STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

THOMAS C. WHITE,

Defendant-Appellant.

Case No. 6pu

C.A. No. 308275 1-24-13

Wayne Cir. No. 03-011966-FH

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WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff

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Attorney for Defendant

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APPEARANCE OF COUNSEL

NOTICE OF HEARING

PROOF OF SERVICE

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APPLICATION FOR LEAVE TO APPEAL

Defendant-Appellant THOMAS C. WHITE, by and through his attorney, James S. Lawrence, seeks leave to appeal the January 24, 2013 ruling of the Michigan Court of Appeals overturning the Circuit Court reversal of his conviction, and reinstating the conviction and sentence, and says:

1. In 2005 the Michigan Department of Corrections notified the Wayne County Prosecutor's Office that they were holding Thomas White,

and providing the full set of identifiers for him, including date of birth, SID number, Department of Corrections number, etc. The prosecutor's office responded that they had no cases pending against Defendant White. When Defendant was being paroled in 2010, the prosecutor's office changed their mind, and proceeded with a case against Defendant from 2003.

2. Although the defense complained about the violation of the 180 day rule, the judge ruled that defendant had not proven that the prosecution had received the 2005 notice. The prosecutor did not come forward with the evidence. Defendant then pled to felony firearm, third offense, and was sentenced. Subsequently, appellate counsel established that the Michigan Department of Corrections had notified the prosecutor by letter dated April 12, 2005, and that the prosecutor had responded on May 17, 2005. Judge Parker, by order of January 11, 2012, allowed Defendant to withdraw his plea, and dismissed the case because the 5 years of delay was longer than allowed by the statute.

3. The prosecutor appealed to the Michigan Court of Appeals which ruled on January 24, 2013 that Defendant had waived the issue of the 180 day rule by pleading guilty, and did not reach the second prosecutor's argument, that Defendant was unable to prove that the notification to the prosecutor's office of April 12, 2005 was or was not mailed by certified mail.

4. Defendant submits that the Circuit Court did not abuse its discretion by allowing him to withdraw the plea, or by dismissing the case pursuant to statute, MCL 750.131; MCL 750.133, and that the Court of Appeals therefore erred by reversing the Circuit Court ruling.

5. The legal issue in this case raises several questions of major significance to the jurisprudence of this state, in part because the questions are likely to arise in other cases, in part because past legal rulings are perhaps less clear than they should be. Among the relevant legal questions posed are:

a. Whether the requirement placed on the Michigan Department of Corrections to notify the prosecutor by certified mail places any duties on the defendant.

b. Whether the rights of the defendant under the 180 day rule are eliminated whenever a state actor chooses not to follow the "certified mailing" provision to notify the prosecutor.

c. Whether a regular mailing, which is actually received by the prosecutor, is enough to trigger the 180 day rule, or whether actual notice is irrelevant.

d. If actual written notice received by and responded to by the prosecutor's office is not adequate, who has the burden of establishing the presence or absence of certified mailing?

e. Whether due process requires that the prosecution preserve and turn over to the defense before trial or plea any evidence in possession of the government relevant to

possible defenses to the charges, including the 180 day rule.

f. Whether destruction by the prosecutor's office of evidence of whether the notification from the Department of Corrections was sent by certified mail or not, would justifiably lead to inferences against the party who destroyed the evidence, or whether it would justifiably lead to inferences against the party who was the victim of the destruction of evidence.

g. Whether the action of a prosecutor's office in withholding critical information from the defense [regarding the notices and responses to those notices] makes the subsequent guilty plea involuntary.

h. Whether the action of a prosecutor's office in withholding critical information from the defense [regarding the notices and responses to those notices] provides a basis for the circuit judge to exercise discretion and allow a plea to be withdrawn.

i. Whether a guilty plea that is withdrawn has any waiver effect.

j. Whether a guilty plea that is withdrawn because the prosecution withheld information from the defense has any waiver effect.

k. Whether a statute that places duties on public officials and establishes rights of defendants, with the intent that prosecutions against prisoners should be disposed of swiftly, should be interpreted so as to effectuate the legislative intent and promote swift disposition of cases, or whether it should be interpreted so as to deny the defendant any rights under the statute whenever possible.

l. Whether MCL 780.133 affects the jurisdiction of the court to proceed on charges once the 180 day rule is violated.

m. Whether a jurisdictional issue is or is not subject to being waived.

n. Whether a jurisdictional issue can be raised at any time.

o. Whether trial court has discretion to grant a withdrawal of a plea even when the motion is made after sentencing.

p. Whether a judge commits an "abuse of discretion" by taking legal action, where the judge bases the ruling upon facts and reason which is not "grossly violative of fact and logic" and which is not "defiance of reason," or whether the reviewing court can find abuse of discretion whenever they disagree with the ruling of the Circuit Court.

q. Whether the prosecutor's office waived any claim of deficiency in the notice from the Department of Corrections by receiving it and responding to it, but not asserting to the Department of Corrections at that time any alleged deficiency.

6. A prosecutor is required to turn over to the Defendant any information which may potentially support a defense. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Failure of the government to produce the evidence is constitutional error "irrespective of the good faith or bad faith of the prosecution." *Giglio v. United States*, 405 U.S. 150; 92 S.Ct. 763; 31 L.Ed.2d 104 (1972).

7. It is not grossly violative of fact and logic to allow withdrawal

of the plea where a complete defense existed, but the Defendant lacked information to successfully pursue that defense because the prosecutor withheld the information. Once the plea was withdrawn, it could have no waiver effect. The Court of Appeals thus clearly erred.

8. Guilty pleas "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Ruelas v Wolfenbarger*, 580 F.3d 403, 408 (6th Cir. 2009) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Defendant, when he pled, did not know that the prosecution was concealing the evidence that would demonstrate his entitlement to dismissal with prejudice. If he had known that, obviously he would not have entered a guilty plea. Therefore, his plea was not a "knowing" plea, and thus not voluntary, and thus not a basis to consider anything waived. No person adequately informed would have waived his right to dismissal in order to get a conviction instead. It is not an abuse of discretion to allow withdrawal of such a plea.

RELIEF SOUGHT

WHEREFORE, Defendant-Appellant Thomas White moves this Honorable Court to grant leave to appeal, to determine the multiple complex

legal questions presented, to determine that Judge Parker did not abuse her discretion in allowing plea withdrawal, to determine that Judge Parker did not abuse her discretion in dismissing the case under MCL 780.133, to reverse the Court of Appeals ruling, and to reinstate the Circuit Court ruling dismissing the present convictions for felony-firearm.

Respectfully submitted,

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Dated: 3-20-2013

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BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED BY REVERSING THE TRIAL COURT'S ORDER GRANTING PLEA WITHDRAWAL AND GRANTING DISMISSAL OF THE CASE UNDER THE 180 DAY RULE OF MCL 780.131.

Defendant-Appellant says "yes".

STATEMENT OF JURISDICTION

The Court of Appeals issued its ruling January 24, 2013. This application is filed within 56 days, pursuant to MCR 7.302(C).

STATEMENT OF THE CASE

Statement of Proceedings:

Defendant Thomas White pled guilty to felony firearm, third offense, on February 9, 2011, and was sentenced to 10 years on April 14, 2011, with credit for time served, by the Hon. Linda Parker of the Wayne County Circuit Court. On January 11, 2012, Judge Parker issued an order to withdraw plea and to dismiss the case for violation of the 180 day rule, MCL 780.131; MCL 780.133. (Apx. B). The prosecutor appealed to the Michigan Court of Appeals, which reversed Judge Parker, and reinstated the conviction and sentence, by ruling dated January 24, 2013. (Apx. A).

Statement of Facts:

Defendant White was arrested on or about September 2, 2003 for the instant case from Wayne County, for carrying a concealed weapon, felon in possession of firearm, felony firearm, and 4th habitual offender. While on bond, on September 27, 2004, Defendant was arrested on firearms charges in Oakland County. On December 8, 2004, a warrant was issued against him for failure to appear in Wayne County. On December 19, 2004, Defendant was arrested on uttering and publishing from Kent County. On March 2, 2005, Defendant was sentenced in Oakland County to 5 years for

felony firearm. On March 7, 2005, Defendant was sentenced in Kent County to prison for 20 months to 14 years for uttering and publishing.

On April 12, 2005, the Michigan Department of Corrections notified the Wayne County Prosecutor's Office in writing of the incarceration of Defendant White, providing full information about his name, date of birth, SID number, etc., and asking them to proceed on all pending charges. (Apx. C). Defendant presented evidence (Apx. G) that in 2005 he wrote to the Hon. Sean Cox, then of the Wayne County Circuit Court, asking for the pending charges to be resolved. On May 17, 2005, the Wayne County Prosecutor's Office responded to the Michigan Department of Corrections that they had no cases pending against Defendant. (Apx. D). The prosecutor's office took no action to proceed until 2010.

The case was reassigned to Judge Linda Parker, and Defendant had pretrials on December 16, 2010, January 26, 2011 and January 28, 2011. Defendant complained about the 180 day rule violation (T 1-28-2011, 7-9) and the judge found that Defendant had not established that the prosecutor had received notice in 2005 as Defendant alleged. The prosecution did not present any of the notices or letters to and from the Department of Corrections at that time.

Defendant pled to felony firearm, third offense, on February 9,

2011, and was sentenced to 10 years on April 14, 2011, with credit for time served. On January 11, 2012, Judge Parker issued an order to withdraw plea and to dismiss the case for violation of the 180 day rule, MCL 780.131; MCL 780.133. (Apx. B).

The prosecutor appealed to the Michigan Court of Appeals, which reversed Judge Parker, and reinstated the conviction and sentence, by ruling dated January 24, 2013. (Apx. A).

I. THE COURT OF APPEALS ERRED BY REVERSING THE TRIAL COURT'S ORDER GRANTING PLEA WITHDRAWAL AND GRANTING DISMISSAL OF THE CASE UNDER THE 180 DAY RULE OF MCL 780.131.

Standard of review: The standard of review on the rulings of law is whether the court committed error, *People v Thomas*, 438 Mich 448 (1991), which involves review de novo. *People v Babcock*, 469 Mich 247, 253 (2003). Issues of constitutional law are reviewed de novo. *People v Grant*, 470 Mich 477, 484 (2004).

The relevant facts are mostly stated in the Michigan Court of Appeals opinion. In this case, the Circuit Court granted a motion by Defendant White to dismiss his convictions for firearms possession offenses with prejudice because of violation of the 180 day rule, MCL 780.131, MCL 780.133; *People v Williams*, 475 Mich 245 (2006); MCR 6.004(D). The prosecution took the matter to the Michigan Court of Appeals which reversed on January 24, 2013 and reinstated the convictions.

Under *People v Lown*, 488 Mich 242, 272 (2011):

> The statutory 180-day rule, MCL 780.131 and MCL 780.133, may be invoked to require dismissal of a criminal case only if action is not commenced in the case within 180 days after the prosecutor receives the required notice from the DOC.

The prosecutor did receive the notice, but took no steps to proceed

for 5 years thereafter. We submit that the Court of Appeals erred, and should not have substituted its own judgment for the judgment of the circuit judge. Moreover, we submit that the jurisdictional nature of the governing statute was not adequately respected by the Court of Appeals panel. We also submit that the question of whether the actions of government officials in carrying out their duties shall be attributed to the Defendant for purposes of determining his legal rights, is an important matter worthy of this Court's review. We submit that actual notice was overwhelmingly shown, and that Defendant's rights thus cannot properly be suspended on the ground of no notice when there was notice. We submit it was not an abuse of discretion to allow withdrawal of the plea, where the plea was induced by prosecutor withholding of information, and that once the plea was withdrawn, it could have no waiver effect. Finally, we submit that the issue of whether it is an abuse of discretion for the Circuit Court to obey the statute instead of invoking judicially-created procedural roadblocks to the operation of the statute is one of major significance to the jurisprudence of this state.

Defendant in the Circuit Court objected to the violation of the 180 day rule, in that the prosecution not only delayed beyond the 180 days, but delayed for 5 years, but the court found that Defendant had failed to

establish that the Wayne County Prosecutor's Office had received notice of the incarceration and pending case. Mr. White then pled guilty on February 9, 2011, and was sentenced on April 14, 2011. Defendant subsequently found proof of the notice received by the prosecutor, which the prosecution had previously failed to come forward with. After the hearing on January 4, 2012, by written ruling of January 11, 2012, the circuit judge granted the dismissal, finding there was a sufficient showing of notice to the prosecutor, therefore the statutory command, MCL 780.133, must be carried out and the case dismissed. The prosecutor appealed.

The Court of Appeals ruled that Defendant waived the issue by his guilty plea. (Opinion, 2). They also suggested the possibility of trial court error regarding certified mailing, but did not reach the question of whether actual notice by the prosecutor is sufficient, as found by the circuit judge, or whether notice by means other than certified mail voids the application of the statute. Apx. C of April 12, 2005, notice from Michigan Department of Corrections to prosecutor, does not contain anything to show what type of mail service was used, certified or otherwise.

The factual determination of whether the mailing was or was not by certified mail would rely on the envelope in which the notice was mailed to the prosecutor's office. The prosecutor's office chose not to preserve the

evidence. Therefore, it continues to be unknown whether there was a certified mailing or not, because the prosecutor's office destroyed the evidence. They should not be rewarded for destroying the evidence.

Because the 180 day rule continues to be an active statute passed by the legislature of Michigan, and because the question of which issues are waived or not waived by a guilty plea arises again and again, and because the question of whether inaccurate information given the the Defendant can make a plea involuntary, this case gives this Court the opportunity to resolve multiple legal questions of widespread applicability and, we submit, to restore the statute to controlling legal authority instead of being a mere nuisance that judges can brush aside as desired.

The statute placed a legal duty on the judge:

> 780.133 Failure to prosecute; dismissal with prejudice.
> In the event that, within the time limitation set forth in section 1 of this act, action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

The judge declared that if she had known of the letters proving that the Michigan Department of Corrections notified the prosecutor's office of Defendant's incarceration and the existence of the pending charges, and that

they received it, she would have dismissed the case for the violation of the 180 day rule. Yet, who was in a position to bring forward the notification they received, or fail to do so? The prosecutor's office. Shall the prosecutor's office be rewarded for failing to come forward with information they were constitutionally required to produce?

The evidence ultimately uncovered shows that the prosecutor's office responded to the Department of Corrections notification back in 2005, Apx. D. They told the Department of Corrections they did not want to prosecute Defendant White. Their later change of mind did not change the fact that they had actual notice, proven by the fact that they responded to the notice. In *People v Williams*, 475 Mich 245 (2006), the Court found that the 180 day rule was not violated because the action was commenced within 180 days of receiving "actual notice." [1] Here the delay was 5 years.

"No respectable interest of the state is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses." *Giles v Maryland,* 386 US 66 , 98; 87 S Ct 793, 809; 17 L Ed 2d 737, 758 (1967). A prosecutor is required to turn over to the

[1] "[W]e affirm the lower courts' decision that the 180-day-rule statute was not violated because defendant was tried within 180 days of the date that the prosecutor received actual notice that defendant was in prison awaiting disposition of his pending armed robbery charge."

Defendant any information which may potentially support a defense. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963); US Const, Amend XIV. Failure of the government to produce the evidence is constitutional error "irrespective of the good faith or bad faith of the prosecution." *Giglio v. United States*, 405 U.S. 150; 92 S.Ct. 763; 31 L.Ed.2d 104 (1972).

In *Kyles v Whitley*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995), the Court ruled that nondisclosure of information whose disclosure is required under *Brady* is constitutional error even if the information is known only to other government agents and not the prosecutor. Moreover, the duty to turn over info goes to any info that may be useful to the defense, including material relevant to defense motions, even if the material does not address the guilt or innocence of the defendant. *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) [duty to provide evidence relevant to defendant's standing to challenge search]; *Smith v. United States*, 666 A.2d 1216, 1224-25 (D.C. 1995) [duty to turn over evidence relevant to whether statement should be admitted as excited utterance].

The 180 day rule is a complete defense. The prosecution was in possession of proof establishing the defense. They failed to come forward with it. If they had produced it, Judge Parker would have dismissed the

case before any plea was entered, thereby preventing a guilty plea, according to Judge Parker herself. But for the prosecutorial withholding, there would have been no guilty plea.

Proceeding with a prosecution against Petitioner while withholding evidence that would have led to reversal of the charges amounted to a fraud upon the court, which justifies relief. *Demjanjuk v. Petrovski*, 10 F.3d 338 (6th Cir. 1993). "A rule . . . declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v Dretke*, 540 US 668 (2004).

By statute, it is the Government that has the burden of bringing the Defendant to trial without delay. MCL 768.1. The same rule is required by the constitution. "A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Grimmett*, 388 Mich 590, 604 (1972).

The 180 day rule implicates the jurisdiction of the court, that is, the very power of the state to proceed on the charges. As the Court put it in *Markillie v Board of County Road Commissioners*, 210 Mich App 16 (1995), jurisdiction is the "power to act." The operation of the statute deprived the Circuit Court of jurisdiction to proceed on the criminal charges as soon as

the 180 days passed. If a court goes beyond its jurisdiction [as it did when it accepted a plea to a case where statutory provisions provided the case could no longer be prosecuted] the extrajurisdictional actions are supposed to be overturned. *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672 (1972). That is exactly what the Circuit Court did when it learned that jurisdiction had expired before the plea. This self-corrective action should have been praised rather than reversed.

The trial court has discretion to grant a withdrawal of a plea even when the motion is made after sentencing. *People v Montrose*, 201 Mich App 378 (1993); MCR 6.311. As the Court held in *People v Rettelle*, 173 Mich App 196 (1989):

> "When first made after sentencing, a motion to withdraw a guilty plea addresses itself to the sound discretion of the trial court."

Allowing plea withdrawal was fully within the discretion of the judge. Once withdrawn, the plea could not have any waiver effect or any other effect. Ordering dismissal of a case over which the court no longer had jurisdiction was not only within the discretion of the judge, but arguably was mandatory. The Court of Appeals therefore should not have interfered. Compare to *People v Cress*, 468 Mich 678 (2003).

The Michigan Court of Appeals found abuse of discretion by Judge Parker. The traditional meaning of the term "abuse of discretion" involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *Spalding v. Spalding*, 355 Mich. 382, 384-385 (1959). See, also, *Arizona v Washington*, 434 U.S. 497, 509-510; 98 S Ct 824; 54 L Ed 2d 717 (1978); *People v Harvey*, 121 Mich App 681, 689 (1982). *People v Ullah*, 216 Mich App 669, 673 (1996). It is not grossly violative of fact and logic to allow withdrawal of the plea where a complete defense existed, but the Defendant lacked information to successfully pursue that defense because the prosecutor withheld the information. Once the plea was withdrawn, it could have no waiver effect. The Court of Appeals thus clearly erred.

Court proceedings conducted without jurisdiction are "absolutely void" under Michigan cases, *In the Matter of Hague*, 412 Mich 532, 544 (1982); *Fox v Board of Regents of University of Michigan*, 375 Mich 238, 242 (1965), *In Re Waite*, 188 Mich App 189 (1991), and "void" under federal cases. *Custis v*

United States, 511 US 485 (1994). The same rule is differently stated, but with equal effect, in *Bowie v Arbor*, 441 Mich 23 (1992), holding that "want of jurisdiction renders a judgment void" and that "Any action the court took other than dismissing the action was void." Under the instant Court of Appeals ruling, the action that they have overturned is the only action that the Michigan Supreme Court would allow under *Bowie v Arbor*.

Normally, a jurisdictional issue can be brought up at any time, even in a Motion for Relief from Judgment, and is not subject to normal rules of waiver and procedural default. *People v Carpentier*, 446 Mich 19 (1994); *People v Erwin*, 212 Mich App 55, 64-65 (1995); *Custis v. United States*, 511 U.S. 485; 114 S.Ct. 1732, 1737; 128 L.Ed.2d 517 (1994). However, the Court of Appeals panel found that the plea waived the court's lack of jurisdiction. We submit this is also a question of major significance to the jurisprudence of this state.

However, we also submit this is a question already answered by controlling case law authority, and the Court of Appeals panel got it wrong. In *Blackledge v Perry*, 417 US 21; 94 S Ct 2098; 40 L Ed 2d 628 (1974), cited with approval in *People v Reid*, 420 Mich 326 (1985), the Court held that a defendant had a right, although he had pled guilty, to claim on appeal that the trial court was without jurisdiction. In *People v New*, 427 Mich 482, 488

(1986) the Court held [citing to *Menna v New York*, 423 US 61; 96 S Ct 241; 46 L Ed 2d 195 (1975)]:

> "In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim."

The Court in *People v New* went on to hold, at 494-5:

> "[A] criminal defendant may appeal from an unconditional guilty plea or a plea of nolo contendere only where the claim on appeal implicates the very authority of the state to bring the defendant to trial, that is, where the right of the government to prosecute the defendant is challenged. Such rights are never waived by a plea of guilty or nolo contendere. Where the claim sought to be appealed involves only the capacity of the state to prove defendant's factual guilt, it is waived by a plea of guilty or nolo contendere."

The instant ruling, finding the guilty plea to be a waiver of jurisdictional issues, is directly contrary to clear authority issued by both the Michigan Supreme Court and the United States Supreme Court. It should thus be overturned. A guilty plea may waive many issues, but not the authority of the court to proceed at all.

Moreover, the plea could not constitute a waiver where the plea was based on false information caused by prosecutor withholding of the evidence that would have led to dismissal on jurisdictional grounds before any plea. In *McCarthy v United States*, 394 US 459; 89 S Ct 1166; 22 L Ed 2d 418 (1969), *Boykin v. Alabama*, 395 US 238; 89 S Ct 1709; 23 L Ed 2d 274 (1969), *Godinez v. Moran*, 509 US 389; 113 S Ct 2680; 125 L Ed 2d 321 (1993) and other cases, the Court ruled that a guilty plea, to be constitutional, must be voluntary. Under *Boykin*, it is error to accept a guilty plea "without an affirmative showing that it was intelligent and voluntary."

Guilty pleas "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Ruelas v Wolfenbarger*, 580 F.3d 403, 408 (6th Cir. 2009) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Defendant, when he pled, did not know that the prosecution was concealing the evidence that would demonstrate his entitlement to dismissal with prejudice. If he had known that, obviously he would not have entered a guilty plea. Therefore, his plea was not a "knowing" plea, and thus not voluntary, and thus not a basis to consider anything waived. No person adequately informed would have waived his right to dismissal in order to get a conviction instead. It is not an abuse of discretion to allow withdrawal of

such a plea.

With the evidence that the court lacked jurisdiction being withheld by the prosecution, the entry of the plea could not be "done with sufficient awareness of the relevant circumstances and likely consequences," *Brady v United States*, supra, as is required for a voluntary plea. As the Court held in *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004):

> "The proper standard of review in this case, then, turns on whether the record of state court proceedings surrounding Stumpf's guilty plea "leav[es] doubt as to whether the plea was in fact intelligent and voluntary." *Dunn*, 877 F.2d at 1277 (*citing Roddy v. Black*, 516 F.2d 1380, 1384 (6th Cir. 1975)). If the record does leave doubt as to whether the plea was voluntary, intelligent and knowing, and the defendant argues that it was not, the State bears the burden of proving the contrary. *Id.* (*citing Boykin*, 395 U.S. at 243, 89 S.Ct. 1709)."

See also *United States v Rodriquez*, 553 U.S. 377; 128 S.Ct. 1783 (2008), where witholding of information meant that "the defendant would have been sorely misled and would have a ground for moving to withdraw the plea". Defendant was misled by the withholding of the information that he was entitled to dismissal, therefore, he was "sorely misled" and "would have a ground for moving to withdraw the plea." In accord see *Maples v. Stegall*, 427 F.3d 1020 (6th Cir. 2005); *Lyons v. Jackson*, 299 F.3d 588 (6th Cir. 2002); *Miller v. Straub*, 299 F.3d 570 (6th Cir. 2002). Therefore, the Court of

Appeals clearly erred by finding abuse of discretion.

It is true that MCL 780.131 states that the Department of Corrections is to notify the prosecutor by certified mail. In this case, the proof shows a mailing that was actually received, but does not show whether it was mailed by certified mail or not. Even assuming that the Michigan Department of Corrections gave actual notice in an uncertified mailing, can the defendant's rights against one unit of government be suspended by the decision of another unit of government not to properly follow all details of the statute? We submit that whether the defendant has rights under the statute is not affected by the decision of a government agency to "almost" follow the statute instead of to follow it to the letter. Otherwise, the rights established in the statutory scheme exist only at the pleasure at the Department of Corrections. Under the instant ruling, the Department of Corrections can decide which prisoners they want to enjoy the statutory rights under the 180 day rule, and void the rights of all others by giving their notice to the prosecutor by regular mail. A right which can be so easily evaded by government officials is no right at all. It is as if the Court of Appeals has written the 180 day rule out of the statute, because it will apply only when the Department of Corrections decides to make it apply.

We submit that the prosecutor's office itself waived the provision for certified mail when they acted on and responded to the notice, whether it was certified or not, instead of notifying the Department of Corrections that the prosecutor rejects the notice because of regular mailing. To "unwaive" their waiver 5 years later we submit to be too late, and that such a finding by the Circuit Court is not an abuse of discretion.

The possible action of the Department of Corrections in using regular mail instead of certified mail (we still do not know if certified mail was used) is action of the state, therefore, it should be held against the state. Compare to *Kyles v Whitley*, supra [withholding of evidence by other government actors must be attributed to government, not the defendant]. See also *Hamman v Ridge Tool Co*, 213 Mich App 252 (1995); *Day v Lacchia*, 175 Mich App 363 (1989); *Pollock v Fire Insurance Exchange*, 167 Mich App 415 (1987) [party cannot be permitted to benefit from its own misconduct]; see also *Estate of Wagner v Department of Treasury*, 224 Mich App 400 (1997) [state cannot be permitted to benefit from delay caused by its own negligence].

A defendant's rights "should not depend on a formal ritual [that] would further no perceivable state interest." *Osborne v. Ohio*, 495 U.S.103, 124 (1990); *Lee v Kemna*, 534 U.S. 362 (2002). What state interest would be advanced by a certified mailing that was received, over the non-certified

mailing that was received?

In the appeal system we have now, defendants are routinely punished for their own procedural defaults. Under the ruling in this case, defendants are now punished for the procedural defaults of a government agency, the Michigan Department of Corrections. This denies due process of law because it is nonsensical to blame Defendant for the possible fact that the Michigan Department of Corrections made a decision not to fully comply with every detail of the statute. We call it a "possible" fact because it remains unknown whether the notice received by the prosecutor and acted upon by the prosecutor was sent by certified mail or not.

Moreover, the action of the Department of Corrections in informing the prosecutor by regular mail was harmless error, because the purpose of the notification requirement is to give the prosecutor notice, and the prosecutor had actual notice.

The people claimed they did not receive "actual notice" of defendant's incarceration, while admittedly having received the April 12, 2005 letter, since they responded to it, based on the lack of certain information in the 2005 MDOC letter. They complained Mr. White's middle name, Clifford, was not used. They complain of the date of birth - in the MDOC letter stated as 01/09/1957 - stating the court records list Mr. White's

date of birth as 01/09/1959. Yet the presentence report, the document which the MDOC record's personnel studied to discover the pending case, of which the people seemed to have lost track, a document clearly part of the people's file, indeed stated the 1957 date. In other words, 1957 was the right date.

The Michigan Department of Corrections properly notified the prosecutor's office of the correct prisoner, correct date of birth, Mr. White's MDOC identification number: 159833, Mr. White's social security number, his FBI number and the SID#. As to the SID#, the people's search (Apx. H,), Defendant SID number search result, found the records for Juliet Smith, but that was not because the MDOC provided the wrong SID#; it was because the people looked up SID# 0890731P, while the SID# in the letter was 0890723T. Perhaps the quality, or comprehensiveness, of this search helps explains why the people responded to the MDOC on May 17, 2005 (Apx. D), and, again, on February 3, 2011(Apx. F), when hearings were actually in progress before Judge Parker, that the inmate has no pending matters in the jurisdiction per their database. The lower court judge stated the prosecutor's effort to locate the case in 2005, having received the MDOC correspondence was not comprehensive enough. She stated that a search of the name of the defendant, even with an "incorrect" birth date, would have yielded discovery of the case. As argued in the lower court, defendants often

use aliases and provide false information of every type, certainly including incorrect birthdates. The people expect this and must routinely be diligent in their record searches, or they would suffer from innumerous cases where they could not be able to go forward. This is especially the case since there was a bench warrant issued in the case; it also seems incongruous that Wayne County would not have known about the Oakland county sentencing in 2005. Surely, records and tracking procedures were not functioning as they should have been in this matter.

Although this might have been a honest mistake by the prosecutor's office in inputting data that differed from that on the notice they received from the Department of Corrections, "the statutory 180-day rule has no judicially created 'good-faith exception.'" *People v Lown*, 488 Mich 242, 263 (2011). The lower court judge did not abuse her discretion and the people's appeal ought to have been denied.

The circuit judge was correct that the people had actual notice herein since they clearly received the Department of Corrections letter in 2005 and responded to it. As the Court held in *People v Lown*, id:

> Clearly, if no action is taken and no trial occurs within 180 days, the statute applies. If some preliminary step or action is taken, followed by inexcusable delay beyond the 180-day period and an evident intent not to bring the case to trial

> promptly, the statute opens the door to a finding by the court that good-faith action was not commenced as contemplated by [MCL 780.133], thus requiring dismissal.

Relief was denied to the Defendant in *People v Lown* because:

> Action was commenced "well within the period," and the prosecution "proceede[d] promptly and with dispatch thereafter toward readying the case for trial" and "[stood] ready for trial within the 180-day period."[fn29] And there is no evidence that ensuing delays caused by docket congestion were without reason or otherwise inexcusable under the facts of this case.

Those consideration cannot fairly be said to apply here where the prosecutor's office waited for 5 years after being notified to take any action, and 5 years after Defendant's letter to Judge Cox from prison, asking for the state to take action on the pending charge. The 5 years is not "excusable delay" under *People v Lown*, and was not found to be excusable by the Circuit Court. And, while the prosecutor's office was dithering for 5 years, Defendant lost any witnesses that the defense might have been able to locate and produce for trial in 2005.

The prosecutor's office could have, but did not, notify the Michigan Department of Corrections that they were asserting the notice mailed to the prosecutor in 2005 was deficient. The prosecutor's office could have, but did

not, take speedy action instead of waiting for 5 years. The prosecutor's office could have, but did not, present the information they had about being notified to Judge Parker, in which the case would have been dismissed right then. It is very unwise policy to encourage prosecutor's offices to keep the facts secret so that they can gain a conviction. In addition to being unwise policy, it is unconstitutional. *Giles v Maryland*, supra. This Court should find that it is the prosecutor's fault that Defendant was not prosecuted for years, even though the legislative intent was that actions be taken to proceed to trial within 180 days. It was not an abuse of discretion to allow plea withdrawal where the plea was involuntary because acquired as a result of prosecutor withholding of the evidence.

RELIEF SOUGHT

WHEREFORE, Defendant-Appellant Thomas White moves this Honorable Court to grant leave to appeal, to determine the multiple complex legal questions presented, to determine that Judge Parker did not abuse her discretion in allowing plea withdrawal, to determine that Judge Parker did not abuse her discretion in dismissing the case under MCL 780.133, to reverse the Court of Appeals ruling, and to reinstate the Circuit Court ruling dismissing the present conviction for felony-firearm.