**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

Appeal from the Michigan Court of Appeals
HON. PAT M. DONOFRIO, P.J., and CYNTHIA DIANE STEPHENS and RONAYNE KRAUSE, JJ.

---

**THE PEOPLE OF THE STATE OF MICHIGAN,**
Plaintiff-Appellant,

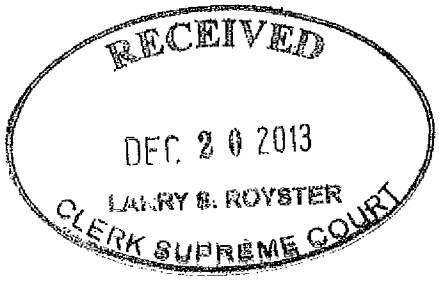
Docket No. 145646

VS.

**JEFFERY ALAN DOUGLAS,**
Defendant-Appellee.

---

# Supplemental Brief - Appellant




**R. BURKE CASTLEBERRY, JR.**
PROSECUTING ATTORNEY FOR LENAWEE COUNTY
**By: JONATHAN L. POER**
CHIEF APPELLATE PROSECUTING ATTORNEY
ATTORNEY FOR PLAINTIFF-APPELLANT

Rex B Martin Judicial Building
425 North Main Street
Adrian, Michigan 49221
Telephone: (517) 264-4640

# TABLE OF CONTENTS

# INDEX OF AUTHORITIES

***CASES:*** *PAGE NO.*



***STATUTES, COURT RULES AND OTHER AUTHORITIES:***

# ARGUMENT

## THE COURT OF APPEALS ERRED IN CONCLUDING THE DEFENDANT WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO INFORM HIM OF A MANDATORY MINIMUM SENTENCE IF CONVICTED OF THE CHARGED OFFENSE WHERE THE TRIAL COURT DETERMINED DEFENDANT REFUSED ALL PLEA OFFERS BECAUSE HE CLAIMED TO BE INNOCENT

## AND

## THE MICHIGAN COURT OF APPEALS ERRED IN FINDING COUNSEL INEFFECTIVE REGARDING HIS TRIAL TACTICS

This appeal was ordered to be held in abeyance by this Honorable Court pending the decision of the United States Supreme Court in *Burt v Titlow,* cert gtd 185 L Ed 2d 360; 2013 US LEXIS 1849; 81 USLW 3470 (US 2013). That case has now been decided. *Burt v Titlow*, No. 12–414, 571 US ——, ——, 2013 WL 5904117 (Nov. 5, 2013). While that court did not reach "whether respondent adequately demonstrated prejudice [due to the loss of the plea bargain], and whether the Sixth Circuit's remedy [instructing the prosecution to reoffer the original plea agreement to the respondent] is at odds with our decision in *Lafler v. Cooper*, 566 U.S. ___ (2012)" analogies and guidance for the instant case can be drawn from *Titlow*. *Titlow*, supra, (slip op. at 4, fn3 at 11).

In *Titlow*, the defendant, having been charged with first degree murder, entered a plea of guilty to the lesser offense of manslaughter pursuant to an agreement which included a sentence agreement and testifying against a co-defendant. Before sentencing, the defendant protested innocence, changed counsel, who then, after prosecutors rejected a new demand for a lesser sentence, withdrew the guilty plea and proceeded to trial. At trial, Titlow maintained innocence. The defendant was convicted of second degree murder. In separate proceedings the co-defendant was acquitted. The defendant appealed, claiming ineffective assistance of counsel for withdrawing the plea which caused the defendant to lose the benefit of the initial plea bargain. The Michigan Court of Appeals rejected Titlow's appeal determining that counsel acted reasonably in light of the defendant's protestations of innocence. However, the Sixth Circuit

Court of Appeals reversed, citing *Lafler v Cooper*, 566 US ___; 132 SCt 1376; 182 LEd 2d 398 (2012) and finding that counsel was ineffective for failing to fully inform the defendant of the possible consequences of withdrawing the guilty plea and ordered the plea be re-offered. On remand, the initial plea offer was renewed but defendant failed to provide a factual basis for the plea. The United States Supreme Court reversed the Sixth Circuit, stating, "When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require that the federal court use a '"doubly deferential"' standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Titlow, supra*, (slip op. at 1), citing *Cullen* v *Pinholster*, 563 US ___, ___ (2011) (slip op., at 17).

### 1. In plea agreement situations, a defendant's claim of innocence is critical to the determination of counsel's effectiveness.

Amicus Criminal Defense Attorneys of Michigan asserts, "What a defendant believes about his or her innocence is irrelevant in the context of the decision whether to accept a plea offer."[1] However, to the contrary, the United States Supreme Court's opinion in *Titlow* is replete with references to the defendant's protestations of innocence in that case and the importance of those protests in the court's ultimate determination that counsel was not ineffective.

> Accepting as true the Michigan Court of Appeals' factual determination that respondent proclaimed innocence to Toca, the Sixth Circuit's *Strickland* analysis cannot be sustained. *Although a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities under Strickland, it may affect the advice counsel gives.* The Michigan Court of Appeals' conclusion that Toca's advice satisfied *Strickland* fell within the bounds of reasonableness under AEDPA, given that respondent was claiming innocence and only days away from offering self-incriminating testimony in open court pursuant to a plea agreement involving an above-guidelines sentence. See *Florida* v. *Nixon*, 543 U. S. 175, 187 (2004) (explaining that the defendant has the "'ultimate authority'" to decide whether to accept a plea bargain); *Brookhart* v. *Janis*, 384 U. S. 1, 7–8 (1966) (observing that a lawyer must not "override his client's desire . . . to plead not guilty"). The Sixth Circuit's conclusion to the contrary was error. [*Titlow, supra*, (slip op. at 8-9)] (Footnote omitted.) (Emphasis added.)

---

[1]Amicus Curiae Brief of the Criminal Defense Attorneys of Michigan in Support of Defendant-Appellee, p. 1.

Here, Defendant Douglas consistently and repeatedly protested his innocence.[2] (80a,87a, 94a, 96a, 105a-106a). The trial court made this finding following a *Ginther* hearing and determined defendant would not have pled guilty to any lesser offense even if defendant had been advised of the mandatory minimum. (112a, 114a) As the U.S. Supreme Court stated:

> Indeed, a defendant convinced of his or her own innocence may have a particularly optimistic view of the likelihood of acquittal, and therefore be more likely to drive a hard bargain with the prosecution before pleading guilty. Viewing the record as a whole, we conclude that the Sixth Circuit improperly set aside a "reasonable state-court determinatio[n] of fact in favor of its own debatable interpretation of the record." *Rice* v. *Collins*, 546 U. S. 333, 335 (2006). [*Titlow, supra*, (slip op. at 8)][3]

Trial counsel's advice was not constitutionally defective by not overriding his client's steadfast and adamant decision not to accept any plea offer.[4] In the instant case, the Michigan Court

---

[2]In contrast to Titlow, who initially entered a guilty plea to manslaughter, at no time did Defendant Douglas ever acknowledge any guilt.

[3]Here, because defendant proclaimed his innocence, he was not interested in any agreement requiring him to admit guilt of sexually abusing his young daughter.

[4]*Burt v Titlow* also strongly reiterated that the burden of establishing ineffective assistance of counsel in plea cases rests squarely on the defendant.

> We have said that counsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Strickland*, 466 U. S., at 690, and that the burden to "show that counsel's performance was deficient" rests squarely on the defendant, *id.*, at 687. [*Titlow, supra*, (slip op. at 9)]

To satisfy the second part of the *Strickland v Washington,* 466 US 668, 687, 694; 104 SCt 2052; 80 LEd 2d 674 (1984) test, a defendant must also show that they were prejudiced by counsel's deficient performance. Specifically, a defendant,

> ... must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the Court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the Court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Lafler v Cooper*, 132 SCt at 1385]

Defendant failed to establish prejudice.

of Appeals improperly disregarded the trial court's reasonable determination of fact in favor of its own debatable interpretation of the record.[5]

### 2. Michigan does not authorize the acceptance of guilty pleas from defendants who maintain their innocence.

MRE 103(D)(1) requires, "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." Defendant must, under oath, admit his guilt. Moreover, the plea procedure outlined in *North Carolina v Alford*, 400 US 25; 91 SCt 160; 27 LEd2d 162 (1970) has not been recognized by Michigan. It should not be the policy of this State to accept guilty pleas from defendants still maintaining their innocence by perpetrating a fraud upon the courts via perjured pleas or, alternatively, via the subterfuge of an *Alford*-type plea. Likewise, perjured testimony should not be rewarded by granting a windfall to a defendant who decided to roll the dice at trial and lost. The remedy ordered by the Michigan Court of Appeals in the instant case would require such fraud or subterfuge or reward. Additionally, any attempt by defendant to plead nolo contendere would have the same effect and would also be a deviation from the initial offer to plead guilty. *Lafler* does not require a renegotiation of the plea offer or to make a plea proposal it had never offered . As Justice Ginsburg stated in her concurring opinion in *Titlow*, "In short, the prosecutor could not be ordered to "renew" a plea proposal never offered in the first place." [*Titlow, supra*, (slip op. at 2)(Ginsburg, J., concurring)] The remedy ordered by the Michigan Court of Appeals is improper.

### 3. Michigan's appellate review of a trial court's determination of effective assistance of counsel is analogous to the federal habeas "doubly deferential" standard of review that gives both the state court and the defense attorney the benefit of the doubt.

In *Titlow*, the United States Supreme Court stated that, by federal statute, "when a federal

---

[5]The sole basis in the record to indicate defendant might have pled guilty if he had known of the mandatory minimum was his own self-serving statement, made after he had been convicted and after he had been sentenced. The whole record discredits that self-serving claim.

habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, the federal court may overturn the state court's decision only if it was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. §2254(d)(2). The prisoner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence."§2254(e)(1). ... For present purposes, it is enough to reiterate 'that a state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.' *Id.*, at 301. AEDPA likewise imposes a highly deferential standard for reviewing claims of legal error by the state courts: A writ of habeas corpus may issue only if the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by' this Court. §2254(d)(1)." [*Titlow, supra*, (slip op. at 5-6]

There, the record supported the state court's factual finding that counsel advised withdrawal only after Titlow's proclamation of innocence. *Id.* Even though the record was silent as to whether counsel gave adequate advice on whether to withdraw the guilty plea, the Supreme Court applied the strong presumption of *Strickland* that counsel rendered adequate assistance and that defendant failed to carry his burden to show counsel's performance was deficient. *Id.* at 8. Because the state court's determination that defendant had been adequately advised before deciding to withdraw the plea was reasonable and supported by the record, the US Supreme Court determined Titlow had received effective assistance of counsel. *Id.* at 11.

Similarly in Michigan, the trial court's determination Defendant Douglas received adequate assistance of counsel is also entitled to two distinct layers of deference. In addition to the *Strickland* presumption and defendant's burden to show deficient performance, deference is to be given to a trial court's findings at a *Ginther* hearing. *People v Grant*, 470 Mich 477, fn 5 at 485; 684 NW2d 686 (2004). This standard is highly deferential to the trial court. MCR

2.613(C);[6] *People v McSwain*, 259 Mich App 654, 683; 676 NW2d 236, 251 (2003). Also, by statute,

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. [MCL 769.26]

Likewise, there is a strong presumption that counsel's performance constituted sound strategy. *Strickland*, 466 US at 690; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

As in *Titlow*, defendant has failed to overcome the strong presumption that the advice given regarding the plea offer and the consequences of going to trial was adequate. Nor has he carried his burden to show he was prejudiced by that advice. Moreover, defendant has failed to overcome the strong presumption that counsel's strategic decisions regarding the admission of evidence were sound, especially in light of defendant's defense of revenge or jealousy for defendant's later marriage and the simultaneous disclosure and reporting of the sexual molestation and counsel's tactical trial decisions as to the manner in which he would question and challenge a child victim. As in *Titlow*, the trial court's determinations following the *Ginther* hearing were reasonable and supported by the record. Defendant received effective assistance of counsel.

---

[6] "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." [MCR 2.613(C)]

## RELIEF REQUESTED

**WHEREFORE,** the People request that this Honorable Court reverse the Michigan Court of Appeals and affirm defendant's convictions and sentences.

December 19, 2013

**Respectfully submitted,**

**R. BURKE CASTLEBERRY, JR. (P72903)**
PROSECUTING ATTORNEY FOR LENAWEE COUNTY

By: _____
**JONATHAN L. POER (P28028)**
CHIEF APPELLATE PROSECUTING ATTORNEY
425 North Main Street
Adrian, Michigan 49221
Telephone: (517) 264-4640

# STATE OF MICHIGAN
# IN THE SUPREME COURT

**THE PEOPLE OF THE STATE OF MICHIGAN,**
Plaintiff-Appellant,

VS.

**JEFFERY ALAN DOUGLAS,**
Defendant-Appellee.

Supreme Court No. 145646

Court of Appeals No. 301546

Trial Court No. 09-14365 FC

R. BURKE CASTLEBERRY, JR. (P72093)
Prosecuting Attorney for Lenawee County
JONATHAN L. POER (P28028)
Chief Appellate Prosecuting Attorney

VALERIE R. NEWMAN (P47291)
Attorney for Defendant-Appellee

## PROOF OF SERVICE

Michelle Lance, being first duly sworn, deposes and says that on December 19, 2013, she mailed two copies of PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF to Valerie R. Newman, Attorney for Defendant-Appellee, via first class mail to the following address: State Appellate Defender Office, 645 Griswold St Ste 3300, Detroit, MI 48226; she further deposes and says on said date she mailed two copies of said brief to Bill Schuette, Attorney General, G. Mennen Williams Bldg., 4th Floor, 525 W. Ottawa Street, P.O. Box 30217, Lansing, MI 48909

Michelle D Lance
Michelle Lance

Sworn and subscribed to before me on December 19, 2013.

Jonathan L. Poer, *Notary Public*
Lenawee County, Michigan
Commission Expiration Date: 12/14/2019