

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellant,

vs

AMDEBIRHAN ABDERE ALEMU,

Defendant-Appellee.

Supreme Court No. 152247

Court of Appeals
No. 320560

Kent County Circuit
Court No. 13-000380-FH

**PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

The People's seek this Honorable Court's review of the July 7, 2015, unpublished majority opinion of the Michigan Court of Appeals, vacating the trial court's sentence and remanding for further proceedings. The People ask that this Court either peremptorily reverse the opinion of the Court of Appeals, or grant leave to clarify the proper application of the abuse of discretion standard in the context of a trial court's decision to deny a defendant treatment under MCL 333.7411 or comparable deferral proceedings.

On November 25, 2015, this Court issued an order directing oral argument be scheduled on whether to grant the application or take other relief pursuant to MCR 7.305(H)(1). This Court also directed that "[t]he parties shall file supplemental briefs within 42 days of the date of this order, and shall include among the issues to be briefed: (1) whether the plea bargain's stipulation that the People would take 'no position on 7411' precludes the People from filing this application; and (2) whether the People's formal adoption of 'no position' in the Court of Appeals waived their ability to request relief in this Court." This supplemental briefing is in response to the Court's order.

STATEMENT OF QUESTIONS PRESENTED

- I. Did the plea agreement to take no position on whether the circuit court granted Defendant relief under MCL 333.7411 preclude the People from challenging the reasoning of the Court of Appeals in the Supreme Court?**

Neither the trial court nor the Court of Appeals were asked this question.
Plaintiff-Appellant answers, “No.”
Defendant-Appellee answers, “Yes.”

- II. Did the People’s response in the Court of Appeals, taking no position on the application for leave to appeal, waive the ability of the People to challenge the reasoning of the Court of Appeals in the Supreme Court?**

Neither the trial court nor the Court of Appeals were asked this question.
Plaintiff-Appellant answers, “No.”
Defendant-Appellee answers, “Yes.”

- III. Did the Court of Appeals majority err in their application of the abuse of discretion standard when it remanded the case to the circuit court for further consideration?**

Plaintiff-Appellant answers, “Yes.”
Defendant-Appellant answers, “No.”

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant was arrested for and charged with Possession with Intent to Deliver Marijuana, MCL 333.7401(2)(d)(iii) arising out of an incident occurring on December 23, 2012 (Original Felony Information). He pled guilty on March 26, 2013, to an amended misdemeanor count of Possession of Marijuana, MCL 333.7403(2)(d), with the People further agreeing to take no position on any request for sentencing pursuant to MCL 333.7411 (Pl Tr, 6, 8-9). Specifically, during the plea hearing, the following was stated:

THE COURT: Is there a plea offer in this case, Ms. Richardson?

MS. RICHARDSON [ASSISTANT PROSECUTOR]: Yes, your Honor. To plead to the amended Count 2 [Possession of Marijuana], we would dismiss the original Count 1.

THE COURT: Is that your understanding of the entire plea agreement, Mr. Milanowski?

MR. MILANOWSKI [DEFENSE COUNSEL]: Your Honor, I also understand the prosecutor is taking no position on 7411.

MS. RICHARDSON: I have no position.

MR. MILANOWSKI: Okay. With that, that's the entire agreement, yes, your Honor. [Plea Transcript, 5-6.]

According to the PSI, the Grand Rapids Police found Defendant parked in his vehicle talking on his phone in the Cambridge Square Apartment complex (PSI, 2). The officer approached Defendant and asked him why he was there (PSI, 2-3). The officer saw a box of clear plastic sandwich baggies in the car (PSI, 2). Defendant was arrested for trespassing, and then consented to a search of his car; a glass jar containing marijuana was found, along with a plastic bag with more marijuana, and a digital scale (PSI, 2). Defendant denied he was there to sell marijuana, but only to share it with some friends (PSI, 2).

On May 23, 2013, the trial court sentenced Defendant to one year of probation and a \$1,000 fine, while declining to give him treatment under §7411 (S Tr, 8-9).¹ Prior to sentencing,

¹ The People, as agreed, took no position on Defendant's request (S Tr, 5).

Defendant told the trial court that the marijuana was an amount he was going to share with his friends over the holiday (S Tr, 5), that he had a box of sandwich bags that he used “to put the marijuana [in] whenever I leave the car instead of bringing what I have with me” (S Tr, 6), and a digital scale (S Tr, 6). The trial court, following the colloquy, stated:

Because I think the more that I ask you, the less credible you become. . . I just am totally incredulous this University of Michigan student who is bright and capable is trying to tell me that he has a glass jar with a pound of marijuana and a box of sandwich baggies that’s open, a digital scale in his door, and he’s just doing this to decant a small, usable amount anytime he goes from home to home to visit friends over the holiday. Now, that doesn’t seem like simply just taking a small amount just to use with your friends. It seems to me in this apartment complex where you were, that you were providing a means to dispense to the willing. That’s how it comes across to me. Now, I have to determine credibility. Maybe I’m wrong. I don’t believe you. (S Tr, 7)

Defendant filed a motion for resentencing, which was heard by the trial court on February 14, 2014, arguing that the trial court improperly relied on a statement in the Presentence Investigation Report that Defendant possessed approximately a pound of marijuana when, in actuality, he only had approximately 23 grams (M Tr, 4).² The People again took no position (M Tr, 3-4). The trial court verified that, regardless of the amount possessed, Defendant had a digital scale with him at the time of his arrest (*Id.*, 8). The trial court ultimately denied the motion for resentencing, stating:

I believe incentives matter. And with regard to section 7411, my decision not to grant it was not based on any quantity stated or any colloquy between the defendant and myself. My decision not to grant it was the recognition that at twenty years of age, this young man had no prior criminal record, that the amount involved – he had no history of trafficking in drugs or narcotics or any other kind of substance abuse, had an education that was well grounded and the potential of a bright future.

Incentives matter, as I say, and I’m saying now that which I had in my mind when I fashioned the sentence was to give to the defendant the opportunity for expungement under

² The People concede that the lab report indicates the marijuana found in the glass jar weighed 21.24 grams while the marijuana found in the plastic bag was 2.37 grams.

a different section of law, namely; the general statute which requires a five-year period of abstinence, except for minor offenses, and the subsequent consideration presuming that he continues in the path that he has chosen.

So I will grant this relief to the petitioner:

An order directing that the probation presentence report be amended to reflect the accurate amount of the drug in the defendant's possession on December 23rd of 2012; and second, that -- and no other relief. The defendant may apply for expungement, provided that he qualifies under the separate statute which relates to crimes committed at a young age and no prior offenses subsequently except for two minor offenses. So I guess in essence, Mr. Alemu has two more opportunities to re-offend that wouldn't disqualify him, provided the statute doesn't change. But in that regard, those paths that he started will be shown to be a permanent path rather than giving him the opportunity to – giving him the opportunity to earn it as a matter of fact as opposed to granting it when his future is still uncertain.

Second thing is with regard to the length of the probation period, I have no objection to early release if the probation department recommends it, but it will have to come from them. They, after all, are charged with his supervision. (M Tr, 12-14.)

Defendant sought leave to appeal in the Court of Appeals, which, as noted *supra*, was granted. The People, in its written response to the granted application, again stated that it was taking no position.

On July 7, 2015, the Court of Appeals vacated the trial court's sentencing and remanded for further proceedings, holding that the trial court's comments about "giving him the opportunity to earn it as a matter of fact [through a motion to set aside] as opposed to granting it when his future is still uncertain" evidenced an abuse of discretion because "[i]n order for a defendant to have the proceedings dismissed without an adjudication of guilt under §7411(1), he or she must 'earn it.' . . . [T]he trial court misapprehended the process for a deferred adjudication under the statute." Slip op at 4-5. Judge Markey dissented, stating "I do not believe a full review of the record supports a finding that the trial court's holding constituted an abuse of discretion – a high hurdle for this court to achieve." Dissent, slip op at 1.

ARGUMENT

- I. The plea agreement only precluded the People from taking a position on whether Defendant should receive treatment under MCL 333.7411 at sentencing. It did not preclude the People from arguing that the Court of Appeals failed to properly apply the law.**

Standard of Review: Contract principles apply by analogy to the consideration of plea agreements, *People v Swirles (After Remand)*, 218 Mich App 133, 135; 553 NW2d 357 (1996), and “[t]he existence and interpretation of a contract are questions of law reviewed de novo,” *Kloian v Domino's Pizza LLC*, 273 Mich App 449; 733 NW2d 766 (2006).

Discussion: The People complied with the terms of the plea agreement by not taking a position on Defendant’s request in the circuit court. That fulfilled the People’s obligations under the contract. While the People submit that a request that the Court of Appeals affirm a valid order entered after compliance with the terms of the plea deal is not a breach of a “no position” plea agreement, and therefore this office could have advocated for the validity of the order in the Court of Appeals, in this case the People are solely asking this Court to review the erroneous application of the abuse of discretion standard by the majority in the Court of Appeals. Defendant did not plead guilty on the understanding that he was entitled to a legally incorrect application of the law by the intermediate appellate court, and therefore the terms of the plea agreement are not violated.

Defendant cites *People v Arriaga*, 199 Mich App 166, 168; 501 NW2d 200 (1993), for the proposition that the prosecution is bound by the terms of a plea agreement and cannot take a position contrary to that agreement in the Court of Appeals. *Arriaga*, however, dealt with a prosecution agreement to take no position on a downward departure, and then, when the downward departure was granted, the prosecution sought a review of the very decision they agreed to not contest. “The prosecution in this case promised to take no position on the proposed sentencing

departure. Although it is entitled to appeal from an unlawful sentence, the sentence imposed here was not unlawful. The trial court had discretion to depart from the statutory mandatory minimum sentence. MCL § 333.7403(3); MSA § 14.15(7403)(3). The prosecutor's appeal from the lawful sentence constitutes a breach of the agreement with defendant.” *Id.* at 169.

The factual differences in this case are that (1) the People did not appeal the trial court’s decision, and, (2) if this Court agrees with the People’s argument about the application of the abuse of discretion standard, the decision of the majority of the Court of Appeals panel was not lawful.

As to the first difference, if the defendant in the *Arriaga* case had not received a downward departure from the trial court and then filed an appeal of the sentence imposed, the prosecutor would not have breached the plea agreement by arguing that the sentencing court properly considered the relevant factors and then decided to impose the sentence it did. Under the terms of the agreement, the prosecution was not allowed to affirmatively advocate for a sentence in the lower court, nor attempt the same result through the back door channel of challenging a downward departure in the Court of Appeals, but the terms of the agreement did not preclude advocacy *for* a lawful order of the trial court in the appellate courts.

Similarly, prosecutors have, on occasion, agreed to take no position on whether a sentence should be concurrent or consecutive when a statute makes such an option discretionary for the trial court, such as Using a Computer to Commit a Crime and the underlying offense. MCL 752.797(4). If the sentencing court then opted to impose a concurrent sentence, the plea agreement would preclude the prosecution from appealing that aspect of the decision. If, however, the trial court decided to impose a consecutive sentence and the defendant appealed, the prosecution could permissibly argue that the consecutive sentence was proper and the trial court did not abuse its discretion by choosing to do so. The plea agreement was fulfilled by the prosecution not taking a

position when the trial court was arriving at its decision. Once a trial court's decision is made without input from the People, the prosecution is permitted to defend the ultimate ruling of the trial court. Thus, the issue in *Arriaga* is not implicated here.

As to the second difference, in this case, the People are challenging the application of the abuse of discretion standard by the majority opinion in the Court of Appeals, not the decision of the circuit court. If the Court of Appeals grossly misapplied the law, as the People argue, there needs to be a mechanism where such an overreach is reviewed. A failure to properly apply the law by the Court of Appeals means the decision was, in fact, unlawful, and even *Arriaga* acknowledged that the People could challenge such a decision 199 Mich App at 169. The failure by the Court of Appeals to provide the deference required to the trial court's decision is an improper usurpation of the trial court's authority, and challenging the faulty reasoning of the Court of Appeals is not the same as advocating for a particular sentence in the trial court.

There is nothing in the plea transcript to indicate that Defendant relied on any alleged promise to not make an argument in the Court of Appeals or this Court, and there is no credible claim that he only pled guilty on the understanding that the People would not seek review of an appellate decision regardless of the appellate court's compliance with the law. The contract did not extend that far, and the People's application for leave to appeal is therefore not barred by the plea agreement.

Defendant also argues that the People cannot pursue this application because it is not an aggrieved party as it has no stake in Defendant's request for 7411 status. If the Court of Appeals makes an error in the application of the law in a criminal case, no other entity is in a position to advocate for the correct interpretation of the law. If this relates to Defendant's waiver argument, that is discussed *infra*. As a general principle, however, the People can defend, e.g., an order that

costs by imposed even though the money is not for the prosecutor's office. See, e.g., *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014), where the Court of Appeals and this Court permitted the prosecuting agency to defend the imposition of costs by the Allegan County Circuit Court, and *People v Nance*, 214 Mich App 257, 260; 542 NW2d 358 (1995), where the Court of Appeals addressed the substantive arguments of the prosecution in an appeal of a motion to reimburse costs paid by a defendant whose conviction was reversed.

II. The initial filing of the People in the Court of Appeals did not waive review of whether the majority panel properly applied the abuse of discretion standard.

Standard of Review: Generally, a party waives an issue for appellate review if the party intentionally relinquishes or abandons a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). The People assume that this is an issue of law for this Court to review de novo (see, e.g., *People v Cain*, 498 Mich 108, 114; 869 NW2d 829 (2015)), although no specific case was able to be located on this point.

Discussion: While the People's initial response to the application for leave to appeal indicated that no position was going to be taken on the appeal, it was not part of the contracted-for agreement between the parties which induced Defendant's guilty plea, as argued *supra*. Additionally, the reasoning adopted by the Court of Appeals was not specifically argued by Defendant in the trial court nor in his brief in the Court of Appeals, and the People cannot knowingly waive making an argument on an unstated and unknown theory.

The document filed by a member of this office in the Court of Appeals stated, "It is our position that we would also violate the plea agreement by taking any position on the defendant's argument in this Court. We are filing this brief solely to advise this Court that in accord with the plea agreement we are taking no position" (People's Brief on Appeal dated June 3, 2014; 2).

While, as evidenced by comments in Argument I, *supra*, the People do not agree with the position that the plea agreement precluded a response in the Court of Appeals, the issue this Court asked the parties to address is whether the language quoted above in the People's response waived the ability to request review in this Court. The People submit the answer is no.

In the Court of Appeals, Defendant had argued it was an abuse of discretion for the trial court to deny him §7411 status because he was "the perfect candidate" (Def's Delayed Application for Leave to Appeal, 9; Def's Brief on Appeal, 3). Defendant did not argue that there was no difference in the incentives for granting relief under §7411 and that of MCL 780.261, allowing convictions to be set aside after a period of time; to the contrary, he argued that the differences between the two statutes highlighted why he should have been given 7411 status rather than having to wait 5 years before petitioning for relief.³ The reasoning adopted by the Court of Appeals, however, ignores the differences between waiting for 5 years to request having a conviction set aside and a maximum 2-year probationary sentence under MCL 333.7411, but instead states that earning relief is a purpose of both statutes and it was therefore a categorical abuse of discretion for the trial court to rely upon the concept of earning relief under one statute without granting it under the other (Slip op, 4-5). Because that legal argument had not been made by Defendant, the People were not on notice that it might need to respond to it. If the Court of Appeals had simply adopted the arguments that Defendant had made, the issue of waiver would be more relevant.⁴ Here,

³ See, e.g., Def's Brief on Appeal, 3: "This Court should reverse the trial judge's refusal to divert the case under MCL 333.7411 because Mr. Alemu presented as the perfect candidate for diversion status and because the trial court's reason – that Mr. Alemu could petition for expunction five years after the sentence was served – fails to consider the damage to Mr. Alemu's academic and career progress during the next five years."

⁴ As the People have hopefully made clear, the issue is not the ultimate result, but the faulty legal reasoning employed by the majority opinion that prompted this appeal.

however, the two signatories to the per curiam opinion went beyond what had been argued and articulated a legal theory that was both novel and wrong. As a result, there is no waiver.

Further, the People submit that there are always situations in which this Court should be able to review a decision. Imagine a hypothetical where the opinion of the Court of Appeals states that it is granting relief to a defendant because the majority disagrees with the religious opinions of the trial court. Such a statement would clearly violate constitutional principles and it would be an unlawful order. If this Court agrees that such a blatantly illegal order could be appealed by the prosecution, even if the prosecution had previously agreed to take no position on the matter in the Court of Appeals, the issue then becomes one of line-drawing. How far afield must the opinion of the Court of Appeals be before it could be brought to this Court's attention? The People's argument here is that the majority opinion, while not such a blatant constitutional violation as assumed in the hypothetical, is still an unlawful order because it supplants the abuse of discretion standard with the personal preferences of the majority, and does so with language that ignores the real differences between deferred proceedings and motions to set aside a conviction. Such a significant deviation from the proper application of a traditional standard of deference should not be immune from review. If the order is, in fact, unlawful, there should be a mechanism for review.

If this Court disagrees and believes that some form of a forfeiture or waiver principle means the People cannot pursue this application for leave to appeal, then this Court should, of course, deny the application and allow the matter to be remanded to the Circuit Court, as the People highlighted in their original application for leave to appeal. While the application was filed in a good faith belief that the issues could and should be presented to this Court, the uncertainty of the issue prompted the People to bring forward the very issue upon which this Court has directed further briefing.

III. The Court of Appeals majority erred in their application of the abuse of discretion standard by substituting its decision for the trial court's rather than providing the necessary degree of deference.

Standard of Review: MCL 333.7411 (1) states that “the court, without entering a judgement of guilt with the consent of the accused, may defer further proceedings and place the individual on probation.” Because the statute affords the trial court discretion regarding whether to defer the proceedings, the Court of Appeals correctly noted that the review should be for an abuse of discretion, although the case cited, *People v Ware*, 239 Mich App 437, 441; 608 NW2d 94 (2000) did not actually state the standard of review. Comparable deferral proceedings, however, have explicitly stated that review is for an abuse of discretion. See *People v Khanani*, 296 Mich App 175, 177-178; 817 NW2d 655 (2012) (assignment under HYTA); *People v Bobek*, 217 Mich App 524, 531; 553 NW2d 18 (1996) (discharge from HYTA reviewed for an abuse of discretion). “A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes.” *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

While the trial court's decision is reviewed for an abuse of discretion, “[t]his Court has historically cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters.” *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999). As such, it is error if the Court of Appeals fails to provide proper deference and instead substitutes its own opinion for that of the trial court. See, e.g., *People v Burns*, 493 Mich 879; 821 NW2d 787 (2012); *Insurance Co of North America v Schuneman*, 373 Mich 394, 397; 129 NW2d 403 (1964). As such, the People submit that the proper standard of review for this Court of the Court of Appeals decision should be de novo, just as a circuit court's decision to deny a motion to quash bindover

under an abuse of discretion standard for the lower court is reviewed de novo by a higher court. See, e.g., *People v Herndon*, 246 Mich App 371, 393; 633 NW2d 376 (2001).

Discussion. The majority opinion of the Court of Appeals improperly substituted its judgment for that of the trial court, and articulated an incorrect legal standard in the process.

One of the things the trial court noted in discussing how “incentives matter” was that the general statutory provision on setting aside a conviction requires a five-year period of abstinence (M Tr, 13); see MCL 780.621(5): “An application [to set aside a conviction] shall only be filed 5 or more years after [the completion of the sentence in various ways].” Because Defendant had pled guilty to a misdemeanor count of Possession of Marijuana, he was only subject to a maximum period of probation for two years. See MCL 771.2(1): “[I]f the defendant is convicted for an offense that is not a felony, the probation period shall not exceed 2 years. . . . [I]f the defendant is convicted of a felony, the probation period shall not exceed 5 years.” The Court of Appeals failed to acknowledge this factor that was articulated by the trial court and noted by Defendant in his argument; it failed to mention this issue at all. Nonetheless, the trial court articulated that it believed a five year period was appropriate to this offense and this offender rather than a sentence under MCL 333.7411, not merely that Defendant needed to demonstrate his suitability for such a disposition in the abstract. While the trial court did not explicitly reference the two-year time limit on probation for a misdemeanor offense, it is clear from the context that the trial court wanted the five year period of behavioral compliance by Defendant, and that was not something it could obtain with §7411 treatment. Because the Court of Appeals failed to acknowledge this aspect of the trial court’s rationale, it failed to afford the trial court the proper deference, and then compounded its error by stating as a matter of law that reserving some cases for motions to set aside rather than

granting relief under a diversionary statute is impermissible.⁵ While the majority clearly believes Defendant was an appropriate candidate for treatment under §7411, that was not the question they were supposed to be answering. Applying the abuse of discretion standard appropriately, the Court of Appeals should not have stepped into the shoes of the trial court and made such the determination in the way that it did, finding an error of law when one did not occur. It therefore erred in its conclusion that the trial court abused its discretion.⁶

Further, as the dissenting judge in the Court of Appeals stated: “The trial judge in this matter is extremely experienced and certainly well familiar with the applicable law. . . . We do not have the ability to perceive the subjective factors that may also affect a judge’s sentencing, such as demeanor, attitude, voice inflections, etc., which is another reason why finding an abuse of discretion in a situation such as this is even more difficult.” Dissent, Slip Op at 1. The majority’s narrow focus on the phrase “incentives matter” failed to accord the proper deference to the trial court’s decision making process.

Defendant repeatedly claims he was “the perfect candidate” for treatment under MCL 333.7411, but obviously the trial court disagreed. There is no indication in the record that the trial court categorically refuses any request for treatment under §7411 or was under the mistaken belief that it could not sentence under the statute (cf. *People v Ware*, 239 Mich App 437; 608 NW2d 94 (2000), where the Court of Appeals properly found an error of law by a trial court which incorrectly

⁵ Slip op at 5: “In denying defendant’s request for this reason [wanting Defendant to earn the relief requested], the trial court misconstrued the deferral process set forth in §7411(1) and *necessarily* abused its discretion. See *People v Waterstone*, 296 Mich App 131, 132; 818 NW2d 432 (2012) (‘A trial court necessarily abuses its discretion when it makes *an error of law.*’)” (emphasis added).

⁶ The majority also remanded the case for an administrative correction of information in the PSI about the quantity of marijuana that was seized. If such correction has not already taken place, the People are not challenging that holding.

held the defendant was ineligible for sentencing under §7411), but that in its discretion it did not think Defendant merited such relief in this case.

Additionally, as referenced *supra* in Argument II, the majority opinion stated:

The trial court's stated reason for denying deferral—making sure that defendant 'earn[ed] it'—is the very purpose of § 7411(1). In order for a defendant to have the proceedings dismissed without an adjudication of guilt under § 7411(1), he or she must 'earn it.' Any violation of probation allows the court to enter an adjudication of guilt. See MCL 333.7411(1). In other words, the defendant is to prove himself or herself. The defendant is not automatically entitled, under § 7411(1), to have the adjudication of guilt dismissed. The defendant, with a still uncertain future, must prove, by way of compliance with an order of probation, that he or she has earned a dismissal without an adjudication of guilt. By denying defendant's request for probation under § 7411(1) for the reason that he had to prove his worth, the trial court misapprehended the process for a deferred adjudication under the statute. The point of requiring a defendant to comply with probation before obtaining a dismissal without an adjudication of guilt is to make the defendant "earn it." Defendant, by requesting the procedure set forth under § 7411(1), was asking for the opportunity to "earn it." In essence, defendant requested the very thing that the trial court cited as its sole reason for denying the request for deferral proceedings under § 7411(1). In denying defendant's request for this reason, the trial court misconstrued the deferral process set forth in § 7411(1) and necessarily abused its discretion. [Slip op, 4-5.]

The majority opinion did not address the argument raised by the defense, that waiting five years for potential relief was too long given Defendant's circumstances, despite it not only being in the Defendant's Brief but also discussed at oral argument.⁷ The majority did not discuss or acknowledge how waiting five years for potential relief might be a principled outcome in at least some cases, and did not discuss whether this case fell within that framework or not. One judge's comments at oral argument certainly indicate a policy preference that a person typically should not have to wait five years (Oral Argument Transcript, 6), but the majority opinion did not discuss the time frame at all. The People submit that reasonable minds could differ on whether to grant any one person relief under these facts, particularly where the trial court had the opportunity to

⁷ See Oral Argument Transcript, pp 5-6 (prepared by a certified reporter at the request of the People and attached to this Supplemental Briefing).

observe Defendant in person; if this statement is correct, the ultimate decision could not be an abuse of discretion. The majority opinion, however, noted that relief is earned under 7411 just as it is under the set-aside statute, and therefore there can be *no basis* to rely upon one rather than the other. If found it was an *error of law* to discuss incentives and mentioning that a defendant should earn the requested relief without granting sentencing under §7411. While the opinion is unpublished, its tortured reasoning will likely be cited as at least persuasive authority in other contexts. No lower court should have to address the legal errors made by the majority, which is why the People seek this Court's intervention.

If this Honorable Court agrees with the People, a peremptory reversal would be appropriate. If this Honorable Court believes that additional clarification of what the abuse of discretion standard means in these cases is required for the benefit of the bench and bar, the People submit that Leave to Appeal should be granted.

RELIEF REQUESTED

THEREFORE, for the reasons stated herein, the People respectfully pray that the decision of the Court of Appeals be peremptorily reversed and the judgment and sentence entered in this cause by the Circuit Court for the County of Kent be AFFIRMED.

Respectfully submitted,

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

Dated: January 6, 2016

By: /s/ James K. Benison
James K. Benison
Chief Appellate Attorney

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REGARDING THE MATTER OF
THE PEOPLE OF THE STATE OF MICHIGAN

V

AMDEBIRHAN ABDERE ALEMU

Court of Appeals File No: 320560
Kent County Circuit Court No: 13-00380-FH

PRESENT:

Hon. Jane M. Beckering, Judge, Michigan Court of Appeals

Hon. Jane E. Markey, Judge, Michigan Court of Appeals

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TKO REPORTING AND TRANSCRIPTION

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2 information this transcriber received from the ordering party)

3 (Audio begins abruptly)

4 JUDGE BECKERING: - - Abdere Alemu. And please correct my
5 mispronunciation. How is it pronounced?

6 MS. YANTUS: Good morning, Your Honor. Anne Yantus on behalf of Mr.
7 Alemu. Alemu. I know he goes by Amdy, so I would have said it Amdebirhan,
8 but I think that's what you said.

9 So what I'm hoping that you will take away from my argument today is that
10 - - that expungement is no substitute for diversion. This is a case where the trial
11 judge denied the request for diversion under 333.7411. And that was done at the
12 time of sentencing when the judge thought that this defendant, who had pled guilty
13 to possession of marijuana, the judge said he had a pound of marijuana. And it
14 appeared from the transcript he didn't really believe much of what the defendant
15 said at the time of sentencing.

16 He denied the request for .7411. We went back in front of him with a
17 motion to correct the sentence, pointing out that it was less than an ounce of
18 marijuana. And he, again, denied the request for .7411, saying that he wanted the
19 defendant to have an incentive.

20 JUDGE BECKERING: Isn't that the very point of .7411 is to give
21 someone incentive to comply with terms of probation at which point the matter
22 would be dismissed?

23 MS. YANTUS: Yes. And that was the point I wanted to make, is that for
24 .7411 and other diversion statutes like Holmes Youthful Trainee Act, the statutes

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1 allow the judge to place the offender on probation. So you have that incentive.
2 And actually, it's required for .7411 that the judge put the defendant on probation.

3 This was a case where the prosecutor had no opposition to .7411, probation
4 recommended it, he was - - the defendant was 20 years old, no prior record.

5 JUDGE SHAPIRO: What do you want us to do?

6 MS. YANTUS: Find an abuse of discretion.

7 JUDGE SHAPIRO: And do what? Remand it for resentencing?

8 MS. YANTUS: Remand - - I noticed that - - I was looking at some of the
9 cases where they found an abuse of discretion on Holmes Youthful Trainee Act.

10 JUDGE SHAPIRO: Oh.

11 MS. YANTUS: I couldn't find a case where they abused discretion, not
12 granting it, in terms of a published case. There's an unpublished case. But there
13 was an abuse of discretion in granting it or discharging the defendant early. And I
14 think the - - the remedy seems to be to send it back.

15 I recall one of the cases and it may be the one where - - the unpublished case
16 where they abused the discretion in denying it. The remedy was sending it back
17 for reconsideration, but the court had expressed its opinion that - -

18 JUDGE MARKEY: What is the - -

19 MS. YANTUS: - - would not be any grounds for denying the request. I
20 don't know - - I mean, I'd like to ask this Court to simply place him on .7411
21 status, but I don't know if I can go that far. I know I'm being - -

22 JUDGE SHAPIRO: Well, you can ask, but we - - I don't think we can go
23 that far.

24 MS. YANTUS: Under the miscellaneous relief provisions under the Court
25 Rules, I know you can grant relief that's - -

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1 JUDGE BECKERING: That's deemed just.

2 MS. YANTUS: Yes. So whether you can do that or not, I don't know. But
3 I would point out that Mr. Alemu is still doing well. It's been - - the judge
4 discharged him from probation after nine months. It's been a year and three
5 months since the Judge did that. There have been no problems. You know, the
6 judge can give him probation under .7411. The statute doesn't say how long a
7 probation it would be. But certainly that whole probation really undercuts the
8 judge's reasoning, the fact that you can give probation. It's required for .7411.

9 JUDGE BECKERING: How would you articulate the abuse of discretion?

10 MS. YANTUS: And I - - the case that was cited in our brief talks about
11 when the court chooses an outcome that falls outside of the range of reasonable
12 and principled outcome, and - - you know - - I don't - - it - - and the judge's
13 decision doesn't appear reasonable here, number one. I mean, there was nobody
14 against it - - against the .7411 status except the judge, and this was possession of
15 marijuana, no prior record.

16 In terms of a principled outcome, the explanation the judge gave doesn't
17 really hold water here, because the idea that he wants him to wait five years, and
18 the whole point of diversion is that you don't have this on your record from the
19 point that you plead guilty. And it really protects the interest of the defendant so
20 that - - you know - - you're protecting their employment prospects, education,
21 reputation, what have you. And especially for somebody who is 20 years old.

22 Mr. Alemu was eligible not only for .7411 status, but also for Holmes
23 Youthful Trainee status. So what - - what the judge has done, and I - - this is my
24 argument it's not a principled outcome, is throw that one away and give you the
25 benefit of expungement. But that's really - - what that's really saying is - - is I

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1 disagree with these diversion statutes that allow me to put you on probation and
2 protect you from this point forward.

3 JUDGE MARKEY: Or he did not believe him. He just didn't believe his
4 explanations and he didn't think he was someone he wanted to extend that
5 discretionary provision to.

6 MS. YANTUS: Well, and I looked at the transcript several times. I mean,
7 it's pretty - - I think it's pretty clear from the plea transcript, he didn't - - or the
8 sentence transcript that he didn't believe him, and I think that - - that it's because it
9 was a pound. And a pound of marijuana. And it makes sense that it's hard to
10 believe that you're coming home for the holidays to share a pound of marijuana.

11 JUDGE MARKEY: Well, it wasn't a - - well, no, but you corrected that.
12 You went back and had another hearing and you - - you clarified that it was, in
13 fact, just an ounce.

14 MS. YANTUS: Right. And then the judge says this is not based on - - I'm
15 denying this not based on - - and I forget his exact wording, but - -

16 JUDGE MARKEY: I mean, the colloquy about - - look for - -

17 MS. YANTUS: Yeah, he - - he says, and it wasn't because of the scales - -

18 JUDGE MARKEY: Or the baggies.

19 MS. YANTUS: Right. And - - and I think he says it wasn't even a - - a
20 colloquy. I think he uses that term. He just says, I'm denying it because I want
21 you to have an incentive. And that essentially, he wanted him to wait five years.
22 And let me see if I have this. So it was pretty clear that he wasn't denying it
23 because - - at least this is what he said on the record. He wasn't denying it because
24 he didn't believe the defendant or because he had this scale. He was just saying
25 that he wants him to wait five years.

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1 And really, if you think about it, five years - - why five years? I mean, that
2 doesn't make sense. Five years for somebody who's 20 years old, no prior record,
3 and for this type of crime. Five years, I think, is an abuse of discretion.

4 JUDGE SHAPIRO: Well, but you see, - - but the incentive is because he's
5 - - during the - -the portion of his life that he's going to be attending university and
6 possibly graduate school, he's not going to be able to pursue any of those things
7 because he has this conviction on his record and all the collateral consequences.

8 So - - this is a personal opinion, and I certainly wouldn't put it - - it's not a
9 matter of law. If you want to help someone get over a drug problem, a minor drug
10 problem, - - you know - - kind of putting your life on hold for five years may not
11 be the best plan. But that's a - - it's not a legal issue.

12 MS. YANTUS: Yeah, well, - - and I - - I can understand wanting to make
13 sure that he's not going to have a problem. And so while he's in undergrad where
14 maybe you're exposed to a lot of people who are engaging in drugs and - - and
15 alcohol abuse, sure. You know, that's - - a couple years on probation, you can
16 monitor that.

17 But there comes a point - -

18 JUDGE SHAPIRO: Right, and you can always take it away.

19 MS. YANTUS: Right. And if he's got a problem, you can take it away.
20 But there comes a point where, for somebody who's young - - and you're talking
21 about the career and their employment prospects - - it really undercuts all of that to
22 say "expungement, not diversion." So that's really, I think, what I started with and
23 what I wanted to end with, which is expungement is really not a substitute for
24 diversion.

25 JUDGE SHAPIRO: Okay.

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1 JUDGE MARKEY: Thank you.

2 MS. YANTUS: Thank you.

3 JUDGE BECKERING: Thank you. Interesting case. The next matter is
4 32033 - - excuse me - - 320033, People of Michigan versus Michael - -
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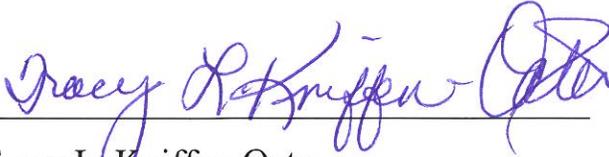
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Dated: January 6, 2016



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