo, 407 US 514, 532 (1972)*.

26. Sixth, Michigan law requires that in cases where tracking dog evidence is used there must be direct evidence demonstrating that a defendant was involved in the crime. *People v Perryman, 89 Mich App 516, 523-524 (1979)*. Also, there was no corroborating evidence that could support the tracking dog evidence. Because no direct evidence of guilt was introduced, the evidence was insufficient to support Defendant-Appellant's conviction for armed robbery. *People v Perryman, supra at 523-524*. It was also a violation of *US Const Ams V, XIV; Const 1963, Art 1, § 17*, and it requires reversal of the conviction.

27. Seventh, Defendant-Appellant Dupree was denied his constitutional right to a properly instructed jury because *M Crim JI 4.14 (Tracking-Dog Evidence)* is inconsistent with Michigan law, which requires direct evidence of guilt in cases where tracking-dog evidence is used. *People v Perryman, 89 Mich App 516, 523-524 (1979)*. Again, the Prosecutor also failed to produce any corroborating evidence. Therefore,

the trial court erred in giving the instruction. *MCL 768.29*. In addition, despite trial counsel's ineffective assistance, the instructional error pertained to a basic and controlling issue in Defendant's case. Most importantly, the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court. *People v Petrella*, 424 Mich 221, 277 (1985). Therefore, because *People v Perryman*, 89 Mich App 516, 523-524 (1979) is controlling law, this Court should grant leave and appellate relief. *MCL 768.29*.

28. Eighth, Defendant-Appellant Dupree was denied due process and a fair trial when the police deliberately failed to preserve known exculpatory evidence. The prosecutor and the police reviewed, examined, and tested this exculpatory evidence. However, Defendant Dupree was deprived of his right to review, examine, and test the exculpatory evidence before it was destroyed. It was the only evidence from which Defendant could present a substantial defense and/or use it for trial strategy. As a result, trial counsel and/or Defendant could not confront the evidence against him or use it to impeach prosecution witnesses. In addition, the prosecutor's deliberate failure to preserve the entire video evidence and material exculpatory evidence severely impaired Defendant's ability to confront his accusers. Therefore, bad faith is not required to be shown. Pursuant to *California v Trombetta*, 467 US 479, 488 (1984); *Brady v Maryland*, 373 US 83 (1963); *United States v Bagley*, 473 US 667, 682 (1985), Defendant's conviction should be reversed and remanded for a new trial and/or vacated and dismissed with prejudice.

29. Ninth, the trial court denied Defendant-Appellant Dupree a fair trial when it: 1) determined the dog handler was not an expert witness, and 2) where it concluded that the prosecutor did not err in failing to produce discovery until trial. In addition, the trial court denied Defendant a fair trial when the Court refused to declare the dog handler an expert in front of the jury. *People v Laidlaw*, 169 Mich App 84, 94 (1988). Also, the prosecutor's refusal to provide discovery deprived Defendant the opportunity to confront the State's evidence. The reliability of dog tracking must be shown prior to its admissibility.

People v Harper, 43 Mich App 500, 508 (1972). Therefore, reversal is required. *Florida v Harris*, 568 US 237, 246-247 (2013). Altogether, this Court should grant leave and appellate relief. *US Const Ams VI, XIV*.

Wherefore, for the reasons set forth in this judgment appealed from, concise allegations of errors, and relief sought, Defendant-Appellant requests for this Court to grant the application for leave to appeal and any other relief according to law.

Respectfully submitted,


Roberto Marcello Dupree

Dated: July 6, 2020