

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

149040

Supreme Court No. ~~149041~~

v.
MANTREASE DATRELL DEQUAN SMART,
Defendant-Appellee.

COA NO. 314980
L.C. No. 11-20652 FC

149040

BRIEF OF THE PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

While MRE 410 is properly read to include discussions with an agent authorized by an attorney for the prosecuting authority to engage in plea discussions, no such authority was given here. Further, the hallmarks of a plea discussion, determined by an examination of the totality of the circumstances, include (1) a specific plea offer was made; (2) a deadline to plead was imposed; (3) an offer to drop specific charges was made; (4) a discussion of sentencing guidelines for the purpose of negotiating a plea occurred; and (5) whether a defense attorney was retained to assist in the formal plea bargaining process, and do not exist here. Should the Court of Appeals be reversed?

Amicus answers: YES

Statement of Facts

Amicus joins in the Statement of Facts of the People.

Argument

I.

While MRE 410 is properly read to include discussions with an agent authorized by an attorney for the prosecuting authority to engage in plea discussions, no such authority was given here. Further, the hallmarks of a plea discussion, determined by an examination of the totality of the circumstances, include (1) a specific plea offer was made; (2) a deadline to plead was imposed; (3) an offer to drop specific charges was made; (4) a discussion of sentencing guidelines for the purpose of negotiating a plea occurred; and (5) whether a defense attorney was retained to assist in the formal plea bargaining process, and do not exist here. The Court of Appeals should be reversed.

A. Introduction

On the People's application for leave to appeal, the Court has directed the filing of supplemental briefs, with oral argument to be held, the Court directing the parties to discuss whether

the defendant's statement to the police on June 8, 2011 should be suppressed under MRE 410. In briefing this issue, the parties should include in their discussion whether, pursuant to MRE 410(4), "plea discussions" must directly involve a prosecuting attorney or whether a prosecuting attorney's agent may act on behalf of the prosecuting authority and, if so, under what circumstances the agent's discussions constitute "plea discussions." The parties should also address whether this Court's two-part analysis for determining if a statement was made 'in connection with' a plea offer, established in *People v. Dunn*, 446 Mich. 409, 521 N.W.2d 255 (1994), should continue to guide the application of MRE 410, and if not, what test should be applied in its stead.¹

Amicus answers that 1) MRE 410 does not bar the defendant's statement to police of June 8, 2011, 2) that a statement may be excluded under MRE 410 though not made directly to a

¹ *People v Smart*, -- N.W.2d ----, 2014 WL 4649133 (2014).

prosecuting attorney, where made to an agent the prosecuting attorney has authorized to engage in plea discussions with the defendant, and 3) that the phrase “in connection with” an offer to plead guilty or nolo contendere to the crime charged or any other crime a plea offer is no longer contained in MRE 410, which now excludes statements made “*in the course of plea discussions with an attorney for the prosecuting authority* which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.” Whether the discussion was a “plea discussion” turns on the totality of the circumstances through an examination of the objective facts, including whether (1) a specific plea offer was made; (2) a deadline to plead was imposed; (3) an offer to drop specific charges was made; (4) a discussion of sentencing guidelines for the purpose of negotiating a plea occurred; and (5) whether a defense attorney was retained to assist in the formal plea bargaining process.²

B. Background: History of the Rule

As initially adopted on January 5, 1978, MRE 410 provided:

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or *of an offer to plead guilty or nolo contendere* to the crime charged or any other crime, or *of statements made in connection with any of the foregoing pleas or offers*, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connect with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to lead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement (emphasis supplied).

The Note to the rule indicated that the rule was identical to FRE 410, and also Rule 11(e)(6) of the Federal Rules Of Criminal Procedure, except that MRE 410 omitted the concluding phrase “if the statement was made by the defendant under oath, on the record, and in the presence of counsel.” The

² See *United States v. Edelmann*, 458 F.3d 791, 804 (CA 8, 2006).

rule as originally promulgated, then, precluded admission of “statements made in connection with” “an offer to plead guilty or nolo contendere to the crime charged or any other crime.”

FRE 410 was amended very soon after MRE 410 was adopted, to read as it presently does, save for a restyling in 2011 that was a part of a comprehensive restyling of the Federal Rules of Evidence, not intended to make any substantive changes. The language on statements made “in connection with” an offer to plea guilty was changed, and now provides:

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(4) a statement made *during* plea discussions *with an attorney for the prosecuting authority* if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea (emphasis supplied).

A little over a decade later, MRE 410 was also amended, and the language on statements made “in connection with” an offer to plea guilty was changed to provide

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(4) Any statement made *in the course of* plea discussions *with an attorney for the prosecuting authority* which do not result in a plea of guilty or which result in a plea of guilty later withdrawn (emphasis supplied).

The principal textual difference between the federal and Michigan rules, then, is that the Michigan rule uses the phrase "in the course of" rather than "during" in describing when the statements that are barred by the rule are made. This is a matter, amicus believes, solely of style not substance.

The purpose of the 1980 amendment of FRE 410 is explained in the Advisory Committee

Note:

The major objective of the amendment to rule 11(e)(6) transmitted by the Supreme Court on April 30, 1979 is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See *United States v. Herman*, 544 F.2d 791 (5th Cir.1977) Fed.R.Ev. 410, as originally adopted by Pub.L. 93-595, provided in part that "evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer." . . .

While this history shows that the purpose of Fed.R.Ev. 410 and Fed.R.Crim.P. 11(e)(6) is to permit the unrestrained candor which produces effective plea discussions between the "attorney for the government and the attorney for the defendant or the defendant when acting pro se," given visibility and sanction in rule 11(e), a literal reading of the language of these two rules could reasonably lead to the conclusion that a broader rule of inadmissibility obtains. That is, because "statements" are generally inadmissible if "made in connection with, and relevant to" an "offer to plead guilty," it might be thought that an otherwise voluntary admission to law enforcement officials is rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea. Some decisions interpreting rule 11(e)(6) point in this direction. See *United States v. Herman*, 544 F.2d 791 (5th Cir.1977) (defendant in custody of two postal inspectors during continuance of removal hearing instigated conversation with them and at some point said he would plead guilty

to armed robbery if the murder charge was dropped; one inspector stated they were not “in position” to make any deals in this regard; held, defendant’s statement inadmissible under rule 11(e)(6) because the defendant “made the statements during the course of a conversation in which he sought concessions from the government in return for a guilty plea”)

The amendment makes inadmissible . . . statements “made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.” It thus fully protects the plea discussion process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions.³

To put the matter finely, the rule was amended to rein in courts that were reading the phrase statements “made in connection with” an “offer to plead guilty” so as to render an “otherwise voluntary admission to law enforcement officials . . . inadmissible merely because it was made in the hope of obtaining leniency by a plea,” the *Herman* decision being a paradigm example.⁴

C. Parsing the Rule

The rule refers to 1) a “statement made *in the course of* plea discussions,” and 2) “*with an attorney for the prosecuting authority*” (emphasis supplied). These phrases each inform the meaning of the other. Amicus will begin with the question whether “‘plea discussions’ must directly involve a prosecuting attorney or whether a prosecuting attorney’s agent may act on behalf of the prosecuting authority.”

³ 77 F.R.D. 507, 533.

⁴ *United States v. Herman*, 544 F.2d 791 (CA 5,1977).

1. MRE 410(4) includes conversations with a government agent who has the express authority to act for the prosecuting attorney

MRE 410 does not refer to a statement by the defendant or his counsel made “to an attorney for the prosecuting authority,” but rather a statement made “in the *course of* plea discussions *with* an attorney for the prosecuting authority.” Under this language, a defendant—and/or his counsel—may be engaged in plea discussions “with” an attorney for the prosecuting authority, and make a statement during “the course of” those discussions to a government agent authorized to negotiate on behalf of the prosecuting authority, and that statement will fall within MRE 410’s prohibition on admission where no plea results, or a plea results that is later withdrawn.

FRE 410 has been read this way in federal circuits that have addressed the question. For example, in *United States v. Millard*,⁵ an FBI agent told the defendants that he was working directly with an Assistant United States Attorney, one Lester Paff, which he in fact was, and said that he had talked to the AUSA, and that if the defendant “was interested in cooperating with the government, that we would offer him a particular deal.” During the course of these conversations, the agent telephoned the AUSA and discussed with him what deal they could offer the defendants. The court found this sufficient to fall within the rule.⁶ And in *United States v. Greene*⁷ the court, citing other cases,⁸ said that FRE 410 applies to “statements made to a law enforcement agent who has express

⁵ *United States v. Millard*, 139 F.3d 1200, 1205 (CA 8, 1998).

⁶ The court was discussing FRCP 11(e)(6)(d), rather than FRE 410, but at the time the two were identical. Now, the rule of criminal procedure simply refers to FRE 410.

⁷ *United States v. Greene*, 995 F.2d 793, 799 (CA 8, 1993).

⁸ *United States v. Lawrence*, 952 F.2d 1034, 1037 (CA 8, 1992); *Rachlin v. United States*, 723 F.2d 1373, 1376–77 (CA 8, 1983); and *United States v. Grant*, 622 F.2d 308, 313, 314 n. 5, 315–16 (CA 8, 1980).

authority to act for the prosecuting government attorney.” Similarly, the 2nd Circuit has said that “the rule can be fairly read to require the participation of a Government attorney in the plea discussions, but not necessarily his physical presence when a particular statement is made to agents whom the attorney has authorized to engage in plea discussions.”⁹ Several states that have had occasion to consider the question have reached the same conclusion.¹⁰ Treatises make the same point.¹¹

Amicus, then, submits that the text of MRE 410—excluding a statement by the defendant or his counsel made “in the *course of* plea discussions *with* an attorney for the prosecuting authority” where not plea results, or a plea is taken but later withdrawn—includes statements made during plea discussions with a government agent authorized to negotiate on behalf of the prosecuting authority.¹²

See also *United States v. McCauley*, 715 F.3d 1119, 1125 -1126 (CA 8, 2013).

⁹ *United States v. Serna* 799 F.2d 842, 849 (CA 2, 1986), abrogated on other grounds, *United States v. DiNapoli*, 8 F.3d 909 (CA 2, 1993).

¹⁰ See e.g. *Commonwealth v. Stuller*, 966 A.2d 594 (Pa.Super.,2009); *State v. Hinton*, 42 S.W.3d 113, 123 (Tenn.Crim.App.,2000) (“the evidence shows that the meeting at which the defendant's statement was taken was arranged at the behest of the prosecutor. Mr. Evans attended the first interview but did not attend the second interview, during which a statement was given, because of illness. Under these circumstances, Detective Schroyer acted as the prosecutor's agent, with his express authority. Thus, the statement can be said to have been given during plea discussions with an attorney for the prosecuting authority”); *Clutter v. Commonwealth*, 364 S.W.3d 135, 138 (Ky. 2012).

¹¹ “Excluded from the scope of Rule 410(a) are statements made during plea negotiations to law enforcement officers, unless the law enforcement officer is acting with express authority from a government attorney.” Graham, *Handbook of Federal Evidence* (7th Ed), § 410.1; 1 *McCormick on Evidence* (7th Ed), § 160.

¹² Some cases suggest, without holding, that “apparent” authority is also sufficient, so that if a law enforcement officer misrepresents his authority, misleading the defendant and/or his attorney into thinking the officer is authorized by the prosecuting authority to engage in plea negotiations, any statements made are within the rule. See e.g. *United States v McCauley*; *United States v Greene*, supra. First, no issue of apparent authority is presented by the present case, and this Court need not discuss the matter. Second, if the officer has no express authority from the

2. **Whether a statement made to an attorney for the prosecuting authority, or an agent authorized to engage in plea discussions with the defendant and/or his attorney, was made “in the course of plea discussions” is determined by an objective assessment of the totality of the circumstances, including such matters as whether (1) a specific plea offer was made; (2) a deadline to plead was imposed; (3) an offer to drop specific charges was made; (4) a discussion of sentencing guidelines for the purpose of negotiating a plea occurred; and (5) whether a defense attorney was retained to assist in the formal plea bargaining process.**

If the statement was not made to an attorney for the prosecuting authority or some agent authorized to engage in plea discussions with the defendant and/or his attorney, then the MRE 410(4) inquiry¹³ is at an end. If it was, then the question is whether the statement was made “in the course of plea discussions.” In *People v Dunn*¹⁴ this court adopted the standard enunciated in the 5th Circuit case of *United States v. Robertson*¹⁵ for determining when a statement by the defendant was made “in connection with” an “offer to plead” guilty: first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances. In *Dunn* the “Court of Appeals held that Dunn's statements were made *in connection with an offer to plead guilty,*

prosecuting authority to engage in plea discussions, then by no construction of the text can the discussion be said to be “with an attorney for the prosecuting authority.” And third, it may well be that statements taken in this scenario *are* subject to exclusion, but the reason would not be that they are excluded by MRE 410(4). See *People v. Gallego*, 430 Mich. 443 (1988). Again, this is not a point this Court need address in any manner at this time.

¹³ See footnote 12; there may be *other* questions regarding admissibility, but the MRE 410(4) inquiry is over.

¹⁴ *People v. Dunn*, 446 Mich. 409, 414 (1994).

¹⁵ *United States v. Robertson*, 582 F.2d 1356, 1366 (C.A.5 1978).

and that their admission into evidence was violative of MRE 410,”¹⁶ and this Court affirmed that determination, made under the version of MRE 410 *before* its amendment.

This Court has directed that to be addressed here is “whether this Court's two-part analysis for determining if a statement was made ‘in connection with’ a plea offer, established in *People v. Dunn*, 446 Mich. 409, 521 N.W.2d 255 (1994), should continue to guide the application of MRE 410, and if not, what test should be applied in its stead.” It should not. That test, adopted from *Robertson*, was a construction of the *prior* version of the rule, concerning statements made “in connection with” an offer to plead guilty, and not limiting the scope of the rule to “plea discussions” with an “attorney for the prosecuting authority.” The question now is not whether the defendant had any particular *subjective* expectation to negotiate a plea, and, if he or she did, whether that expectation was reasonable; rather, the question is, under the text of the rule, whether what was occurring *was*, as a matter of fact, plea discussions. And that question is answered by an examination of the totality of the objective circumstances.

Again, the predicate for examination of the question is whether the discussion was with an attorney for the prosecuting authority or his or her authorized agent. If *it was*, then what was it's nature? This is not a inquiry into what defendant believed, and whether that belief was reasonable, but whether, in fact, plea discussions had occurred. What a “plea discussion” is a question of law, and whether a particular discussion *was* a plea discussion is a matter of objective fact, and so review in each case is a mixed question of fact and law.¹⁷ As one court has observed,

¹⁶ *People v. Dunn*, 446 Mich. at 414 (emphasis supplied).

¹⁷ “We review de novo the district court's ultimate conclusion of whether the statements were made in the course of plea negotiations because the determination is a mixed question of law and fact.” *United States v. Olson*, 450 F.3d 655, 680 (CA 7, 2006). See also *United States*

While the amended rule rejects *Herman*, it embraces neither *Robertson's* two-tiered test nor [a] . . . multi-factored approach. Most courts have simply applied the plain language of the rule to the facts before them and have had little difficulty identifying the demarcation line between admissible and inadmissible statements. . . . In other words, plea discussions means plea discussions.¹⁸

While this approach has much to commend it,¹⁹ guidance to the bench and bar in identifying those discussions that fall within the ambit of the rule is likely useful, and amicus urges on the Court the approach taken by the 8th Circuit. That court has held there are identifiable hallmarks or indicia of plea discussions: “normal plea discussion events” include circumstances where (1) a specific plea offer was made; (2) a deadline to plead was imposed; (3) an offer to drop specific charges was made; (4) a discussion of sentencing guidelines for the purpose of negotiating a plea occurred; and (5) whether a defense attorney was retained to assist in the formal plea bargaining process.²⁰

*United States v Morgan*²¹ provides an example. There one Walker LaBrunerie was suspected of among other things, bribing a city council member, who, unknown to LaBrunerie, was cooperating in the FBI investigation. The FBI sought another cooperative suspect in addition to the council

v. Morgan, 91 F.3d 1193, 1195 CA 8,1996).

¹⁸ *United States v. Penta*, 898 F.2d 815, 818 (CA 1, 1990).

¹⁹ Cf. *People v. Steubenvoll*, 62 Mich. 329, 334 (1886) the court, regarding instructions on reasonable doubt, saying that “We do not think that the phrase ‘reasonable doubt’ is of such unknown or uncommon signification that an exposition by a trial judge is called for. *Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining*” (emphasis supplied), and *People v. Waller*, 70 Mich. 237, 239 (1888), also concerning an instruction on reasonable doubt that did not define the term, and saying that ““We must presume the jury understood the English language, and were able to comprehend the term.”

²⁰ See e.g. *United States v. Edelmann*, 458 F.3d 791, 804 (CA 8, 2006).

²¹ *United States v. Morgan* 91 F.3d 1193, 1194 (C.A.8 (Mo.),1996)

member, and approached LaBrunerie. Agents met with him at his home, informed him of the criminal charges he could face, the strong possibility of jail time, and the importance of his cooperation. LaBrunerie gave a brief explanation of his role in the suspect offenses, and a subsequent meeting was set up later that day. That meeting was at a hotel, and present in addition to FBI agents was an Assistant United States Attorney Paul Becker. The AUSA spent approximately fifteen minutes explaining to LaBrunerie the charges he could face, that his cooperation could affect his sentence, and in general terms, the sentence guidelines. The meeting continued for approximately three hours, and LaBrunerie gave a detailed explanation of his role in the offenses.²²

But the cooperative enterprise fell about after LaBrunerie informed other suspects of his cooperation. He was indicted, and moved to suppress his statements at both meetings. The second statement was found by the district judge to have been made in the course of plea discussions, and so excluded it under FRE 410, and the government appealed, arguing that the second statement was made by LaBrunerie merely “in the hope of obtaining leniency in sentencing.”

The 8th Circuit reversed the district court. The court observed that the AUSA did not discuss a possible plea bargain or in any way encourage arrival at a plea bargain before LaBrunerie made the incriminating statements, which were made “in the hope of bettering [his] situation somewhere down the road.” The court said:

[The defendant's] statements were offered unconditionally in an effort to cooperate. Perhaps [the defendant] was hopeful of improving his situation and eventually gaining a motion for substantial assistance at sentencing, but the statements cannot be said to have been made in the course of plea discussions within the meaning of the exclusionary rules because no plea bargain was offered or even contemplated at that point.

²² *United States v. Morgan*, 91 F.3d at 1194.

Simply put, normal plea discussion events did not occur in the present case: (1) no specific plea offer was made; (2) no deadline to plead was imposed; (3) no offer to drop specific charges was made; (4) no discussion of sentencing guidelines for the purpose of negotiating a plea occurred—only a generalized discussion to give the suspect an accurate appraisal of his situation occurred; and (5) no defense attorney was retained to assist in the formal plea bargaining process.²³

D. Application

The second statement given here, amicus submits, does not present a close case. Before defendant's first statement, at a meeting with Sgt. Brown, his attorney, Lazzio, discussed the matter with assistant prosecutor Riggs, advising that defendant would make a statement on the condition that it would not be used against him and that he would be charged in no other matter than the pending carjacking case, wanting assurances against any possible controlled substances charges (Lazzio was unaware of defendant's role in the murder). Riggs agreed, and said he was only interested in defendant's as a witness to the murder. The meeting occurred at the request of prosecutor Riggs. Defendant told the Sgt. Brown that he provided two individuals with the weapon used in the murder.

Defendant's counsel, Lazzio, arranged a *second* meeting with Sgt. Brown at defendant's request. Before the meeting Lazzio asked Brown to tell defendant that the plea agreement Lazzio had negotiated on the carjacking case was not going to get better. Prosecutor Riggs asked Sgt. Brown to try to get more information from defendant about the murder, but it was understood that defendant was not going to be given a better deal on the carjacking case. It was made clear to the defendant that the plea agreement would not change. As the Court of Appeals put it, "Sergeant

²³ *United States v. Morgan*, 91 F.3d at 1196. See also *United States v. Edelmann*, and *United States v. McCauley*, *supra*, to the same effect.

Brown told defendant that he did not think that the plea agreement was going to get any better *and that it was the prosecutor's office that decided what plea deals to offer.*"²⁴ Defendant nonetheless made a further statement in the hope of obtaining more leniency, and, to his attorney's surprise, admitted involvement in the murder.

Defendant's statements at the second meeting are not within MRE 410, failing on both aspects of the rule. First, Sgt. Brown was neither an attorney for the prosecuting authority, nor was he authorized by the prosecuting authority to engage in plea discussions. Indeed, though amicus has argued that any argument of "apparent authority" would raise issues other than an MRE 410 issue, but no MRE 410 issue, here there cannot even be a claim of apparent authority to discuss a plea, or modification of the existing plea agreement, as Sgt. Brown told the defendant he had no such authority, and that the deal was not going to get better. The analysis can end here. But on the facts, there was also no "plea discussion." Looking to hallmarks laid out by the 8th Circuit, (1) no specific plea offer was made; (2) no deadline to plead was imposed; (3) no offer to drop specific charges was made; (4) no discussion of sentencing guidelines for the purpose of negotiating a plea; and (5) no defense attorney was not present to assist in any plea bargaining, but to make sure the defendant understood that the meeting was *not* a plea negotiation!

E. Conclusion

Here, then, MRE 410 does not bar the defendant's statement to police on June 8, 2011. While a statement may be excluded MRE 410 though not made directly *to* a prosecuting attorney,

²⁴ *People v. Smart*, 304 Mich.App. 244, 248 (2014) (emphasis supplied). As Judge Wilder put it in dissent, "Brown also told defendant that the prosecutor's office, and not Brown, would decide what plea deals to offer, so defendant could 'take it or leave it.'" *People v. Smart*, 304 Mich.App. at 262-263.

where made to an agent the prosecuting attorney has authorized to engage in plea discussions with the defendant, no such authority was given here regarding the June 8, 2011 meeting. Further, the phrase “in connection with” an offer to plead guilty or nolo contendere to the crime charged or any other crime a plea offer is no longer contained in MRE 410, and it was this phrase the Court construed in *People v Dunn*. Whether a plea discussion occurred in a given case is a matter of objective fact, determined through an examination of the totality of the circumstances, the hallmarks of which are whether (1) a specific plea offer was made; (2) a deadline to plead was imposed; (3) an offer to drop specific charges was made; (4) a discussion of sentencing guidelines for the purpose of negotiating a plea occurred; and (5) whether a defense attorney was retained to assist in the formal plea bargaining process. Those hallmarks do not exist in the present case. The Court of Appeals should be reversed.

Coda

MRE 410 is not a statute, but a rule adopted by this Court. It excludes reliable and probative evidence not on any ground going to the accurate ascertainment of truth, such as by application of MRE 403, finding that some logical inference prohibited by law from consideration by the factfinder flows from the evidence and overwhelms—“substantially outweighs”—the logical force of the evidence for a permissible purpose, nor on the ground that exclusion is required to deter governmental misconduct in violation of the Constitution, viewed as outweighing the truth-finding mission of the trial. Rather, the purpose of the rule is, as the Advisory Committee Note to the original federal rule explained, “the promotion of disposition of criminal cases by compromise.”

This Court has itself said that the rules' purpose is to "promote the disposition of criminal cases by compromise" and to "permit the unrestrained candor which produces effective plea discussions."²⁵

The promotion of resolution of criminal cases by way of plea agreement, through a rule of exclusion of evidence designed to permit "unrestrained candor" in plea discussions, might well be a good policy. It is one followed throughout the country, though resolution of cases by plea is not without its critics.²⁶ But it is something of a stretch to find the advancement of this policy within the judicial power:

In 1859, this Court described "judicial power" as "the power to hear and determine controversies between adverse parties, and questions in litigation." The fundamental purpose in resolving such controversies is quite simple: the fair ascertainment of the truth.²⁷

Advancing a policy of resolution of criminal cases by way of plea has all the hallmarks of a legislative policy decision; indeed, the Federal Rules of Evidence, *are*, in fact, statutes—they are enacted by Congress.²⁸ That here it is the Court that is advancing the policy of resolution of cases by plea counsels at least caution, amicus submits, with regard to any expansive reading of the rule.

²⁵ *People v. Jones*, 416 Mich. 354, 364-365 (1982).

²⁶ See e.g. Ralph Adam Fine, "Plea-Bargaining: An Unnecessary Evil," 70 Marq. L. Rev. 615, 616 (1987).

²⁷ *In re Justin* 490 Mich. 394, 414 (2012)

²⁸ See 28 USC §§ 2073, 2074.

Relief

WHEREFORE, the amicus requests that the Court of Appeals be reversed.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne
President
Prosecuting Attorneys Association
of Michigan

A handwritten signature in black ink, appearing to read "Timothy A. Baughman", with a long horizontal flourish extending to the right.

TIMOTHY A. BAUGHMAN
Chief, Research, Training,
and Appeals

STATE OF MICHIGAN
IN THE SUPREME COURT

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

Supreme Court
No. 149041

vs.

MANTREASE DATRELL DEQUAN SMART,
Defendant-Appellee.

Lower Court No. 11-020652
Court of Appeals: 314980

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE)^{SS}

The undersigned deponent, being duly sworn, deposes and says that [he/she] served a true copy of **Plaintiff-Appellant's Brief of the Prosecuting Attorneys Association of Michigan as Amicus Curiae in Support of the People of the State of Michigan**

upon: Daniel Bremer & Vikki Haley

the above named defendant, by PERSONAL SERVICE or by DEPOSITING SAID PLEADING IN THE U.S. MAIL IN THE CITY OF DETROIT, ENCLOSED IN AN ENVELOPE BEARING POSTAGE FULLY PREPAID, on **October 7, 2014**, plainly addressed as follows:

Daniel Bremer
Attorney at Law
1133 E. Bristol Road
Burton, MI 48529

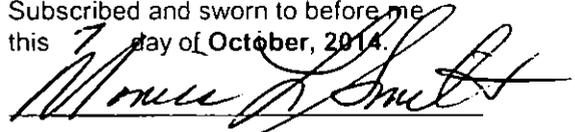
Vicki Haley
Prosecutor
900 S. Saginaw Street, Courthouse Rm. 100
Flint, MI 48502


Joycelyn Frederick

said pleading was filed in the SUPREME COURT, by U.S. Mail, PONY EXPRESS or PERSONAL SERVICE at the following address:

LARRY ROYSTER, Clerk
Michigan Supreme Court
2nd Floor, Law Building
925 Ottawa Street
Lansing, Michigan 48902

Subscribed and sworn to before me
this 7 day of **October, 2014**.



Notary Public, Wayne County, Michigan
My commission expires: 01-06-19