

**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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JEFFERY ALAN DOUGLAS,

Defendant-Appellee.

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Supreme Court No. 145646

Court of Appeals  
Docket No. 301546

Lenawee County Circuit Court  
Case No. 09-14365-FC

**BRIEF ON APPEAL - APPELLEE**

**Oral Argument Requested**

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**TABLE OF CONTENTS**

	<u>Page</u>
INDEX OF AUTHORITIES.....	iv
COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW .....	ix
STATEMENT IDENTIFYING JUDGMENT BEING APPEALED .....	xi
STATEMENT OF FACTS .....	1
Procedural History of the Case .....	1
The Testimony at the Preliminary Examination.....	2
The Trial Testimony .....	3
 ARGUMENT	
I.    MR. DOUGLAS WAS DENIED THE FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE TRIAL COURT AND COUNSEL WERE UNAWARE THAT MR. DOUGLAS FACED A TWENTY FIVE YEAR MANDATORY MINIMUM SENTENCE FOR FIRST DEGREE CRIMINAL SEXUAL CONDUCT, AND DEFENSE COUNSEL GAVE MR. DOUGLAS ERRONEOUS ADVICE ABOUT BOTH THE SENTENCE HE FACED IF HE WENT TO TRIAL AND LOST, AS WELL AS ABOUT THE CONSEQUENCES OF PLACEMENT ON THE SEX OFFENDER REGISTRY. THE COURT OF APPEALS PROPERLY HELD THAT MR. DOUGLAS WAS PREJUDICED AND HE SHOULD BE PERMITTED TO ENTER A PLEA TO THE OFFENSE OF FOURTH DEGREE CRIMINAL SEXUAL CONDUCT, WHICH WAS OFFERED JUST BEFORE JURY SELECTION BEGAN. MR. DOUGLAS WOULD HAVE ACCEPTED THE PLEA BUT FOR DEFENSE COUNSEL'S ERRONEOUS ADVICE. ....	15
Standard of Review .....	15
The Trial Court's Decision .....	16
Argument.....	16

	Mr. Douglas' Claim of Innocence Does Not Preclude Relief .....	22
II.	THE REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL INCLUDES RE-OFFERING A PLEA TO THE LESSER CHARGE AFTER MR. DOUGLAS TESTIFIED AT TRIAL THAT HE DID NOT COMMIT AN OFFENSE.....	25
	Standard of Review.....	25
	Argument.....	25
III.	NO CIRCUMSTANCES, INCLUDING FEAR, EXISTED IN THIS CASE TO EXCUSE THE FAILURE OF THE COMPLAINANT TO REPORT ALLEGATIONS OF SEXUAL ABUSE FOR MORE THAN A YEAR. MR. DOUGLAS' RIGHT TO A FAIR TRIAL AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED WHERE THE COMPLAINANT'S STATEMENTS WERE REPEATED THROUGHOUT TRIAL, AND HER TRUTHFULNESS WAS REPEATEDLY VOUCHERED FOR DURING TRIAL, LARGELY WITHOUT OBJECTION FROM DEFENSE COUNSEL, AND DEFENSE COUNSEL DID NOT IMPEACH HER WITH PRIOR INCONSISTENT TESTIMONY FROM THE PRELIMINARY EXAMINATION, IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS.....	29
	Standard of Review.....	29
	The Court of Appeals Opinion.....	29
	Improperly Admitted Hearsay.....	31
IV.	A SECOND CORROBORATIVE STATEMENT IS INADMISSIBLE UNDER MRE 803A EVEN IF IT DESCRIBES A DIFFERENT ALLEGATION OF SEXUAL ABUSE THAN DESCRIBED IN THE FIRST STATEMENT. ....	36
	Standard of Review.....	36
	Argument.....	36
V.	IMPROPER VOUCHING, INCLUDING STATEMENTS THAT THE COMPLAINANT'S STATEMENT WAS "SUBSTANTIATED," PERMEATED THIS CASE AND RESULTED IN AN UNFAIR TRIAL . IN VIOLATION OF THE RIGHT TO A FAIR TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS. ....	40

Standard of Review .....	40
Argument.....	40
VI. THE MULTIPLE CORROBORATIVE STATEMENTS ADMITTED AT TRIAL WERE NOT HARMLESS.....	43
Standard of Review .....	43
Argument.....	43
VII. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT DEFENSE COUNSEL’S FAILURE TO OBJECT TO IMPROPER HEARSAY AND VOUCHING EVIDENCE, AND TO IMPEACH THE COMPLAINANT WITH HER TESTIMONY AT THE PRELIMINARY EXAMINATION, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.....	45
Standard of Review .....	45
Argument.....	45
CONCLUSION AND RELIEF SOUGHT .....	49

## INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Blackburn v Foltz</u> , 828 F2d 1177 (6 <sup>th</sup> Cir 1987).....	46
<u>Burt v Titlow</u> , 2013 WL 656043 (2/25/13).....	17,25
<u>Cave v Singletary</u> , 971 F2d 1513 (11 <sup>th</sup> Cir 1992).....	46
<u>Ebron v Commissioner of Corrections</u> , 307 Conn 342 (2012).....	28
<u>Glover v United States</u> , 531 US 198 (2001).....	19
<u>Griffin v United States</u> , 330 F3d 733 (6 <sup>th</sup> Cir 2003).....	16,23
<u>Guilty Plea Cases</u> , 395 Mich 96 (1975).....	19
<u>Hall v Small</u> , 267 Mich App 330 (2005).....	34
<u>Hill v Lockhart</u> , 474 US 52 (1985).....	15,25
<u>Kimmelman v Morrison</u> , 477 US 365 (1986).....	45
<u>Lafler v Cooper</u> , 566 US ___, 132 S Ct 1376 (2012).....	17,26
<u>Mitcham v Detroit</u> , 355 Mich 182 (1959).....	35
<u>Mudge v Macomb Co</u> , 458 Mich 87 (1998).....	35
<u>Murray v Carrier</u> , 477 US 478 (1986).....	45
<u>Nix v Whiteside</u> , 475 US 157 (1986).....	27
<u>North Carolina v Alford</u> , 400 US 25 (1970).....	22
<u>Padilla v Kentucky</u> , 559 US 356 (2010).....	17
<u>People v Bahoda</u> , 448 Mich 261 (1995).....	29
<u>People v Brown</u> , 491 Mich 914 (2012).....	47
<u>People v Brown</u> , 492 Mich 684 (2012).....	19
<u>People v Buckley</u> , 133 Mich App 158 (1984).....	42

<u>People v Cairnes</u> , 460 Mich 750 (1999).....	29,40,43
<u>People v Carbin</u> , 463 Mich 590 (2001).....	15,25,45
<u>People v Cole</u> , 491 Mich 325 (2012).....	20
<u>People v Coleman</u> , 130 Mich App 639 (1984).....	21
<u>People v Corteway</u> , 212 Mich App 442 (1995).....	17
<u>People v Dalessando</u> , 165 Mich App 569 (1988).....	46
<u>People v Dobek</u> , 274 Mich App 58 (2007).....	42
<u>People v Douglas</u> , 296 Mich App 186 (2012).....	2,12
<u>People v Dunham</u> , 220 Mich App 268 (1996).....	32
<u>People v Fonville</u> , 291 Mich App 363 (2011).....	19
<u>People v Gee</u> , 406 Mich 279 (2004).....	44
<u>People v George</u> , 481 Mich 867 (2008).....	33
<u>People v Ginther</u> , 390 Mich 436 (1973).....	1,9
<u>People v Gursky</u> , 486 Mich 596 (2010).....	43,44
<u>People v Hicks</u> , ___ Mich App ___, 2007 WL 101228 (2007) (unpublished)	42
<u>People v Higgins</u> , 22 Mich App 479 (1970).....	21
<u>People v Jones</u> , 138 Mich App 455 (1985).....	21
<u>People v Katt</u> , 468 Mich 272 (2003).....	30,37
<u>People v Knox</u> , 469 Mich 502 (2004).....	46
<u>People v Krueger</u> , 466 Mich 50 (2002).....	44
<u>People v Ligget</u> , 378 Mich 706 (1967).....	42
<u>People v Lukity</u> , 460 Mich 484 (1999).....	36,42
<u>People v McCauley</u> , 493 Mich 872 (2012).....	18

<u>People v Mauch</u> , 397 Mich 646 (1976).....	22
<u>People v McCrady</u> , 213 Mich App 474 (1995).....	17
<u>People v McGraw</u> , 484 Mich 120 (2009).....	35
<u>People v McMillan</u> , 213 Mich App 134 (1995).....	29
<u>People v Means</u> , 97 Mich App 641 (1980).....	46
<u>People v Miller</u> , 182 Mich App 711 (1990).....	21
<u>People v Peterson</u> , 450 Mich 349 (1995).....	41
<u>People v Phillips</u> , 468 Mich 583 (2003).....	37
<u>People v Pickens</u> , 446 Mich 298 (1994) .....	45
<u>People v Pinkney</u> , ___ Mich App ___, 2009 WL 2032030 (unpublished 2009).....	21
<u>People v Reed</u> , 449 Mich 375 (1995).....	45
<u>People v Smith</u> , 182 Mich App 436 (1990).....	22
<u>People v Smith</u> , 425 Mich 98 (1986).....	44
<u>People v Stanaway</u> , 446 Mich 643 (1994).....	29
<u>People v Straight</u> , 430 Mich 420 (1988).....	43
<u>People v Thew</u> , 201 Mich App 78 (1993).....	17
<u>People v Trakhtenberg</u> , 493 Mich 38 (2012).....	47
<u>People v Trombley</u> , 67 Mich App 88 (1976).....	22
<u>People v Werner</u> , 254 Mich App 528 (2002).....	15,25,45
<u>People v Wolff</u> , 389 Mich 398 (1973).....	23
<u>Powell v Alabama</u> , 287 US 45 (1932).....	45
<u>Santobello v New York</u> , 404 US 257 (1971).....	26,27

<u>Smith v United States</u> , 348 F3d 545 (6 <sup>th</sup> Cir 2003).....	26
<u>Strickland v Washington</u> , 466 US 668 (1984).....	15,25,45
<u>Titlow v Burt</u> , 680 F3d 577 (6 <sup>th</sup> Cir 2012), cert granted 2013 WL 656043 (2/25/13).....	26
<u>United States v Morrison</u> , 449 US 361 (1981).....	26
<u>United States v Peete</u> , 919 F2d 1168 (6 <sup>th</sup> Cir 1990).....	21
<u>Washington v Hofbauer</u> , 228 F3d 689 (6 <sup>th</sup> Cir 2000).....	46
 <b><u>Statutes, Court Rules and Other Authorities</u></b>	
CONST 1963, art 1, § 20.....	45
MCL 28.725, Sex Offender Registration Act.....	20,21
MCL 28.735(1).....	21
MCL 712A.13a.....	20
MCL 712A.18f.....	20
MCL 712A.19a.....	20
MCL 771.2(1).....	21
MCL 771.3(3).....	21
MCR 6.104(E)(1).....	16
MCR 6.302.....	19
MCR 6.302(B)(2).....	19
MRE 201(b)(2).....	6
MRE 404(b).....	46
MRE 608.....	42
MRE 803A.....	passim

MRE 803A(3).....	30,33
MRE 803(24).....	passim
U.S. CONST, Am VI.....	25,28,45,46

## COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. WAS MR. DOUGLAS DENIED THE FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL, WHERE THE TRIAL COURT AND COUNSEL WERE UNAWARE THAT MR. DOUGLAS FACED A TWENTY-FIVE YEAR MANDATORY MINIMUM SENTENCE FOR FIRST DEGREE CRIMINAL SEXUAL CONDUCT, AND DEFENSE COUNSEL GAVE MR. DOUGLAS ERRONEOUS ADVICE ABOUT BOTH THE SENTENCE HE FACED IF HE WENT TO TRIAL AND LOST, AS WELL AS ABOUT THE CONSEQUENCES OF PLACEMENT ON THE SEX OFFENDER REGISTRY. DID THE COURT OF APPEALS PROPERLY HOLD THAT MR. DOUGLAS WAS PREJUDICED AND HE SHOULD BE PERMITTED TO ENTER A PLEA TO THE OFFENSE OF FOURTH DEGREE CRIMINAL SEXUAL CONDUCT, WHICH WAS OFFERED JUST BEFORE JURY SELECTION BEGAN. MR. DOUGLAS WOULD HAVE ACCEPTED THE PLEA BUT FOR DEFENSE COUNSEL'S ERRONEOUS ADVICE?

The Court of Appeals answered: Yes

Mr. Douglas answers: Yes

The prosecution answers: No

- II. DOES THE REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL INCLUDE RE-OFFERING A PLEA TO THE LESSER CHARGE AFTER MR. DOUGLAS TESTIFIED AT TRIAL THAT HE DID NOT COMMIT AN OFFENSE?

The Court of Appeals answered: Yes

Mr. Douglas answers: Yes

The prosecution answers: No

- III. WAS MR. DOUGLAS' RIGHT TO A FAIR TRIAL AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL DENIED WHERE THE COMPLAINANT'S STATEMENTS WERE REPEATED THROUGHOUT TRIAL, AND HER TRUTHFULNESS WAS REPEATEDLY VOUCHERED FOR DURING TRIAL, LARGELY WITHOUT OBJECTION FROM DEFENSE COUNSEL, AND DEFENSE COUNSEL DID NOT IMPEACH HER WITH PRIOR INCONSISTENT TESTIMONY FROM THE PRELIMINARY EXAMINATION, IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS?

The Court of Appeals answered: Yes

Mr. Douglas answers: Yes

The prosecution answers: No

- IV. IS A SECOND CORROBORATIVE STATEMENT INADMISSIBLE UNDER MRE 803A EVEN IF IT DESCRIBES A DIFFERENT ALLEGATION OF SEXUAL ABUSE THAN DESCRIBED IN THE FIRST STATEMENT?

The Court of Appeals answered: Yes

Mr. Douglas answers: Yes

The prosecution answers: No

- V. DID IMPROPER VOUCHING, INCLUDING STATEMENTS THAT THE COMPLAINANT'S STATEMENT WAS "SUBSTANTIATED," PERMEATE THIS CASE AND RESULT IN AN UNFAIR TRIAL?

The Court of Appeals answered: Yes

Mr. Douglas answers: Yes

The prosecution answers: No

- VI. WERE THE MULTIPLE CORROBORATIVE STATEMENTS ADMITTED AT TRIAL HARMLESS?

The Court of Appeals answered: No

Mr. Douglas answers: No

The prosecution answers: Yes

- VII. WAS THE COURT OF APPEALS CORRECT IN FINDING THAT DEFENSE COUNSEL'S FAILURE TO OBJECT TO IMPROPER HEARSAY AND VOUCHING EVIDENCE, AND TO IMPEACH THE COMPLAINANT WITH HER TESTIMONY AT THE PRELIMINARY EXAMINATION, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL?

The Court of Appeals answered: Yes

Mr. Douglas answers: Yes

The prosecution answers: No

**STATEMENT IDENTIFYING JUDGMENT BEING APPEALED**

This is an appeal from the April 12, 2012 opinion of the Court of Appeals.

## STATEMENT OF FACTS

### Procedural History of the Case

Jeffery Douglas was convicted by jury of one count each of Criminal Sexual Conduct First Degree and Second Degree in the Lenawee Circuit Court, the Honorable M.S. Noe presiding. Mr. Douglas was sentenced to respective terms of 85 months to 360 months and 38 months to 180 months in prison.

The prosecution had made two plea offers before trial. The first offer was made before the preliminary examination, to an unspecified five-year felony. The morning trial began, there was a second plea offer to Fourth Degree CSC. Defense counsel told Mr. Douglas that this offer carried a ten-month term at the county jail, at worst, and registration on the Sex Offender Registry (163b-165b). Neither attorney, nor the court, was aware at any time before his sentence and incarceration that Mr. Douglas faced a mandatory twenty five years of incarceration upon conviction. It was not until after he began his term of incarceration that the Department of Corrections wrote to the trial court, asking for the reason(s) that the court did not impose the twenty five-year mandatory minimum sentence. The parties were notified of this correspondence.

The prosecution then filed a motion to “modify” the sentence to the mandatory minimum, and the defense filed a motion to reinstate the plea offer, for a Ginther hearing, and for a new trial based on both ineffective assistance of counsel and the erroneous admission of evidence at trial. A Ginther<sup>1</sup> hearing was held, the trial court denied the

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<sup>1</sup> People v Ginther, 390 Mich 436 (1973)

defense motions and granted the prosecutor's motion, and imposed a twenty-five-year mandatory minimum sentence.

The Court of Appeals decided the case on April 12, 2012, People v Douglas, 296 Mich App 186 (No. 301546, Donofrio, PJ, Stephens, J and Ronayne Krause, J). In its decision, the Court held that trial counsel was ineffective both during plea negotiations and during trial, and that the trial errors deprived him of a fair trial. The prosecution sought reconsideration, and Mr. Douglas requested that his bond be reinstated. Both motions were denied. This Court granted leave to appeal.

### **The Testimony at the Preliminary Examination**

Kendal Douglas denied at the preliminary examination that her mouth touched her father's penis (19a). She stated that she and Navaeh (her step sister) touched his penis with their hands at the home of Jessica Douglas', her dad's wife. She repeated, then denied, that her dad was sleeping, naked, when this happened, and then stated that she asked to do this, and her father said yes (4b-7b). She then said she spoke with her mother about putting her mouth on her dad's penis and milk came out (19a-20a). She said she had touched pee pees before, and she and Navaeh touched it twice. She then testified that she had her dad's pee pee in her mouth, probably at her grandma's office, but it could have happened somewhere else (8b). She asked him to do this, and she had learned about doing this somewhere (9b). She knew she would be testifying about this in court, and people told her to say in court that she sucked it: "Sucked – my mama –wanted me to tell you people I sucked it", and that milk came out (10b-11b).

On redirect, Kendal confirmed that her mother made up a story and told her to tell the story, a lie, that Kendal did not know anything about, and then she denied it, but then

testified that her mom told her to come to court and say that, "I touched it once and I sucked it, that's what she wanted me to come here for," and that her mom was the first one to tell the story (12b). She then testified that this really happened, she both touched and put her mouth on her dad's penis, and milk came out that tasted like cherry. When the prosecutor admonished her on the importance of telling the truth, Kendal testified that it tasted like another kind of milk (13b). The prosecutor agreed that Navaeh denied any sexual contact with Mr. Douglas (14b).

### **The Trial Testimony**

At trial, the evidence showed that complainant, five year old Kendal Douglas lived with her parents, Jessica Brodie and Jeffery Douglas, who cohabited for six or seven years until 2008, when they broke up after domestic violence charges were brought by each of them against one another (both charges were ultimately dismissed). Protective Services took the position that it was in Kendal's best interests to live with her dad, and Kendal lived with Mr. Douglas and his mother from mid-April 2008 to the first week in May 2008. In January 2009, Kendal went to live with her mother, and Mr. Douglas had parenting time on alternating weekends (2b-3b, 25b-26b).

In May 2009, Mr. Douglas married Jessica Douglas, and the two went on a honeymoon. Mrs. Douglas became pregnant immediately, and, after they announced the pregnancy, the accusations arose (21a, 37a-38a, 80a). On June 1, 2009, Ms. Brodie reported that, while they were driving in the car, Kendal told her that she "sucked her daddy's pee pee until milk came out" and she also touched it with her hand (1b-2b, 23a). Ms. Brodie called Kendal's therapist, Tara Saunders, and moved up her existing appointment to June 5, 2009. She told Kendal it would be a good idea for her to discuss

this with Tara (2b).

Kendal testified that she touched her dad's pee pee with her hand, but nothing else (23a). This happened at her grandmother Rhonda's house in the bedroom; she lived there for one day (24a). She stated that she did not know what she meant by pee pee, and that both boys and girls have pee pees, that she did not know where they were on the body, that she told no one but her mom about this, and she told her at home. She then testified that she sucked her dad's pee pee, but she did not tell Jennifer (and then she said she did), and she also told Tara that she touched her daddy's pee pee. Ms. Sanders testified at the child protective proceedings, but not at the criminal trial. Kendal also said that Navaeh also touched her dad's pee pee once (27b-32b).

Kendal claimed that she and Navaeh had the same father (29a). She denied that she told anyone about this other than her mother (29a). She told her mom that milk came out of her daddy's pee pee and it tasted like pee pee and regular milk (30a). Kendal interrupted the Court to say that she saw her father [in the courtroom], and she really wanted to see him (33b-34b). She denied that anyone asked her to tell them things (35b-36b).

Kendal's mother, Jessica Brodie, testified that she and Kendal lived with her fiance Marcello, Marcello's brother, his girlfriend, and her two children (37b). She and Mr. Douglas had separated on March 30 or 31, 2008, after seven years of cohabitation, following a domestic violence incident in which both of them were charged, and then both charges were dismissed (40b, 47b). She claimed that she was already seeing Marcello, and Mr. Douglas was already seeing his future wife, Jessica, when they stopped living together (49b).

Kendal lived with Mr. Douglas after Child Protective Services told Ms. Brodie that would be in her best interest, and they lived with Mr. Douglas' mother Rhonda from mid-May 2008 until the following month (38b-44b, 47b-48b).

Ms. Brodie was the first witness to repeat Kendal's statements at trial. She testified that, in June 2009, they were driving in her car, and her daughter spontaneously volunteered that she sucked her daddy's pee pee in grandma Rhonda's office, and her dad said "oh, yeah, that's how you do it" (34a-35a). Kendal's previously scheduled appointment with her therapist, Tara Saunders, was moved up, CPS worker Diana Fallone stopped by the following day, and, a couple of weeks later, Ms. Brodie took Kendal to Care House (45b). Ms. Brodie denied any animosity towards Mr. Douglas or his wife (46b).

A Michigan State Police Detective Sergeant, Gary Muir, had Ms. Brodie telephone Mr. Douglas after Kendal's Care House interview on June 15, 2009. He identified Ms. Brodie as the mother of the victim (51b). He had Ms. Brodie make a recorded call to Mr. Douglas from Care House, and she repeated Kendal's allegation to him in the call, to which he replied that he did not know why Kendal would say that, and Ms. Brodie said her daughter did not lie, and Mr. Douglas told Ms. Brodie during the telephone call that he slept in the nude once, and he awoke in the night with Kendal touching his penis and he told Kendal this was a bad thing to do; he reminded Ms. Brodie that he had previously told her about this and she said she did not remember this (52b-57b).

Defense counsel objected to the testimony of Care House forensic interviewer Jennifer Wheeler, pursuant to MRE 803A. The prosecutor responded that the witness could be cross examined and that this was the first occasion in which Kendal disclosed touching (59b-64b). She was qualified as an expert in forensic interviewing, without

objection, and she testified that she interviewed Kendal on June 15, 2009. The interview was tape recorded and admitted into evidence (65b-75b).

Ms. Wheeler agreed that Kendal got a few things “mixed up” about telling the truth and lying (55a). Ms. Wheeler, too, repeated Kendal’s allegations against Mr. Douglas, stating that her daddy makes her suck his pee pee, it happened once, then she said it happened two times, we touched it once and we sucked it once (57a). Over defense objection, she testified that she did not think Kendal had been coached because her story contained details about the taste, which she described as tasting like “pee pee milk” (77b-81b).<sup>2</sup> She believed Kendal was truthful and, if the protocols for conducting interviews are followed, the results are true, unbiased answers (79b-81b, 82b, 83b-85b).

Diana Fallone, a Child Protective Services employee, interviewed Ms. Brodie, set up the Care House interview, and filed a petition in Oakland County. She would not seek a petition if she thought the child was lying or the allegation was unfounded (67a, 86b-92b). She would have to substantiate that “this in fact did occur” before she sought a petition (65a-66a). Based on the interview, alternative hypotheses did not fit and the disclosures were true, “it seemed very clear [Kendal] had identified the right perpetrator”, “there was no indication that [Kendal] was coached or being untruthful” (67a, 93b-95b).

Larry Rothman of the Michigan State Police interviewed Mr. Douglas on June 16, 2009, after Mr. Douglas and his wife went to a doctor’s appointment that day for her

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<sup>2</sup> Ms. Wheeler testified at the child protective proceedings in Oakland County Circuit Court on October 6, 2009, that Kendal’s fidgeting during the Care House interview could have meant that she was either nervous or coached and, when Kendal asked if she was coached, she said she wasn’t, then said she was. At the end of the interview, Kendal said she wanted to go to her mom, because she did not have details about what had happened (15b-22b). A motion to expand the record, or to remand to expand the record, is pending before the Court. The Court can take judicial notice of the transcript from the Oakland County proceedings pursuant to MRE 201(b)(2).

pregnancy. Mr. Douglas initially denied the allegations. Two days later, Rothman interviewed Douglas again. Mr. Douglas said he did not remember that happening. Mr. Douglas was nervous, and his nervousness increased, which Detective Rothman believed was an indication of untruthfulness (96b-104b). Mr. Douglas did say that once, when Kendall was two or two and one half years old, he was sleeping, and he awoke to Kendall touching his penis, and continued to sleep in the nude after the incident although the children were not in his bed when he did that (71a-72a, 109b). He did not find an alternative hypothesis of a custody or visitation dispute between the parents to be valid, nor did he think Kendal could have described what she did based on looking at pornography, although there was pornography in the home (105b-106b, 110b ).<sup>3</sup> He thought Mr. Douglas' response to his question about whether he remembered if Kendal sucked his penis to be "odd." Navaeh, who was six or seven years old, denied that anything happened with Mr. Douglas (69a; 107b-108b).

The videotape of the Care House interview was admitted and played, over defense objection, during which Kendal said she had to talk to her mom, who helped her know what happened with her dad. She claimed that she and Navaeh touched her dad's pee pee and her dad said to quit touching it (111b, 130b, 134b, 136b). The prosecution rested (137b).

Rhonda Douglas, Mr. Douglas' mother, stated that he son and granddaughter lived with her for approximately two weeks in 2008. During that time, Kendal slept with her and was never alone with her father (138b-140b).

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<sup>3</sup> Trooper Rothman had testified at the child protective proceedings that he told Mr. Douglas that Ms. Brodie was unstable and that he knew there were custody issues in this case, and that Ms. Brodie was irate with the situation. (23b-24b).

Jessica Douglas, Mr. Douglas' wife, testified that these allegations arose immediately after she and Mr. Douglas married and found out they were pregnant. When her husband lived at his mother's, he and Kendal usually stayed with Mrs. Douglas. One night, her daughter Navaeh stayed with her and Mr. Douglas at his mother's home. Ms. Brodie was angry with, and jealous of, Mrs. Douglas. She agreed that Mr. Douglas slept in the nude, but not with his daughter. If she heard that Kendal touched him in bed, it would not have concerned her because the child was two years old and acted out of curiosity (141b-147b).

Mr. Douglas testified in his defense, and he agreed that on one occasion Kendal got into bed with him and touched him with her mouth or hand, and on a second occasion, the girls jumped on the bed, but he was under the covers and they were not. When he spoke with Trooper Rothman, he denied the allegation and, when the trooper asked him if he remembered this happening, he told him that he did not. His relationship with Ms. Brodie ended very badly; domestic violence charges were brought against them and then dropped. Ms. Brodie said that if she could not have Kendal, no one could, during the time period (until January 2009) when Mr. Douglas had custody of Kendal. As soon as he returned from his honeymoon, he was accused of this. He denied inappropriate sexual activity with his daughter (79a; 148b-152b).

In closing argument, the prosecutor argued that Ms. Wheeler "hit the nail on the head" in her testimony that the detail in Kendal's description of the offense was consistent and not indicative of coaching (154b). He stated that Kendal's testimony, "the testimony of Jennifer Wheeler, along with the testimony of the law enforcement officers and the people

that were part of the team, that what Kendal Marie Douglas told you did in fact occur” (155b).

The jury convicted him as charged. The trial court imposed a sentence of 85 months to twenty years on the CSC 1 count. The Michigan Department of Corrections then notified the court that Mr. Douglas was subject to a mandatory minimum sentence of twenty-five years imprisonment. Neither the trial court nor the attorneys in the case were aware of this before the correspondence.

The prosecutor filed a motion for modification of the sentence, and Mr. Douglas filed a motion for a Ginther hearing and for reinstatement of the plea offer made at the beginning of jury selection. His motion was based on the fact that his decision to reject the plea offer and proceed to trial was not knowing, intelligent, and voluntary, and had he been told that he was subject to a twenty five years mandatory minimum sentence, he would have accepted the plea offer. His affidavit was filed in support of the motion. Both parties agreed that an evidentiary hearing should be held on the issue of ineffective assistance of counsel.

At the hearing, defense counsel James Daly testified that the plea offer in the case at the preliminary examination was to a five-year felony. Mr. Daly advised Mr. Douglas that, if he lost at trial and was convicted of First Degree CSC, he would go to prison, and there was no guarantee he would be released at his minimum term. He thought the guidelines were in the “8 year range,” and Mr. Douglas’ relationship with his children and his stepdaughter would be “severely jeopardized” (157b-160b). He told Mr. Douglas that as a condition of being on the Sex Offender Registry, he would not be able to live with Kendal, his wife’s daughter Navaeh, and the baby of Mr. Douglas and his wife, and it would

be extremely difficult to have any visitation with any of them, for twenty-five years (160b-162b). Both Mr. Daly and Mr. Douglas agreed to reject that offer (163b).

The morning that trial began, there was a plea offer to Fourth Degree CSC. Mr. Daly told Mr. Douglas that this offer carried a maximum ten-month term at the county jail, at worst, and registration on the Sex Offender Registry (163b-165b). Mr. Douglas asked for Mr. Daly's advice about whether he should accept the plea offer, but Mr. Daly told him that was up to him (166b-167b). Mr. Daly never knew that Mr. Douglas was facing twenty-five years in prison until after Mr. Douglas had been sentenced and started serving his term of imprisonment. If he had known that, his advice would have been different.

He had always told Mr. Douglas he was facing five to eight years in prison. If he had known Mr. Douglas was facing twenty-five years in prison, he would have insisted that Mr. Douglas enter the plea (168b-169b). Mr. Douglas always proclaimed his innocence, and he would not plead to any offense which placed him on the Sex Offender Registry (97a, 98a). Despite Mr. Douglas' claims of innocence, Mr. Daly would have made sure he entered a plea if he knew Mr. Douglas was facing twenty-five years. Although Mr. Daly did not guarantee Mr. Douglas that he was facing twenty years in prison, he told him that his guidelines were far less than that (99a). In his experience, sometimes innocent people entered pleas (171b).

Mr. Daly objected to the admission of the Care House video, but he could not remember any other trial testimony that vouched for Kendal's truthfulness, and he would have objected to that (170b). His defense theory at trial was that Kendal was not credible (94a-95a).

Mr. Douglas testified that he and Mr. Daly discussed the possible sentence he

faced, and he believed he faced a twenty year maximum, with placement on the Sex Offender Registry and no contact with his children unless it was "severely supervised" for twenty years (103a). He did not remember what the plea offer was at the preliminary examination stage; but he would not enter a plea then because he was innocent and he would not be able to see his children while he was on the Registry. He did not know he was facing a twenty-five-year term of imprisonment until he had been sentenced and was serving his sentence (172b). The morning of trial, he was offered a plea, which probably involved no prison time, but he would still be on the Sex Offender Registry and he would not be able to see his children while he was on the Registry (173b). If he had known he was facing a twenty-five-year sentence, he would have pleaded guilty regardless of his ability to see his children (174b-177b). His lawyer told him he was facing a twenty-year term, and he did not understand anything about minimum or maximum terms; Mr. Daly said there was a good chance he was looking at a five or six year sentence (175b). He was not sure if the morning-of-trial plea offer was with or without jail time; Mr. Daly told him that it was possible he could do a few months in jail (176b, 179b).

Mr. Douglas still believed he was innocent, but that was not the only reason he turned down a plea bargain (178b). He would not have accepted a plea, which included registry on the Sex Offender Registry, because he [erroneously] believed that placement on the Registry meant he could not see his children for twenty-five years. Now that he understood the twenty-five years mandatory minimum he faced, and the difference between conditions of probation, which could include a provision that prohibited contact with his children, and the Sex Offender Registry, which did not, he would have entered a plea before trial (180b-185b).

The trial court found that Mr. Daly was not ineffective, and imposed a sentence of 300 to 450 months imprisonment for First Degree Criminal Sexual Conduct (186b-187b, 190b).<sup>4</sup>

On appeal, the Court of Appeals reversed Mr. Douglas' convictions and remanded for reinstatement of the pretrial plea offer. The Court ordered that, if the Defendant rejected the offer, a new trial shall be ordered. The Court found that Mr. Douglas' right to the effective assistance of counsel was violated both during the plea offer made before trial, and during trial, in his failure to object to numerous instances of hearsay, vouching, opinions by one witness on the credibility of another, and his failure to impeach the complainant with her prior inconsistent testimony at the preliminary examination. The Court of Appeals characterized the trial errors as "extensive error that permeated defendant's trial," 296 Mich App at \*7.

As to the evidentiary errors, the Court of Appeals found that Kendal's statements to Ms. Wheeler, and the videotape of the interview, were admitted in violation of MRE 803A because they were arguably not spontaneous, they were not made immediately after the incidents, there was no indication that they were caused by fear or another equally effective circumstance, and the statements were not the first corroborative statement about the incident that she "sucked his pee pee." The Court also found the statements inadmissible under MRE 803(24) because there were no circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exception.

The Court found that Detective Muir's testimony constituted inadmissible hearsay which tended to bolster Kendal's testimony, that Ms. Fallone's testimony improperly

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<sup>4</sup> Sentencing occurred on November 1, 2010.

bolstered Kendal's testimony, and that defense counsel's failure to object constituted ineffective assistance of counsel, as did his failure to impeach Kendal with her preliminary examination testimony, at which she testified that her mouth never touched Mr. Douglas' penis, that he mother wanted her to tell that she sucked it, and that he mom wanted her to tell a lie that she did not know anything about. The prosecution requested reconsideration, and the defense requested bond. Both requests were denied.

As to the pretrial plea offer, the Court found that counsel's failure to inform Mr. Douglas that he faced a mandatory minimum term of twenty-five years in prison fell below an objective standard of reasonableness. Prejudice was shown because both defense counsel and Mr. Douglas testified that he would have taken the plea offer had they known of the mandatory minimum and been accurately informed of the implications that registration on the Sex Offender Registry would have had on his ability to live with his children. The Court held that the trial court's conclusion that Mr. Douglas' awareness that he was facing a possible twenty-year term in prison was erroneous because there is a significant difference between a possible twenty-year term with a likelihood of a much shorter sentence and the certainty of a mandatory twenty-five year term. The remedy was for the prosecution to reoffer the plea agreement and, if Mr. Douglas accepted the offer, for the trial court to exercise its discretion in determining whether to vacate the convictions and resentence Mr. Douglas according to the agreement, to vacate one of the convictions and resentence him accordingly, or to leave the convictions and sentences from the trial undisturbed. If Mr. Douglas refused the plea offer, a new trial shall be held.

In a concurring opinion, Judge Ronayne Krause agreed with the majority in every respect, except that Kendal's statements to her mother were inadmissible under MRE

803A. She agreed that there were no cases defining what constitutes an “equally effective circumstance” other than fear to excuse the delay in reporting, but found no plain error because, although the record was disappointing, Kendal may not have had a concept of time, a realistic opportunity to report the incident, or understood why reporting should have occurred, or she may have suffered from shame or confusion. Otherwise, Judge Ronayne Krause concurred with the majority.

The prosecution then filed an Application for Leave to Appeal, which this Court granted. This is Mr. Douglas’s Brief on Appeal.

## ARGUMENT

- I. MR. DOUGLAS WAS DENIED THE FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE TRIAL COURT AND COUNSEL WERE UNAWARE THAT MR. DOUGLAS FACED A TWENTY FIVE YEAR MANDATORY MINIMUM SENTENCE FOR FIRST DEGREE CRIMINAL SEXUAL CONDUCT, AND DEFENSE COUNSEL GAVE MR. DOUGLAS ERRONEOUS ADVICE ABOUT BOTH THE SENTENCE HE FACED IF HE WENT TO TRIAL AND LOST, AS WELL AS ABOUT THE CONSEQUENCES OF PLACEMENT ON THE SEX OFFENDER REGISTRY. THE COURT OF APPEALS PROPERLY HELD THAT MR. DOUGLAS WAS PREJUDICED AND HE SHOULD BE PERMITTED TO ENTER A PLEA TO THE OFFENSE OF FOURTH DEGREE CRIMINAL SEXUAL CONDUCT, WHICH WAS OFFERED JUST BEFORE JURY SELECTION BEGAN. MR. DOUGLAS WOULD HAVE ACCEPTED THE PLEA BUT FOR DEFENSE COUNSEL'S ERRONEOUS ADVICE.

### Standard of Review

To establish ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error or errors, a reasonable probability exists that a different outcome would have resulted. Strickland v Washington, 466 US 668, 687-688 (1984); People v Carbin, 463 Mich. 590, 599-600 (2001); People v Werner, 254 Mich App 528, 534 (2002). These same standards apply where a defendant's ineffective assistance of counsel claim is based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a prosecutor's plea offer. Hill v Lockhart, 474 US 52, 58 (1985). In this case, the defendant must show that a reasonable probability exists that he would have accepted the plea offer but for counsel's bad advice.

A reasonable probability does not mean a certainty, or even a more likely than not outcome. Strickland, 466 US at 694. The greater the disparity between the rejected plea offer and the sentence the defendant faced after trial, the more reasonable the probability

that a properly advised defendant would have accepted the plea, Griffin v United States, 330 F3d 733, 737-38 (6<sup>th</sup> Cir 2003).

### **The Trial Court's Decision**

The trial court held that, because Mr. Douglas knew he faced some term of incarceration, because he asserted his innocence, it did not matter that he was not informed of the mandatory minimum: "Defendant knew and he believed, although that there was a twenty -year max, and in fact there is a twenty five year mandatory. In the face of a plea of innocence, it makes no difference," that "the extent or the potential for prison was apparent at all stages" and "In the face of 'I didn't do it', I don't know how that would have changed anything. I would have said I did do it if I'd known it was twenty five years. Well, it just doesn't make sense, and it's not logical" (188b-189b).

### **Argument**

The prosecution makes two arguments: first, that although defense counsel was "deficient," his advice was "sufficiently accurate" and not ineffective, where he counseled Mr. Douglas that he was facing five to eight years in prison if he went to trial and lost, ignorant of the mandatory minimum twenty-five years term of imprisonment his client was facing. Second, the prosecutor argues that the difference between a possible twenty year sentence and the mandatory minimum sentence of twenty-five years in prison is "objectively insignificant." Nether argument is supported in the record or by case law.

Mr. Douglas established that he was not aware that he faced a mandatory twenty five year minimum sentence, in violation of his right to make a knowing, voluntary and intelligent plea, of MCR 6.104(E)(1), and of his right to the effective assistance of counsel. It is undisputed that the court and counsel did not know of the twenty five year mandatory

minimum sentence he faced if he went to trial and lost (168b-169b). Had he been given proper advice by his lawyer, he would have accepted the plea offer to Fourth Degree Criminal Sexual Conduct, made on the morning of jury selection.<sup>5</sup> The Court of Appeals properly found that counsel was ineffective and that his convictions and sentences must be vacated.

It is axiomatic that effective representation requires accurate advice to permit an informed decision whether or not to enter a plea, Padilla v Kentucky, \_\_\_ US \_\_\_, 130 S Ct 1473, 1481-1482 (2010); People v Corteway, 212 Mich App 442, 446 (1995). The advice must be reasonable, that is, within the range of competence demanded of attorneys in criminal cases, People v Thew, 201 Mich App 78, 89-90 (1993). Where a defendant rejects a plea offer and goes to trial, counsel is ineffective if he failed to sufficiently inform the defendant of all of his plea bargaining options and the implications of those options, People v McCrady, 213 Mich App 474, 479 (1995).

While this case was pending before the Court of Appeals, the United States Supreme Court decided Lafler v Cooper, 566 US \_\_\_, 132 S.Ct. 1376 (2012), confirming that the effective assistance of counsel is violated where a plea bargain is offered and defense counsel advises against accepting it, based on a misunderstanding of the law as applied to the case, the defendant goes to trial, and is convicted of a more serious charge or is sentenced more severely. In this case, counsel's advice to reject the plea offer to CSC Fourth Degree and county jail time was based on his ignorance of the law, which required a mandatory twenty-five year sentence after a conviction at trial. Counsel

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<sup>5</sup> The United States Supreme Court granted certiorari to decide whether a defendant's testimony alone is sufficient to establish a reasonable probability that he would have accepted the plea, Burt v Titlow, 2013 WL 656043 (2/25/13). In Mr. Douglas' case, his testimony did not stand alone.

admitted that, had he been aware of the mandatory minimum sentence, he would have advised Mr. Douglas to accept the plea offer. Mr. Douglas testified that he would have accepted the plea offer, had he been properly advised. The Lafler decision held that the remedy may be to require the prosecution to reoffer the plea proposal, and then the judge can exercise discretion in deciding whether to vacate the trial conviction, accept the plea, or leave the conviction undisturbed.

The Lafler decision, that defense counsel's bad advice regarding acceptance of the plea constituted ineffective assistance of counsel, is consistent with several decisions from this Court and the Court of Appeals. In People v McCauley, 493 Mich 872 (2012), the Court vacated judgment and remanded the case to the trial court to determine the appropriate remedy, in light of Lafler.<sup>6</sup> This Court held the trial court did not clearly err in deciding that defense counsel was ineffective and there is a reasonable probability that the defendant would have accepted the plea offer, had he been properly advised. The prosecutor was ordered to reoffer the plea, and the trial court should then exercise its discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed, considering the defendant's willingness to accept responsibility for his actions, information obtained after the plea offer was made to fashion a remedy that does not require the prosecution

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<sup>6</sup> Mr. McCauley turned down a plea offer to second degree murder based on defense counsel's advice that he could not be convicted of first degree murder where he did not shoot the victim and he was unaware of the prosecution's theory of accomplice liability. He testified at trial that he acted in self defense, and at the Ginther hearing that he would not have gone to trial but would have entered a plea but for counsel's advice.

to incur the expense of conducting a new trial.

In this case, the prosecutor incredulously asserts that trial counsel's communication with Mr. Douglas that he could face up to twenty years is "close enough" to the mandatory twenty five-year minimum he actually faced so that counsel was really not ineffective. For close to forty years, this State has required that a defendant be advised of the mandatory minimum he faces at the time of a plea, Guilty Plea Cases, 395 Mich 96, 113 (1975); MCR 6.302. Substantial compliance with advice about a defendant's sentencing consequences at the time of his plea is insufficient, MCR 6.302(B)(2).

In People v Fonville, 291 Mich App 363 (2011), the Court reversed the denial of a motion for relief from judgment where the defendant entered a plea without full knowledge that he would need to register on the Sex Offender Registry. The Court reversed the trial court's refusal to permit plea withdrawal.

In the instant case, not only did defense counsel render erroneous advice to Mr. Douglas about the effect that sex offender registration would have on his ability to see his children, but he missed, by almost two decades, the amount of prison time Mr. Douglas would serve, cf Glover v United States, 531 US 198, 203 (2001) ("any amount of actual jail time has Sixth Amendment significance"). If the Fonville decision required reversal, the facts of this case are much more egregious.

The same result was recently ordered in People v Brown, 492 Mich 684, 698 (2012), where the defendant was not advised of his maximum possible sentence as a habitual offender. The Court ordered that the defendant be allowed to withdraw his plea, or elect for his plea and sentence to stand. If he chose plea withdrawal, his conviction and sentence must be vacated, and the matter must proceed to trial.

Similarly, in People v Cole, 491 Mich 325, 337 (2012), the Court held that plea withdrawal must be allowed where the defendant was not informed at his plea that he was subject to lifetime electronic monitoring. The court stated that, to hold otherwise would offend due process and be inconsistent with the practical rationale underlying the requirement that a plea be knowing and voluntary, and, for the defendant to accurately assess the benefits of the bargain, he must be aware of critical information necessary to assess the bargain being considered.

Further error occurred in this case based on trial counsel's misunderstanding of the Sex Offender Registration Act (SORA) provisions applicable to Mr. Douglas.<sup>7</sup> Mr. Douglas discussed the possibility of a plea to Fourth Degree Criminal Sexual Conduct with defense counsel, who informed him that he would probably not be able to see his children while he was registered as a sex offender (a period of twenty five years). This advice was mistaken, since the Sex Offender Registry in effect at the time of Mr. Douglas' trial did not affect the persons with whom a registrant can live. This erroneous advice contributed to Mr. Douglas' refusal to enter a plea.

Defense counsel was mistaken as to what constituted a lawful condition of probation (which may or may not prohibit a defendant from residing with his children) and that which the Sex Offender Registration Act prohibits (SORA prohibits a defendant from living proximate to certain locations, but does not affect the persons with whom a defendant resides). The SORA was designed to register and provide public notification for certain sex offenders, MCL 28.723. It provides for residency restrictions in student safety zones,

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<sup>7</sup> The prosecutor quotes at Page 9 of his Brief from the amended SORA statutes, MCL 712A.13a; 712A.18f; 712A.19a, which were not in effect when Mr. Douglas stood trial and did not become effective until May 1, 2012.

MCL 28.735(1), but does not otherwise prohibit with whom a convicted sex offender can reside.

The probation statute, MCL 771.3(3), on the other hand, provides that a court may impose lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper. Mr. Douglas does not believe that a probation condition, which prohibited him from seeing or residing with his child would be lawful. Although the term "lawful condition" is not defined in the statute, the condition must be reasonably related to the goal of rehabilitation and lawful, People v Jones, 138 Mich App 455, 461 (1985). Where a probation condition impinges on another constitutional right (here, the right to associate with one's family), the condition must be subject to careful review, People v Pinkney, \_\_\_ Mich App \_\_\_, 2009 WL 2032030 (unpublished, 2009), citing United States v Peete, 919 F2d 1168, 1181 (6<sup>th</sup> Cir, 1990). Cf People v Coleman, 130 Mich App 639 (1984) (where defendant's parents were the crime victims, probation condition with no contact provision was to prevent further victimization).

In People v Miller, 182 Mich App 711 (1990), the Court of Appeals reversed a probation order which prohibited the defendant from associating with the father of her child. In People v Higgins, 22 Mich App 479 (1970), the Court of Appeals reversed a trial court probation order prohibiting the defendant from playing college or professional basketball.

Mr. Douglas was facing a maximum of five years probation if he entered a plea to the CSC 4 charge, MCL 771.2(1). He was unaware that a lawful restriction by the Court on his residence, if ordered, could not last more than five years, the period of probation. Counsel informed him that he would, in all likelihood, not be permitted to live with his child during the period of his registration of the Sex Offender Registry, as provided in MCL

28.725. Mr. Douglas believed, based on counsel's advice that he would be unable to live with his wife and daughter for twenty or more years. This is an additional reason why he received ineffective assistance of counsel at the time he rejected the plea offer.

**Mr. Douglas' Claim of Innocence Does Not Preclude Relief**

This Court and the Court of Appeals have held that a defendant's claim of innocence does not preclude a guilty plea, where the defendant enters a plea knowingly and it is an informed choice under all of the circumstances, People v Mauch, 397 Mich 646, 667 (1976), or to avoid the possibility of conviction on a greater charge, People v Smith, 182 Mich App 436, 442 (1990). A defendant may plead guilty for reasons other than guilt; he may plead to a lesser charge because, although he believes he is innocent, he does not want to take a chance on being convicted of a more serious crime with a more severe penalty, People v Trombley, 67 Mich App 88, 92 (1976).

The prosecutor's argument misapprehends well established law from the United States Supreme Court in North Carolina v Alford, 400 US 25 (1970), in which the Court condoned the acceptance of guilty pleas while the defendant maintains his innocence: an individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime, *id.* at 28-29.

Alford is based on the fact that the defendant in a criminal case could intelligently have concluded that, whether he believed himself to be innocent and whether he could bring himself to admit guilt or not, the State's case against him was so strong that he would have been convicted anyway. Since such a defendant has every incentive to conclude otherwise, such a decision made after consultation with counsel is viewed as a sufficiently reliable

substitute for a jury verdict that a judgment may be entered against the defendant. It would preclude all changes of pleas which follow an arraignment at which a not guilty plea is entered, or motions to withdraw pleas after one is entered. Notably, the prosecution has no authority for its argument.

In Griffin, *supra*, 330 F3d at 738, the Court addressed this precise issue and stated:

Griffin's repeated declarations of innocence do not prove, as the government claims, that he would not have accepted a guilty plea. See *North Carolina v. Alford*, 400 U.S. 25, 33, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). ("reasons other than the fact that he is guilty may induce a defendant to so plead. ... and he must be permitted to judge for himself in this respect" quoting *State v. Kaufman*, 51 Iowa 578, 2 N.W. 275, 276 (Iowa 1879)). Defendants must claim innocence right up the point of accepting a guilty plea, or they would lose their ability to make any deal with the government. It does not make sense to say that a defendant must admit guilt prior to accepting a deal on a guilty plea. It therefore does not make sense to say that a defendant's protestations of innocence belie his later claim that he would have accepted a guilty plea. Furthermore, a defendant must be entitled to maintain his innocence throughout trial under the Fifth Amendment. Finally, Griffin could have possibly entered an *Alford* plea even while protesting his innocence. See *id.* These declarations of innocence are therefore not dispositive on the question of whether Griffin would have accepted the government's plea offer. Griffin, 330 F.3d at 738.

This Court and the Court of Appeals have relied on Alford and held that there are many reasons a person may plead guilty while still proclaiming his innocence:

Many situations come readily to mind in which a defendant may protest his innocence altogether and still offer to plead guilty intelligently, deliberately and freely.

A man accused of murder might well offer a plea to manslaughter if he were convinced a jury might not believe his claim of self defense or accident as opposed to the witnesses who would give testimony supporting malice and deliberation. Cfr. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

A three time loser protesting innocence might well prefer to plead to attempted breaking and entering instead of run the risk that a jury might believe the Vicar's direct evidence of his armed robbery over defendant's ex-cell mates'

support of his claimed alibi.

In this very case defendant's willingness to plead to unarmed robbery was well advised as evidence by the result-even giving full credit to his 'exculpatory' statement to the presentence investigator.

So too with many situations wherein the charge involves specific intent and the evidence against the defendant is convincing. Many defendants faced with serious charges, particularly those who have criminal records, or who are found in incriminating circumstances or who may be aware that alleged victims of the crime will testify against them, may wish to plead guilty to a lesser offense rather than face a possible heavy sentence on conviction of a higher charge, despite their honest belief in their innocence. People v Wolff, 389 Mich 398, 413-14 (1973).

The same result should occur in the instant case. Mr. Douglas and Mr. Daly were adamant that, had they been aware of the mandatory term of imprisonment, he would have accepted the guilty plea offer. The difference is not, as the prosecutor argues, between twenty and twenty-five years in prison, but between a ten-month jail sentence and a mandatory twenty-five term of incarceration. The Court of Appeals decision should be affirmed.

**II. THE REMEDY FOR INEFFECTIVE ASSISTANCE OF COUNSEL INCLUDES RE-OFFERING A PLEA TO THE LESSER CHARGE AFTER MR. DOUGLAS TESTIFIED AT TRIAL THAT HE DID NOT COMMIT AN OFFENSE.**

**Standard of Review**

To establish ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error or errors, a reasonable probability exists that a different outcome would have resulted. Strickland v Washington, 466 US 668, 687-688 (1984); People v Carbin, 463 Mich. 590, 599-600 (2001); People v Werner, 254 Mich App 528, 534 (2002). These same standards apply where a defendant's ineffective assistance of counsel claim is based on counsel's failure to properly inform the defendant of the consequences of accepting or rejecting a prosecutor's plea offer. Hill v Lockhart, 474 US 52, 58 (1985).

**Argument**

The prosecution challenges the relief awarded by the Court of Appeals, which held that because Mr. Douglas was denied effective assistance of counsel both before and during trial, the pretrial plea offer must be reinstated and, if Mr. Douglas rejects it, a new trial must occur. The relief ordered by the Court of Appeals is consistent with the nature of the Sixth Amendment violations in this case, where ineffective assistance occurred both before and during trial. The relief ordered is appropriate to remedy the Sixth Amendment violations in this case, which occurred at both stages of the proceedings. 8

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8 The United States Supreme Court granted certiorari to decide whether Lafler requires resentencing where a defendant shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance of counsel, and to do so in a way to remedy the constitutional violation, Burt v Titlow, 2013 WL 656043 (2/25/13).

The remedy for violations of the right to effective counsel should neutralize the taint and be tailored to fit the violation, United States v Morrison, 449 US 361, 364 (1981). In this case, the remedy for the pretrial violation is to reoffer the pretrial plea offer, which Mr. Douglas rejected because of defense counsel's erroneous advice. There are a range of constitutionally permitted remedies for violations, Santobello v New York, 404 US 257, 262-263 (1971) (Marshall, J., concurring in part and dissenting in part), and the one ordered by the Court of Appeals is that which will return Mr. Douglas to his pre-violation status. Mr. Douglas established in his affidavit and in his testimony that he would have accepted the plea offer had he known he was facing twenty-five years at trial.<sup>9</sup>

The prosecutor jumps the gun in arguing that the Court of Appeals decision precludes the trial court from exercising its discretion in the event Mr. Douglas accepts the plea offer. Nothing in the Court of Appeals opinion eliminates the trial court's discretion. The Court of Appeals opinion quotes Lafler, 566 US at \_\_\_\_, slip op at 12 ("Today's decision leaves open to the trial court how to best exercise that discretion in all the circumstances of the case").

However, this case is materially different than Lafler insofar as Mr. Douglas was denied the effective assistance of counsel both at the time of his plea and at trial. The remedy for the trial violation is a new trial. This case is distinguishable from Lafler and other cases where the defendant received a fair trial after a plea offer was rejected. The difference is that, in this case, the trial proceedings were grossly unfair.

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<sup>9</sup> The prosecutor's claims that permitting Mr. Douglas to enter a plea would be to suborn perjury are ludicrous. There are many reasons why a person would enter a plea while maintaining his innocence, Titlow v Burt, 680 F3d 577, 588-589 (6<sup>th</sup> Cir, 2012), cert granted 2013 WL 656043 (2/25/13), citing Smith v United States, 348 F3d 545, 552 (6<sup>th</sup> Cir, 2003).

The Court of Appeals correctly ordered relief to remedy the constitutional violations. The prosecutor's complaint that the trial court cannot exercise discretion under the terms of the opinion misreads the opinion and must be rejected. Nothing in that opinion precludes the Lafler decision's direction to trial courts, to consider both the defendant's acceptance of responsibility, and information which was discovered after the plea offer was made.

The prosecution goes further, however, in asking this Court to ignore the Lafler remedy on the grounds that Mr. Douglas' trial testimony that he committed no inappropriate sexual behavior with his daughter, and his attorney's belief in his innocence, should result in no relief to him.

This argument ignores the fact that the constitutional violation at issue here is counsel's pretrial ineffectiveness. Without the erroneous advice to reject the plea, Mr. Douglas would have accepted it. He should be restored to the position he was in before the constitutional violation.

The prosecutor mixes up the Nix v Whiteside, 475 US 157, 174-75 (1986) line of cases, which hold that defense counsel properly refuses to present perjured testimony at trial, with the instant case, which involves trial counsel's failure to properly advise his client about the implications of accepting or rejecting a plea offer. Under the prosecutor's reasoning, every time a defendant in a criminal case enters a not guilty plea, and then later pleads guilty, defense counsel cannot be ineffective regardless of the mistakes made, and the plea must be "perjured."

This claim ignores case law which requires the effective assistance of counsel during plea proceedings, and recognizes that plea bargains are an integral part of the criminal justice system. Santobello v New York, 404 US 257 (1971). Effective assistance

requires accurate advice at the plea stage. Because Mr. Douglas did not receive representation which comports with the Sixth Amendment, the plea offer must be reinstated. In McCauley, supra, the defendant testified at trial (after rejecting a plea offer based on inaccurate advice) that he did not shoot the deceased and asserted self defense. This Court sent the case back to the trial court for reinstatement of the plea. The same result should occur here.

In Ebron v Commissioner of Correction, 307 Conn 342, 53 A3d 983 (2012), the Connecticut Supreme Court held that the defendant was prejudiced by his lawyer's failure to advise him to accept the state's plea offer. The court made clear that Lafler should not be interpreted to suggest that, in fashioning a suitable remedy, a court could consider information that never would have come to the court's attention if the defendant and the trial court had accepted the offer, such as information that was developed at trial: "It would have been inconsistent for the court in Lafler to conclude, on the one hand, that the habeas court can consider information that never would have come to light if not for counsel's deficient performance in the interest of fairness while, on the other hand, concluding that the fact that the petitioner received a fair sentence after a fair trial does not obviate any prejudice embodied in the petitioner's failure to accept the plea offer", 307 A3d at 357, fn 9. The prosecutor is asking this Court to do precisely that which the Ebron case prohibits: to consider Mr. Douglas' testimony at trial in precluding relief to which he is entitled based on counsel's deficient pretrial performance. The Court should decline the invitation.

III. NO CIRCUMSTANCES, INCLUDING FEAR, EXISTED IN THIS CASE TO EXCUSE THE FAILURE OF THE COMPLAINANT TO REPORT ALLEGATIONS OF SEXUAL ABUSE FOR MORE THAN A YEAR. MR. DOUGLAS' RIGHT TO A FAIR TRIAL AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED WHERE THE COMPLAINANT'S STATEMENTS WERE REPEATED THROUGHOUT TRIAL, AND HER TRUTHFULNESS WAS REPEATEDLY VOUCHERED FOR DURING TRIAL, LARGELY WITHOUT OBJECTION FROM DEFENSE COUNSEL, AND DEFENSE COUNSEL DID NOT IMPEACH HER WITH PRIOR INCONSISTENT TESTIMONY FROM THE PRELIMINARY EXAMINATION, IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS.

### **Standard of Review**

Trial court decisions regarding the admission of evidence are reviewed for abuse of discretion, People v McMillan, 213 Mich App 134, 137 (1995). The constitutional dimension of the issues is reviewed *de novo*, People v Bahoda, 448 Mich 261 (1995). Where no objection is made to objectionable evidence, appellate review is appropriate if the failure to consider the issue would result in manifest injustice or if the resulting prejudice is so great that a curative instruction could not have counteracted it, People v Stanaway, 446 Mich 643, 687 (1994). Unpreserved constitutional error warrants reversal only when the plain, forfeited error resulted in the conviction of an actually innocent person or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings, People v Cairnes, 460 Mich 750, 763-64 (1999).

### **The Court of Appeals Opinion**

In ordering a new trial, the Court of Appeals agreed that the following errors were made at trial: 1) the testimony of Jennifer Wheeler of Care House violated MRE 803A where the complainant's statements were made to her more than one year after the alleged abuse, and after the complainant had spoken with her mother and her own therapist, there was no explanation for the delay, nor any indication of the complainant's

fear or other “equally effective circumstance”; 2) the showing of the video of the complainant’s interview with Ms. Wheeler at Care House violated MRE 803A and MRE 803(24)<sup>10</sup>; 3) the testimony of Michigan State Police Detective Sergeant Gary Muir constituted hearsay and improperly vouched for Kendal Douglas’ credibility; 4) the testimony of Child Protective Services worker Diana Fallone improperly vouched for the complainant’s credibility; and 5) trial counsel was ineffective where he failed to object to hearsay and to testimony which vouched for her credibility, failed to object to the admission of the Care House video, and failed to impeach the complainant with inconsistent statements she made at the preliminary examination.

The prosecutor is appealing the Court of Appeals decision on hearsay grounds as to the testimony of the mother, Jessica Brodie, asking that the concurring opinion of Judge Ronayne Krause be adopted. Her concurring opinion, agreeing with the majority in all other respects that a new trial was warranted, wrote separately to address her “concerns” about excusable delay in reporting under MRE 803A(3).

The majority opinion, at page 4, fn 2, stated that the admission of the testimony of Jessica Brodie violated MRE 803A “on this record,” noting that if retrial occurred, “and the prosecution is able to establish that fear or another ‘equally effective circumstance’ caused the delay, KD’s statement to JB may be properly admissible under MRE 803A. We

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<sup>10</sup> There was no mention at trial about MRE 803(24) during the discussion of the admissibility of the Care House video (59b-64b), and, had there been, that rule would not have justified the admission of the video. People v Katt, 468 Mich 272, 293 (2003) (admission of evidence under the rule is limited to exceptional circumstances).

emphasize that our determination regarding this issue is based on the record before us.”<sup>11</sup> The concurrence noted the paucity of the trial court record and “concerns” regarding what constitutes excusable delay in reporting under MRE 803A, and would not find that plain error occurred. Concurring otherwise with the majority, Judge Ronayne Krause agreed that a new trial must be ordered if Mr. Douglas rejected the plea offer.

On remand, under both the majority and the concurring opinions, the trial court will need to make the determination about the admissibility of Ms. Brodie’s statements under MRE 803A. The Court of Appeals decision was correct, based on the existing record. Even if this Court agreed entirely with Judge Ronayne Krause’s concurring opinion, a new trial would still occur on remand.

### **Improperly Admitted Hearsay**

Kendal’s credibility was bolstered by the testimony of her mother, Jessica Brodie, as well as by witnesses Gary Muir, a Michigan State Police Detective Sergeant, Diana Fallone, a Child Protective Services worker, and Jennifer Wheeler, a forensic interviewer at Care House, all of whom repeated Kendal’s hearsay statements, and by the admission of the videotape of Kendal’s interview at Care House. The admission of Ms. Brodie’s testimony was improper because it vouched for Kendal’s credibility and because it constituted hearsay, and no exception permitted its admission.

MRE 803A, the “tender years” exception states:

A statement describing an incident that included a sexual act performed with

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<sup>11</sup> There was no evidence of fear or another equally compelling circumstance at this trial. In the child protective proceedings, the witnesses, including Tara Sanders, Kendal’s therapist, stated unequivocally that Kendal had never expressed fear of her father. That evidence is the subject of the Motion to Expand the Record (to include portions of the child protective proceedings).

or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.

The only witness whose testimony arguably met Subsection (2) is Ms. Brodie. As to all of these witnesses, Subsection (3) was not met because the statements were made more than a year after the alleged acts and the record is devoid of evidence that the delay was caused by any claim of fear or other "equally effective circumstance." The trial court relied on People v Dunham, 220 Mich App 268, 272 (1996) ("the trial court did not abuse its discretion in ruling the eight or nine-month delay in reporting the sexual abuse was excusable on the basis of the young victim's well grounded fear of defendant" (emphasis added)). Dunham is distinguishable from the instant case because the fear was established in that case. In this case, the record shows the complainant's lack of fear of her father. The only factor the trial court considered in this case was fear; no other "equally effective circumstance" was argued or considered in the trial court.

The prosecutor's argument is that the Court should adopt the reasoning of Judge

Krause's concurrence as to the admissibility of the child's statements to her mother, more than one year after the alleged sexual abuse, pursuant to MRE 803A(3). This argument ignores the purpose behind the tender years exception, which is based on fear or other "equally effective circumstance" to excuse the delay in reporting. In this case, there is nothing to show fear (in fact, the transcript evidences the child's friendliness towards her father throughout trial) (33b-34b); the child spontaneously said that she saw her dad, despite the screen between them, and she really wanted to see her "dada"). It also ignores Judge Krause's opinion, which found the record "disappointing" and concluded only that plain error did not occur because trial counsel did not object to the admission of the statements. Judge Krause concurred "because this matter must be remanded for a new trial in any event," as the other trial errors warranted relief.

The record shows that the child's statements do not come close to meeting the threshold for admission under MRE 803A(3). In People v George, 481 Mich 867 (2008), this Court adopted the dissent in the Court of Appeals, 2007 WL 4125372. That case involved a one-year delay in reporting sexual abuse to the complainant's sister and mother, which the majority in the Court of Appeals held was excusable because of the complainant's fear. The dissent pointed out that, at the preliminary examination and trial, the eight year old complainant testified that she was not afraid of her uncle, the defendant, and he did nothing to prevent her from telling the truth. Both her sister and mother testified about statements she made to them, although it was unclear whether the sister or a friend was the first person to whom a report was made. When defense counsel objected to the testimony, the trial court held it was a question of fact for the jury.

The dissent, adopted by this Court, held that the sister questioned the complainant,

so the statements to her were not spontaneous, and the mother was not the first person to whom the statements were made, so the mother's testimony was improper and served to bolster the complainant's testimony. The improperly admitted testimony was outcome determinative because, without this evidence, the sole witness against the defendant was the eight year old victim, and the prosecutor had a substantially weak case.

In the instant case, the testimony repeating the allegations over and over fell far outside the narrow exception to the hearsay rule set forth in MRE 803A. The statements were far from reliable and none of them, including the testimony of Jessica Brodie, should have been admitted.

They were first made more than a year after they abuse allegedly occurred, and after a tumultuous breakup between Mr. Douglas and his former girlfriend, the child's mother. At the preliminary examination, she testified that her mom told her to say she touched her father's penis with her hand and her mouth, and her mom told the story first, and her mom told her to tell a lie (10b, 12b-13b). Coincidentally, the allegations were made just after Mr. Douglas' remarriage and announcement that he and his wife were expecting a child. The circumstances of the statements do not show fear or an "equally effective circumstance".

The prosecutor argued to the Court of Appeals that the delay was excusable "due to the extreme youth of the child". Now, changing course, he complains that the delay is excusable because Kendal must have feared her father because she was placed in his custody at the direction of Child Protective Services (although absolutely nothing in the record supports this and, in fact, the record from the child protective proceedings shows exactly the opposite). This argument, never raised before, is abandoned. Hall v Small, 267

Mich App 330, 335 (2005).

Where an argument is made which was not raised in the court below, or a new theory raised for the first time before an appellate court, it is abandoned. People v McGraw, 484 Mich 120, 131, fn 36 (2009). Further, the argument is completely unsupported by the record, nor does the prosecutor cite any case law. This Court should reject it. See Mudge v. Macomb Co, 458 Mich 87, 104-105 (1998), quoting Mitcham v. Detroit, 355 Mich 182, 203 (1959) (“It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” ’).

**IV. A SECOND CORROBORATIVE STATEMENT IS INADMISSIBLE UNDER MRE 803A EVEN IF IT DESCRIBES A DIFFERENT ALLEGATION OF SEXUAL ABUSE THAN DESCRIBED IN THE FIRST STATEMENT.**

**Standard of Review**

Evidentiary rulings are reviewed for abuse of discretion. People v Lukity, 460 Mich 484 (1999).

**Argument**

The prosecutor argues that Kendal's statement to Jennifer Wheeler is admissible because she described an act of touching, not penetration, to Ms. Wheeler. The prosecutor assumes this is the first mention of this act. By the time Kendal spoke with Ms. Wheeler, she had also spoken with her mother, her therapist, Tara Sanders, and her mother had spoken with Diana Fallone of Child Protective Services. Ms. Sanders did not testify at trial, but she did meet with Kendal on June 5, 2009, ten days before Kendal met with Ms. Wheeler. On each of these occasions, the touching was mentioned, as was stated throughout the child protective proceedings. Thus, the prosecutor's argument that the Care House interview was Kendal's first mention of touching is not based on the facts.<sup>12</sup> However, the argument will be addressed below.

MRE 803A is clear that, to be admissible under the Rule, the statement must be the first corroborative statement made by the child. There is nothing in the rule that distinguishes each individual act and permits its retelling by multiple witnesses. When the plain language of a court rule is unambiguous, "we must enforce the meaning expressed,

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<sup>12</sup> The Motion to Expand the Record, filed concurrent with this Brief, establishes that Kendal disclosed both the touching and the oral act to her mother and to her therapist. Her mother repeated the statements to Ms. Fallone.

without further judicial construction or interpretation.” People v. Phillips, 468 Mich 583, 589 (2003). MRE 803A states that “[i]f the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.”

In People v Katt, 468 Mich 272 (2003), the Court addressed the applicability of MRE 803(24), and not MRE 803A. The Court noted that MRE 803A did not apply because the prosecutor conceded that the victim's statement was the second statement about the abuse. Katt, supra, at 275.

In this case, the prosecutor never argued before the trial court that the subsequent statements were admissible under MRE 803(24). That argument is waived. Had this argument been made, it would have been rejected because the statements are insufficiently reliable and trustworthy.

The undersigned believes that the dissent is the more well reasoned opinion in the Katt case. However, under even the majority opinion, the language of MRE 803(24) provides guidance in determining the proper method of analysis. The rule contains four elements. To be admitted under MRE 803(24), a hearsay statement must:

(1) demonstrate circumstantial guarantees of trustworthiness equivalent to the categorical exceptions, (2) be relevant to a material fact, (3) be the most probative evidence of that fact reasonably available, and (4) serve the interests of justice by its admission. The statements were not trustworthy. In Katt, 468 Mich at fn 11, the Court considered, in discussing the trustworthiness requirement, the Federal Rules of Evidence Manual, which states:

There are certain standard factors all courts consider in evaluating the trustworthiness of a declarant's statement under the residual exception. These include:

(1) The relationship between the declarant and the person to whom the

statement was made. For example, a statement to a trusted confidante should be considered more reliable than a statement to a total stranger.

(2) The capacity of the declarant at the time of the statement. For instance, if the declarant [were] drunk or on drugs at the time, that would cut against a finding of trustworthiness....

(3) The personal truthfulness of the declarant. If the declarant is an untruthful person, this cuts against admissibility, while an unimpeachable character for veracity cuts in favor of admitting the statement. The government cannot seriously argue that the trust due an isolated statement should not be colored by compelling evidence of the lack of credibility of its source: although a checkout aisle tabloid might contain unvarnished truth, even a devotee would do well to view its claims with a measure of skepticism.

(4) Whether the declarant appeared to carefully consider his statement.

(5) Whether the declarant recanted or repudiated the statement after it was made.

(6) Whether the declarant has made other statements that were either consistent or inconsistent with the proffered statement.

(7) Whether the behavior of the declarant was consistent with the content of the statement.

(8) Whether the declarant had personal knowledge of the event or condition described.

(9) Whether the declarant's memory might have been impaired due to the lapse of time between the event and the statement.

(10) Whether the statement, as well as the event described by the statement, is clear and factual, or instead is vague and ambiguous.

(11) Whether the statement was made under formal circumstances or pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it.

(12) Whether the statement appears to have been made in anticipation of litigation and is favorable to the person who made or prepared the statement.

(13) Whether the declarant was cross-examined by one who had interests similar to those of the party against whom the statement is offered.

(14) Whether the statement was given voluntarily or instead pursuant to a grant of immunity.

(15) Whether the declarant was a disinterested bystander or rather an interested party. [Federal Rules of Evidence Manual (Matthew Bender & Co. Inc., 2002), § 807.02(4) (citations omitted).]

The list is not intended to be all-inclusive, but to provide general guidelines.

Every factor applicable in this case mitigates against trustworthiness. Because the argument that the statements were admissible under MRE 803(24) is unpreserved,

because, even if preserved, the statements were not trustworthy, they were not the most probative evidence of the act alleged, this Court should reject the prosecutor's argument.

**V. IMPROPER VOUCHING, INCLUDING STATEMENTS THAT THE COMPLAINANT'S STATEMENT WAS "SUBSTANTIATED," PERMEATED THIS CASE AND RESULTED IN AN UNFAIR TRIAL, IN VIOLATION OF THE RIGHT TO A FAIR TRIAL UNDER THE FEDERAL AND STATE CONSTITUTIONS.**

**Standard of Review**

Unpreserved challenges to the admission of evidence are reviewed for plain error, People v Cairnes, 460 Mich 750, 763-764 (1999). Reversal is required where the defendant is actually innocent or the error seriously affects the fairness, integrity, or public reputation of judicial proceedings, Id at 774.

**Argument**

This trial consisted of the unsubstantiated testimony of the complainant, and numerous instances of improper hearsay testimony which vouched for her credibility. The trial court's statement that she was credible could have been reached only where that court was unaware of the many instances where her testimony changed and could have been impeached, but was not, because defense counsel did not do so. His failure to bring out her inconsistencies is inexplicable given his stated strategy to challenge her credibility at trial. He also failed to object on the grounds that the improper testimony constituted improper vouching.

The Court of Appeals properly found that the testimony of Detective Sergeant Muir, Ms. Wheeler and Ms. Malone constituted improper vouching for Kendal, in violation of the right to due process and a fair trial, and that Mr. Muir's testimony was an improper comment on Mr. Douglas' truthfulness.

The testimony was not, as the prosecution claims, a statement of the obvious. The admission of the testimony was particularly egregious because the witnesses were

professionals -- a Protective Services caseworker, a State Police detective, and a Forensic Interviewer who qualified as an expert -- so their vouching carried added weight. In People v Peterson, 450 Mich 349, 352-53 (1995), the Court stated that the scope of expert testimony in CSC cases involving children did not permit testimony about the complainant's veracity, that sexual abuse occurred, and whether the defendant is guilty:

In these consolidated cases, we are asked to revisit our decision in People v. Beckley, 434 Mich. 691, 456 N.W.2d 391 (1990), and determine the proper scope of expert testimony in childhood sexual abuse cases. The question that arises in such cases is how a trial court must limit the testimony of experts while crafting a fair and equitable solution to the credibility contests that inevitably arise. As a threshold matter, we reaffirm our holding in Beckley that (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, we clarify our decision in Beckley and now hold that (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.

Ms. Wheeler's testimony started with her twice repeating the same statement that Kendal told her mother that "daddy made me suck his pee pee," and three times stated that Kendal told her that one time they sucked it and one time they touched it (56a-58a; 76b). She testified to body maps and that Kendal said that she sucked it with her mouth (60a). She testified that Kendal was not coached (63a, 84b).

The Care House videotape was played for the jury, and Kendal's statements were repeated yet again (112b-134b). This included Kendal's statement that her daddy makes her suck his pee pee (118b); that they also touched it (she later said her stepsister Navaeh also touched it and her dad told her to quit touching it) (118b, 134b-135b); and that this happened when she was three years old (119b).

The video, too, was inadmissible, People v Hicks, \_\_\_ Mich App\_\_\_, 2007 WL 101228 (2007) (unpublished) (admission of the complainant's Care House interview was improper, but harmless error in that case). In this case, the admission of the Care House video was one more piece of evidence which was improperly admitted, without any objection by defense counsel. The prosecutor's closing argument repeatedly emphasized the testimony of the vouching witnesses (153b), "When Kendal took that stand, her testimony was consistent with what she told Ms. Wheeler when she was four years old") and (155b), "I would submit to you, ladies and gentlemen, that with her testimony, her being Kendal, the testimony of Jennifer Wheeler, along with the testimony of the law enforcement officers and the people that were a part of the team, that what Kendal Marie Douglas told you did in fact occur").

The statements of the prosecution witnesses constituted multiple expressions that Kendal was credible, and that Mr. Douglas was not, in violation of the rule that a witness may not express an opinion about the credibility of another witness, MRE 608, People v Lukity, 460 Mich 484 (1999); People v Dobek, 274 Mich App 58, 71 (2007); People v Buckley, 133 Mich App 158 (1984); People v Liggett, 378 Mich 706 (1967). Ms. Wheeler vouched for the protocol used at Care House, and Ms. Fallone testified that she would not seek a petition (as she did in this case) absent valid allegations.

**VI. THE MULTIPLE CORROBORATIVE STATEMENTS ADMITTED AT TRIAL WERE NOT HARMLESS.**

**Standard of Review**

Unpreserved challenges to the admission of evidence are reviewed for plain error, People v Cairnes, 460 Mich 750, 763-764 (1999). Reversal is required where the defendant is actually innocent or the error seriously affects the fairness, integrity, or public reputation of judicial proceedings, id at 774.

**Argument**

The prosecutor argues that the Court should rule that the MRE 803A violations are harmless because Kendal's credibility was at issue. In support of this argument, the prosecutor cites People v Gursky, 486 Mich 596 (2010). In Gursky, the child complainant was questioned by her mother and her mother's friend about sexual abuse, id at 600-601. The Court held that statements were not spontaneous, even where other indicia of reliability exists, but their admission was harmless. The Court agreed that, in a case involving one on one credibility contest between the complainant and the defendant, hearsay evidence may tip the scales against the defendant and render the error more harmful, especially where the complainant is a young child, id at 620, citing People v Straight, 430 Mich 420, 427-428 (1988).

The Court compared the facts of the Straight case, in which the prosecutor argued in closing that the testimony of the child's parents was substantive proof of the defendant's guilt. In the instant case, the prosecutor followed the same path by arguing that the testimony of Kendal and the other witnesses who repeated her statements was a sufficient basis on which guilt could be found.

The harmless analysis by the Court in Gursky was based on the evidence at trial, which did not rely solely on the complainant's testimony. Instead, her mother also testified about an incident in the child's bedroom where she walked in on the defendant and the child, and the testimony from a nurse who examined the child and found evidence consistent with the child's testimony. 486 Mich at 623-25.

In contrast, in this case, there was no evidence to support the allegations other than the complainant's testimony. Her testimony was suspect because it directly followed her father's remarriage and the announcement of his wife's pregnancy after an acrimonious breakup between her parents; because her testimony was so inconsistent and untrustworthy; and because nothing corroborated it. When a case is primarily a credibility contest, the erroneous admission of corroborating testimony on either side results in harmful error because it "could tip the scales." People v Gee, 406 Mich 279, 283 (2004). See also, People v Gursky, 486 Mich 596, 620-621 (2010). Any error "closely linked to the complainant's believability," when vouching for him or her, has, by its nature, "a high probability of influencing the verdict." People v Krueger, 466 Mich 50, 55 (2002); People v Smith, 425 Mich 98, 113 (1986). The Court of Appeals got it right in reversing Mr. Douglas' convictions.

**VII. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT DEFENSE COUNSEL'S FAILURE TO OBJECT TO IMPROPER HEARSAY AND VOUCHING EVIDENCE, AND TO IMPEACH THE COMPLAINANT WITH HER TESTIMONY AT THE PRELIMINARY EXAMINATION, CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.**

**Standard of Review**

To establish ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for his attorney's error or errors, a reasonable probability exists that a different outcome would have resulted. Strickland v Washington, 466 US 668, 687-688 (1984); People v Carbin, 463 Mich. 590, 599-600 (2001); People v Werner, 254 Mich App 528, 534 (2002).

**Argument**

An accused's right to counsel encompasses the right to "effective assistance of counsel. US CONST, Am VI; CONST 1963, art 1, § 20; Powell v Alabama, 287 US 45 (1932). An accused's right to effective assistance of counsel is so undermined as to require reversal of his conviction where counsel's performance falls below an objective standard of reasonableness, and the representation so prejudices the defendant as to deprive him of a fair trial. Strickland v Washington, 466 US 668 (1984); People v Pickens, 446 Mich 298, 302-303 (1994). A claim of ineffectiveness is not necessarily a referendum on an attorney's performance at trial overall. A single, serious error may support a claim of ineffective assistance of counsel. Murray v Carrier, 477 US 478, 496 (1986); Kimmelman v Morrison, 477 US 365, 383 (1986); People v Reed, 449 Mich 375, 535 (1995).

To make a successful claim of ineffective assistance, the defendant must overcome

the presumption that counsel's actions were based on reasonable trial strategy. Strickland, supra. However, simply calling counsel's errors "strategy" does not insulate his performance from Sixth Amendment scrutiny. Washington v Hofbauer, 228 F3d 689 (6<sup>th</sup> Cir, 2000). See also, Cave v Singletary, 971 F2d 1513, 1518 (11<sup>th</sup> Cir, 1992). Counsel will still be found ineffective despite a "strategic" decision if the strategy employed was not a sound or reasonable one. People v Dalessandro, 165 Mich App 569, 574 (1988). In particular, counsel's behavior cannot be considered objectively reasonable if his strategy is predicated on ignorance of the law. Blackburn v Foltz, 828 F2d 1177, 1181 (6<sup>th</sup> Cir 1987).

In this case, defense counsel was ineffective at trial for failing to object to the admission of repeated instances of hearsay, which also impermissibly bolstered Kendal's testimony. In People v Knox, 469 Mich 502 (2004), the court held trial counsel ineffective where he did not object under MRE 404(b) to evidence of the mother's good character and parenting. The case followed the murder of the four-month-old child of the defendant father. The issue at trial was who murdered him. The trial court admitted evidence of the defendant's past anger towards the child's mother and other former girlfriends, the child's prior injuries, and the mother's good character, all without objection. The Court held that the case, as the instant one, was a close credibility contest, and that evidence of the other acts evidence constituted plain error. Reversing the Court of Appeals, the Supreme Court remanded the case to the circuit court for a new trial. See also, People v Means, 97 Mich App 641 (1980).

Finally, defense counsel did not impeach the complainant with her prior inconsistent statements. Kendal Douglas had testified at the preliminary examination that her mouth never touched her dad's penis and his penis never touched her mouth (19a), although she

testified at trial that she sucked her daddy's "pee pee" (23a). He did not elicit her testimony from the preliminary examination that people told her what to say in court, and told her to say she sucked his penis ("my mama – wanted me to tell you people I sucked it...and that 'milk' came out") (10b-11b) or that her mom told her to tell the story, a lie, and told Kendal to "tell a lie that [she] didn't know anything about" (11b), or that her mom told her the story before Kendal did (12b). He did not impeach her with her testimony at the preliminary examination that the "milk" that came out of her dad's penis tasted like cherry milk, when she denied it tasted like cherry milk and said it tasted like "regular milk" and "pee pee" (30a; 12b-13b).

This does not constitute trial strategy. Defense counsel testified at the Ginther hearing that Kendal's testimony at trial, impermissibly bolstered by the other prosecution witnesses, was all of the evidence against Mr. Douglas. Because this was a credibility contest, impeaching Kendal was paramount. Defense counsel was ineffective for the above stated actions and inactions. His errors affected the outcome of the trial and made the difference between acquittal and conviction.

In People v Brown, 491 Mich 914 (2012), the Court ordered that the case must be remanded for a new trial where defense counsel, *inter alia*, did not request activity logs which would have supported his claim that he did not have as many counseling sessions with the complainants as they claimed; he did not effectively cross examine the complainant with her prior inconsistencies, and he failed to develop the point that in some respects her testimony was inconsistent with her preliminary examination testimony and with her initial statement to the police.

In People v Trakhtenberg, 493 Mich 38, \*7 (2012), the Court held defense counsel

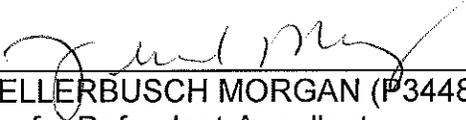
to be ineffective where she did not conduct an adequate investigation, and thus did not impeach the complainant with prior inconsistent statements, and the case was a close credibility contest between her testimony and the defendant's. Although defense counsel cross examined the complainant, the omissions from the cross examination and the failure to cross examine the complainant's mother prejudiced the defendant. A new trial was ordered on defendant's motion for relief from judgment.

The instant case was not one of overwhelming evidence, but instead a closely drawn credibility contest where one of these errors, standing alone, should require reversal. All of them, cumulatively, mandate that the Court of Appeals be affirmed and a new trial be held.

**CONCLUSION AND RELIEF SOUGHT**

For the reasons set forth in this Brief, Jeffrey Douglas requests that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

  
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