ORIGINAL

No. 18-8707

IN THE

SUPREME COURT OF THE UNITED STATES

Wallace G. Carlyle — PETITIONER

Vs.

SHARMAN CAMPBELL. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Wallace George Carlyle #402465

In Pro Se

GUS HARRISON CORRECTIONAL FACILITY

2727 E. Beecher Rd.

Adrian, MI. 49221

(City, State, Zip Code)

QUESTION(S) PRESENTED

I. DID TRIAL COUNSEL'S FAILURE TO ADEQUATELY CONSIDER MR. CARLYLE'S MENTAL RETARDATION AND HISTORY OF ABUSE, AND OTHER VARIOUS ACTS, DEPRIVE DEFENDANT OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN MITIGATION OF MR. CARLYLE'S SENTENCE, PLEA AND DEFENDANT'S RIGHT TO A JURY TRIAL; DEPRIVE DEFENDANT OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

II DID PRIOR APPELLATE COUNSEL'S CONSTITUTIONALLY INEFFECTIVE ASSISTANCE, TOGETHER WITH APPELLANT'S MENTAL RETARDATION, ESTABLISH "GOOD CAUSE" FOR APPELLANT'S FAILURE TO PROPERLY SUPPORT THE PLEA WITHDRAWAL ISSUE RAISED IN HIS PRIOR APPEAL, AS WELL AS ARGUE TRIAL COUNSEL'S CONSTITUTIONALLY INEFFECTIVE ASSISTANCE RAISED IN THIS MOTION FOR RELIEF FROM JUDGMENT?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

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Michigan Statutes

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MICH CONST;

SECONDARY AUTHORITIES:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Federal Courts.

The opinion of the United States Court of Appeals for The Sixth Circuit appears at Appendix [A] to the petition and is Unpublished

The opinion of the United States District Court appears at Appendix [B] to the petition and is Unpublished

State Courts

The opinion of The Michigan Supreme Court appears at Appendix [C] to the petition and is Unpublished.

The opinion of The Michigan Court of Appeals appears at Appendix [D] to the petition and is Unpublished.

JURISDICTION

Petitioner, Wallace G. Carlyle is filing this Petition for Writ of Certiorari pursuant to 28 U.S.C.A. § 1254(1) and 28 U.S.C.A. § 1257(a), as a state prisoner convicted in the 2nd Circuit Court for Berrien County in the State of Michigan, he plead guilty on September 18, 2009, to Criminal Sexual Conduct Third Degree, (Habitual Criminal 2nd Offense). Petitioner was sentenced on November 3, 2009 to 144 to 270 months in prison, defense counsel failed to adequately consider Petitioner mental retardation, history of abuse, and other various acts depriving defendant of his Sixth and Fourteenth Amendment rights to the effective assistance of counsel in the mitigation of Petitioner's sentence, plea and Petitioner's right to a jury trial. violates his constitutional rights. And seek relief from an unconstitutional detention. As such, this Petition for Writ of Certiorari is being filed within the 90-day period of the final decision from the United States Court of Appeals for the Sixth Circuit denying, a Petition for Writ of Habeas Corpus. And a Certificate of Appealability on. September 26, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due process under the U.S. Const. 14th Amendment, and Const. 1963, art 1, sec. 17, requires that a defendant have the effective assistance of counsel on his direct appeal as of right. The determination of whether there is reasonable provocation is a question of fact for the fact-finder and matter of right to trial by jury. U.S. Const. V, VI, and XIV;

STATEMENT OF THE CASE

Petitioner, Wallace G. Carlyle #402465, was sentenced to 144 to 270 months in prison on November 3, 2009 for Case No.09-015792-FC by the Berrien Circuit Court. The sentencing court issued an Order Appointing Counsel on January 07, 2010, and Petitioner Carlyle was appointed Laurel Young (40671) to handle his Application for Leave to Appeal. Petitioner filed an appellate brief consisting of the following issue:

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT-APPELLANT'S REQUEST FOR PLEA WITHDRAWAL BY RESPONDING TO ONLY ONE BASIS FOR DEFENDANT-APPELLANT'S PLEA WITHDRAWAL WHEN DEFENDANT-APPELLANT CHALLENGED THE PLEA PROCEDURALLY AND ALSO CLAIMED HIS INNOCENCE NUMEROUS TIMES PRIOR TO SENTENCING.

On November 05, 2010, the Michigan Court of Appeals affirmed Petitioner's conviction, People v. Wallace George Carlyle, COA No.300382.

On May 24, 2011, the Michigan Supreme Court denied leave to appeal stating: On order of the Court, the application for leave to appeal the November 5, 2010 order of the Court of Appeals is considered, and it is **DENIED**, because we are not persuaded that the questions presented should be reviewed by this Court. MSCt No.142292.

Petitioner filed a Motion for Relief from Judgment pursuant MCR 6.500 and a Motion to Conduct an Evidentiary Hearing in the Berrien County circuit court on September 9, 2015. The Prosecutor filed a response to Petitioner's Motion on December 4, 2015, on April 11, 2016 Petitioner filed a Motion to Amend/Supplement Motion for Relief from Judgment. Petitioner appealed Circuit Court Judge Scott Schofield order of May 26th, 2016 denying Motion for Relief from Judgment to the Michigan Court of Appeals which was denied January 27, 2017. On or about Feb 16, 2017, Petitioner filed an appeal to the Michigan Supreme Court to which he was denied on 11-17-2017, Petitioner then filed a Habeas and a Motion to Toll his time on Jan 16, 2018 in the Eastern District of Michigan, Petitioner was denied on May 1, 2018, Petitioner filed a Notice of Appeal to the Sixth Circuit. The Sixth Circuit ruled and denied Petitioner appeal, this Petition for Writ of Certiorari is being filed within the 90-day period of the final decision from the United States Court of Appeals for the Sixth Circuit denying, a Petition for Writ of Habeas on September 26, 2018.

ISSUE I

INEFFECTIVE ASSISTANCE: DEFENSE COUNSEL'S FAILURE TO ADEQUATELY CONSIDER MR. CARLYLE'S MENTAL RETARDATION AND HISTORY OF ABUSE, AND OTHER VARIOUS ACTS, DEPRIVED DEFENDANT OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE MITIGATION OF MR. CARLYLE'S SENTENCE, PLEA AND DEFENDANT'S RIGHT TO A JURY TRIAL.

The state and federal constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const Amend VI, XIV; Const 1963, art 1, sec 20. The test for determining ineffective assistance is twofold: Whether counsel's performance was deficient, and if so, whether his deficient performance prejudiced the defense. Strickland v Washington, 466 US 668; 104 S Ct 5052; 80 L Ed 2d 674 (1984). Counsel's performance is deficient if, "under an objective standard of reasonableness," he "made an error so serious that [he] was not functioning as an attorney as guaranteed by the Sixth Amendment. A claim of ineffective assistance of counsel can be premised on the counsel's performance before a plea is entered. Petitioner is entitled to the effective assistance of counsel in determining how to plead. It seems that the decision to reject a plea bargain offer and plead not guilty is also a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches."

A guilty plea is not constitutionally valid unless entered in a voluntary, knowing and intelligent manner. See Machibroda v United States, 368 US 487; 82 S Ct 510; 7 LEd 473 (1962); Brady v United States, 397 US 742, 748; 90 S Ct 1463; 25 LEd 2d 747 (1970). A defendant must understand the likely or possible consequences of the plea. In Brady v United States, supra at 25 L Ed 2d 748 fn. 6, Justice White speaking for the majority said that guilty pleas:

> Must not only be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. [25 L Ed 2d at 756]

***

> The importance of assuring that a defendant does not plead guilty

> except with a full understanding of ...the possible consequences of his plea was at the heart of our recent decisions in McCarthy and Boykin. [25 L Ed 2d at 756, n.6.]

A guilty plea is "a grave and solemn act to be accepted only with care and discernment" because "the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial." Brady, supra. Since Kercheval v United States, 274 US 220; 47 S Ct 582; 71 L Ed 1009 (1972), the Supreme Court has recognized that "unfairly obtained" guilty pleas in the federal courts ought to be vacated. In Boykin v Alabama, 395 US 238; 89 S Ct 1709; ____ L Ed 2d 274 (1969), the Supreme Court recognized that the question of whether a guilty plea, entered in a state court, is voluntary, knowing and intelligent, involves federal constitutional rights and is governed by federal standards. For the waiver which a guilty plea represents to be valid under the Due Process clause, it must be "an intentional relinquishment of a known right or privilege." Johnson v Zerbst, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938).

The test for determining the validity of a guilty plea was summarized in North Carolina v Alford, 400 US 25, 31; 91 S Ct 160; 27 L Ed 2d 162 (1970):

> "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."

A guilty plea does not waive a claim of ineffective assistance of counsel. Kimmelman v Morrison, 477 US 365; 106 S Ct 2574; 91 L Ed 305 (1986). Only a voluntary intelligent plea constitutes a waiver of a claim of ineffective assistance of counsel, and that is not the case at bar. In reviewing a claim of ineffective assistance of counsel in the context of a guilty plea, a court should focus on whether the plea was offered voluntarily and understandingly. The controlling test is whether counsel provided competent assistance when rendering the advice to forego a claim.

The test for misadvise by counsel is whether counsel's performance fell below an objective standard of reasonableness and whether there is a reasonable probability that but for counsel's errors the petitioner would not have pleaded guilty. Hill v Lockart, 474 US 52, 106 S Ct 366, 88 L Ed 203 (1985). In other words, a defendant must show both ineffective assistance of counsel

and an involuntary plea. To show "prejudice" for a claim of ineffective assistance of counsel, defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v Lockart, 88 L Ed 2d at 210. In this case, defense counsel took advantage of Petitioner's mental retardation and his diminished capacities to understand and process information, to communicate, (petitioner's impairments). Petitioner's singularly focus on his desire to see his girlfriend and it can possibly be better understood with the knowledge the Petitioner is mentally disabled. (PSIR, January 28, 2010, Page 2) (PSIR January 28, 2010, Page 1) Petitioner was the victim in Berrien Case Number 95-1123-FC, MCL 750.520B1H, Criminal Sexual Conduct in the 1st degree as a mentally disabled relation.

Defense Counsel took advantage of Petitioner's ignorance in the complaint's ability to tell the difference in truth and falsehood.

On 7/28/09, at the Preliminary Examination the following exchange took place:

"Mr. Sible: Yes, judge. When young Dakota first stated testifying, judge, you asked him questions about his ability to tell the difference between truths and falsehood, and I it didn't have any questions about it at the time, but I think, certainly, with his testimony, I do. And—And the reason I think his competency and his ability to tell the difference in truth and falsehood is important because I think right now the Court can maybe think something bad happened to Dakota that night, but, I don't think the court can even come close to guessing exactly what it was. I think Dakota showed that, I could sit there and ask him questions and questions and he'll tell stories and just keep going and going with it and then say it's true, under oath, say it's true. He's got –They got a thousand skeletons in their basement and he shoved them all off of him, and they were two guns being shot. And, honestly, I stopped, but I could—didn't have to. We could've had all sort of stories, probably could've had hours' worth of stories, judge, and Dakota said it's all true." (See Attachment F Preliminary Examination PT, 07/28/2009, p.61, lines 21-25;62, lines 1-13)

So, while I think the Court can certainly find probable cause that maybe something bad happened, certainly not probable cause as to what that, was because Dakota demonstrated pretty clearly that he can't tell the difference between truth and what's not true. And something that's clearly not true, is fabulous, he'll say it's true. And the Court might also remember, I think in the 80's, there's quite a few cases where children testified that they had been molested or abused

and they mixed it in with these crazy stories about elephants – and maybe thousands of skeletons in the basements, I don't know. And most of those end up getting overturned because turned out to be lies, judge. I'm not saying Dakota is lying about (See Attachment F, Preliminary Examination PT, 07/28/2009, p.62, lines 14-25) everything. I'm just saying I don't see any way the Court can tell the difference. He plainly stated, I told you the truth there are thousands of skeletons in the basement, that's true. Told a story about two guns, which there's no evidence to support. Told the story about how he—again, how he shoved them both off of him and they went flying. And he might've been harmed and he might've abused, but I don't see how the Court could tell what was true and what wasn't." (See Attachment F, Preliminary Examination PT, 07/28/2009, p.63, lines 1-8)

THE COURT: Thank you, Mr. Sible. Mr. LutZ?

THE COURT: I object to the Bind over." (See Attachment F, Preliminary Examination PT, 07/28/2009, p.63, lines 9-10) In this instant case at the Preliminary Examination both counsel for the Petitioner and his Co-defendant objected to the Bind over. (p.63, lines 9-10, id.)

And the fact that counsel known that Dakota was in foster care and that they had made a determination that it wasn't in his best interest to have to testify at a trial in front of 13 or 14 jurors and that his mother's rights had been terminated. (See ST 11/03/09, p.13). The Petitioner know he was not guilty of any crime.

Petitioner continues to maintain his innocence which is a "fair and just" reason for plea withdrawal. People v. Carlyle, 203 Mich.App. 607, 611; 513 N.W.2d 206 (1994). Petitioner stated this in a number of unfortunately somewhat convoluted ways. Trial counsel attempted to clarify this concept with the trial court as follows:

THE COURT: So, is Mr. Carlyle saying that he – he met with law enforcement and gave a confession?

MR. SIBLE: That's correct, your Honor.

THE COURT: On the strength of a promise that he would be able to meet with his girlfriend after he made the confession?

MR. SIBLE: Well, I-I-I won't—characterize it as a promise, and if he is saying that. I—I'd let him say whether it was actually a promise or not, judge.

THE COURT: There's no contention that the confession was untrue?

MR. SIBLE: I believe he **made that contention in his letter,** your Honor. (emphasis added)

(Sentencing Transcript November 2, 2009, page 5)

At trial, these along with many other facts, benefitting the defense, would have been brought out. Yet, counsel robbed Petitioner of the opportunity to properly defend himself against the charges he was accused of and to prove his innocence. At the Preliminary Examination on July 28, 2009, Petitioner and his Codefendant adamantly insisted that they wanted to go to trial and were pleading not guilty and demanding a jury?

MR. SIBLE: Mr. Carlyle is, judge.

MR. LUTZ: yes. (See Attachment F, Preliminary Examination PT, 07/28/2009, p.64, lines 22-25).

Prior to sentencing, Petitioner - sent a letter to the trial court and stated that he wished to withdraw his plea of guilty. (Sentence Transcript, November 2, 2009, Page 3) Although the letter itself was not present in the trial court's file, Judge Schofield's description of the letter on the record indicates that Petitioner - believed that he had been tricked into pleading guilty to something he did not do. (See Attachment C, Sentence Transcript, November 2, 2009, Page 3 and Petitioner - Letter to the Trial Court.) The presentence report also indicates that prior to sentencing the Petitioner stated that neither he nor his co-defendant committed any crimes. (See Attachment D, PSIR, Page 3, Petitioner Description of the Offense.) The trial court responded to Petitioner request immediately prior to Sentencing him the following day on November 3, 2009. The trial court denied the motion by declaring that no error had occurred in the plea proceeding. The trial court did not address Petitioner claim of innocence nor recognize it as a fair and just basis for withdrawal of a plea of guilty. (See Attachment E, Sentence Transcript, November 3, 2009, Page 3.) The trial court and defense counsel did not address Petitioner's "history of mental retardation."

Atkins v Virginia, 536 US 304; 122 S Ct 2242, 2244-2245; 153 L Ed 2d 335 (2002). The court observed [122 S Ct 2242, 2250-2251]:

As discussed above, clinical definitions of mental retardation require not only sub average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to

stand trial. **Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.** ***Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.***

In *People ex rel Bernstein v McNeill* (48 N.Y.S. 2d 764, 766) the court . . . said, in part: 'Ability to make a defense, however, means more than capacity to discuss his case with his attorney, answer questions, and to understand the nature of legal proceedings. If relator is to go to trial, he should be able to discuss with counsel, rationally, the facts relating to his case which are within his recollection. He should also be able, rationally, to consider the evidence offered against him, to advise with his attorney concerning it, and to make such decisions as may be necessary for him to make during the course of such a trial.' * * * The word 'understanding' requires some depth of understanding, not merely surface knowledge of the proceedings."

A Petitioner faced with criminal prosecution should have the ability to make necessary trial decisions. *Godinez v Moran, supra*, 125 LEd2d at 331. Not only must the Petitioner decide whether to testify, but he or she must have the ability to testify. The ability to testify includes the ability to understand and withstand cross-examination. Mecklenburg, Competency to Stand Trial and the Mentally Retarded Petitioner: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem, 17 Cal. W. L. Rev. 365, 388-389 (1981). Another consideration is whether the defendant has the ability to withstand the rigors and stress of trial. Id at 389.

Defense counsel did not addressed the issue of the question of the complaint's competency and the complaint's ability to tell the difference in truth and falsehood, not at defendant's sentencing hearing on November 2-3, 2009.

However, in this case counsel didn't want to listen to the Petitioner, he made his decision at the (Preliminary Examination Trans, 07/28/2009, p.62): "So, while I think the Court can certainly find probable cause that maybe something bad happened, certainly not probable cause as to what that, was because Dakota demonstrated pretty clearly that he can't tell the difference between truth and what's not true." (Emphasis added).

While the nature of the criminal justice process is to focus on a single event "the crime." Viewed more broadly, this case stands for the articulated reasons or policies for sentencing the defendant, based on the fact that the Prosecutor, the Court and Defense Counsel had decided that "certainly find probable cause that maybe something bad happened" (Preliminary Examination Trans, 07/28/2009, p.62), supra. Because the court, prosecutor, and defense counsel was disconcerting with the primary facts of the case before it, the court, travel on increasingly on unconstitutional ground the further the court venture from the primary facts. The obvious guide in venturing from those facts is the Petitioner's plea:

THE COURT: Having heard all of these rights, Mr. Carlyle, how do you wish to plead to Criminal Sexual Conduct 3rd degree, with one supplemental, a 22 ½ year felony?

THE DEFENDANT: Plead guilty.

THE COURT: Are you pleading guilty of your own free choice?

THE DEFENDANT: Yes, sir.

THE COURT: Do you believe you actually guilty?

THE DEFENDANT: Yes, sir. (Plea Tran., 9/18/09, p.12, lines 1-22).

THE COURT: You were there with Tracy Fritsche?

THE DEFENDANT: Yes, sir.

THE COURT: And with Dakota Keckler?

THE DEFENDANT: Yes, sir.

THE COURT: Dakota was 5 years old at the time?

THE DEFENDANT: Yes, sir.

THE COURT: Dakota was placed in your care by his mother?

THE DEFENDANT: Yes, sir.

THE COURT: You and Tracy Fritsche were in bed with Dakota Keckler?

THE DEFENDANT: Yes, sir.

THE COURT: And you had Dakota Keckler put his mouth on your penis and perform fellatio, is that correct?

(At 12:29 p.m., DA confers with defendant)

(At 12:30 p.m., conference concluded)

THE COURT: Just a minute, sir. Do you want me to question Mr. Carlyle further—

MR. SIBLE: No, he's – he's gonna give a statement as to what penetration occurred, judge.

THE COURT: All right. So you were in bed with Miss Fritsche and Dakota Keckler, the 5-year-old?

THE DEFENDANT: Yes, sir.

THE COURT: You didn't have any clothes on?

THE DEFENDANT: No, Sir. (Plea Tran., 9/18/09, p.13, lines 1-25).

THE COURT: Miss Fritsche didn't have any clothes on?

THE DEFENDANT: About half, I'd say.

THE COURT: So, she was partially naked?

THE DEFENDANT: Yes, sir.

THE COURT: What half was naked?

THE DEFENDANT: Like the bottom part.

THE COURT: All right. And Dakota Keckler was naked?

THE DEFENDANT: Pretty much, yeah.

THE COURT: By, pretty much, you mean what?

THE DEFENDANT: I mean, well, yeah, pretty much naked all the way.

THE COURT: So he was completely naked?

THE DEFENDANT: Yeah.

THE COURT: All right. What did you do to Dakota Keckler?

THE DEFENDANT: Basically, I used my fingers to – What was the name of that word there, penetration (sic)?

MR. SIBLE: Penetrate – Penetration.

THE DEFENDANT: Penetration.

MR. SIBLE: Yes.

THE COURT: Did you put your penis in his mouth?

THE DEFENDANT: No, sir.

MR. SIBLE: He's saying he – he stuck his fingers in his anus, judge.

THE COURT: Did you put your finger in Dakota's anal (Plea Tran., 9/18/09, p.14, lines 1-25).

Opening, his anus?

THE DEFENDANT: Yes.

THE COURT: And what else did you do to Dakota?

THE DEFENDANT: Basic fondled and stuff.

THE COURT: You fondled him. You fondled his penis?

THE DEFENDANT: Yes.

THE COURT: Now, Dakota's penis was inserted in Miss Fritsche's vagina, is that right?

THE DEFENDANT: No, sir.

THE COURT: Miss Fritsche laid on top of Dakota?

THE DEFENDANT: Yes, sir. But –

THE COURT: You assisted her in doing so and encouraged he to do so?

THE DEFENDANT: What's that?

THE COURT: You were laying right there in bed beside her, am I right?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And you helped her in that process of laying on top of Dakota?

MR. SIBLE: Was the whole – this whole thing your idea, or was it her idea?

THE DEFENDANT: Basically, it was both of our idea of (Plea Tran., 9/18/09, p.15, lines 1-25).

doing it.

THE COURT: All right. And part of what your idea was, that – was to have Dakota's penis inserted into Miss Fritsche's vagina, is that right?

THE DEFENDANT: What was the question?

(From 12:33 p.m. to 12:33 p.m., DA confers with defendant)

THE COURT: So, you understand that a woman's genitals, or vulva, includes something called the labia, two lips, right, that surrounds the vagina?

THE DEFENDANT: Yeah, I…

THE COURT: You're familiar with those?

THE DEFENDANT: Yeah, I'm—

THE COURT: All right. And Miss Fritsche was laying on top of Dakota, such that the lips of her labia were on top of Dakota's penis?

THE DEFENDANT: Yes, sir.

THE COURT: And his penis was partially insider the lips of those labia?

THE DEFENDANT: I'm—I'm gonna—Yes.

THE COURT: Is that yes or no?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Have we—has the defendant successfully stated two instances of sexual penetration, Miss Malesky? (Plea Tran., 9/18/09, p.16, lines 1-25).

MISS MALESKY: Yes.

THE COURT: Mr. Sible?

MR. SIBLE: Yes, Judge.

THE COURT: And did you tell me that Dakota was 5 years old at the time?

THE DEFENDANT: I believe he was, yes. (Plea Tran., 9/18/09, p.17, lines 1-6).

THE COURT: The Court does find that Mr. Carlyle has stated sufficient facts to support his plea. I find that the crime to which he has pled was committed, and that he committed (Plea Tran., 9/18/09, p.17, lines 23-25).

It?

Defense Counsel stands by and allows the Petitioner to plead guilty to a crime that the Petitioner was not even charged with and no jury could have found him guilty of putting his fingers in Dakota's anus or Dakota's anal and when it came to putting his penis in Dakota's mouth the defendant said he did not do it. (Plea Tran., 9/18/09, p.14, id.). The crime the Petitioner plead guilty to was beyond the scope the complaint and the warrant and it had already been determined that the complaint would not be available for trial. Counsel known that Dakota was in foster care and that they had made a determination that it wasn't in his best interest to have him testify at a trial in front of 13 or 14 jurors and that his mother's rights had been terminated. (See ST 11/03/09, p.13). The Petitioner known he was not guilty of any crime and the state's case was falling apart and counsel known it. This was more than just defense counsel simply not conveying the different possible outcomes of going to trial, nor was counsel merely giving his advice, as he should. No, counsel was trying to get the Petitioner to take the plea, purposely to avoid having to deal with the hassles of a trial.

"The prompt disposition of criminal cases is to be commended and encouraged but in reaching that result, a Petitioner must not be stripped of his right to have sufficient time to advise

with counsel and prepare his defense. To do that is not to proceed promptly in the calm sprit of regulated justice, but to go forward with the haste of the mob." Powell v Alabama, 287 U.S. 45 (1932); It calls upon us to analyze whether potential "substantial prejudice to Petitioner's right's inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." Powell v Alabama, id.

"The right to have the assistance of counsel is too fundamental and absolute to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v US, 315 US 60, 76; 62 S Ct 457; 86 L Ed 680 (1942). This is especially true in the case at bar where counsel's performance was constitutionally deficient based on all that has been stated above and counsel's performance prejudiced the Petitioner, by making sure that he plead guilty to a crime that the state was without a star witness (victim) thus finding himself charged convicted and sentence to the MDOC. If counsel had informed the Petitioner that the state had no complainant the Petitioner would not had plead guilty and would had taken his chances with a jury, cross-examining all states witnesses, "the greatest legal engine ever invented for the discovery of truth."

Because counsel failed to advise Petitioner of the consequences of his plea, he provided ineffective assistance of counsel. Counsel's ineffectiveness caused Petitioner to plead guilty without understanding the consequences of his plea, rendering Petitioner's plea involuntary.

Petitioner ask this honorable to remand this case for the opportunity to withdraw his plea or, in the alternative, an evidentiary hearing to support his claim that he was not afforded the effective assistance of counsel.

ISSUE II

PRIOR APPELLATE COUNSEL'S CONSTITUTIONALLY INEFFECTIVE ASSISTANCE, TOGETHER WITH APPELLANT'S MENTAL RETARDATION, ESTABLISHED "GOOD CAUSE" FOR APPELLANT'S FAILURE TO PROPERLY SUPPORT THE PLEA WITHDRAWAL ISSUE RAISED IN HIS PRIOR APPEAL, AS WELL AS ARGUE TRIAL COUNSEL'S CONSTITUTIONALLY INEFFECTIVE ASSISTANCE RAISED IN MOTION FOR RELIEF FROM JUDGMENT.

The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel on the first appeal by right. Evitts v. Lucey, 469 US 387, 396-397, 105 SCt 830, 83 L.Ed.2d 821 (1985). Constitutionally ineffective assistance of counsel is "cause" for a state procedural default, see Murray v Carrier, 477 US 478, 488; 106 SCt 2639; 91 L.Ed.2d 397 (1986). The Strickland standard applies equally on appeal: the petitioner must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the appeal. Strickland, 466 US at 687; Carpenter v Mohr, 163 F3d 938, 946 (CA 6, 1998), rev'd on other grounds sub nom Edwards v Carpenter, 529 US 446; 120 SCt 1587; 146 LEd2d 518 (2000). The second prong of the test (prejudice) requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. "Id.at 694, 104 SCt 2052.

Certain factors weigh towards a finding of ineffective assistance of appellate counsel, including, failing to raise an issue which was obvious from the trial record and which would have resulted in a reversal on appeal, Matire v Wainwright, 811 F.2d 1430, 1438 (CA 11, 1987). It is counsel's duty to provide competent assistance and to avoid serious mistakes. People v Garcia, 398 Mich 250; 247 NW2d 547 (1976).

Argument: Failure to raise the issue of counsel's ineffectiveness causing Petitioner to plead guilty without understanding the consequences of his plea, rendering Petitioner's plea

involuntary, during the appeal of right can only be considered ineffective assistance of counsel, which establishes good cause. Here, the Court cannot conclude that the Petitioner received the guarantee of an appeal by right with constitutionally effective assistance of counsel. He literally received direct appellate review, but it was meaningless appellate review without the assistance of "constitutionally adequate counsel." Appellate counsel was clearly ineffective in failing to raise *the issue of ineffective assistance of counsel.*

Moreover, the good cause and actual prejudice requirements are not required for a jurisdictional defect. Lack of counsel is a jurisdictional defect. Ineffective assistance of counsel should likewise be considered a jurisdictional defect, since constitutionally ineffective counsel is the equivalent of no counsel. See *United States v Cronic*, 466 US 648, 654 at fn. 11 (1984) ("In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided").

The next part of test for whether relief should be granted requires defendant to show that he has been actually prejudiced. This can be met if the defendant can show that the convictions were invalid due to the error. As mentioned in **ISSUES I** above, defense counsel took advantage of Petitioner's mental retardation and his diminished capacities to understand and process information, to communicate, (Petitioner's impairments); and Defense counsel took advantage of defendant's ignorance in the complaint's ability to tell the difference in truth and falsehood. Petitioner's, guilty plea was constitutionally invalid the plea was not voluntary, knowing and intelligent.

Forever, viewing the world through the lens of legal analysis presents the danger that judges and lawyers will lose the ability to care about people as individuals. Empathy will give way to dissecting life's problems as legal issues rather than human struggles. In this instant case empathy gave way to dissecting Petitioner's life's problems as legal issues rather than human

struggles, "given the fact that the Petitioner is retarded and was the victim of a sexual assault, and there were some question about the complaint's competency and his ability to tell the difference in truth and falsehood.

While, the nature of the criminal justice process is to focus on a single event "the crime." Viewed more broadly, this case stands for the articulated reasons or policies for sentencing the defendant. Because counsel was disconcerted with the primary facts of the case before him, counsel travel on increasingly, on unconstitutional ground the further counsel venture from the primary facts, and engaged in discussions regarding a sentence cap for the Petitioner." (Preliminary Examination TT, 07/28/2009, p.69-70, lines 25-1).

Defense Counsel stands by and allows the Petitioner to plead guilty to a crime that the Petitioner was not even charged with and no jury could have found him guilty of putting his fingers in Dakota's anus and when it came to putting his penis in Dakota's mouth the Petitioner said he did not do it. (Plea Tran., 9/18/09, p.14, id.). The Petitioner known he was not guilty of any crime and the state's case was falling apart and counsel known it. This was more than just defense counsel simply not conveying the different possible outcomes of going to trial, nor was counsel merely giving his advice, as he should. No, counsel was trying to get the Petitioner to take the plea, purposely to avoid having to deal with the hassles of a trial.

On or around 12-4-89, the Petitioner was a victim, at his plea and sentencing Petitioner would once again become a victim, as he would be asked to plead guilty to a crime that the Petitioner was not even charged with and no jury could have found him guilty of putting his fingers in Dakota's anus and when it came to putting his penis in Dakota's mouth the defendant said he did not do it. (Plea Tran., 9/18/09, p.14).

Petitioner has thus met his burden of proof and established both "good cause" and "actual prejudice" and established his entitlement to relief. Petitioner is entitled to the relief he seeks as

the errors presented are offensive to the maintenance of a sound judicial system. They assuredly effected the outcome of the proceedings at both the trial and appellate levels. Review of these claims is possible from the record.

REASONS FOR GRANTING THE PETITION

Petitioner is entitled to post-conviction relief where he was deprived of his right to due process and a fair trial under the XIV Amendment to the United States Constitution and also under Mich Const 1963 art 1 sec 17. Petitioner is also entitled to relief where he was deprived of his VI and XIV Amendment rights to the United States Constitution and under Mich Const 1963 art 1 sec 20.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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