STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Hon. Pat M. Donofrio, P.J. and Cynthia D. Stephens and Ronayne Krause, JJ

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No. 145646

Court of Appeals No. 301546

Lower Court No. 09-14365-FC

-v-

JEFFERY ALAN DOUGLAS,

Defendant-Appellee.

_____/

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_____/

AMICUS CURIAE BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN IN SUPPORT OF DEFENDANT-APPELLEE

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Criminal Defense Attorneys of Michigan (CDAM) is an organization consisting of hundreds of criminal defense attorneys licensed to practice in this state. CDAM was organized for the purposes of promoting expertise in criminal and constitutional law; providing training for criminal defense attorneys to improve the quality of representation; educating the bench, bar, and public of the need for quality and integrity in defense services; promoting enlightened thought concerning alternatives to and improvements in the criminal justice system; and guarding against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. *CDAM Constitution and By-laws*, Art 1, sec 2.

CDAM was invited to file an amicus brief in this matter.

I. AN ATTORNEY WHO IS IGNORANT OF THE LAW IS INCAPABLE OF PROPERLY ADVISING THE CLIENT AND RENDERS PER SE CONSTITUTIONALLY DEFICIENT PERFORMANCE IN THE CONTEXT OF PLEA NEGOTIATIONS. IF THE RESULTING CONVICTION OR SENTENCE IS MORE SEVERE THAN WHAT WOULD HAVE RESULTED FROM THE PLEA THEN THE DEFENDANT IS ENTITLED, UNDER *LAFLER V COOPER*, TO HAVE THE PROSECUTION REOFFER THE PLEA.

The central fact[1] of defense counsel's ignorance of the mandatory 25-year minimum sentence that would be imposed upon a conviction for first-degree criminal sexual conduct is undisputed in this case. It is also undisputed that the prosecution offered Mr. Douglas a plea that would result in dismissal of the two charged offenses in exchange for his plea to fourth-degree criminal sexual conduct. There is nothing on the record to indicate that the court would have not accepted the plea offer. There is record testimony that Mr. Douglas, had he been properly informed of the 25 year ***mandatory*** minimum sentence, would have accepted the offer. As such both the deficient performance and prejudice prongs are satisfied and defense counsel's representation was constitutionally deficient. *See generally, Lafler v Cooper,* 566 US ___132 S Ct 1376. 182 L Ed 2d 398 (2012)

The above construct should be the end of the legal analysis on the issue of ineffective assistance of counsel. What a defendant believes about his or her innocence is irrelevant in the context of the decision whether to accept a plea offer. Further, because criminal defendants often are convicted of crimes they did not commit[2] and plead to crimes they believe they did not commit, the issue of innocence or one's belief in innocence is irrelevant to the legal analysis of whether a criminal defendant would have accepted a plea offer.

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[1] Amicus adopt the Statement of Facts set forth in the Appellee's Brief.
[2] There are currently 1089 verified exonerations throughout the country. National Registry of Exonerations found at http://www.law.umich.edu/special/exoneration/Pages/about.aspx

Before accepting a defendant's guilty plea, Michigan Court Rules require the trial court to "establish support for a finding that the defendant is guilty of . . . the offense to which the defendant is pleading." MCR 6.302(D)(1). However, this does not mean that a defendant cannot maintain his innocence. Instead, establishing a "factual basis" simply means that "an inculpatory inference can reasonably be drawn by a jury from the facts admitted by the defendant." *In re Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975). A defendant is still free to assert that "an exculpatory inference [sh]ould . . . be drawn." *See id.*

And the United States Supreme Court has conclusively held that it is not a constitutional violation to accept a guilty plea despite defendant's professed belief in his innocence. *See North Carolina v Alford,* 400 US 25, 37-38 91 S Ct 160 27 L Ed 2d 162 (1970). In fact, in *Alford*, the Supreme Court acknowledged it is sometimes reasonable for a defendant who maintains his innocence to accept a plea bargain to a lesser charge: "Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term." *Id.* at 37.

It is well documented that innocent defendants plead guilty for fear of losing at trial and the risk of a higher sentence. Hessick and Saujani, *Plea Bargaining and Convicting the Innocent; The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 B Y U J Pub Law 189 (2002). See also, Lester, *System Failure: The Case For Supplanting Negotiation With Mediation in Plea Bargaining*, 20 Ohio St. J. on Disp Resol 563 (2005). The specter of an innocent defendant pleading guilty is even more likely where the prosecutor offers especially enticing plea concessions (e.g., a sentence of time served). Hessick and Saujani, *supra* at 199. In fact, innocent

defendants are arguably more risk adverse than the criminal who was willing to risk breaking the law in the first place. *Id.* at 202; *Lester*, *supra* at 569.

In the case at hand, Mr. Douglas was not informed of the mandatory twenty-five-year minimum prison sentence he was facing. Mr. Douglas was also not properly informed of the impact of sex-offender registration on his relationship with his children. It is not unreasonable to conclude that, like the defendant in *Alford*, Mr. Douglas, if properly informed, would have concluded it was a better course to accept the plea bargain than to risk a conviction and the severe mandatory prison sentence that came with it. This would have been objectively reasonable risk management by Mr. Douglas, even if he adamantly believed he was innocent.

Mr. Douglas's denial during his trial testimony of "inappropriate sexual activity" with his young daughter does not foreclose his ability to maintain his innocence while admitting to facts that might lead a jury to conclude that he was guilty. The plea offer was to fourth-degree criminal sexual conduct. Mr. Douglas, in his interview with the police and at trial, did admit that his daughter touched his penis on one occasion. This admission supports a factual plea to fourth-degree criminal sexual conduct. MCL 750.520e

II. ALLOWING A CRIMINAL DEFENDANT WHO HAS REJECTED A PLEA BASED ON COUNSEL'S CONSTITUTIONALLY DEFICIENT PERFORMANCE TO ACCEPT THE OFFERED PLEA MOST APPROPRIATELY REMEDIES THE CONSTITUTIONAL VIOLATION SUFFERED.

In cases involving ineffective assistance of counsel during the plea negotiation stage, the appropriate remedy is for the prosecutor to reoffer the original plea bargain. *See Lafler v Cooper,* 566 US ___ 132 S Ct 1376. 182 L Ed 2d 398 (2012). In *Lafler*, the defendant was offered a minimum sentence of somewhere between 51 to 85 months in prison in exchange for pleading guilty before trial to two of the four counts he was charged with. *See id.* at 1383. After some initial indication of a willingness to accept the plea deal, the defendant twice refused that offer (and a later offer at the start of trial that involved more prison time) after his counsel advised him that the prosecution could not prove the intent element of attempted murder because the victim's injuries were below her waist. *See id.*

Following a constitutionally adequate trial, Mr. Cooper was convicted of all four counts and sentenced to 185 to 360 months in prison. *Id.* After determining that Mr. Cooper had suffered a Sixth Amendment violation during plea negotiations, the Supreme Court held that the proper remedy was for the State to reoffer the original plea agreement. *See id.* at 1391.

The Supreme Court reasoned that remedies for Sixth Amendment violations must strive to "neutralize the taint" of the Constitutional injury. *See id.* at 1388 (quoting *United States v Morrison,* 449 US 361, 365 (1981)). The Supreme Court further reasoned that Sixth Amendment violations resulting only in an increased sentence could be remedied by allowing the defendant to show reasonable probability that, but for the ineffective counsel, the plea bargain would have been accepted. *See id.* at 1389. However, in situations where the Sixth Amendment violation resulted in harm beyond an increased sentence (such as being convicted of a more

serious charge), the Supreme Court reasoned that the appropriate remedy was to simply require the State to reoffer the original plea bargain. *See id.* In either case, the Supreme Court noted that the trial court retained the ultimate duty of ensuring that the remedy appropriately addressed the violation, in light of all the known circumstances and state law. *See id.*

In addition to the guidance provided in *Lafler*, the trial court must also consider general principles regarding Sixth Amendment remedies. Perhaps most importantly, "[t]he Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." *Kimmelman v Morrison,* 477 US 365, 379 (1986). This prohibits shifting the burden to the defendant, even if the state has a competing interest. *See, e.g., United States v Blaylock,* 20 F3d 1458, 1469 (CA 9, 1994).

Lafler and *Kimmelman* control this issue. During plea negotiations, Mr. Douglas suffered an egregious Sixth Amendment violation both when his attorney misinformed him regarding a 25-year mandatory minimum sentence and when he misinformed him of the impact of sex offender registration. Since Mr. Douglas suffered a harm worse than additional prison time (i.e., conviction of a more severe crime than the plea offer), per *Lafler*, the appropriate remedy is for the State to reoffer the plea deal and allow Mr. Douglas to accept or reject it after the advisement by effective counsel. Further, any modification or rejection of Mr. Douglas's acceptance of the reoffer by the trial court would make the remedy prescribed by *Lafler* illusory, and it would violate *Kimmelman* by shifting the burden of Mr. Douglas's constitutional violation from the state to Mr. Douglas. Exercise of discretion to modify or reject the original plea offer would be especially inappropriate in a situation such as the present matter, where the worst fact adduced at trial is that Mr. Douglas proclaimed his innocence. This is not a situation where subsequent behavior of the defendant calls into doubt the reasonableness of the plea offer in the first place.

III. MRE 803A REQUIRES THAT A TRIAL COURT MAKE A SPECIFIC RECORD OF THE REASONS FOR A DELAYED DISCLOSURE BEFORE THE COURT RULE THAT THE FAILURE TO IMMEDIATELY REPORT ALLEGATIONS OF SEXUAL ABUSE IS "EXCUSABLE AS HAVING BEEN CAUSED BY FEAR OR OTHER EQUALLY EFFECTIVE CIRCUMSTANCE" AND SUCH A RECORD MUST BE ANALYZED IN LIGHT OF MODERN SCIENTIFIC LITERATURE WHICH REFUTES PREVIOUSLY HELD BELIEFS REGARDING "DELAYED DISCLOSURE".

The prosecution in this matter contends that the corroborative statements of the complainant should be admitted under the "tender years" exception to the hearsay rule and contends that the delay in disclosing the allegations was excusable because (1) the complainant was extremely young, (2) the complainant lived with the defendant and might not have had an opportunity to report the abuse sooner, and (3) the complainant may not have understood nor appreciated the nature of the acts as abuse.[3]

Notwithstanding that there is no evidentiary record to support the above findings - with the exception of the factual age of the child - the prosecution asks this Court to expand the MRE 803A exception. The prosecution encourages this Court to redefine "equally effective circumstances" to include the admission of a corroborative statement where the prosecution can illustrate "the extreme youth of a victim, the closeness of the relationship between the victim and abuser, the proximity of the abuser to the living arrangements establish of the victim, fear of the abuser, fear of being disbelieved, fear of causing emotional upset to other members of the household, fear of breaking up the family, guilt or false sense of responsibility for the abuse, or absence of a sense of safety and security. [*People v Peterson,* 450 Mich 349 (1995)]."

[3]These two latter rationales were advanced by the dissent in the Court of Appeals below and appear to have been adopted by the prosecution.

(Appellant's Brief on Appeal at 21). Yet, the prosecution has overlooked the fact that the "research" relied upon by the *Peterson* Court has been largely refuted in subsequent scientific literature. Thus, if this Court wishes to consider the appropriateness of such an expansion, it must do so with a thorough review of the current literature in the area of delayed disclosure. It follows that a lower court should not admit any alleged corroborative statements involving delayed disclosure without a record supporting such admission.

The *Peterson* holding, and the impact of subsequent research cannot be understood without revisiting the case in which the Court approved the use of expert testimony in child sexual assault cases. *See People v Beckley,* 434 Mich 691 (1990). In *Beckley*, this Court embarked on an exhaustive review of the development of the study of child sexual abuse, specifically noting that "[t]he study of child sexual abuse is an emerging, if not well-defined, specialized field of human behavior." *Id.* at 712. The Court ultimately held that expert testimony was admissible:

> On the basis of the origins, the purpose, and the limitations of the so-called child sexual abuse syndrome, we are unwilling to have such evidence introduced as a scientific tool, standing on its own merits as a doctrine or bench mark for determining causality in child sexual abuse cases. However, we think, as do so many jurisdictions who have grappled with the phenomenon, that behavior attributed to the syndrome has a place in expert evidence jurisprudence in child sexual abuse cases. There has developed a body of knowledge and experience about the symptomatology of child abuse victimization. We therefore conclude and would hold that persons otherwise properly qualified as experts in dealing with sexually abused children should be permitted to rely on their own experience and their knowledge of the experience of others to rebut an inference that specific behavioral patterns attributed to the victim are not uncharacteristic of the class of child sexual abuse victims. Such witnesses should be permitted to testify regarding characteristics of sexually abused children so long as it is without reference to a fixed set of behaviors constituting a "syndrome". It should, therefore, be the knowledge of the expert that carries the day, not the syndrome doctrine. Expert testimony should be admissible only to the extent that it is directed towards providing an explanation of a specific behavior attributable to the complainant. *Id.* at 733.

Clearly, the *Beckley* Court recognized that the study of child sexual abuse was a new field of expertise. And, five years later, the Court revisited its opinion, in *People v Peterson, supra,* and sought to determine the proper scope of expert testimony in child sexual abuse cases and to define how a trial court must limit such testimony. The Court held:

> (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. *Id.* at 352-353.

The *Peterson* Court relied upon an article published by Dr. Roland Summit entitled *The Child Sexual Abuse Accommodation Syndrome,* 7 Child Abuse & Neglect 177 (1983) (syndrome referenced as CSAAS). That article described common characteristics observed in child victims of sexual abuse. The *Peterson* Court ruled that evidence of CSAAS characteristics could be admissible:

> Qualified experts on child sexual abuse may, therefore, use evidence of CSAAS characteristics of sexually abused children *for the sole purpose* of explaining a victim's specific behavior which might be incorrectly construed as inconsistent with an abuse victim *or* to rebut an attack on the victim's credibility. For example, if the facts of a particular case show that the victim delayed reporting the abuse, recanted the allegations, kept the abuse secretive, or was accommodating to the abuse, then testimony about that particular characteristic of CSAAS would be admissible to dispel any myths the jury may hold concerning that behavior. [Emphasis added]. *Id.* at 372.

The problem with this conclusion is that Summit's definition of CSAAS was based on anecdotal experience rather than scientific research and study. Summit subsequently stressed the lack of underlying data for CSAAS, and further stressed that it was a compilation of observed behaviors, in some children, for the purpose of therapy. Summit, R.C., *Abuse of the Child Sexual Abuse Accommodation Syndrome*, Vol. 1, Journal of Child Sexual Abuse (1992).

Thus, while the reasoning and rationale which led to the *Beckley* and *Peterson* holdings approving the use of expert testimony remains valid, those holdings require that the expert testimony be current and that unsupported conclusions, such as those reached by Summit, not be relied upon in determining admissibility.

The study of child sexual abuse is no different than other areas of scientific research. Just as the understandings of DNA evidence and arson investigation have changed over time, so too have the concepts associated with defining the characteristics of child sexual abuse. No holding of this Court should be read or intended to confine future litigants to outdated literature. The reality is that in 2013, much of the information previously relied upon to explain delayed disclosure is scientifically inaccurate or, at the very least, is unsupported and unsupportable.

In 1983, Roland Summit published his description of how sexually abused children disclosed abuse. He called his model the "child sexual abuse accommodation syndrome" (CSAAS) and provided an outline of why child victims of intrafamilial abuse might be reluctant to disclose abuse. Summit opined that when children revealed abuse they did so over a period of time - a process that involved denial, recantation and ultimately reinstatement of the abuse allegations. Bruck, M., London, K., Ceci, S., Shuman, D., *Disclosure of Child Sexual Abuse: What Does the Research Tel Us About the Ways That Children Tell?* Psychology, Public Policy, and Law 2003, Vol 11, No. 1, 194, 195. Investigators adopted the idea that sexually abused children denied their abuse. Summit was endorsed by many clinicians even in light of his later attempts to qualify his statements.

In 1992, Summit specifically wrote that he never intended to imply that CSAAS was present in all abused children nor that it represented a diagnostic of abuse. Summit, R.C., *Abuse of the Child Sexual Abuse Accommodation Syndrome*, Vol. 1, Journal of Child Sexual Abuse,

(1992). He cautioned that CSAAS was intended as a clinical opinion only and not a scientific or diagnostic gauge: "It should be understood without apology that the CSAAS is a clinical opinion, not a scientific instrument." *Id.* Nonetheless, many professionals adopted, and continue to use, CSAAS as a template by which to diagnose sexual abuse.[4] Many latched onto the idea that sexually abused children denied abuse or even that such denials might be diagnostic of abuse. Kulkofsky, S., London, K., *Reliability and Suggestibility of Children's Statements From Science to Practice,* Elissa Benedek, Peter Ash, and Charles L. Scott, Principles and Practice of Child and Adolescent Forensic Mental Health 217, 222 (Am. Psychiatric Pub 2009).

Summit's conclusions were not scrutinized by the scientific community for some time. However, despite its initial popularity, studies now illustrate that the view simply lacks scientific validity. Empirical evidence does not support the disclosure patterns that Summit suggested.

Summit's original report was based upon the disclosure patterns of the victims of intrafamilial abuse and concluded that such children were less likely to report abuse than those abused by non-family predators. Subsequent studies have failed to identify such an association. Bruck, M., London, K., Ceci, S., Shuman, D., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?* Psychology, Public Policy, and Law 2003, Vol 11, No. 1, 194, 201 (see studies cited therein). Similarly, a complainant's age at the time of the abuse has not been consistently associated with a failure to disclose. The existing data does not support the conclusion that disclosure is related to the amount of fear or violence associated with the abuse or with the abuser. Nor is there support for the assertions that certain types of

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[4]Probably the most noteworthy example of this practice was illustrated in *State v Michaels,* 136 NJ 299 (1994), wherein Margaret Kelly Michaels was convicted of 115 counts of child sexual abuse in New Jersey based, in part, on the expert testimony that the children in the case exhibited behavior consistent with CSAAS. After five years in prison, Ms. Michaels' convictions were overturned.

abuse are more or less likely to be reported. Rather, studies suggest that "commonly held assumptions, such as fewer disclosures among more severe cases of CAS, or in cases of intrafamilial abuse, lack empirical support." Bruck, M., London, K., Ceci, S., Shuman, D., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?* Psychology, Public Policy, and Law 2003, Vol 11, No. 1, 194, 202-203. Researchers have found that "even when adults in these studies provided CSAAS-consistent explanations of delay or of non-disclosure of abuse (e.g., fear, shame, embarrassment, guilt, fear of not being believed), when independently tested, these factors tend not to significantly predict who discloses and who delays." London, K., Bruck, M., Wright, D. B., and Ceci, S. J., *Review of the Contemporary Literature on How Children Report Sexual Abuse to Others: Findings, Methodological Issues, and Implications for Forensic Interviewing,* Memory, 16(1), 29, 42 (2008).

Thus, there is simply no support for the contention that MRE 803A should be expanded based upon the myriad of reasons offered by the prosecution (extreme youth, relationship to the defendant, living arrangements). The data does not support the conclusion that these reasons will guarantee the trustworthiness of the hearsay. Further, none of the speculative reasons cited by the prosecution has been established by the evidence in the instant matter.

Exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy. *People v Meeboer (After Remand),* 439 Mich. 310, 322 (1992). Yet, the prosecutor advances a rule that any reason - with or without an established scientific relationship - could be the reason for a delay in disclosure and thus support admission of a later statement. The facts of this case illustrate that the prosecution's position would entirely consume the rule rather than insure the admission of only reliable evidence.

Any finding as to the basis for a delayed disclosure should be handled on a case by case basis. A trial court should determine whether the complainant's cognitive, developmental or linguistic condition at the time of the alleged events precluded disclosure. In order to support admission of the statement, the court must find that the reasons for the delay in disclosure causally relate to known data and research as to the reasons that children do not disclose or delay in disclosing abuse. In this way, the trial courts can best insure the admission of reliable and trustworthy evidence. In this case the record does not support any legal or scientific basis to permit admission of the complainant's statements. The statements were made a year after the alleged events and after intervening exposure to interviews, questioning, discussion and therapy. Under these facts, it is not possible to know what was encoded by a 3 ½ year old at the time of the alleged acts and not possible to insure trustworthiness.

CONCLUSION

This Court should affirm the Court of Appeals decision granting Mr. Douglas relief in the form of reoffering the plea and/or a new trial.

Respectfully submitted,

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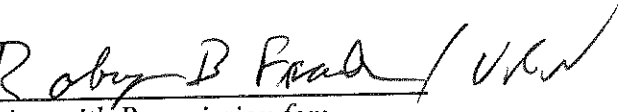
BY: 

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