STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Court of Appeals No. 228323

Lower Court No. 80-005947

-vs-

LOUIS MOORE

Defendant-Appellant.

______________________________________/

PRISON AND CORRECTIONS' SECTION *AMICUS CURIAE* BRIEF SUPPORTING APPELLANT

PROOF OF SERVICE

PRISON AND CORRECTIONS SECTION
OF THE STATE BAR OF MICHIGAN

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STATEMENT OF QUESTIONS PRESENTED

I. WHERE SENTENCING JUDGES ROUTINELY IMPOSED PAROLABLE LIFE TERMS BASED ON A MISCONCEPTION THAT DEFENDANTS SENTENCED TO THOSE TERMS WOULD BE SENTENCED AFTER TEN YEARS, SHOULD THIS COURT RULE THAT LIFERS ARE ENTITLED TO CHALLENGE THEIR SENTENCES BY SEEKING RELIEF FROM JUDGMENT?

Amicus answers, "Yes."
Defendant answers, "Yes."
Plaintiff answers, "No."
The trial court found that it lacked jurisdiction to entertain this issue.

JURISDICTION

Amicus accepts the Defendant's Statement of Jurisdiction.

INTEREST OF AMICUS

Amicus Curiae Prison & Corrections of the State Bar of Michigan ("Amicus" or "the Section") is a Section of the State Bar of Michigan. Amicus' mission is to focus on issues relating to prison and corrections, which includes parole. This brief is filed pursuant to a formal resolution of the Section's council. The views expressed in this brief do not necessarily reflect those of the State Bar of Michigan.

STATEMENT OF FACTS

In 1981, following a bench trial before Judge Michael Sapala of the Recorder's Court for the City of Detroit, Appellant Louis Moore was convicted of second-degree murder and felony firearm. (ST 4). On September 22, 1981, Judge Sapala sentenced Mr. Moore to a term of parolable life imprisonment for the murder conviction, and a consecutive two-year term for the felony firearm conviction. (ST 11-12).

When imposing sentence, the judge specifically expressed an intent that Mr. Moore be paroled after ten years:

> "[THE COURT]: I am not going to impose a sentence of a term of years. I want to leave it up the parole board so that after a period of 10 years, you could be considered for parole if you put yourself and your life in such a position that you should be considered for." (ST 11).

Trial counsel specifically asked Judge Sapala whether he chose a sentence of life imprisonment based upon the thought that Ms. Moore would be eligible for parole after 10 years. (ST 13). The judge indicated that it was an important basis for the sentence he imposed. (ST 13-14). He advised that it Mr. Moore was unable to obtain his release in that time frame, the issue could be addressed with Judge Sapala or his successor. (ST 14). He then specifically stated: "It's clear that my intent is that Mr. Moore be eligible for parole after a proper amount of time." (ST 14).

On June 22, 1999, Mr. Moore sought, in a Motion for Relief from Judgment, resentencing on his life sentence. (MT 8-10). During that motion hearing, Mr. Moore's attorney noted that he initially filed a Motion for Relief from Judgment in 1984, but at that time, the prosecutor argued that the motion was premature because ten years had not elapsed and Mr.

Moore and had not been reviewed by the parole board for release. (MT 4, 12, 17).[1] Mr. Moore filed another motion in 1997, which was heard and denied by Judge Chylinski. (MT 4-5). However, Judge Chylinski later ruled that he should not have decided the motion and that the case should have been reassigned to Judge Sapala. (MT 5).

Turning to the substance of the motion, Mr. Moore's attorney noted that ten years earlier, judges believed that a sentence of life imprisonment made a person eligible for parole in ten years. (MT 6). Counsel then noted that the sentencing transcript was replete with references that the judge wanted Mr. Moore to be eligible for parole. (MT 6). He cited a case from this Court which held that while a person serving a life sentence is subject to review for parole after ten years, that person is not eligible for parole in ten years. (MT 6).

At the hearing on the Motion for Relief from Judgment, Judge Sapala admitted that he was operating under "a misunderstanding or misapprehension" that life sentences generally resulted in parole. (MT 16). He noted: "it turns out . . . surprisingly few parolable life sentences result in parole." (MT 16).

Yet, Judge Sapala ruled that he had no jurisdiction to resentence Mr. Moore:

> "Now it was my intention that he become eligible for parole, but I don't believe I have jurisdiction to resentence him, notwithstanding the fact that he, as a practical matter, has not become eligible." (MT 17).

On May 18, 2001, this Court granted the Section's motion to file an amicus brief. Amicus Curiae files this brief urging this court to fashion a remedy for the large number of lifers sentenced under a judicial misconception that those lifers would be paroled after serving ten years.

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[1] The prosecutor at the motion hearing admitted that he argued in 1984 that the motion was premature. (MT 12). Judge Sapala recognized that his denial of the 1984 sentence was "premised upon prematurity." (MT 17).

Argument

I. WHERE SENTENCING JUDGES ROUTINELY IMPOSED PAROLABLE LIFE TERMS BASED ON A MISCONCEPTION THAT DEFENDANTS SENTENCED TO THOSE TERMS WOULD BE SENTENCED AFTER TEN YEARS, THIS COURT SHOULD RULE THAT LIFERS ARE ENTITLED TO CHALLENGE THEIR SENTENCES BY SEEKING RELIEF FROM JUDGMENT.

Standard of Review. Amicus Curiae agrees with the prosecution that this case presents a question of law which is reviewed *de novo*. Cardinal Mooney High School v Michigan High School Assn., 437 Mich 75, 467 NW2d 21 (1991).

When imposing life sentences, trial judges commonly believed that the persons sentenced to those sentences would be eligible for parole after serving ten years. This pervasive judicial misconception was acknowledged by Assistant Attorney General Chester Sugierski, who argued Glover v Parole Board, 460 Mich 511, 596 NW2d 598 (1990) on behalf of the Parole Board. Admitting the misunderstanding regarding life sentences, he noted:

> "We have had cases where a judge thought a life sentence was a lighter sentence because he says in 10 years, you're eligible for parole."

In fact, the parole board no longer considers lifers eligible for parole after ten years; rather, they are now only "subject to the jurisdiction of the parole board." People v Legree, 177 Mich App 134, 441 NW2d 433 (1989). In fact, the parole board considers prisoners serving parolable life terms to be less eligible for parole than those serving terms of years. People v Hurst, 169 Mich App 160, 166, 425 NW2d 752 (1988).

The change in paroling lifers is part of an overall change in Parole Board philosophy. The Department of Corrections, in a document analyzing the parole board since 1992, readily admits:

" the new parole board is not as willing as the old board was to grant parole to prisoners on their first eligibility date." Five Years After: An Analysis of the Michigan Parole Board Since 1992 (Michigan Department of Corrections, 1997) (App 33a). The Department's statistics illustrate that while only 16.5% of prisoners in 1991 were serving beyond their minimum sentences, 28% of prisoners in 1997 were incarcerated past their minimum sentences. According to even more recent statistics, in 2001, 44% of the prisoners were incarcerated past their minimum sentence.

While testifying before the state legislature regarding House Bill 4624, Parole Board Chairperson, Stephen Marschke stated:

> "It has been a longstanding philosophy of the Michigan Parole Board that a life sentence means just that-life in prison … it is the parole board's belief that something exceptional must occur which would cause the parole board to request the sentencing judge or Governor to set aside a life sentence. Good behavior is expected and is not in and of itself grounds for parole." (App. 40a).

Mr. Marschke's position was reiterated by Matt Davis, spokesman for the Michigan Department of Corrections. In a March 3, 2000, article in the Lansing State Journal, Davis noted that in the past decade, several hundred lifers were eligible for parole but only one-percent of them received it. "Man released after prison sentence is reduced", Lansing State Journal, March 3, 2000, (App. 29a). He went on to state: "If you sentence someone to life, expect him to get life . . . If you want someone to get out in 12 years, sentence him to 12 years." Id.

The generally held view at the time of this Defendant's sentencing was that a "lifer" with a solid record of accomplishment and growth would be given serious parole consideration was supported by official statements of the Department of Corrections itself. In its Annual Report of 1974,[2] it is first noted, at p. 99, that "if [the inmate] has involved himself in programs relevant to

[2] Pertinent sections of the Annual Report are contained at App.1a et seq.

his particular problem, has done well, and seems to be making a sincere effort, this offers at least some additional hope for the future." Speaking specifically to parolable lifers, the Report states, at p. 101:

> "Parole for persons with minimum sentences of longer than ten years and of non first degree murder lifers is governed by a 'lifer law' statute which allows eligibility for parole after service of ten calendar years.[3] While release cannot be prior to ten years, the Parole Board, as a practice, grants an initial interview in all lifer cases after the service of seven years. This is done primarily to get acquainted with the individual prior to the service of ten years and to offer any advice or help relative to achieving future parole. (Emphasis added).

The historical record shows that, prior to 1982, under the Board's own rules and practices, Board members personally conducted lifer interviews that were designed to improve the inmate's chance for release. See Shabazz v. Gabry, 123 F.3d 909, 910-912 (CA 6, 1997). In 1982, the statute was amended to require personal interviews of lifers.

MDOC annual reports from the 1960's and 1970's show that in fact, parole rates for eligible lifers used to be very high. Starting in 1964, statistical reports show how many prisoners with parolable life sentences were committed to the MDOC each year. In the ten years from 1964 to 1973, MDOC Annual Reports show 254 prisoners committed to serve parolable life terms (1964–8, 1965–3, 1966–7, 1967–3, 1968–37, 1969–45, 1970–43, 1971–43, 1972–37, 1973–28). (These Reports are attached at App. 7a-16a).

In 1973, a new chart was added to the Annual Report showing the distribution of sentences among all prisoners incarcerated at year's end, regardless of when they were sentenced. The 1973 Report (attached as App. 16a) shows 272 prisoners serving life. It thus

[3] Under the subsequent decision in Johnson v. Parole Board, 235 Mich.App. 21 (1999), lifers are not eligible for parole by virtue of the passage of time.

appears that, at most, 18 lifers were eligible for parole by the end of 1973. (272 total prisoners serving life at the end of 1973 minus 254 lifers sentenced within past 10 years, equals 18 lifers who had served 10 or more years by December 1973). According to the MDOC statistics contained in Appendix (Parolable Lifers Granted Parole by Board Action, App. 18a), the number of lifers paroled the following year was 18. Therefore, it appears from the Department's own figures that in 1974, every lifer eligible for release was paroled.

Trial judges in other cases are on the record as having held the belief that a parolable life sentence would translate into a sentence of 10 to 15 years, assuming good conduct in prison. For example in People v. Duncan, Wayne County Circuit Court No. 77-725510 (App. 19a), former Judge James Canham imposed a life sentence for second degree murder, with the following proviso:

> THE COURT: ...In this particular offense you do have the right to parole after ten years, do you understand that, that is depending a great deal upon how you conduct yourself in prison.
>
> MISS RITTER (Defense Counsel): If the Court would explain to Taurus in a way, depending on her conduct, it is like a ten year sentence, do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: When you accept that fact, you start cooperating, I suggest you will be out of prison, this is the same as a ten year crime...I think you're paroleable or the fact that you are paroleable in ten years, this Court has shown great mercy.

In People v. Fante, Macomb County Circuit Court No. 77-360-FY (App. 22a) former Judge Alton H. Noe imposed three life sentences, two for criminal sexual conduct and one for armed robbery. He advised the defendant as follows:

> "Now, I am informed that the life sentences, which, of course, will be the most important for you, that there is a possibility, depending

> upon your behavior in prison, that it probably will be cut down to maybe ten or twelve years. It requires conduct, certainly, more exemplary than you have shown in the past several years. That is up to you and the prison authorities.
>
> "As I said to you, if you conduct yourself properly and to the satisfaction of the prison authorities, perhaps you can get out of this thing in less than ten or twelve years."

In 1990, former Oakland County Circuit Court Judge John N. O'Brien wrote a letter to then-Chairman of the Parole Board William J. Hudson, regarding Dennis Davey, whom he had sentenced to a parolable life sentence. Judge O'Brien wrote:

> "I would like to state as clearly as possible that it was my understanding then, as it is now, (an understanding that I think is shared by most trial court judges) that when such a sentence is imposed, the Parole Board opens a parole file on the person after 10 years and thereafter the average release will occur after 14 years." (App. 25a).

Last year, Wayne County Circuit Court Judge Vera Massey-Jones wrote a letter to Sen. Virgil C. Smith, Jr., when the Legislature was holding hearings of HB 4624, which eliminated parole appeals. Judge Massey-Jones explained as follows the thinking of judges who imposed parolable life sentences in the past:

> "As you know I was elected back in 1979 to serve on the then Recorder's Court bench. Thus, I have had the opportunity to take many pleas and to try many cases where the maximum possible penalty was life in prison. On the armed robberies and second degree murders there were often times when a plea would be negotiated and the attorney would state to the Court the hope that a life sentence would be imposed rather than a term of years. It was my understanding, as well as the lawyers who appeared before me, that a life sentence meant that the defendant would be eligible for parole in ten years. We also understood that the defendant might not be paroled on that tenth year but by twelve to fifteen years he probably would be paroled. Therefore a lot of lawyers as well as defendants wish to have life sentences imposed. Such a sentence would lessen the amount of time that the defendant would spend

before being eligible for parole and or release from prison." (App. 27a).

Even more recently, visiting Macomb County Circuit Court Judge Thomas Brookover granted a resentencing to an inmate who was given a life term for second degree murder in 1978, because the sentencing judge's intent was frustrated by the new Parole Board's inflexible policies.[4] In that case, the prosecutor agreed that the expectation was that the defendant would have been released before serving 22 years, and former Judge Robert Chrzanowski, who originally sentenced the defendant to a life term, "told the courts and the parole board that he anticipated Jones would be released by now." (App. 29a).

The Jones ruling is consistent with the basic proposition that a defendant's sentence must be consistent with the trial court's intent. People v Brown, 184 Mich App 567, 459 NW2d 19 (1990), People v Foy, 124 Mich App 107, 333 NW2d 596 (1983), Cross v Department of Corrections, 103 Mich App 409, 303 NW2d 218 (1981), Brinson v Genesee County Circuit Judge, 403 Mich 676, 272 NW2d 513 (1978). Where such intent is frustrated, there must be an avenue for effectuating the judge's intent.

This Court should provide such an avenue.

A. A Lifer's Challenge to a Misconception Regarding His Entitlement for Meaningful Parole Consideration Is Not "Ripe" for Review until He Has Passed His Date of Eligibility and Has Not Yet Been Paroled.

Courts ordinarily will not decide a question on which there is no real controversy. People v Conat, 238 Mich App 134, 145, 605 NW2d 49 (1999). An issue is not ripe for review if it does not reflect an actual, existing controversy, but merely a potential one. Id. An actual

[4] Contained at App. 32a is an article from the Lansing State Journal of March 3, 2000, detailing Judge Brookover's resentencing of James A. Jones to a term which resulted in his release from prison after serving 22 years.

controversy exists if a party faces a real and immediate threat to the party's interests as opposed to a hypothetical one. Conat, supra. Where a party's claim is based on a particular policy of a party, the issue is not subject to review until that policy is actually implemented. People v Conat, 238 Mich App at 145, quoting, Kelvinator, Inc. v Dep't of Treasury, 136 Mich App 218, 234, 355 NW2d 889 (1984).

Where a lifer seeks relief from his sentence based on a judicial misconception that the Defendant would receive meaningful parole consideration, his challenge is not "ripe" for review until he has actually served at least ten calendar years and is denied parole. Until that time, any claim that his sentence was premised upon a misconception as to his parole eligibility is purely hypothetical. Obviously, until he has been denied parole after serving ten years, his argument that the judge inaccurately believed he would be released after ten years cannot be proven.

In fact, in this case, the prosecutor argued and Judge Sapala agreed in 1984 that Mr. Moore's challenge to his sentence was premature. At that time, he had only served three years of his life sentence. Not having served ten years, he simply could not establish that Judge Sapala's belief that he be would paroled in ten years was inaccurate.

B. **Where the Sentencing Judge Imposed a Life Sentence Based on a Misconception That the Defendant Would Receive Meaningful Parole Consideration the Sentence Violated the Defendant's Due Process Rights to Be Sentenced on the Basis of Accurate Information and Thus, Constitutes an "Invalid Sentence" Pursuant to MCR 6.508(d)(3)(b)(iv).**

Since the Board's current policy that "life means life" was established longa after the Defendant's conviction, sentence, and appeal of right, this constitutes a retroactive change in the law pursuant to MCR 6.508(D)(2). Consequently, lifers sentenced by judges operating in reliance on the belief that an inmate would receive meaningful parole consideration through the

lifer parole process are entitled to seeking resentencing through a motion for relief from judgment.

As established in Sub-Issue A, a lifer's challenge his sentence based on the judge's misconception regarding parole eligibility is not ripe until he has served ten years and been denied parole. For this reason, it is critical that lifers be allowed to seek resentencing through a Motion for Relief from Judgment. Due to the time limitations for pursuing an appeal of right on trial issues,[5]lifers will be precluded from challenging their life sentences in their appeals of right. By the time the ten year-period has elapsed, rendering a lifer's sentencing challenge ripe, he will have already exhausted his appeal of right.

For this reason, Appellants serving life sentences imposed before 1992 are entitled to file a Motion for Relief from Judgment pursuant to Michigan Court Rule 6.508(3). Such appellants are able to establish "good cause" for failing to raise the sentencing challenge in the appeal of right, namely: the issue was not ripe. MCR 6.508(D)(3)(a). They can also actual prejudice supporting relief. Clearly, sentences based on a misconception of the law are invalid. MCR 6.508(D)(3)(b)(iv); People v Whalen, 412 Mich 166, 169, 312 NW2d 638 (1981), People v Lauzon, 84 Mich App 201, 269 NW2d 524 (1978), Cross v Department of Corrections, 103 Mich App 409, 303 NW2d 218 (1981). In fact, sentences based on inaccurate information or an invalid premise violate due process. United States v Espinoza, 481 F2d 553 (CA 5, 1973), People v Malkowski, 385 Mich 244, 249, 188 NW2d 559 (1971).

Even those lifers who previously challenged their sentences on other grounds or as here prematurely are not precluded from relief through a Motion for Relief from Judgment. The case law establishing that resentencing is authorized where the judge imposes a sentence based on an inaccurate belief that lifers are eligible for parole after serving ten years was issued after 1992.

[5] MCR 7.204, 7.210, 7.212.

People v Biggs, 202 Mich App 450, 509 NW2d 803 (1993), People v Lino, 213 Mich App 89, 539 NW2d 545 (1995). These decisions constitute a "retroactive change in the law" which entitles lifers sentenced before 1992 to relief from their life sentences pursuant to MCR 6.508 (D)(2).

This Court should rule that lifers sentenced before 1992 are able to seek resentencing through a Motion for Relief from Judgment where their life sentence was based on the sentencing judge's misconception about parole eligibility under the lifer law.

C. Law of the Case Does Not Bar this Appeal Where the 1984 Trial Judge Hearing the Defendant's Motion for New Trial Rejected the Issue as Premature.

In 1984, the Defendant presented a similar argument to the trial judge which rejected the issue on the grounds that the parole board had not yet denied Mr. Moore for parole consideration. In proceedings below, the People suggested that this somehow constituted law of the case precluding review of this issue now that the parole board has denied the Defendant for parole consideration.

Law of the case is "weak sister" of the res judicata and collateral estoppel. People v Spinks, 206 Mich App 488, 491, 522 N.W.2d 875 (1994). The doctrine applies to stop relitigation of issues previously litigated in the same proceeding. Grievance Administrator v Lopatin, ___ Mich ___, ___ NW2d ___, 2000 WL 827906 (2000) ("Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same."). Application of the doctrine is not mandatory. Law of the case is discretionary in

nature. Messenger v Anderson, 225 US 436, 444, 32 S Ct 739, 56 LEd. 1152 (1912) (law of the case "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power"). See also Arizona v California, 460 US 605, 618, 103 S Ct 1382, 75 L. Ed. 2d 318 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power"); Safir v Dole, 231 US App DC 63, 718 F2d 475 (1983) (the law of the case doctrine is discretionary and does not preclude courts from reexamining issues that address their constitutional power).

The Michigan Supreme Court has expressly held that law of the case should not be applied to issues never decided by the Court. In Grievance Administrator v Lopatin, supra, the Supreme Court rejected the respondent/attorney's argument that law of the case estopped the Grievance Administrator from relitigating an issue which it had previously presented in an unsuccessful application for leave to appeal in the same case. The Court held that "law of the case applies, however, only to issues actually decided, either implicitly or explicitly, in the prior appeal." In reaching this ruling, the Lopatin Court cited approvingly to the Eighth Circuit's ruling in Roth v Sawyer-Cleator Lumber, 61 F3d 599 (CA 8, 1995). There, the District Court found that a prior Eighth Circuit decision had implicitly rejected the position urged by Roth concerning its loss.[6] The original Eighth Circuit decision however declined to address the issue because neither side had briefed it. The Court therefore found that the District Court had erroneously applied law of the case:

> The district court's first rationale may be quickly disposed of. Law of the case applies only to issues actually decided, either implicitly or explicitly, in the prior stages of a case. Little Earth of the United Tribes, Inc. v United States Dep't of Hous. & Urban

[6] The prior decision is Roth v Sawyer-Cleator Lumber, 16 F3d 915 (CA 8, 1994)

> Dev., 807 F2d 1433, 1438 (CA 8, 1986); 2A Federal Procedure: Lawyers Edition ' 3:705 (1994). However, in Roth I, we addressed the trustees' loss argument as follows:
>
> The trustees here argue that the ESOP did not suffer a loss as a result of their decision to secure the plaintiffs' notes with Company stock. We decline to review this argument, however, because the trustees did not raise the loss issue in their memorandum supporting their summary judgment motion.

16 F3d at 920. Thus, we expressly declined to resolve the issue of loss. As there was no decision concerning loss, the doctrine of law of the case does not apply. Although it is impossible to tell from the district court's order exactly how much weight it gave to our observations in Roth I, it is clear that the law of the case doctrine does not support a finding of no loss." Id. at 602-603.

The trial judge never addressed the merits of the Defendant's issue. Like the Roth decision (relied on by the Lopatin Court), it is improper to extend that the law of the case where there is no decision on the merits.

Further, law of the case should not be enforced where its enforcement would result in unjust results. As the Court of Appeals recognized in People v Spinks, 206 Mich App 488, 491, 522 NW2d 875 (1994), a Court should not Aapply a doctrine designed for judicial convenience in fairly administering the obligation to do justice so as to work an injustice. See also White v Murtha, 377 F2d 428, 431-432 (CA5 1967) (Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice); People v Schneider, 171 Mich App 82, 429 NW2d 845 (1988) (Weaver, J.) ("the present case falls within an exception to the bar of collateral estoppel. The exception allows for further litigation of cases such as this,

wherein the issue determined by the circuit court's misapplication of a jury-trial legal standard to misdemeanor plea proceedings, see infra, may be relitigated in order to avoid inequitable administration of the laws"); Locricchio v Evening News Ass'n., 438 Mich. 84, 109-110, 476 N.W.2d 112 (1991); Bennett v Bennett, 197 Mich App 497, 500, 496 NW2d 353 (1992).

In Socialist Workers Party v Secretary of State, 412 Mich 571, 317 NW2d 1 (1982), the Court adopted the Restatement of Judgment exception to res judicata:

> "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances.
>
> * * *
> "(b) The issue is one of law and * * *
>
> * * *
> "(ii) **A new determination is warranted in order to take account of an intervening change in the applicable legal context o**r otherwise to avoid inequitable administration of the laws * * *." (emphasis added)

This is precisely the situation that we have here. It would be highly inappropriate to apply law of the case to a motion which was originally denied for being premature. A dismissal because a claim was premature is not a ruling on the merits and is without prejudice to the motion being relitigated once those facts arise. A motion which has been dismissed without prejudice is by definition not a successive petition for the law of the case purposes. Federal courts construing the successive petition ban on federal writs of habeas corpus have expressly held that when the first petition is dismissed without prejudice, the second petition is not a "successive petition." See Camarano v. Irvin, 98 F.3d 44, 47 (2d Cir. 1996); Dickinson v. State, 101 F.3d 791 (1st Cir. 1996) (per curiam) (following Camarano); In re Turner, 101 F.3d 1323 (CA 9, 1996). This Court must reach the merits of the Defendant's claim.

Mr. Moore is serving a sentence which the trial judge admits was imposed based on mistake of facts. A sentence based on such an error, is invalid and can be modified by this Court. Law of the case does not bar this litigation because the issue was never decided on the merits in the prior litigation. The previous courts dismissed the action as being premature which by definition means that the motion can be renewed at the appropriate time.

This Court should reverse the decision of the lower court and remand this matter for resentencing.

RELIEF

WHEREFORE, Amicus urges this Court REVERSE the decision of the trial court and remand this matter for further proceedings consistent with the Appellant's brief.

Respectfully submitted,

STATE BAR OF MICHIGAN
PRISON AND CORRECTIONS SECTION

BY: ____________________________
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(734) 662-4070

Dated: June 12, 2001

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

The undersigned declarant being first duly sworn, deposes and says that on June 14, 2001, (s)he did mail a copy of the foregoing brief to:

Larry Roberts
Asistant Prosecuting Attorney
1200 Frank Murphy Hall of Justice
1441 St Antoine
Detroit, MI 48226

James Howarth
Attorney at Law
2000 Penobcot Building
Detroit, MI 48226

Declaration in Lieu of Notarization. I declare that the foregoing is true and correct to the best of my information, knowledge, and belief.

Respectfully submitted,

____

STUART G. FRIEDMAN (P46039)
Attorney for Amicus
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DATED: June 14, 2001