

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LORENZO J. HARRELL,

Defendant-Appellee.

UNPUBLISHED
February 26, 2019

No. 339800
Wayne Circuit Court
LC No. 93-007172-01-FC

Before: STEPHENS, P.J., and K. F. KELLY and TUKEL, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's order resentencing defendant, and by extension, the underlying order granting defendant's motion for relief from judgment. The prosecution contends on appeal that the trial court erred in determining that defendant's motion for relief from judgment was an initial motion rather than a successive motion governed by MCR 6.502(G). Further, the prosecution contends that even assuming defendant's motion was not a successive motion, defendant failed to demonstrate good cause for not having raised the issue earlier and actual prejudice in the form of an invalid sentence, both of which are necessary to entitle a defendant to resentencing. For the reasons provided below, we affirm.

I. BACKGROUND

As a preliminary matter, we note that the lower court record delivered to this Court on appeal is missing documents, contains other documents that appear to have been erroneously filed, and that the registers of actions pertaining to both defendant's and codefendant Jenard Sharp's 1993 convictions are in similar disarray.

Defendant and Sharp were originally convicted by a jury in 1993 of first-degree felony murder, MCL 750.316, two counts of assault with intent to murder (AWIM), MCL 750.83, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant, who was a juvenile at the time, was sentenced by Judge Margie R. Braxton to life without the possibility of parole for the first-degree murder conviction, life with the possibility of parole for the assault with intent to murder convictions as well as the armed robbery conviction, and the mandatory two years' imprisonment for the

felony-firearm conviction. In 1994, both defendant and Sharp filed claims of appeal challenging their convictions on a number of grounds. In 1996, this Court issued an unpublished opinion holding that it was a violation of double jeopardy to convict defendant and Sharp of felony murder along with the predicate felony, and thus vacated defendant's and Sharp's armed robbery convictions but left intact all other convictions and sentences. *People v Harrell*, unpublished per curiam opinion of the Court of Appeals, issued August 16, 1996 (Docket Nos. 171615 and 172276), pp 1-3.

This appeal arises out of a motion for relief from judgment filed by defendant in 2017. After the release of *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *Montgomery v Louisiana*, ___ US ___, 136 S Ct 718; 193 L Ed 2d 599 (2016), which invalidated mandatory life sentences applied to juveniles, the prosecution filed a notice of intent to seek a term-of-years sentence for defendant's first-degree murder conviction. Shortly thereafter, defendant filed his motion, contending that he should be granted resentencing with respect to his parolable life sentences as well. The trial court agreed, and defendant was ultimately resentenced to 25 to 60 years' imprisonment for his felony-murder conviction, and 17½ to 25 years' imprisonment for his AWIM convictions.

II. DISCUSSION

The prosecution contends that defendant never should have been resentenced on the AWIM convictions. We disagree.

"We review a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of facts supporting its decision for clear error." *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes or makes an error of law." *Id.* (citation omitted). "A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made." *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2011). "Matters of constitutional and statutory interpretation are reviewed de novo." *People v Skinner*, 502 Mich 89, 99; 917 NW2d 292 (2018). "[W]e review de novo the proper interpretation and application of court rules." *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018). "[W]hen interpreting a court rule, this Court begins with the text of the court rule and reads the individual words and phrases in their context within the Michigan Court Rules." *Id.*

The prosecution first contends that the trial court never should have considered defendant's motion for relief from judgment because it constituted a successive motion that was limited by the restrictions of MCR 6.502(G). We note that a large portion of the prosecution's argument on appeal is that the trial court failed to *apply* MCR 6.502(G) to defendant's motion for relief from judgment. In fact, the trial court determined that defendant's motion was not a successive motion, and thus the issue is less about *how* MCR 6.502(G) applies and more about *whether* it applies at all. Although the poorly organized condition of the lower court file complicates review of the issue on appeal, ultimately, it cannot be said that the trial court clearly erred when it concluded that defendant's motion for relief from judgment was not a successive motion, nor should defendant bear the responsibility for the disorder of the lower court file.

The Michigan Court Rules provide that a judgment of conviction and sentence not subject to appellate review may be reviewed by the circuit court solely upon the filing of a proper motion for relief from judgment. MCR 6.501; MCR 6.502. MCR 6.502 provides a number of procedural requirements that must be satisfied prior to the trial court considering the substance of the motion. MCR 6.502(G) provides the following:

(G) Successive Motions.

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

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

The prosecution contends that the trial court never should have considered defendant's motion for relief from judgment because it constituted a successive motion that fell under the purview of MCR 6.502(G)(1), and that defendant failed to establish a change in law or newly uncovered evidence that would permit consideration of a successive motion. Specifically, the prosecution claims that defendant filed his initial motion for relief from judgment in 2005 and that the trial court issued an opinion and order denying the motion on October 24, 2005.

A full review of the record clearly shows that the motion for relief from judgment disposed of by the October 24, 2005 order was filed by co-defendant Sharp and *not* defendant. The record then reflects continued failure by the trial court to rectify its mistake despite consistent communication and pleas from defendant for the error to be corrected. On appeal, the prosecution concedes that, "admittedly, defendant seems to be correct" about the motion, and that "the body of the order seemed to discuss the issues raised in Sharp's motion, not defendant's motion," yet contends that defendant should nevertheless have been barred from filing a motion for relief from judgment because defendant failed to appeal either the October 24, 2005 order, or the December 7, 2005 order denying defendant's request for reconsideration.¹

The argument simultaneously accepts that the October 24, 2005 order was erroneously captioned and did not pertain to a motion filed by defendant, yet suggests that defendant's failure

¹ Although titled a "motion for reconsideration," we note that the motion was a pro se attempt by defendant to inform the court that the order denying relief from judgment was erroneously captioned with his name and file number.

to appeal an order *that did not apply to him* extinguished his right to file a motion for relief from judgment in the future. To hold that defendant was clearly not the subject of the October 24, 2005 order and yet that the order should be treated as though it disposed of a motion by defendant for the purpose of applying MCR 6.502(G) would be entirely inequitable. Such a holding also would raise complicated issues of whether defendant had standing to appeal an order which facially applied to him but in fact was not properly directed to his conduct. Although defendant did not file an appeal from the October 24, 2005 order, and although defendant did not appeal the December 7, 2005 order denying his motion for reconsideration, defendant made continual and consistent efforts to enlighten the trial court as to its record-keeping error *and* to obtain the alleged February 20, 2004 order that, according to the register of actions, actually pertained to him. Defendant sought to obtain the February 20, 2004 order *for the purpose of filing an appeal*. Defendant's letters indicate that he was aware of his appellate rights and that is exactly why he continuously sought to obtain—without success—a copy of the February 20, 2004 order, as opposed to the October 24, 2005 order.

Admittedly, and although the prosecution does not discuss the February 20, 2004 order on appeal, the existence of the order would suggest that defendant did file a motion for relief from judgment sometime in 2003.² However, the existence of the order cannot be confirmed, as the lower court file provided on appeal does not contain the order or any related documents, and defendant has consistently demonstrated that he has never been provided a copy of the order. Thus, there is no way to determine, based upon the register of actions alone—which is riddled with its own errors—that defendant ever actually filed a motion in 2003, or that an order ever actually was entered or circulated in 2004.

Through no fault of defendant, it is unclear whether he filed a motion for relief from judgment in 2003, and it is even more unclear, assuming such a motion was filed, whether the trial court disposed of the motion. It is clear, however, that the motion for relief from judgment filed in 2005 was *not* filed by defendant and that the October 24, 2005 order was erroneously captioned with defendant's name. Based upon those facts, we are not left with a definite and firm conviction that the trial court was mistaken when it determined that, to the extent that defendant had ever filed a motion for relief from judgment, the motion had never been properly reviewed and decided. Consequently, it cannot be said that the trial court's decision to treat defendant's motion for relief from judgment as an initial rather than a successive motion was an abuse of discretion.³

² The register of actions suggests that defendant filed the motion on August 12, 2003, another motion or a supplemental motion on September 17, 2003, and that the trial court denied defendant's motion on February 20, 2004.

³ Because the trial court did not clearly err in determining that defendant's April 12, 2017 motion for relief from judgment was an initial motion, we do not consider the prosecution's arguments regarding whether the motion would have qualified for consideration notwithstanding its possible successive status, i.e., whether a retroactive change in law occurred or whether new evidence was discovered warranting the filing of a successive motion. Such arguments are moot.

The prosecution next argues that the trial court abused its discretion when it determined that good cause and actual prejudice existed to warrant granting defendant's motion for relief from judgment. We disagree.

"MCR 6.508 protects [against] unremedied manifest injustice, preserves professional independence, conserves judicial resources, and enhances the finality of judgments." *People v Clark*, 274 Mich App 248, 253; 732 NW2d 605 (2007). Subsection D provides the circumstances under which a motion for relief from judgment may be granted:

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

* * *

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

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

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

* * *

(iv) in the case of a challenge to the sentence, the sentence is invalid.
[MCR 6.508(D)(3).]

With regard to the actual prejudice prong, we note that, despite requesting the transcript of defendant's original 1993 sentencing hearing, this Court has not been provided it. Thus, there is nothing for us to review to assess the trial court's conclusion that the original sentencing judge failed to exercise discretion when she imposed a parolable life sentence. Without anything to challenge or assess the trial court's interpretation of the original sentencing transcript, we are incapable of disturbing it, as it is impossible for us to reach "a definite and firm conviction that a mistake has been made."⁴ *Allen*, 295 Mich App at 281. Thus, the only reviewable issue on

⁴ This aspect makes the present case distinguishable from this Court's recent opinion in *People v Williams*, ___ Mich App ___, ___ NW2d ___ (2018) (Docket No. 339701). In *Williams*, the defendant, like the defendant here, argued that the sentencing court "gave less thoughtful consideration" to his parolable sentences, given that the court had also sentenced the defendant to life without the possibility of parole. *Id.* at ___; slip op at 5. This Court held that the defendant could not prove that the parolable life sentences at issue in that case constituted an invalid sentence, i.e., actual prejudice. The Court noted that such an argument rested on speculation, which "the record does not support." *Id.* at ___; slip op at 3, 5. In support of its

appeal is whether defendant properly established good cause to support his failure to raise the argument prior to his motion for relief from judgment.

A defendant may show good cause by “showing that some external factor prevented counsel from previously raising the issue.” *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995) (opinion by BOYLE, J.). “External factors include ‘showing that the factual or legal basis for a claim was not reasonably available to counsel’” *Id.* at 385 n 8.

First, the prosecution concedes that good cause existed for defendant’s failure to raise the argument that the trial court did not give adequate consideration to defendant’s parolable life sentences because—prior to *Miller* and *Montgomery*—the trial court was under the mistaken belief that defendant’s life without parole sentence was constitutional and that defendant would spend the rest of his natural life in prison, regardless of his other non-murder sentences. But at the same time, the prosecution contends that defendant failed to establish good cause for the actual reason the trial court granted resentencing—the failure of the sentencing judge to exercise discretion. The argument is splitting hairs. Based upon the motion hearing transcript, it cannot be said that, when the trial court implicitly found good cause by granting defendant’s motion for relief from judgment, the court at all distinguished the lack of adequate consideration based upon defendant’s then-natural-life sentence from the failure to exercise discretion. That is, a reasonable interpretation of the trial court’s ruling was that good cause was established by the sentencing judge’s lack of exercise of discretion *based upon* her belief that defendant would spend his natural life in prison.

Second, perhaps the most obvious external factor that provided good cause for defendant’s failure to raise the argument that the sentencing judge failed to exercise her discretion was this Court’s explicit ruling in 1996 that such an argument would have been moot. In response to arguments made by Sharp in defendant’s and Sharp’s consolidated appeals challenging Sharp’s lesser sentences, this Court simply held, “Because we do not find that Sharp’s conviction for felony murder should be reversed, we need not consider his argument that he should be resentenced on the remaining counts.” *Harrell*, unpub op at 3. Thus, defendant would have reasonably believed that he need not and in fact could not raise such sentencing arguments prior to *Miller* and *Montgomery* because they were moot, as this Court had explicitly confirmed the same. Under the circumstances, the trial court’s finding of good cause for failing

holding, the Court quoted from the original sentencing transcript, *which showed that the sentencing judge had exercised her discretion* in sentencing the defendant to life with the possibility of parole. *Id.* at ____; slip op at 5. But here, despite this Court’s request, no transcript of the sentencing hearing can be produced, and the circuit court, who did have a copy of the sentencing transcript, *found that the sentencing judge failed to exercise discretion* in imposing the life with the possibility of parole sentences. As we have already noted, without a copy of that transcript before us, we cannot evaluate—and, hence, cannot disturb—the circuit court’s interpretation of that sentencing proceeding. Therefore, *Williams* is distinguishable and does not dictate the outcome in this circumstance.

to raise the sentencing issues prior to the Supreme Court's decisions in *Miller* and *Montgomery* was not outside the range of reasonable and principled outcomes.

Lastly, the prosecution suggests in its brief that reversal is warranted solely because the trial court failed to explicitly articulate its finding of good cause. The prosecution cites no caselaw to suggest that the failure to articulate good cause specifically constitutes an abuse of discretion—particularly where it is clear from the court's conclusion that it *did* believe good cause existed. Regardless, the trial court's ultimate conclusions—that good cause existed and that defendant's parolable sentences were invalid—were apparent from its ruling, and consequently, the prosecution's argument is not persuasive.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Jonathan Tukel

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K. F. KELLY, J. (*dissenting*).

I respectfully dissent. In light of the dismal and confusing state of the lower court record, I will assume that defendant did not raise a successive motion for relief from judgment. Nevertheless, even with that assumption in place, defendant failed to demonstrate “good cause” or “actual prejudice” and, accordingly, Judge Skutt erred in granting defendant’s motion for relief from judgment and in re-sentencing defendant on his AWIM convictions.

MCR 6.508(D) provides, in relevant part:

The defendant has the burden of establishing entitlement to the relief requested.
The court may not grant relief to the defendant if the motion

* * *

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

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

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, “actual prejudice” means that,

* * *

(iv) in the case of a challenge to the sentence, the sentence is invalid.
[MCR 6.508(D)(3).]

Defendant must have demonstrated *both* good case for failing to raise the sentencing issue in his prior appeal *and* that his original sentence was invalid. He can do neither.

In addressing whether there was “good cause” to revisit his AWIM sentences, defendant notes that Judge Baxter deviated from the judicial sentencing guidelines of 120 to 300 months’ imprisonment when she sentenced defendant to parolable life. Defendant argues that Judge Baxter’s failure to articulate the reasons for such a departure was good cause to revisit sentencing on the AWIM offenses. However, in his motion, defendant acknowledged that “the grounds on which [defendant] now seeks relief have never been decided against him on the merits, and indeed, although the error *could have been potentially raised on appeal* from the conviction and sentence . . .” It is clear that whether Judge Baxter failed to exercise discretion when imposing sentences for the AWIM convictions that departed from the applicable judicial sentence guidelines is the sort of issue that could have been raised in defendant’s original appeal. Justice Riley has noted:

The circumstances under which a defendant may appeal under MCR 6.508(D) are narrowly limited when the defendant has already utilized the full gamut of the appellate process and is found wanting. Without such restrictions, the finality of judgments would be effectively undermined. The appellate process is not a game in which defendants should be afforded unlimited and unrestricted opportunities to attack convictions and sentences that were duly imposed years before. Once a defendant has been granted his day in court and his appeal by right, only under the most egregious circumstances should he be permitted to again attack the integrity of his conviction or sentence. [*People v Carpentier*, 446 Mich 19, 42; 521 NW2d 195 (1994).]

“Neither the guarantee of a fair trial nor a direct appeal entitles a defendant to as many attacks on a final conviction as ingenuity may devise.” *People v Clark*, 274 Mich App 248, 253; 732 NW2d 605 (2007).

I am not persuaded that defendant was excused from raising the issue on appeal simply because of his subjective belief that it may have been “fruitless” or “moot.” He points to this Court’s decision in codefendant Sharp’s appeal: “Because we do not find that Sharp’s conviction for felony murder should be reversed, we need not consider his argument that he should be resentenced on the remaining counts.” *People v Harrell*, unpublished per curiam opinion of the Court of Appeals, issued August 16, 1996 (Docket Nos. 171615 and 172276), p 3. That opinion could not form the basis for defendant’s failure to raise the issue because, by necessity, the opinion came after briefing. Therefore, it could not serve as a basis for claiming that an appeal on the AWIM sentences would have been futile or moot. In fact, it does just the opposite. This Court’s prior opinion supports my belief that defendant should have raised the sentencing issue in his original appeal. At the time defendant was sentenced, the judicial guidelines were in effect. Judges were not required to sentence within the guidelines but were

expected to articulate the reasons for departure *in order to facilitate appellate review* to determine whether a defendant's sentence was proportionate. Defendant, had he truly believed his AWIM sentences were disproportionate, should have raised the issue in his original appeal, as did his codefendant Sharp. As the prosecutor noted, defendant raises no legal or procedural basis that allows for the resurrection of a dormant claim. That is, unlike the change in law that entitled defendant to resentencing on his murder conviction, the legal and factual support for an attack on Judge Baxter's sentencing decision remains unchanged. Any alleged error in failing to articulate a basis for departing from the judicial guidelines was obvious from the date of that sentence.

Even if I accepted that good cause existed, defendant fails to demonstrate actual prejudice. That is, defendant cannot demonstrate that his AWIM sentences are *invalid*.

After accurately stating the court rule, which clearly sets forth the definition of "actual prejudice," the majority concludes:

With regard to the actual prejudice prong, we note that, despite requesting the transcript of defendant's original 1993 sentencing hearing, this Court has not been provided it. Thus, there is nothing for us to review to assess the trial court's conclusion that the original sentencing judge failed to exercise discretion when she imposed a parolable life sentence. Without anything to challenge or assess the trial court's interpretation of the original sentencing transcript, we are incapable of disturbing it, as it is impossible for us to reach "a definite and firm conviction that a mistake has been made."

The majority continues: "[t]hus, the only reviewable issue on appeal is whether defendant properly established good cause to support his failure to raise the argument prior to his motion for relief from judgment." The majority ultimately speculates that "a reasonable interpretation of the trial court's ruling was that good cause was established by the sentencing judge's lack of exercise of discretion *based upon* her belief that defendant would spend his natural life in prison." In essence, the majority conflates "good cause" and "actual prejudice" and then exacerbates the error by *guessing* that defendant's sentence to a term of years for the greater offense would have influenced the original sentencing court's decision to sentence defendant to life with the possibility of parole on the lesser offense. In other words, according to the majority, defendant's sentence on the lesser offense "didn't matter until it did."

This speculative analysis directly conflicts with our Court's decision in *People v Williams*, ___ Mich App ___; ___ NW2d ___ (Docket No. 339701, approved for publication November 29, 2018). In *Williams*, the defendant, a juvenile, was sentenced to mandatory life without parole for first-degree murder and life with the possibility of parole for second-degree murder. After the *Miller* and *Montgomery* decisions, the prosecutor filed a notice that it would seek a term of years sentence for defendant's first-degree murder conviction. The defendant later filed a motion for relief from judgment, arguing that he was also entitled to be resentenced on his second-degree murder conviction. The trial court agreed. *Williams*, at slip op, pp 1-2. We reversed. The Court was not asked to address whether the defendant had established "good cause" for failing to raise the issue. Therefore, "[t]he only issue before [the Court was] whether

defendant established the second prong of the analysis: actual prejudice in the form of an *invalid* sentence.” *Williams*, at slip op, p 3 (emphasis in original).

Williams first concluded that nothing in *Miller* or *Montgomery* compelled a finding that the invalidation of one sentence necessarily invalidated the remaining sentences. *Williams* explained: “*Miller* and *Montgomery* guarantee that defendants convicted as juveniles are afforded ‘some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’” *Williams*, slip op, p 4. *Williams* concluded that the defendant’s life with the possibility of parole sentence:

satisfied *Miller*’s mandate. Defendant once served a sentence of life without the possibility of parole, but is now eligible for parole on each of his sentences. Stated differently, defendant has been granted a meaningful opportunity to obtain release . . . on his sentences for first- and second-degree murder. And because defendant has some meaningful opportunity to obtain release on his sentence of life with the possibility of parole, that sentence was not invalid under *Miller*. [*Williams*, slip op, p 4.]

Williams added: “Defendant is not entitled to eventual freedom, only a meaningful opportunity to obtain it.” *Id.*

Next, *Williams* addressed whether defendant’s life sentence was based upon inaccurate information or a misconception of the law. We noted:

Defendant premises his argument on the original sentencing court’s mistaken belief that defendant’s first-degree murder conviction mandated a sentence of life without parole and that defendant would spend the rest of his life in prison. Defendant reasons that, because of this mistaken belief, the trial court necessarily gave less thoughtful consideration to defendant’s sentence for second-degree murder. *The glaring problem with this argument is that it is purely speculative.* Defendant provides no argument grounded in fact to support that his sentence for first-degree murder had any impact on his sentence for second-degree murder. [*Williams*, slip op, p 5 (emphasis added).]

Finally, in *Williams*, we rejected the trial court’s belief that because the defendant’s life without parole sentence was invalidated, the trial court was obligated to resentence the defendant on all convictions:

In Michigan, “trial courts ordinarily lack the authority to set aside a valid sentence.” *People v Comer*, 500 Mich 278, 295 n 40; 901 NW2d 553 (2017). The trial court relied on *People v Jackson*, 487 Mich 783, 793-794; 790 NW2d 340 (2010), for the contention that “where there are multiple counts within a single judgment of sentence and one or more counts are reversed (or in this case resentencing to a term of years) a Defendant must be resented on the remaining counts.” *Jackson* made no such holding, and it in no way suggests that trial courts may alter otherwise valid sentences. The trial court’s reliance on the case was therefore misplaced.

On appeal, defendant relies upon *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972), superseded by statute on other grounds as stated in *United States Irey*, 612 F3d 1160, 1180-1181 (CA 11, 2010), and *People v Moore*, 391 Mich 426; 216 NW2d 770 (1974), in support of the trial court's conclusion that, where a defendant is entitled to resentencing on one conviction, he is entitled to resentencing as to all other related convictions. In *Tucker*, however, it was found that the defendant's sentence for armed robbery was impacted by two previous convictions that were later found to be constitutionally invalid. *Tucker*, 404 US at 443-445, 448. Because the sentence was based upon invalid convictions, the sentence was invalid. *Id.* at 448. In *Moore*, again, the sentencing judge considered a prior conviction that was constitutionally invalid when it sentenced the defendant for possession of narcotics, and accordingly, the defendant was entitled to resentencing. *Moore*, 391 Mich at 439-440. Both cases dealt with sentences that contemplated invalid prior convictions, thus invalidating the sentences. Defendant employs these cases to argue that one invalid sentence in a judgment of sentence invalidates all other sentences in that judgment of sentence, but the cases do not support that contention and, therefore, the argument is without merit. Defendant has thus failed to establish that the trial court had authority to set aside his valid sentence for second-degree murder. [*Williams*, slip op, pp 5-6.]

Here, defendant fails to demonstrate that his original sentence was invalid. He speculates that Judge Baxter would have given more thoughtful consideration to his remaining sentences had she been aware that a term of years sentence was possible for first-degree murder. But, as *Williams* holds, this is pure speculation. Granted, the *Williams* Court had the benefit of the sentencing transcript while we do not, but that does nothing to change the speculative nature of defendant's position. Moreover, when defendant was originally sentenced to parolable life the Michigan Parole Board had not yet implemented its "life means life" policy and defendant would have been considered for parole after 10 years of incarceration. See *People v Washington*, 483 Mich 1005; 764 NW2d 785 (2009) (KELLY, C.J., dissenting). It could be that Judge Baxter believed that, in sentencing defendant to parolable life, he would have been eligible for parole sooner than a term of years sentence would have allowed. Of course, all of this is speculation, which *Williams* prohibits.

Nor am I persuaded by defense counsel's reference to the Michigan Supreme Court order in *People v Gunn*, (Docket No. 156962). The order provides:

The trial court erred by finding that it did not have the authority to review the defendant's sentence for second-degree arson. When the defendant was originally sentenced, the probation department calculated her guidelines only for the higher crime class offense of placing explosives on or near property, MCL 750.207(2)(b), and not for second-degree arson, MCL 750.73(1). The trial court sentenced the defendant to 15 years for both crimes, which was a departure sentence for the arson offense, but it had no practical effect in light of the sentence for placing explosives on or near property. The trial court acknowledged this by stating that the arson sentence was "really based on" the higher class sentence. After the defendant was resentenced in 2016 and her sentence for

placing explosives on or near property was reduced, the departure sentence for arson was no longer inconsequential. The arson sentence, being based on a higher class crime offense sentence that had been significantly reduced, was invalid because it was based on inaccurate information, and the trial court had the authority to resentence the defendant on that count. [*People v Gunn*, ___ Mich ___; 919 NW2d 402 (2018).]

At first blush, *Gunn* lends support to defendant's position. But, one critical difference is that the sentence in *Gunn* was invalidated because the judgment of conviction listed the wrong *conviction*. The trial court sentenced the defendant under the mistaken belief that she had been convicted of placing an explosive near property when, in fact, she was convicted of placing an offensive or injurious substance in or near real property. *People v Gunn*, unpublished per curiam opinion of the Court of Appeals, issued November 21, 2017 (Docket No. 333317), rev'd in part, vacated in part 919 NW2d 402 (2018). In a dissent, Judge Gleicher explained:

When Gunn was first sentenced in 2013, the probation department calculated her sentencing guidelines only for the higher crime class offense, placing explosives on or near property, MCL 750.207(2)(b), and not for second-degree arson, MCL 750.73(1). The trial court selected the same minimum sentence for both crimes (15 years), which amounted to a departure sentence for Gunn's arson offense. Since Gunn would serve the longer sentence anyway, the departure made no practical difference; any error in imposing it was harmless. But when the trial court resentenced Gunn in 2016 and reduced her sentence for the higher crime class offense, the departure sentence for arson was harmless no more. [*Id.* at unpub op, p 4.]

Here, there was no error regarding defendant's conviction; instead, there was a change in law necessitating that defendant be resentenced on the murder conviction. As it stands, *Williams* controls and *Gunn* is inapplicable.

I would hold that defendant failed to demonstrate "good cause" for failing to raise the issue in his original appeal and failed to demonstrate "actual prejudice" in the form of an invalid sentence.

/s/ Kirsten Frank Kelly