STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

THOMAS C. WHITE,

Defendant-Appellant.
_____/

Case No. 146872

C.A. No. 308275

Wayne Cir. No. 03-011966-FH

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff

JAMES STERLING LAWRENCE (P33664)
Attorney for Defendant
_____/

146872
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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

APPENDIX

PROOF OF SERVICE

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I. WHETHER THE CIRCUIT COURT CORRECTLY RULED THAT DEFENDANT'S UNCONDITIONAL GUILTY PLEA DID NOT WAIVE HIS RIGHTS UNDER MICHIGAN'S 180 DAY STATUTE.

Defendant-Appellant answers "Yes".

II. WHETHER THE GUILTY PLEA WAS PROPERLY SET ASIDE BY THE TRIAL COURT AS UNKNOWING AND INVOLUNTARY.

Defendant-Appellant answers "Yes".

STATEMENT OF FACTS

Proceedings

Defendant-Appellant Thomas C. 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).

Defendant filed an Application for Leave to Appeal to the Michigan Supreme Court. By order of 10-25-2013, the Michigan Supreme Court ordered further briefing and oral argument on the question of whether leave to appeal or other relief should be granted.

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. These were uncovered only after Defendant was sent to prison.

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 as involuntary, and to dismiss the case for violation of the 180 day rule, MCL 780.131; MCL 780.133.

I. THE CIRCUIT COURT CORRECTLY RULED THAT DEFENDANT'S UNCONDITIONAL GUILTY PLEA DID NOT WAIVE HIS RIGHTS UNDER MICHIGAN'S 180 DAY STATUTE.

The question at bar, as more fully stated in the Michigan Supreme Court order of 10-25-2013, is "whether the defendant's unconditional guilty plea waived any violation of the 180-day rule, MCL 780.131 and MCL 780.133; see *People v Lown*, 488 Mich 242, 268-270 (2011), where the prosecutor had received (albeit possibly not by certified mail) a written Department of Corrections (DOC) notice of the defendant's incarceration and a request for final disposition of the pending charges, had responded to the notice stating that there were no pending charges against the defendant, and commenced the criminal action five years after receipt of the notice, and where the defendant and the Wayne Circuit Court were unaware of the notice and the response at the time of the plea proceeding."

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 780.13, 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.

In *People v New*, 427 Mich 482 (1986), the Court held:

> "[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."

If this Court continues to uphold *People v New*, it would have to find that "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." That would end the matter right there.

In this case, the Circuit Court record showed that the prosecutor's office did receive notice of Defendant's incarceration, and that they responded they had no charges they wished to proceed on against Defendant. In other words, that action by the prosecutor was the waiver: an express written waiver of the right to prosecute on any pending matter against Defendant. Waivers by the state are enforceable. *Miller v Stovall*, 608 F3d 913 (CA 6, 2010); *Cristini v McKee*, 526 F3d 888, 898 (CA 6, 2008).

"This Court has defined "waiver" as "the intentional relinquishment or abandonment of a known right." *People v Kowalski*, 489 Mich 488 (2011). That clearly applies more to the prosecution, which knew it had a right to

prosecute those believed to be offenders, and declared in writing they had nothing they wished to proceed on against Defendant, than it would apply to Defendant, who was told directly by a judge that he did not have a right to dismissal, but was found by the Court of Appeals to have waived that right anyway. The prosecutor in direct language waived the right to prosecute. Defendant did not state on the record that he was waiving a right to dismissal under the 180 day rule. The only thing he waived was the right to a trial. The trial court did not abuse its discretion by finding that Defendant did not waive a right to dismissal that he was not told that he had, or told that he was waiving.

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 state's position, which Defendant finds to be untenable, is that the statutory protection applies only to defendants who have good lawyers who properly invoke the protections of the statute, and that the prosecutor can evade the statute by hiding the evidence of their notification and response until after they secure a guilty plea by what amounts to fraud and deception. If the lawyer is less than attentive, or if the prosecution fails to

come forward with the exculpatory evidence, contrary to the express command of *Brady v Maryland*, 373 US 83 (1963) [which applies "irrespective of the good faith or bad faith of the prosecution"], that is just too bad. We submit such a rule would be contrary to the Michigan Supreme Court ruling in *People v Lown*, supra, at 247:

> Finally, we note that a violation of the 180-day rule — which deprives the court of "jurisdiction," MCL 780.133 — specifically divests the court of personal jurisdiction over the defendant for the particular action.

It is of some importance that the issue is jurisdictional. *People v Carpentier*, 446 Mich 19 (1994). A jurisdictional issue deals with jurisdiction, that is, the authority of people to perform certain acts. As the Court put it in *Markillie v Board of County Road Commissioners*, 210 Mich App 16 (1995), jurisdiction is the "power to act." In *United States v Cotton*, 535 US 625 (2002), the Court defined "what the term "jurisdiction" means today, *i.e.*, "the courts' statutory or constitutional *power* to adjudicate the case."" As the Circuit Court lacked jurisdiction, none of its actions have legitimate legal effect, because the Circuit Court lacked the power to act. In *People v Lown*, the Court stated:

> "as this Court has held for more than 50 years, the rule requires the prosecutor to proceed promptly within 180 days to move the case to the point of readiness for trial."

Since the prosecutor did not proceed for 5 years, this ruling would appear to control, and require dismissal. However, later in *People v Lown*, by a 4-3 vote, the Court found that jurisdiction over the person is subject to waiver:

> "But the court's jurisdiction over a particular person is another matter; a party may stipulate to, waive, or implicitly consent to personal jurisdiction.[fn49] The circuit court here had subject matter jurisdiction over the home invasion charge; Michigan circuit courts are courts of general jurisdiction and unquestionably have jurisdiction over felony cases.[fn50] Because the jurisdictional aspect of the 180-day rule, MCL 780.133, requires dismissal of a particular defendant in a particular case when the rule is violated, however, the rule governs personal jurisdiction and thus is waivable."

This ruling should be reconsidered, as it apparently conflicts with the United States Supreme Court ruling in *United States v Cotton*, at 630, which held that a jurisdictional issue, "because it involves a court's power to hear a case, can never be forfeited or waived." Moreover, the general rule is that proceedings conducted by a judge or court 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), and "void" under federal cases. *Custis v United States*, 511 US 485; 114 S.Ct. 1732, 1737; 128 L.Ed.2d 517 (1994).

It is our position that this circumstance (prosecutor cannot lawfully proceed at all if proper objection made, and prosecutor does not hide the evidence of notification and waiver by state) is different from when a charge is merely brought in the wrong locality, which is a nonjurisdictional issue subject to waiver. *People v Houthoofd*, 487 Mich 568 (2010). In the case of bringing a charge in the wrong locality, a waiver would only keep the case in one forum instead of another; the charge could still be prosecuted. By waiving venue, the defendant might get benefits such as a speedier disposition, or a more favorable judge, or even a courtroom that is easier to get to. There could be rational reasons for the defendant to waive venue. There would virtually never be a rational reason for the defendant to waive dismissal. But for the delay in the prosecutor revealing that their office had been notified of Defendant's incarceration 5 years earlier, and expressly waived any plans to prosecute him, there would have been no plea.

Here, we have a situation where the Defendant's choices are continuing to be subjected to a prosecution, or complete dismissal. Yet, Defendant was not informed those were his choices. Waiver must be knowing and intelligent, but it could not be where Defendant was not told that he was entitled to a complete dismissal, and the prosecutor failed to produce the documentation that would establish that. No reasonable person

who was aware of the 180 day rule and the evidence concealed by the prosecution would waive its protections, because a complete dismissal is far more beneficial to the defendant than any sort of conviction.

As a practical matter, allowing waiver of the 180 day rule should have no practical consequences, and the 180 day rule should still be enforced, because a waiver would necessarily imply an invalid plea anyway, because of ineffective assistance of counsel, or involuntary plea, or mentally incompetent defendant, or denial of due process by hiding exculpatory evidence. This lawyer did not tell the Defendant, "you can get a complete dismissal, but we are going to choose to have you prosecuted anyway." If he had done so, there would not have been any guilty plea. In *Brady v United States*, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970), the Court stated that guilty pleas:

> "must not only be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."

Therefore, the position of the United States Supreme Court in *United States v Cotton* that such an issue is not subject to waiver is correct and should be followed. And, the position of the Michigan Supreme Court in *People v Johnson*, 396 Mich 424, 442 (1976), *People v New*, supra, and *People v*

Carpentier, supra, that such an issue is not subject to waiver, should be followed, and the deviation from that principle in *People v Lown* should be discarded. This Court ruled in *People v Johnson*, "Defendant may always challenge whether the state had a right to bring the prosecution in the first place."

As argued below, however, the facts of this case do not justify a finding of waiver even under the standards of *People v Lown*. Even if waiver of the issue is possible in some cases, *Lown* is not a ruling that waiver exists in all cases. Instead, we must look at case law regarding waiver, to see what elements will make a solid case of waiver. And, we must look at what the Defendant actually did. He never said "I waive my right to dismissal under the 180 day rule." The judge did not tell him he was waiving such a right.

We suggest the Court should look at *People v Kotesky,* 190 Mich App 330 (1991):

> "We initially note that assertions that a charge is brought under an inapplicable statute are not waived by a plea of guilty. *People v New*,27 Mich 482, 492, 398 NW2d 358 (1986); *People v Beckner*, 92 MichApp 166, 285 NW2d 52 (1979)."

To accept the prosecutor's position, this Court must find that if the prosecutor brings a charge he has a right to bring, but uses the wrong statute, this error is not waived by a guilty plea, but if the prosecutor brings

a charge he has no right to bring at all, that error can be waived by a guilty plea. We submit that position makes no sense. The error of charging under the wrong statute is far lesser than the error of filing when no charging is allowed at all. To find the lesser error not subject to waiver, but the much greater error is subject to waiver, is to turn things on their head.

A finding of waiver in this case is inconsistent with the rule that Courts must "indulge every reasonable presumption against waiver." *Johnson v Zerbst*, 304 US 458, 464 (1938).

A purported waiver, to be effective, must be voluntary, knowing and intelligent. *United States v Wrice*, 954 F2d 406 (CA 6, 1992); *Filiaggi v Bagley*, 445 F3d 851 (CA 6, 2006). A plea of guilty could not be "knowing and intelligent" where the most important fact is withheld from the defendant: that he was absolutely entitled to a dismissal, and did not have to plead guilty to get it. Similarly, the guilty plea could not be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences," *Brady v United States*, 397 US 742 (1970), because there is no circumstance more relevant than what happens if the defendant does not plead guilty. There was nothing "intelligent" about this purported waiver. The prosecutor, judge and defense counsel failed in their duties to tell Defendant he had a right to dismissal, and that by pleading guilty he

was volunteering for a conviction and punishment which could have been avoided in its entirety. It would be unreasonable to find that Defendant White knew what he was getting and what he was giving up by entering a guilty plea.

"A defendant can hardly be said to make a strategic decision to waive his jury trial right if he is not aware of the nature of the right or the consequences of its waiver." *United States v Martin*, 704 F2d 267 (CA 6, 1983). No one told Defendant that a consequence of his guilty plea would be that he would give up his right to complete dismissal, a right founded in statute and case law.

Jurisdictional challenges may be brought at any time, even years after the trial. *People v Carpentier*, 446 Mich 19 (1994). As the Court held in *Carpentier*:

> See also *People v Johnson*, 396 Mich 424, 442; 240 N.W.2d 729 (1976) ("Defendant may always challenge whether the state had a right to bring the prosecution in the first place").

The Court of Appeals ruling that Defendant White may not challenge whether the state had a right to bring the prosecution in the first place is inconsistent with *Carpentier* and *Johnson*. "[A] jurisdictional defect

[is] not subject to the "good cause" or "actual prejudice" demands of MCR 6.508(D)(3)." *People v Carpentier*, supra.

Another factor in this case is that the prosecutor had received notice of the charge, and wrote the Department of Corrections that they did not wish to proceed with a prosecution, but did not come forward with that information to the defense until after Defendant was sentenced. Should Defendant be punished because the prosecutor withheld the information? It should be exactly the opposite. Defendant should be excused from all supposed defaults that were a consequence of the prosecutor's failure to come forward with the evidence that would set Defendant free.

The trial court found that any type of notice that the prosecutor actually receives is good enough to put into play the protection of the 180 day rule. The prosecutor takes the position that whether the defendant can be prosecuted or not depends on what is on the outside of the envelope when the prosecutor's office employee opens it. We submit that position is at odds with common sense, as the prosecutor is equally informed no matter how the envelope got there.

MCL 780.131 states:

> "the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice

> of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint."

It is true that the last sentence of the statute says: "The written notice and statement shall be delivered by certified mail." The statute does not provide any consequence for using some other sort of mail. Where the statute does not provide a remedy or consequence for noncompliance, it is inappropriate for the court to insert one. See, for example, *People v Hawkins*, 468 Mich 488 (2003) [statutory violation in executing search warrant has no remedy for defendant, because the statute did not provide one]; *People v Hamilton*, 465 Mich 526 (2002) [arrest in violation of statute has no remedy for defendant, because the statute did not provide one]. In contrast, MCL 780.131 does provide a remedy of dismissal for failure of the prosecutor to proceed within 180 days.

The approach used by the trial court, and rejected by the Court of Appeals panel, is analogous to the correct approach adopted in MCR 2.105(J)(3): "(3) An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." The Court of Appeals has expressly held that formal service requirements may be disregarded when

the party responds to improperly served documents, showing actual notice. *Penny v ABA Pharmaceutical Co*, 203 Mich App 178 (1993).

We submit that this Court should be extremely alarmed at the ruling of the panel below that:

> "We note, however, that the notice sent by the Department of Corrections must strictly comply with the relevant statute to trigger the 180-day rule, which includes the requirement that notice be provided to the prosecution by certified mail."

It would be unfair to maintain a rule that if a private party gets actual notice and responds, they are served, but if there is even the slightest possibility the Department of Corrections used the wrong envelope, the prosecutor is not served, even if he responds. This argument must be viewed against the backdrop of zero evidence that the Department of Corrections departed from their usual practices and used an incorrect mailing procedure just for Thomas White, as well as the inability of almost all defendants to prove what happened in a prison office where they were not present, if the prosecutor's office decides to discard the envelope. The whole business of applying strict rules against criminal defendants which are routinely relaxed for civil parties and prosecutors is something this Court should decline to adopt. Instead of punishing the Defendant for not knowing the evidence the prosecutor was withholding, this Court should excuse any defaults

resulting from that withholding. Otherwise, the party with the duty to disclose gets rewarded for nondisclosure. That will just encourage parties not to disclose.

The trial court found that written notice was provided to the prosecution years before they proceeded with prosecuting Defendant, and the Court of Appeals did not find this ruling to be unreasonable. It is supported by the evidence. 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 be shown on the envelope in which the notice was mailed to the prosecutor's office. The prosecutor's office chose not to preserve the evidence. It would deny due process for them to be rewarded for discarding the evidence. US Const, Amend XIV.

Moreover, Defendant had no control over the Department of Corrections and what type of mailing they used. Even if non-certified mail was used [something not established; we submit a remand for an evidentiary hearing would establish that the Department of Corrections always uses certified mail for these mailings] it would be unfair to blame Defendant for a defect committed by others: State of Michigan officials.

Orzel v Scott Drug Co, 449 Mich 550 (1995); *Lincoln v American Universal Insurance Co*, 435 Mich 408 (1990). See *In Re Egelus Living Trust*, Michigan Court of Appeals No. 292020 (9-23-2010):

> "Therefore, the order that defendants are relying on for their collateral estoppel argument was only entered because of their own conduct. It would be improper to reward that conduct by holding that plaintiffs were now estopped from arguing the legitimacy of the settlement agreement."

The purposes of the statute include to ensure that the prosecutor's office promptly would be informed of defendant's incarceration, and to ensure that the prosecution on those pending charges would take place reasonably promptly. This would avoid a defendant having pending charges hanging over him for years. This would avoid a defendant being deprived of credit for time served while the prosecutor's office failed to proceed. This would allow the Department of Corrections to appropriately classify and program the prisoner.

When the Department of Corrections provided notice to the prosecutor's office, and the prosecutor's office responded by declaring openly to the Department of Corrections that they had no charges they wished to proceed with against Defendant, the statutory purpose was fulfilled. It only became unfulfilled when the prosecutor decided 5 years later to retract its

waiver of the right to proceed with any charges, and the Court of Appeals overruled the Circuit Court to let them.

We submit that this Court should find that the Court of Appeals erred by finding an implied waiver of the protections of the 180 day rule. This Court should reverse the Court of Appeals panel and uphold the Circuit Court ruling.

II. THE GUILTY PLEA WAS PROPERLY SET ASIDE BY THE TRIAL COURT AS UNKNOWING AND INVOLUNTARY.

The question at bar, as more fully stated in the Michigan Supreme Court order of 10-25-2013, is "whether the defendant's guilty plea was properly set aside by the trial court for the reason that it was unknowing and involuntary due to the defendant's and the court's unawareness of the DOC notice and prosecutorial response."

In addressing this question, we must look at the standard of review. See *People v Brown*, 492 Mich 684 (2012):

> This Court reviews for an abuse of discretion a trial court's ruling on a motion to withdraw a plea. A defendant pleading guilty must enter an understanding, voluntary, and accurate plea. MCR 6.302(B)(2) states that for a plea to be understanding, the defendant must be informed of "the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law[.]"

We submit there was no abuse of discretion in allowing Defendant to withdraw his plea. In *Herald Co v EMU Board of Regents*, 475 Mich 463 (2006) the court stated: "abuse of discretion, which this Court now defines as a determination that is outside the principled range of outcomes."

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." As the Court explained more fully in *Hammond v United States*, 528 F2d 15 (CA 4, 1975):

> "In order to plead voluntarily, a defendant must know the direct consequences of his plea, including 'the actual value of any commitments made to him.' Where, as here, counsel's alleged advice, corroborated by the information supplied by the court, grossly exaggerated the benefit to be derived from the pleas of guilty, it would follow that the pleas were not voluntary."

In *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970), the Court said that guilty pleas "must not only be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."

What were the relevant circumstances? That the prosecutor had received the notice 5 years earlier. That the prosecutor had responded they had no charges to bring against Defendant. That Defendant was entitled to a dismissal. That by pleading guilty he was volunteering for a conviction and sentence that could not otherwise be imposed against him. Defendant

was not aware of any of that. The findings of the trial court were therefore not an abuse of discretion.

If there is a reasonable possibility that the Petitioner was not properly advised about the consequences of the plea, the plea is involuntary and should be vacated. *Hill v Lockhart*, 474 US 52; 106 S Ct 366; 88 L Ed 2d 203 (1985).

This should not be a tough decision. No reasonable person would intelligently decide to take a conviction that could not otherwise be imposed. The plea could not have been knowing and intelligent, and the trial court did not abuse its discretion by so finding.

When Defendant came to court on this case, and filed the motion to dismiss for violation of the 180 day rule, the prosecutor should have been there proffering the notice the prosecutor's office received from the Department of Corrections, and the prosecutor's response. If he had done that, there would have been no guilty plea, but instead a dismissal. If this failure by the prosecutor is rewarded, it is not too likely that other prosecutors are going to do their best to uncover evidence in the records of their own offices.

It is unfair, and contrary to sound public policy, to reward a party for failure to come forward with evidence. *Orzel v Scott Drug Co*, 449 Mich 550

(1995); *Lincoln v American Universal Insurance Co*, 435 Mich 408(1990). See *In Re Egelus Living Trust*, Michigan Court of Appeals No. 292020 (9-23-2010):

> "Therefore, the order that defendants are relying on for their collateral estoppel argument was only entered because of their own conduct. It would be improper to reward that conduct by holding that plaintiffs were now estopped from arguing the legitimacy of the settlement agreement."

Here, we have a situation where the Defendant's choices are continuing to be subjected to a prosecution, or complete dismissal. Yet, Defendant was not informed those were his choices. Waiver must be knowing and intelligent, but it could not be where Defendant was not told that he was entitled to a complete dismissal, and the prosecutor failed to produce the documentation that would establish that. No reasonable person who was aware of the 180 day rule and the evidence concealed by the prosecution would waive its protections, because a complete dismissal is far more beneficial to the defendant than any sort of conviction.

Guilty pleas are involuntary as a matter of law and cannot be sustained if the defendant is misinformed about the value of the benefits from the plea. *Brady v United States*, supra; *Dillon v United States*, 307 F2d 445 (CA 9, 1962); *Hammond v United States*, supra; *People v Hoerle*, 3 Mich App 693 (1966); *People v Goins*, 54 Mich App 456 (1974); *People v Lawson*, 75 Mich App

726 (1977); *People v Roderick Johnson*, 86 Mich App 77 (1978); *People v Schofield*, 124 Mich App 134 (1983); *People v Taylor*, 124 Mich App 426 (1983); US Const, Amend XIV. He got no benefits from the plea, only huge deficits with no compensating benefit. He got a conviction and incarceration where he could have had none. No properly informed person would have chosen that.

This lawyer did not tell the Defendant, "you can get a complete dismissal, but we are going to choose to have you prosecuted anyway." If he had done so, there would not have been any guilty plea. In *Brady v United States*, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970), the Court stated that guilty pleas:

> "must not only be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."

We must look at what the Defendant actually did. He never said "I waive my right to dismissal under the 180 day rule." The judge did not tell him he was waiving such a right. Under these circumstances, a finding of waiver is inconsistent with the rule that Courts must "indulge every reasonable presumption against waiver." *Johnson v Zerbst*, 304 US 458, 464 (1938).

A purported waiver, to be effective, must be voluntary, knowing and intelligent. *United States v Wrice*, 954 F2d 406 (CA 6, 1992); *Filiaggi v Bagley*, 445 F3d 851(6th Cir, 2006). A plea of guilty could not be "knowing and intelligent" where the most important fact is withheld from the defendant: that he was absolutely entitled to a dismissal, and did not have to plead guilty to get it. Similarly, the guilty plea could not be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences," *Brady v United States,* 397 US 742 (1970), because there is no circumstance more relevant than what happens if the defendant does not plead guilty. There was nothing "intelligent" about this purported waiver. The prosecutor, judge and defense counsel failed in their duties to tell Defendant he had a right to dismissal, and that by pleading guilty he was volunteering for a conviction and punishment which could have been avoided in its entirety. It would be unreasonable to find that Defendant White knew what he was getting and what he was giving up by entering a guilty plea.

"A defendant can hardly be said to make a strategic decision to waive his jury trial right if he is not aware of the nature of the right or the consequences of its waiver." *United States v Martin*, 704 F2d 267 (CA 6, 1983). No one told Defendant that a consequence of his guilty plea would be that

he would give up his right to complete dismissal, a right founded in statute and case law.

In *Padilla v Kentucky*, 559 US 356 (2010), the Court held that for a guilty plea to be voluntary, if the conviction will subject the defendant to deportation, the defendant must be advised of that. We submit that for a guilty plea to be voluntary, if the government would be blocked from proceeding unless the defendant pleads guilty, the Defendant must be advised of that as well.

The judge agreed that if she had had the information from the prosecutor's office she would have dismissed the case. That demonstrates the prejudice.

The burden is on the state to show that the plea was voluntary, intelligent and knowing. As the Court held in *Stumpf v Mitchell*, 367 F3d 594 (CA 6, 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 F2d at 1277 (*citing Roddy v Black*, 516 F2d 1380, 1384 (CA 6, 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 US at 243, 89 S.Ct. 1709)."

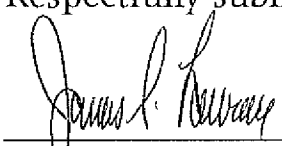
Note that the standard for plea withdrawal is not that the plea be involuntary, but that there be a doubt as to whether the plea is voluntary. The mere existence of reason to doubt is enough to require the defendant to be allowed to withdraw his plea.

The trial court found that written notice was provided to the prosecution years before they proceeded with prosecuting Defendant, and the Court of Appeals did not find this ruling to be unreasonable. The trial court found that the plea was not knowing and intelligent because Defendant was not properly informed of the facts, circumstances and consequences, and the Court of Appeals did not find this ruling to be unreasonable. It is supported by the evidence. It was not "outside the principled range of outcomes." Therefore, this Court should reverse the Court of Appeals panel and reinstate the Circuit Court rulings.

RELIEF SOUGHT

WHEREFORE, Defendant-Appellant Thomas White moves this Honorable Court to grant leave to appeal, to reverse the Court of Appeals, and to reinstate the Circuit Court order granting plea withdrawal and dismissal.

Respectfully submitted,



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