STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the MichiganCourt of Appeals
Judges: Pat M. Donofrio, Cynthia Diane Stephens and Ronayne Krause

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff- Appellant

Vs
JEFFERY ALAN DOUGLAS

Defendant-Appellee.
_____/

Supreme Court No. 145646

Court of Appeals No. 301546

Lower Court No. 09-14365-FC

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DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF

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I. THERE EXISTS NO INNOCENCE EXCEPTION TO THE CONSTITUTIONAL MANDATE OF EFFECTIVE ASSISTANCE OF COUNSEL AND THERE IS NO BAR IN MICHIGAN TO A DEFENDANT ACCEPTING A NO CONTEST OR GUILTY PLEA WHERE INNOCENCE IS MAINTAINED BUT EVIDENCE SUBSTANTIATES A FINDING OF GUILT.

In *Lafler v Cooper*, 132 S Ct 1376 (2012) the Court recognized the right to effective assistance of counsel in the forgone plea context. The Court stated: "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *Id* at 1387.

Mr. Cooper's counsel advised him that he could not legally be convicted of the charged offense. Based on that erroneous premise, counsel believed that the proffered plea was worse than the sentencing consequences following trial, where he believed Mr. Cooper would be acquitted of the most serious offense and convicted of a lesser offense. Counsel advised Mr. Cooper to reject all plea offers and Mr. Cooper followed that advice.

The remedy for the ineffective assistance of counsel was to remand the case to the trial court. There, the prosecution would reoffer the plea and the trial court would determine whether it would accept it. In fact, the prosecution did reoffer the plea; the court accepted it and Mr. Cooper was resentenced in accordance with the original terms of the deal[1].

By contrast, in *Burt v Titlow*, 134 S Ct 10 (2013), there was no record of the advice from Counsel to Ms. Titlow. Because Defendant Titlow failed to establish any record evidence of

[1] Undersigned Counsel represented Mr. Cooper at all stages of his appeal and at the remand proceeding. So, while there is no transcript of those proceedings Counsel states these facts as a participant in the proceedings. See also, http://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=381895

Counsel's advice to her, she failed to overcome two critical components to habeas relief: (1) the *Strickland*[2] presumption that Counsel's advice to her was constitutionally adequate and (2) showing that the state court's decision was contrary to, or involved an unreasonable application of, United States Supreme Court precedent.

The *Titlow* decision merely reiterates the standards for habeas relief yet the prosecution attempts to engraft the doubly deferential review format for relief in federal courts onto an appeal within the state court. There is no such doubly deferential review standard for an appellate court reviewing a lower court within the same jurisprudential system.

Contrary to the lack of record in *Titlow* a post-conviction hearing was held in this case. The trial court found that the trial attorney, who was ignorant of a mandatory 25 year minimum sentence upon conviction of the charged offense, was effective. (111a-113a). The ruling was premised, at least in part, on the Court's finding that "In the face of a plea of innocence, it makes no difference." (112a-113a). The prosecution attempts to uphold the circular reasoning of the trial court's ruling by claiming that a claim of innocence was central to the Court's ruling in *Titlow*. Such a finding is a perversion of the *Titlow* decision.

Justice Alito, speaking for the Court, stated that: "Although a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities under *Strickland*, it may affect the advice counsel gives. *Id* at 17. As Justice Sotomayer stated in her concurring opinion:

> "First, we state that "[a]lthough a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities under *Strickland,* it may affect the advice counsel gives." *Ante,* at 17. The first part of that statement bears emphasis: Regardless of whether a defendant asserts her innocence (or admits her guilt), her counsel must "make an independent examination of the facts, circumstances, pleadings and laws involved and then ... offer his informed opinion as to what plea should be entered." *Von Moltke v.*

[2] *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984)

Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 92 L.Ed. 309 (1948) (plurality opinion)."

Mr. Douglas's counsel could not offer an informed opinion on the plea offer because he was ignorant of the consequences of a conviction and offered unequivocally incorrect legal advice to his client. Counsel testified that he would have offered different advice had he known the law. Mr. Douglas testified he would not have gambled on a trial, despite his innocence, had he known he was facing a ***mandatory 25 year minimum*** sentence. Given the plea offer to fourth-degree criminal sexual conduct, which has a ***maximum*** penalty of 2 years[3], there is no question about prejudice. Deficient performance and prejudice equal ineffective assistance of counsel and demand relief.

The prosecution claims that Michigan does not authorize the acceptance of guilty pleas from defendants who maintain their innocence and in support of that assertion cites only to MCR 6.302(D)(1).[4] The prosecution further argues that allowing *Alford*[5] pleas in Michigan would support perjury, but that blanket assertion is not only untrue, it also seriously blunders the principles the United State Supreme Court sought to protect in *North Carolina v Alford,* 400 US 25; 91 S Ct 160; 27 L Ed 2d 162 (1970).

First, it is important to note that 47 out of 50 states throughout this country have explicitly adopted the *Alford* plea.[6] Michigan is only 1 of 3 states, along with Indiana and New

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[3] MCL 750.520e(2)

[4] The prosecution actually cited to MRE 103(D)(1), which does not exist; undersigned counsel believes the cite to be a clerical error with the correct cite being MCR 6.302(D)(1). MRE 103 deals with erroneous rulings on evidence.

[5] *North Carolina v Alford,* 400 US 25; 91 S Ct 160; 27 LEd2d 162 (1970).

[6] **Alabama**: *Allison v State,* 495 So2d 739, 741 (Ala Crim App 1986); **Alaska**: *Miller v State,* 617 P2d 516 (1980); **Arizona**: State v Draper, 162 Ariz 433 (1989); **Arkansas**: *Davis v State* (Ark 2006); **California**: *In re Alvernaz,* 2 Cal 4th 924 (Cal 1992); **Colorado**: *People v Canino,* 181 Colo 207 (1973) (en banc); **Connecticut**: *State v Amarillo,* 198 Conn 285 (1986); **Delaware**: Supreme Court of Delaware: *Robinson v State,* 291 A 2d 279, 281 (Del Supr Ct

Jersey, which has not expressly authorized the acceptance of *Alford* pleas. While Indiana and New Jersey have made it explicitly clear that they do not allow *Alford* pleas,[7] the same cannot be said about Michigan.

In fact, Michigan's classification as a non-*Alford* state can best be attributed to semantics given that this Court has recognized that our state system does allow *Alford*-type pleas for all practical and functional purposes. *See In re Guilty Plea Cases*, 395 Mich 96, 129-132; 235 NW2d 132, 145 (1975) (allowing the record itself to establish a defendant's guilt where, after a

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1972); **Florida**: Troville v State, 953 So 2d 637 (Dist Ct of Appeal 2007); **Georgia**: *Goodman v Davis,* 249 Ga 11 (1982); **Hawaii**: *State v Smith,* 61 Haw 522 (1980); **Idaho**: *Sparrow v State,* 102 Idaho 60 (1981); **Illinois**: *People v Barker,* 83 Ill 2d 319 (1981); **Iowa**: *State v Hansen,* 344 N W 2d 725, 727 n 1 (Iowa App 1983); **Kansas**: *State v Dillon,* 242 Kan 410 (Kan 1988); **Kentucky**: *Com v Corey,* 826 S W 2d 319, 321 (Ky 1992); **Louisiana**: State v Bass, 47 So3d 541 (La Ct App 2d Cir 2010); **Maine**: *State v Malo,* 577 A 2d 332, 334 (Me 1990); **Maryland**: *Banegura v Taylor,* 312 Md 609 (Ct App Maryland 1988); **Massachusetts**: *Com v Lewis,* 399 Mass 761 (Sup Jud Ct of Mass 1987); **Minnesota**: *State v Winchell,* 363 N W 2d 747, 749 (Minn 1985); **Mississippi**: *Bush v State*, 922 So2d 802 (2005); **Missouri**: *Wilson v State*, 813 SW2d 833 (1991); **Montana**: *State v Cameron,* 253 Mont 95 (Mont 1992); **Nebraska**: *State v Rhodes,* 233 Neb 373 (Neb 1989); **Nevada**: *Tiger v State*, 98 Nev 555 (1982); **New Hampshire**: *Wellington v Commissioner, New Hampshire DOC*, 140 NH 399 (1995); **New Mexico**: *State v Garcia,* 121 N M 544 (1996); **New York**: Supreme Court, Appellate Division: *People v Hicks,* 201 A D 2d 831 (3 Dept 1994); **North Carolina**: *State v McClure,* 280 N C 288 (N C 1972); ***North Dakota***: *State v Bates*, 726 NW2d 595 (2007); **Ohio**: *State v Padgett,* 67 Ohio App 3d 332 (Ct App Ohio 2 Dist 1990); **Oklahoma**: Court of Criminal Appeals of Oklahoma: *Ocampo v State,* 778 P 2d 920, 923 (Ok Cr 1989); **Oregon**: *Oregon v Sullivan, 197 Or App 26 (2005)*; **Pennsylvania**: *Commonwealth v Snavely*, 982 A 2d 1244 (2009); **Rhode Island**: *Armenakes v State*, 821 A 2d 239 (R I 2003): South Carolina: *State v Gaines,* 335 S C 376 (1999); **South Dakota**: State v Engelmann, 541 NW2d 96 (1995); **Tennessee**: *State v Williams,* 851 S W 2d 828, 830 (Tenn Cr App 1992); **Texas**: Court of Criminal Appeals of Texas: Johnson v State, 478 S W 2d 954, 955 (Tex Cr 1972); **Utah**: *State v Stilling,* 856 P 2d 666, 671 (Utah App 1993); **Vermont**: *State v Fisk,* 165 Vt 260 (1996); **Virginia**, *Cobbins v Commonwealth*, 668 S E 2d 816 (Va Ct App 2008); **Washington**: *State v Osborne,* 102 Wash 2d 87 (Wash 1984); **West Virginia**: *Kennedy v Frazier,* 178 W Va 10 (1987); **Wisconsin**: State v Garcia, 192 Wis 2d 845 (Wisc 1995); **Wyoming**: *Maes v State*, 114 P 3d 708 (Wyo 2005).

[7] **Indiana:** *Atchley v State*, 622 NE2d 502, 503 (Ind 1993) ("A trial court may not accept a plea of guilty from one who in the same breath professes innocence."); **New Jersey:** *State v Smullen,* 118 NJ 408 (NJ 1990) ("In New Jersey, except in capital cases, the trial court must be satisfied from the lips of the defendant that he committed the acts which constitute the crime." (internal quotations omitted).

guilty plea had been entered, it was later determined that the defendant did not admit, and in some cases, affirmatively denied, essential elements of the offense); *People v Haack*, 396 Mich 367, 376; 240 NW2d 704, 709 (1976) (finding that the factual basis of a plea is established even where a defendant claims an exculpatory inference from the facts so long as the record makes an inculpatory inference from the facts equally as plausible); *People v Booth*, 414 Mich 343, 359-360, 324 NW2d 741, 748 (1982) (citing *Alford* as a reason to permit a guilty but mentally ill plea by a defendant who claims lack of memory, the Court held, "We would not force an unwilling defendant to go to trial if he wishes to avoid the risks and perhaps the degradation inherent in cases such as these. . . However, as in *Alford*, we would require from some appropriate source strong evidence of actual guilt."); *People v Clark*, 129 Mich App 119, 124-26, 341 NW2d 248, 251-52 (1983) (collecting Michigan cases that have cited the *Alford* principle favorably).

The Supreme Court of the United States and forty-seven states have determined that an acceptance of a guilty plea from a defendant maintaining innocence is not equivalent to "perpetrating a fraud upon the court via perjured pleas." (Appellant's Supplemental Brief, P. 4). Michigan should be no different.

Secondly, there is no requirement in Michigan law that prohibits defendants from pleading guilty or nolo contendere where they maintain their innocence. MCR 6.302(D) authorizes pleas of guilty and nolo contendere when there is "support" for a finding of the defendant's guilt:

> (1) If the defendant pleads guilty, the court, by questioning the defendant, must establish *support for a finding that the defendant is guilty* of the offense charged or the offense to which the defendant is pleading.

> (2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:
>
> (a) state why a plea of nolo contendere is appropriate; and
>
> (b) hold a hearing, unless there has been one, that *establishes support for a finding that the defendant is guilty* of the offense charged or the offense to which the defendant is pleading. [Emphasis added].

MCR 6.302(D) does not prohibit guilty pleas from defendants who maintain their innocence. In fact, the purpose of the "factual basis" requirement of MCR 6.302(D) is to determine whether the trier of fact could properly convict on the facts as either stated by the defendant or placed into the record by other means. *In re Guilty Plea Cases*, *supra* at 128-132; *People v Haack*, *supra* at 376-377; *People v White*, 411 Mich 366, 381-382; 308 NW2d 128, 132 (1981).

A trier of fact is never asked to determine the innocence of a particular defendant, but instead, is asked to decide whether the prosecution has met the legal standard to prove guilt. A claim of innocence is not a deal-breaker for entering into a guilty plea in Michigan so long as the trial court finds there is evidence in support of a defendant's guilt. MCR 6.302(D)(1); *In re Guilty Plea Cases*, *supra*; *People v Haack, supra*.

To claim, as the prosecution does, that accepting a guilty plea from a defendant that maintains his innocence would be equivalent to perjury is a fallacy.

Most often, a plea bargain by nature gives a defendant the option to plead to a lesser offense in exchange for the dismissal of the originally charged offense. An offer of charge reduction is the type of bargain that was offered to Mr. Douglas in this case.

Under that scenario, a defendant may maintain his innocence to the originally charged offense, while at the same time admit his guilt and enter a plea to a lesser offense. *See People v Trombley*, 67 Mich App 88, 92-93; 240 NW2d 279, 281 (1976), (citing *Alford* while

acknowledging that a defendant may plead to a lesser charge while believing him or herself innocent because he or she does not want to risk a conviction on the greater charge).

Or, under a different scenario, a defendant may *believe* he is innocent of the offense, but he may actually be guilty according to the law and may enter a plea to the offense. *See People v Haack*, *supra* at 376 (the "'factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury on the facts admitted by the defendant *even if an exculpatory inference could also be drawn and defendant asserts the latter is the correct inference.*'" (emphasis added) (quoting *In re Guilty Plea Cases*, *supra* at 130 (1975)).

In both circumstances, a defendant who maintains his innocence is absolutely permitted to enter into a guilty plea in accordance with Michigan law. The requirement of MCR 6.302(D)(1) that a defendant entering into a guilty plea must make sufficient statements that would support a trial court's finding that the defendant is guilty, is not inconsistent with that same defendant maintaining his innocence, and is the exact type of situation the United States Supreme Court in *Alford,* sought to approve and protect.

Additionally, the prosecution's claim that allowing Mr. Douglas to plead guilty in this case would perpetuate a fraud on the court is misplaced in two regards. First, Mr. Douglas has never denied that the complainant touched his penis one time. The plea offer was to fourth-degree criminal sexual conduct. While Mr. Douglas maintains the touching was inadvertent and therefore, from his perspective, not criminal, the Court and a trier of fact could find otherwise. Thus, the proffered plea is supported by the record.[8] Second, if the prosecution or trial court were to disagree that the record supports a factual finding supporting guilt on the elements of a

[8] The factual basis for the guilty plea could also be established through the police report, without any admissions from him at all, consistent with the plea-taking procedures in all states that accept *Alford* pleas. See fn. 6, *supra*. This is the same procedure already adopted and used in Michigan for the acceptance of nolo contendere pleas.

fourth-degree criminal sexual conduct charge, the court could accept[9] a no contest plea from Mr. Douglas[10].

To hold that an innocent defendant in Michigan *must* take the risk of a trial, knowing what we know now—that juries can and often do find innocent people guilty, would be a great impediment to the integrity of Michigan's criminal justice system. The Court in *Alford* expressly recognized this important principle and noted that there was no "material difference" between a defendant who availed himself to a no contest plea and a defendant who claimed innocence while entering a plea of guilty:

> The fact that his plea was denominated a plea of guilty rather than a plea of nolo contendere is of no constitutional significance with respect to the issue now before us, *for the Constitution is concerned with the practical consequences, not the formal categorizations, of state law*. . . Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. *An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.*
>
> Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, *a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.*

Alford, supra at 400 US 25, 37 (internal citations omitted) (emphasis added).

While Michigan is not expressly an *Alford* state, it should be. An innocent defendant should be allowed to enter into a guilty plea in Michigan whenever he is willing to admit responsibility for the offense and willing to accept punishment. He should not be required to

[9] "MCR 6.301(B) Pleas That Require the Court's Consent. A defendant may enter a plea of nolo contendere only with the consent of the court."
[10] MCR 6.301(C) sets forth two situations where the prosecution's (and the court's consent) is needed for a particular plea: (1) guilty but mentally ill or insanity and (2) a conditional plea.

gamble that his counsel will be effective, that the prosecution will be ethical, that the witnesses will be truthful, that the judge will be fair, and that the jury will reach the correct verdict.

An innocent defendant should be afforded all of the same protections, procedures and advantages as a defendant who is guilty. If there is a strong likelihood that a trier of fact could find a defendant guilty, despite his adamant protestations of innocence, then he should have the right to reduce his sentencing risk and risk of collateral consequences by entering into a guilty plea if that is what is offered by the prosecution. To hold otherwise would result in a serious miscarriage of justice.

An express ruling that Michigan does authorize *Alford* pleas would once and for all put this issue to rest and would increase the fairness of Michigan's criminal justice system. Even if this Court declines to make such a ruling in this case, it is still true that Mr. Douglas is permitted to accept the previously offered guilty plea according to MCR 6.302(D)(1).

II. THE ADMISSION OF TESTIMONY UNDER 803(A) OF THE FIRST DISCLOSURE DESPITE AN UNEXPLAINED ONE YEAR DELAY, THE ADMISSION OF A SECOND CORROBORATIVE STATEMENT UNDER MRE 803(A) AND TESTIMONY THAT THE COMPLAINANT'S ALLEGATIONS WERE "SUBSTANTIATED" WERE INDIVIDUALLY AND CUMULATIVELY ERROR MANDATING A NEW TRIAL. TRIAL COUNSEL'S CONSTITUTIONAL FAILURES TO PROVIDE THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE ADMISSION OF SOME OF THIS EVIDENCE PREJUDICED MR. DOUGLAS.

As is often the case with child sex abuse allegations, the sum and substance of the prosecution's case against Mr. Douglas was the testimony of a young child. While these cases in general often revolve around such testimony and such lack of other evidence, it is no reason to do an end run around the rules of evidence. Yet, that is exactly what happened not only in this case but in other cases as well. This Court, just in the last several months, has decided multiple cases involving evidentiary issues in child sex abuse cases[11]. While maybe not rising to the level of a pattern, there is certainly strong circumstantial evidence that prosecutors are getting more and more manipulative with the rules of evidence and trial courts are allowing this circumvention of the rules for all the wrong reasons.

In *Tome v US*, 513 US 150, 166, 115 S Ct 696, 130 L Ed 2d 574 (1995), the Court stated:

> "Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only eyewitness. But "[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *United States v. Salerno,* 505 U.S. 317, 322, 112 S.Ct. 2503, 2507, 120 L.Ed.2d 255 (1992). When a party seeks to introduce out-of-court statements that contain strong circumstantial indicia of reliability, that are highly probative on the

[11] *People v Burns*, 494 Mich 104, 832 NW2d 738 (2013)(conviction reversed); *People v Duncan*, 494 Mich 713, ___NW2d ___ (2013)(case remanded to trial court); *People v Harris*, ___ Mich ___, ___ NW2d ___, 2013 WL 6761883 (remanded to Court of Appeals); *People v Musser*, 494 Mich 337, 835 NW2d 319 (2013)(convictions reversed)

> material questions at trial, and that are better than other evidence otherwise available, there is no need to distort the requirements of Rule 801(d)(1)(B)."

People v Straight, 430 Mich 418; 424 NW2d 257 (1988) dealt with the admission at trial, as an excited utterance, of a young child's statement one month after alleged abuse. This Court held the statement was not admissible as an excited utterance and stated:

> "This case represents the most recent example of the tension created in the trial courts and the Court of Appeals by the application of the Rules of Evidence to the unique situation of a child witness in an alleged sexual abuse case. The tension originates from the conflict between two underlying policies: a desire to protect the most vulnerable of our citizens from heinous and damaging exploitation, and a need to protect the accused individual against both erroneous conviction and the devastating consequences that can follow. The tension is exacerbated by an ever-growing number of such cases, and by what some members of the bench and bar may perceive as an overly rigid application and unfortunate effect of the Rules of Evidence in this category of cases.
>
> The attempts to resolve this tension vary. The Court of Appeals in this case has urged us to reconsider the holding in *People v Kreiner*, 415 Mich 372, 329 NW2d 716 (1982). What remains consistent, however, is the perception that existing rules of evidence and procedure may not adequately deal with these cases. This case illustrates an extension of the Rules of Evidence to accommodate facts which fail to neatly fall within a recognized exception to the hearsay rule."

Straight at 422-423.

This Court found reversible error and granted the defendant a new trial. In doing so it acknowledged that: "Our review of cases on application for leave to appeal in the wake of *Kreiner* has shown increasing resort to the excited utterance exception to admit a young child's statements. The problems inherent in sex offense cases involving a young child cannot, however, be resolved by stretching the excited utterance exception so far that its intended purpose is abused." *Id* at 431.

In *People v Katt*, 468 Mich 272; 662 NW2d 12 (2003) now Chief Justice Young in his dissent stated:

> The rule against the admissibility of hearsay is a venerable doctrine deeply rooted in our common law. The principle has been called "a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure."

Katt, 662 NW2d at 26-27.

The Court of Appeals did not err in finding multiple violations of the rules of evidence that resulted in prejudice to Mr. Douglas. This Court should continue to issue opinions that reflect the importance of adhering to the rules of evidence and send a strong message to prosecutors and judges that the failure to scrupulously adhere to the rules of evidence flies in the face of due process and the fairness and integrity of the justice system.

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