

No. 18-_____

In the
Supreme Court of the United States

WESTLEY ALBRIGHT,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

TIMOTHY V. POTTER

ATTORNEY FOR PETITIONER

REYNOLDS, POTTER, RAGAN & VANDIVORT, PLC
210 EAST COLLEGE STREET
DICKSON, TN 37055
(615) 446-2221
TPOTTER@RPRVLAW.COM

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QUESTIONS PRESENTED

Whether the Supreme Court of Tennessee erred when it held, as a matter of first impression, that due process rights under the Fourth and Fourteenth Amendments are not violated by a trial court's failure to provide actual notice to a criminal defendant that his subsequent admission of criminal intent to a treatment instructor will be a mandatory condition of his diversion following the entry of a *nolo contendere* plea?

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PETITION FOR WRIT OF CERTIORARI

Westley A. Albright petitions for a writ of certiorari to review the judgment of the Tennessee Supreme Court of Tennessee.



OPINIONS BELOW

The opinion of the Supreme Court of Tennessee addressing the question on appeal is reported at 564 S.W.3d 809 (Tenn. 2018) and included at App.1a. The dissent of Tennessee Supreme Court Justice Lee is included at App.34a. The opinion of the Court of Criminal Appeals of Tennessee at Nashville is included at App.41a and is unreported. The Petitioner's original plea agreement is included at App.76a, 78a, along with the plea elocution at App.80a. The revocation and modification of the plea agreement by the trial Judge Wolfe is included at App.65a along the bench ruling at App. 69a.



JURISDICTION

The Supreme Court of Tennessee entered judgment on December 11, 2018. (App.1a). This Court has jurisdiction in accordance with 28 U.S.C. § 1257(a). *See Cohens v. Virginia*, 19 U.S. 264 (1821).



CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve the interpretation of statutory provisions. It does involve proper application of those protections provided by the Fourth and Fourteenth Amendments to the United States Constitution.

U.S. Const, amd. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const, amd. XIV

... nor shall any State deprive any person of life, liberty, or property, without due process of law . . .



STATEMENT OF THE CASE

On February 28, 2013, the Petitioner, was arrested in Dickson County, Tennessee and charged with two felony offenses for alleged solicitation of a minor in violation of Tenn. Code Ann. § 39-13-528. (T.R. 1)¹. The

¹ References to the Technical Record will be identified as “T.R.” followed by the corresponding page number(s). References to the

charges arose from the Petitioner’s alleged communications via internet with a Dickson County detective posing as “the mother of her 13-year-old daughter.” *Id.*

Count I of the indictment alleged that the Petitioner “solicited a law enforcement officer posing as a minor, and whom the person making the solicitation reasonably believes to be less than eighteen (18) years of age, to engage in conduct that, if completed, would constitute a violation by the soliciting adult of Aggravated Statutory Rape, pursuant to Tenn. Code Ann. § 39-13-506(c), in violation of Tenn. Code Ann. § 39-13-528, a Class E Felony.” (T.R. 15).

Count II alleged that on the same dates, the Appellant “solicited a law enforcement officer posing as a minor, and whom the person making the solicitation reasonably believes to be less than eighteen (18) years of age, to engage in conduct that if completed, would constitute a violation by the soliciting adult of Especially Aggravated Sexual Exploitation of a Minor under Tenn. Code Ann. § 39-13-528, a Class C Felony.” (T.R. 15).

An Order was entered setting the case for trial to begin September 17, 2015. (T.R. 42). On September 16, 2015, the Petitioner appeared before the trial court and entered a plea of *nolo contendere* pursuant to a negotiated plea bargain to Count I of his indictment. (T.R. 44). The Petitioner was sentenced in accordance with Tennessee Code Annotated § 40-35-313 (the Tennessee judicial diversion statute) to serve one year of

transcripts of the plea hearing and revocation hearing will be identified as “T.E.” followed by the corresponding page number(s).

supervised probation beginning September 16, 2015 and ending September 16, 2016. *Id.* The Judgment Order further specifically provided, “If the Defendant successfully completes his one year diversionary probation, he will be released from all reporting and other requirements of the Tennessee Sexual Offender Registration Act (Tenn. Code Ann. 40-39-210, *et seq.*)” *Id.* Count II of the indictment was dismissed. *Id.*

At the time Petitioner’s plea was announced and entered, the trial court did not require the Petitioner to recite his criminal offense or to otherwise agree with the factual basis for his plea which was announced in open court by the Assistant District Attorney. (T.E. II). The transcript of the plea hearing reflects the following exchange:

Q. Do you understand that as Mr. Potter and Mr. Miller have pointed out, you’re entering a no contest plea? That means you’re going to have a judicial diversion for one year. During that time—and I want to make sure you understand judicial diversion. It’s a bit unusual.

You’re going to be entering a plea of no contest. In other words, saying, I give up, I choose not to contest this charge. And the State has laid out the factual basis that will be supporting that plea. Do you understand that?

A. Yes, sir.

Q. That is what the State would prove if they went to trial. You’re saying, I’m not going to contest that. That’s going to result in me entering what is called a conditional finding

of guilt. You're handing me this plea, I'm going to put it in a drawer or in the court file for one year.

And during that time, if you do everything you're supposed to do, report to the Sexual Offender Register, obey all of those requirements, stay out of trouble, don't commit any new offense, pay your court costs and so forth, that at the end of that year this case will be dismissed.

(T.E. II, 11-12). At the plea hearing, the trial court specifically acknowledged that the Petitioner was not agreeing with the State's factual basis when it observed, "even though I know you're not admitting your guilt, I have to find that you are guilty." (T.E. II, 14).

On the same date that the Petitioner entered his plea, he met with his new probation officer. (T.R. 48). The Petitioner read and signed a State of Tennessee Department of Correction Probation Order. *Id.* Said document contained "general rules and conditions of Probation." *Id.* Among the rules was Probation Rule No. 12 which provides, "If convicted of a sex offense, I will abide by the Specialized Probation Conditions for Sex Offenders as adopted by the Tennessee Department of Correction." (T.R. 48). During the same meeting, the Petitioner also read and signed a form listing those referenced special conditions entitled "Specialized Probation Conditions for Sex Offenders." (T.R. 49). Condition No. 3 obligated the Petitioner to do the following:

I will attend, participate in, and pay for treatment or counseling with an approved treatment provider as deemed necessary by the Board, the Court, or my Officer. I will con-

tinue in such treatment as instructed for the duration of supervision unless my treatment provider, in consultation with my Officer, instructs me in writing that I have satisfactorily completed treatment.

Id. In order to comply with all rules and conditions, the Petitioner selected a treatment program from an approved list. (T.R. 63). The Petitioner followed all directives and participated in the program by attending all meetings and complying with all directions. *Id.* However, on February 17, 2016, the Petitioner's treatment instructor, made the unilateral decision to discharge the Petitioner from the treatment program because the instructor subjectively determined that the Petitioner was not being truthful regarding his intentions. *Id.* Specifically, the instructor wrote a letter to the Petitioner's probation officer which stated in part, "Although he appeared to be in compliance with supervision and attended all required treatment groups, he was not able to give a credible statement of responsibility for his offense of conviction." *Id.*

In anticipation that his discharge from the treatment program could endanger his court ordered diversionary status, the Petitioner filed a preemptive Motion with the trial asking the trial court to relieve him from the treatment instructor's directive. (T.R. 51-53). In his Motion, the Petitioner reminded the trial court of his *nolo contendere* plea and asked to be relieved from any condition which might otherwise require him to "admit facts which he asserts are not true." *Id.* Said Motion was scheduled to be heard on March 14, 2016. *Id.* at 53.

Thereafter, the Petitioner's probation officer obtained a Warrant for Violation of Diversion. (T.R. 56). The affidavit of the probation officer alleged that the Petitioner had committed the following single violation of his diversionary status:

Rule No. 12: If convicted of a sex offense, I will abide by the Specialized Probation Conditions of Sex Offenders as adopted by the Board of Probation and Parole.

Specialized Condition No. 3 which states I will attend, participate in, and pay for treatment or counseling with an approved treatment provider as deemed necessary by the Board, the Court, or my Officer. I will continue in such treatment as instructed for the duration of supervision unless my treatment provider, in consultation with my Officer, instructs me in writing that I have satisfactorily completed treatment.

Violation: On 02/17/2016, Offender was discharged from sex offender specific treatment for noncompliance with treatment goals.

Id. The trial court consolidated the two pending matters and heard both the Petitioner's Motion and the Violation of Diversion Warrant on March 30, 2016. (T.R. 62). Only two witnesses testified at the hearing. Those two witnesses were the probation officer and the treatment instructor. (T.E. III). The probation officer testified that the only reason she obtained a warrant was due to the Petitioner's violation of Probation Rule 12 and special condition No. 3 as noticed in the Warrant. (T.E. III, 11-12). Specifically, the probation officer testified

that she received a discharge letter from the treatment instructor informing her that the Petitioner had been discharged from the treatment program for noncompliance. (T.E. III, 15). The probation officer specified that the decision to discharge the Appellant from the treatment program was solely the decision of the treatment instructor. (T.E. III, 18). Despite cooperating with all required treatment assessments, attending all required meetings, participating in all meetings, and paying for meetings, the Petitioner was told that he could no longer attend any meetings because he was “not agreeing with his goals.” (T.E. III, 16-17). In fact, the probation officer clarified that the Petitioner was not attending the treatment program because “he’s no longer allowed to attend.” (T.E. III, 17).

The treatment instructor testified that he wrote a letter to the Petitioner’s probation officer which stated, “Although he appeared to be in compliance with supervision and attended all required treatment groups, [Petitioner] was not able to give a credible statement of responsibility for his offense of conviction.” (T.E. III, 34).

The treatment instructor confirmed that the Petitioner completed all required assessments and attended all group meetings. (T.E. III, 34-35). In part, the treatment instructor testified as follows:

- Q. [Petitioner] was in compliance with supervision and did everything that he was told to do, with the exception of, in your opinion, he was not credible; is that right?
- A. Yes, sir.

- Q. Now, let's explore the credibility issue just a bit. Did [Petitioner] admit that he in fact sent messages that were emailed to an undercover officer purporting to be a woman and her minor child?
- A. Yes, he did.
- Q. Did [Petitioner] in fact admit that he arranged a meeting that took place at the Charlotte, Tennessee ball park?
- A. Yes, he did.
- Q. Did he in fact admit that he attended that meeting?
- A. Yes, he did.
- Q. If I am understanding you correctly, because I don't want there to be any confusion, the thing that you are saying that he did not do that was truthful is he was not credible in your opinion about his intentions?
- A. Yes, he was not credible in his intentions or his reason or rationale for why.

(T.E. III, 35-36) (emphasis added). Notwithstanding this testimony, the trial court thereafter concluded that the Petitioner's diversion should be revoked and the Petitioner was declared a convicted felon for life.



REASONS FOR GRANTING THE WRIT

The Court should grant the writ to decide the important question this case presents: the requisite due process notice to be given a criminal defendant who enters a *nolo contendere* plea pursuant to judicial diversion. The Supreme Court of Tennessee has decided the important question in a way that conflicts with relevant decisions of this Court and needs to be resolved by following the reasoning in the dissent of the Honorable Justice Sharon Lee of the Supreme Court of Tennessee.

I. WHETHER THE SUPREME COURT OF TENNESSEE ERRED WHEN IT HELD, AS A MATTER OF FIRST IMPRESSION, THAT DUE PROCESS RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS ARE NOT VIOLATED BY A TRIAL COURT'S FAILURE TO PROVIDE ACTUAL NOTICE TO A CRIMINAL DEFENDANT THAT HIS SUBSEQUENT ADMISSION OF CRIMINAL INTENT TO A TREATMENT INSTRUCTOR WILL BE A MANDATORY CONDITION OF HIS DIVERSION FOLLOWING THE ENTRY OF A *NOLO CONTENDERE* PLEA?

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), this Court concluded that the loss of liberty entailed by the revocation of probation is a serious deprivation for which an individual defendant must be accorded due process. *Id.* at 781-82; *see also United States v. Simmons*, 812 F.2d 561, 565 (9th Cir. 1987) (noting that a defendant's liberty interest in probation must be protected by due process of law). Inherent in the accords of due process, and fundamental to the tenants

thereof, is the concept of fair notice, fair warning. *See Scott v. McNeal*, 154 U.S. 34 (1894) (finding that “[n]o judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.” *Id.* at 47). Notice is a fundamental facet of due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (where the Court found that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances).

When a provision of the Bill of Rights is considered fundamental and essential to a fair trial, the same is made obligatory upon the States by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). Accordingly, the various states cannot ignore the requirements of the United States Constitution and the Amendments thereto. The United States Constitution sets the minimum constitutional protections a state must afford individuals, including criminal defendants. *See Cooper v. State of Cal.*, 386 U.S. 58, 61 (1967); *see also Oregon v. Hass*, 420 U.S. 714, 719 (1975).

In the present case, the Petitioner’s due process rights were violated by lack of fair notice. First, a *nolo contendere* plea is “fundamentally inconsistent with a requirement of admission of guilt in treatment.” *See State of Tennessee v. Albright*, 564 S.W.3d 809 (Tenn. 2018) (Lee, S. dissent) (App.34a). As indicated on the Petitioner’s judgment sheet, he entered into a conditional *nolo contendere* plea under judicial diversion, and he was not sentenced nor found guilty by the trial court. (App.78a-81a). This Court in *North Carolina v.*

Alford, 400 U.S. 25 (1970) found that an *Alford* plea, also known as a *nolo contendere* plea, “is one in which the defendant is unwilling or unable to admit his participation in the acts constituting the crime.” *Id.* at 37. The inability or unwillingness to admit the crime is the core of a *nolo contendere* plea. Other jurisdictions have found similarly.²

This case is admittedly a very narrow issue, because of the facts surrounding the plea itself, and the nature of the alleged offense has no bearing on this Court’s constitutional analysis. Not only was the agreement between the Petitioner and Respondent in the form of a *nolo contendere* plea, it was also a conditional *nolo contendere* plea pursuant to judicial diversion under Tennessee State law. *See* Tenn. Code Ann. § 40-35-313; (App.78a-81a). Under Tenn. Code Ann. § 40-35-313, the trial court entered neither a guilty plea nor a sentence. This is fundamentally different than a guilty plea, and, accordingly, due process rights attached to a conditional *nolo contendere* plea pursuant to judicial diversion are more exacting than under a regular guilty plea. One of those more exacting due process rights is that of notice.

² *See State v. Katon*, 719 A.2d 430, 434 (Vt. 1998) (Dooley, J., concurring) (observing that the underlying problem was the mutual inconsistency between the plea and sentence); *see also People v. Walters*, 627 N.Y.S.2d 289, 291 (Schoharie Cnty. Ct. 1995) (concluding that “[t]o require [a] defendant to admit to his factual guilt during treatment, upon threat of incarceration, is directly inconsistent with [an *Alford*] plea agreement”); *State v. Birchler*, No. 00AP-311, 2000 WL 1473152, at *2 (Ohio Ct. App. Oct. 5, 2000) (“Requiring [defendant] to admit that there was a victim or to specific criminal conduct against a victim would be in contradiction to his maintenance of factual innocence pursuant to *Alford*.”).

The Petitioner did not receive actual notice that an admission of guilt was a condition of his judicial diversion. *See State of Tennessee v. Albright*, 564 S.W. 3d 809 (Tenn. 2018) (Lee, S. dissent) (App.34a). In fact, the trial court stated that it was “going to put [the conditional *nolo contendere* plea] in a drawer or in the court file for one year.” *Id.* (T.E. II, 11-12). When the Petitioner entered his *nolo contendere* plea, the trial court did not inform the Petitioner that he would have to admit guilt, or his criminal intent, during treatment. *Id.* (T.E. II, 11-12). Even looking to the Specialized Probation Conditions for Sex Offenders in Tennessee, to which the Petitioner was subject, there is no mention of an admission of guilt or any type of requirement obligating Petitioner to confess to a particular *mens rea*. The lack of actual notice of mandatory admission to a specific criminal intent is fatal and a violation of due process rights.

The majority of the Supreme Court of Tennessee relied heavily upon the notion that the Petitioner received implied notice, and that implied notice satisfies due process under the Fourth and Fourteenth Amendments. This is misplaced under this Court’s precedent. First, the facts of this case do not support the contention that the Petitioner received implied notice. An unstated condition of his judicial diversion that he would have to admit guilt and criminal intent, in treatment is not implied notice. The Petitioner could not know from being told to register as a sex offender or to attend treatment that if he did not admit guilt during treatment, to the subjective satisfaction of his therapy instructor, his judicial diversion would be revoked. The Petitioner was not required to admit guilt, or criminal intent, to the trial court, and it cannot be

implied that he would know that he would have to admit guilt, or criminal intent, in treatment. The therapy instructor asked him to do something that was not required of him by the trial court when his plea was accepted.

Even if there is found to be implied notice, such implied notice does not satisfy this Court's due process requirements in this case, where the underlying conduct that led to the revocation of judicial diversion, of probation, is not criminal in nature.³ Failing to admit guilt, to admit criminal intent, to a therapist is not a crime, and actual notice is required where such a failure will lead to a revocation of diversion. Fair warning by the trial court to a criminal defendant who enters a *nolo contendere* plea, receives judicial diversion, and is required to participate in treatment, that admitting guilt, or criminal intent, during treatment is a condition of his diversion is not a heavy burden.

This problem could have been easily remedied. The State of Tennessee could have insisted that the Petitioner plead guilty, in lieu of *nolo contendere*, as a condition of the plea agreement, or the trial court could have given proper notice to the Petitioner at the time the plea was entered that a confession of guilt would be expected of him.

Finally, it is of import to note that the Petitioner complied with all stated conditions of his diversion.

³ *United States v. Simmons*, 812 F.2d 561, 565 (9th Cir. 1987); *People v. Calderon*, 356 P.3d 993, 997 (Colo. Ct. App. 2014); *State v. Boseman*, 863 A.2d 704, 712 (Conn. App. Ct. 2004); *State v. Monson*, 518 N.W.2d 171, 173 (N.D. 1994); *State v. Budgett*, 769 A.2d 351, 354 (N.H. 2001).

See State of Tennessee v. Albright, 564 S.W.3d 809 (Tenn. 2018) (Lee, S. dissent) (T.E. III, 16-17). He attended his treatment, paid for counseling, and he did make requested admissions. *Id.* (T.E. III, 35-36). The problem was that he did not have the “requisite mental intent” that his therapist desired to hear. *Id.* In essence, the Petitioner and his therapist disagreed as to the Petitioner’s *mens rea*. This alone is the reason for the Petitioner’s revocation of diversion by the trial court. (T.E. III, 34).

Without actual notice of the mandatory requirement to admit specific criminal intent in treatment, a defendant who enters a *nolo contendere* plea under judicial diversion is setup for failure. Without being afforded the opportunity to not enter this type a plea after being told that an admission of guilt is mandatory at the plea colloquy, a criminal defendant entering a no contest plea will likely fail diversion. At best, such an outcome encourages criminal defendants in these situations to lie during treatment. In fact, it could be argued that the Petitioner would have successfully completed diversion and had his case dismissed if he had simply complied with the treatment instructor’s directives and satisfied his subjective demand for a confession.

The constitutional mandates of due process under the Fourth and Fourteenth Amendments are violated by the Supreme Court of Tennessee’s holding.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY V. POTTER
ATTORNEY FOR PETITIONER
REYNOLDS, POTTER, RAGAN
& VANDIVORT, PLC
210 EAST COLLEGE STREET
DICKSON, TN 37055
(615) 446-2221
TPOTTER@RPRVLAW.COM

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