STATE OF MICHIGAN
IN THE SUPREME COURT

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

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

Docket No. 145646

VS.

JEFFERY ALAN DOUGLAS,
Defendant-Appellee.

Reply Brief - Appellant

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

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

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ARGUMENT

I.

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

Defendant did not reject the offer to plead guilty to 4th degree CSC because of counsel's failure to advise him of the mandatory minimum. Defendant rejected all plea offers because he always maintained his innocence. This was the finding of the trial court following the *Ginther* hearing. The Michigan Court of Appeals ignored this finding . Other than quoting the trial court's finding, defendant also ignored it. Both defendant and the Court of Appeals failed to take into consideration the trial court's superior position to evaluate credibility and determine pertinent facts. Defendant was not prejudiced by counsel's advice.

Defendant has the burden of establishing the outcome of the plea process would have been different if he had been informed of the mandatory minimum. *Lafler v Cooper*, 566 US ___; 132 SCt 1376; 182 LEd 2d 398 (2012); *Strickland v Washington*, 466 US 668; 104 SCt 2052; 80 LEd 2d 674(1984). Defendant failed to carry this burden and the trial court found that defendant's post-conviction claim that he would have pled guilty to a lesser offense was not believable. This finding is entitled to deference. *People v Grant*, 470 Mich 477, fn 5 at 485; 684 NW2d 686 (2004).

Contrary to defendant's assertion in his Brief (p. 17), trial counsel did not advise defendant to reject the 4th degree CSC guilty plea offer. Counsel advised defendant it was defendant's choice to make and that he would have to deal with the consequences of admitting what he did. (93a; 167b) Moreover, counsel accurately advised defendant that even if he pled guilty to a lesser CSC offense, he would still be required to register as a sex offender. (161b) Counsel complied with *People v Fonville*, 291 Mich App 363; 804 NW2d 878 (2011). Likewise, he accurately advised defendant of the practical realities of pleading guilty to sexually

molesting his daughter and the potential negative impact that admission could have with all of his children. MCL 712a.19b.[1] The fact that this and the other cited sections of the Probate Code have been amended in 2012 is of no consequence. The statutory factors for parental termination can be applied at any time as the Probate Code is not a criminal statute and carries no Ex Post Facto connotations.[2] Simply being on the sex offender's registry would likely affect his relationship with his children. MCL 712A.13a; MCL 712A.18f; MCL 712A.19a. The negative effect upon defendant would have been even greater since he would have admitted sexually abusing his own child, a sibling of his other children. *Id*; MCL 712A.19b. Trial counsel would have been remiss if he had not advised his client of the potential collateral consequences of being a convicted child molester.

Counsel advised defendant he was charged with an offense carrying a maximum penalty of life. (102a) He was not advised the offense with which he had been charged required a mandatory minimum sentence of 25 years. Defendant was informed that if convicted of CSC, 1st, he could be looking at 20 years in prison. He rejected the plea offer. (17a-18a) Defendant testified at his *Ginther* hearing that he would not have pled guilty to any offense that required him to register as a sex offender. (105a) He testified that regardless of any minimum sentence, or a sentence of twenty years in prison, or just jail time, he would not have accepted any guilty plea because he was innocent. (106a)[3] Finally, he testified he didn't commit the crime so any

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[1]This advice was also based on counsel's 35 years of actual experience with DHS in similar cases. He was not advising his client the SORA required separation/termination. He was advising of the practical realities of being a convicted child molester. *(Ginther* hearing, pp. 28-29)

[2]Defendant mistakenly claims the amended Probate Code sections cited in Appellant's Brief, p. 9, are part of the Sex Offender's Registration Act. They obviously are not. Moreover, the requirements and restrictions of the SORA can be applied retroactively and are not Ex Post Facto. *People v Golba*, 273 Mich App 603; 729 NW2d 916 (2007), lv den 485 Mich 933 (2009).

[3]Defendant conflates the trial court's requirements under MCR 6.302(B)(2) to insure a guilty plea is understanding with the requirements of counsel when advising a client about a plea offer. A trial court must advise a defendant of the consequences of entering a guilty plea. MCR 6.302(B)(2); *People v Brown*, 492 Mich 684; 822 NW2d 208 (2012). But this is not a guilty plea

minimum sentence "didn't matter" to him. (106a) Evaluating this testimony, balancing the witnesses's credibility, the trial court did not err by finding that his post-conviction claim he would have accepted the guilty plea offer if he had been told about the minimum was not credible. This finding was not a determination that a defendant who maintains his innocence cannot also accept a favorable plea bargain.[4] The trial court did not say or infer such a thing. The finding was the result of defendant's constant adherence to his protestations of innocence[5] throughout the proceedings up to and including the post-conviction *Ginther* hearing, together with his other statements admitting he would not have accepted any plea offer. These protestations and admissions outweighed and discredited his belated claim he would have pled guilty to 4th degree CSC if he had but known of the minimum. The outcome of the plea process would not have been different and the trial court did not abuse its discretion when making this finding. *Lafler,* at 11-13. Therefore, counsel's advice was not constitutionally deficient. *Strickland.* The Michigan Court of Appeals clearly erred by substituting its opinion in place of the trial court's without giving proper consideration to the trial court's findings and its superior position to evaluate credibility and determine the pertinent facts.

II.

THE REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD NOT INCLUDE RE-OFFERING A PLEA BARGAIN TO A LESSER CHARGE AFTER DEFENDANT HAS TESTIFIED AT TRIAL THAT HE DID NOT COMMIT AN OFFENSE.

Defendant concedes that *Lafler v Cooper* permits a trial court to exercise its discretion whether to vacate defendant's convictions and sentences or to reject the plea offer altogether. (Appellee's Brief, pp. 18, 26) Defendant further concedes that when exercising its discretion the

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case. Here, defendant has the burden to establish the plea decision would have been different if he had been informed of the minimum. *Lafler*. Defendant has failed to carry his burden.

[4]See Argument II, *infra.*

[5]Protestations of innocence throughout trial are properly a factor in a trial court's analysis. *Smith v United States*, 348 F3d 545, 552 (6th Cir, 2003).

trial court may consider both the defendant's acceptance of responsibility and information discovered after the plea offer was made. (Appellee's Brief, p. 27)[6] The exercise of this discretion, of course, presupposes that there was actual ineffective assistance of counsel during the pre-trial plea process which actually prejudiced defendant.[7,8]

Defendant, however, fails to address the indisputable fact that perjury has either already been committed or would be suborned if permitted to plead guilty to CSC, 4th. Defendant testified under oath on at least two separate occasions (during trial and during his *Ginther* hearing) that he did not sexually molest his young daughter. (80a, 178b) If he were now to be permitted to plead guilty to a lesser CSC offense, as directed by the Court of Appeals, he would have to testify under oath that he had sexually molested his young daughter. MCR 6.302(A); MCR 6.302(D). The Court Rule is explicit and unambiguous as to this requirement.[9] To permit

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[6]Defendant apparently attempts to take back this concession by urging this Honorable Court not to permit consideration of defendant's trial testimony. (Appellee's Brief, p. 28). However, the consideration of all the surrounding circumstances, including post-plea offer information, is authorized by the United States Supreme Court. "... a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions." *Lafler*, Slip Op at 13, 16. Here, defendant proclaimed his innocence at both his trial and *Ginther* hearing. "A defendant who maintains his innocence at all the stages of his criminal prosecution and shows no indication that he would be willing to admit his guilt undermines his later . . . claim that he would have pleaded guilty if only he had received better advice from his lawyer." *Sanders v United States,* 341 F3d 720, 723 (CA 8 , 2003)

[7]The People do not concede this point. See Argument I, *supra.*

[8]It is recognized that there are two main questions that must be answered. (1) Would the plea process have been different if defendant had been advised of the mandatory minimum? *Lafler*. If the answer is there would have been no difference in the plea process, or if there would have been a difference and defendant rejects the plea offer or the trial court determines the plea offer should not be reinstated, then the answer to the second question must be applied by the trial court. (2) Were there trial errors committed entitling defendant to a new trial? Hence, review in this appeal is a two-stage process, what happened before trial and what happened during trial.

[9]There is no requirement under the Rules for a plea of "Not Guilty" to be under oath. MCR 6.301(A). Accordingly, the People have not advanced any notion that a guilty plea following a plea of not guilty must have been perjured. (Appellee's Brief, p. 27) The argument that is being made is that counsel cannot be deemed ineffective for failing to knowingly advance a perjured guilty plea.

such a windfall (immunity from perjury) to defendant is contrary to *Lafler*, Slip Op at 12, and contrary to the administration of justice.

Inasmuch as Michigan does not specifically recognize *Alford*[10] pleas,[11] in light of his claims of innocence, Defendant could only plead nolo contendere to 4th degree CSC, assuming there also existed an "appropriate" basis for a no-contest plea. MCR 6.302(D)(2)(a). The only distinction between no-contest pleas and guilty pleas is the manner in which the trial court determines the accuracy of the plea under MCR 6.302(D)(1) and (2). *People v Cole*, 491 Mich 324, fn 6 at 333; 817 NW2d 497 (2012). However, a no-contest plea offer was never made or contemplated by the parties. No such plea offer having been made, it cannot be ordered to be reinstated. The Michigan Court of Appeals clearly erred in ordering such a remedy.

III.

UNDER MRE 803A(3), THERE EXIST CIRCUMSTANCES OTHER THAN "FEAR" WHICH EXCUSE THE FAILURE TO REPORT SEXUAL ABUSE IMMEDIATELY.

MRE 803A(3) unambiguously states a corroborative statement is admissible if the delay in reporting has been caused by some factor equally effective as fear. Therefore, actual fear or a derivative of fear is not required. As Judge Krause stated in her concurring opinion,

> "MRE 803A requires any circumstance that would be similar *in its effect* on a victim as fear in inducing a delay in reporting, not a circumstance that is necessarily similar *in nature* to fear. Indeed, the plain language of the rule explains that it must be an 'equally *effective* circumstance,' not necessarily a *similar* one. Nothing in the rule

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[10]*North Carolina v Alford*, 400 US 25; 91 SCt 160; 27 LEd2d 162 (1970)

[11]The Michigan cases cited by defendant to argue defendants can plead guilty while proclaiming innocence are mere dicta. (Appellee's Brief, pp. 22-24) Moreover, the references to *People v Mauch,* 397 Mich 646, 667; 247 NW2d 5 (1976) and *People v Wolff,* 389 Mich 398, 413-414; 208 NW2d 457 (1973) are not from the majority opinions. The reference in *Mauch* was from Justice Levin's concurrence, *Id.* at 667, and the citation from *Wolff* was taken from Justice T.G. Kavanagh's "separate opinion" in which he was writing for himself, *Id.* at 413-414. Furthermore, in *Alford*, the United States Supreme Court has left it to the individual States whether to bar their courts from accepting guilty pleas from any defendants who assert their innocence. *Alford*, fn 11at 168. The Michigan Court Rules clearly establish that Michigan does not recognize such guilty pleas.

even requires that any 'other equally effective circumstance' even must have been affirmatively created by the defendant." (133a)

Contrary to the express language of the rule, defendant apparently clings to the notion that fear was not present in the instant case and, therefore, the mother's testimony should not have been admitted. But, as John Adams once said, "facts are stubborn things." The existing trial record shows that following the domestic quarrel between defendant and Jessica Brodie, the police and CPS became involved, and CPS recommended the victim leave her mother and live with defendant. (33a, 36a-37a) The abuse occurred while living with defendant. Regardless of whether 3½ year old Kendal was fearful of her father, these facts are "equally effective circumstances," especially in light of the victim's extreme youth and the multiple reasons for delayed reporting as set forth in *People v Baker*, 251 Mich App 322, 326; 232 NW 381 (1930) and *People v Peterson*, 450 Mich 349, 360; 537 NW2d 857 (1995). Moreover, defendant wanted to show the disclosure was delayed.[12] The admission of Kendal's delayed statement to her mother did not cause an innocent man to be convicted. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

IV.

A SECOND CORROBORATIVE STATEMENT CONCERNING SEXUAL ABUSE SHOULD BE ADMISSIBLE UNDER 803A WHERE THE STATEMENT INCLUDES A DIFFERENT ALLEGATION OF SEXUAL ABUSE THAN WAS PROVIDED IN THE CHILD'S FIRST STATEMENT.

The existing record shows the first corroborative statement of the incident involving sexual touching was made to Jennifer Wheeler.[13] (75a) MRE 803A makes a corroborative "statement describing **an incident** that included a sexual act...admissible...." (Emphasis added.) "If the declarant made more than one corroborative statement about **the incident**, only the first is

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[12]Indeed, it was important for defendant's trial strategy to show the disclosures were not made until after defendant had remarried. (21a-22a, 85a) Defendant cannot advance a trial strategy that requires showing delay, and then argue on appeal he was prejudiced by getting what he asked for.

[13]It is disputed that the Oakland County Neglect Proceedings demonstrate anything to the contrary. See Appellant's Answer to Motion to Expand the Record.

admissible...." (Emphasis added.) This requirement is unambiguous. However, since the rule does not define the term "incident," that word's ordinary and generally accepted meaning is to be applied. *People v Gurski*, 486 Mich 596, 608; 786 NW2d 579 (2010). Applying this standard, since the touching and the fellatio were two separate events, they are two separate independent incidents. MRE 803A unambiguously states the first corroborative of each incident is, therefore, admissible.[14]

V.

A WITNESS'S TESTIMONY THAT A CHILD'S STATEMENT WAS "SUBSTANTIATED" DOES NOT CONSTITUTE IMPROPER VOUCHING.

Defendant argues that Kendal's testimony was "unsubstantiated." (Brief, p. 40) However, the testimony of a victim of sexual abuse need not be corroborated. MCL 750.520h. It can stand alone regardless of the presence or absence of other witnesses or forensic evidence. Nevertheless, the victim's allegations in this case were corroborated. They were corroborated by defendant. He admitted that his young daughter had touched his penis. (72a, 78a-79a, 81a) When confronted with the specific allegations his daughter sucked his penis resulting in ejaculation, defendant responded he could not "remember." (69a-70a, 82a-83a)

The statement by CPS worker Fallone that Kendal's allegations were substantiated was not plain error resulting in the conviction of an innocent man. This Court has determined that an expert can testify that a victim's behavior is consistent. *Peterson, supra* at 353. Saying the allegations are "substantiated" is the equivalent of an expert testifying that the behavior of a particular victim is "consistent" with victims of child sexual abuse. Moreover, everyone in the courtroom, including the jurors, were inherently aware that various investigators and authorities had already determined that the allegations had been substantiated, which defendant was now

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[14]Contrary to defendant's assertion, Appellant argued below the testimony of Jennifer Wheeler was admissible under MRE 803(24). While the Court of Appeals rejected the argument (122a), it has been preserved for this Court's consideration. The trial court did not abuse its discretion in permitting Ms. Wheeler to testify and admitting the video of the interview. *People v Katt*, 468 Mich 272; 662 NW2d 12 (2003).

contesting. Otherwise, there would have been no reason for a trial. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007) This testimony was not plainly erroneous. *Carines, supra.*

VI.

IN LIGHT OF DEFENDANT'S ATTACKS ON THE VICTIM'S CREDIBILITY FROM THE OUTSET OF THE TRIAL, ALL CORROBORATIVE STATEMENTS OF KENDAL'S ALLEGATIONS OF SEXUAL ABUSE AND OTHER TESTIMONY DEEMED IMPROPERLY ADMITTED BY THE COURT OF APPEALS SHOULD BE CONSIDERED HARMLESS.

The concern expressed in *Gursky, supra* at 620-621, repeated in part by defendant, does not exist in this case because the victim testified.

> However, if the declarant himself testified at trial, "any likelihood of prejudice was greatly diminished" because "the primary rationale for the exclusion of hearsay is the inability to test the reliability of out-of-court statements[.]" Where the declarant himself testifies and is subject to cross-examination, the hearsay testimony is of less importance and less prejudicial. [*Id.*]

Moreover, as noted above, the victim's allegations were corroborated by defendant's own testimony and tacit admissions.

VII.

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

Defendant complains that counsel failed to object to "hearsay, which impermissibly bolstered Kendal's testimony. No objections were made to the testimony of Kendal's disclosure to her mother (Jessica Brodie) because it was the first disclosure and the delay in reporting supported his trial strategy that the allegations were fabricated in retribution for defendant's remarriage. He objected to the testimony of Jennifer Wheeler (45a) and the video of the interview. (April 1, 2010 Trial Transcript, Vol II, p. 40). As demonstrated previously, the testimony of Det. Muir was not offered for the truth of the matter asserted and was, therefore, not hearsay. No objection was made to CPS Worker Fallone's testimony the complainant's statement was "substantiated" for reasons previously stated. Moreover, Fallone's isolated and brief statement about not being coach was not responsive to the question asked and trial counsel

should not be deemed ineffective for not focusing attention on the nonresponsive statement by objecting.[15] (67a-68a)

Defendant also recites three instances of supposed failures of counsel to impeach five-year-old Kendal with her Preliminary Examination Transcript. However, the record shows that counsel did elicit the perceived contradictions either directly from Kendal or established them through other witnesses. (1) Counsel had Kendal testify at trial that she had only touched her "dad's peepee with [her] hand" (29a); (2) Counsel elicited from Kendal at trial that her mother had asked her to tell about these things (31a); and, (3) Counsel elicited from Kendal's mother that Kendal had said at the preliminary examination the "milk" that came out of her dad's penis tasted like "cherry." (39a)[16] Moreover, if counsel had attempted to impeach the five-year-old with the preliminary examination transcript, then the rule of completeness would have permitted the balance of Kendal's preliminary examination statements to also be admitted, thereby resolving the apparent contradictions . MRE 105.

Trial counsel's strategy was to get Kendal on and off the stand as quickly as possible because she was so young. That because of the many factors going on since the disclosure, coupled with her youth, he could persuade the jury she wasn't credible and reliable. That she was unbelievable, not because she was lying, but that "her testimony had been tainted by that of her mother who was now disgusted with Mr. Douglas." (94a) The fact that he elected not to bully the little girl does not render his counsel ineffective. The testimony defendant thinks should have been used for impeachment was obtained. Counsel did aggressively exam the other prosecution witnesses. The fact the overall trial strategy did not work, likewise, does not make counsel ineffective.

Defendant has not established his burden that counsel's performance was deficient AND

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[15]Defendant did not specifically ask counsel about this testimony at the *Ginther* hearing.

[16]Counsel also got Kendal to testify she had told no one other than her mother about these allegations. (29a) The opposite was obvious.

that the outcome of the trial would have been different but for counsel's perceived error(s). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *Strickland, supra.* This case turned on the testimony of only two persons, regardless of what any other witness had to say about those persons or the allegations. First was Kendal. The jury had the opportunity to see her on the witness stand and evaluate her actions, reactions, body language, etc. in conjunction with her testimony. "...it is very apparent that – to the prosecutor and to defendant and to defense counsel her testimony was compelling. Her accuracy, her recollection, her detail to the facts surrounding this criminal sexual conduct were apparent." (112a) Second, was defendant. He only made a general denial at trial. While attempting to downplay the event, however, defendant testified Kendal touched his penis while he was nude in bed. (78a-79a) He also testified, when confronted with the specific allegations that he had Kendal suck his peepee until milk came out of it, that he couldn't "remember" if that had occurred. (82a-83a) Defendant's absurd inculpatory testimony convicted him. Counsel was not constitutionally deficient.

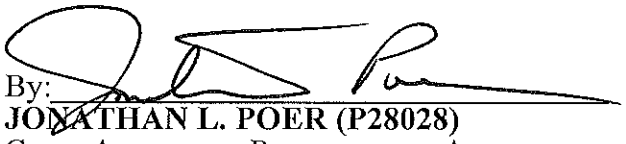
RELIEF REQUESTED

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

April 1, 2013

Respectfully submitted,

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



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