ORIGINAL

18-9827
No.____

IN THE SUPREME COURT OF THE UNITED STATES

DONALD WAYNE LAMOUREAUX, Petitioner.

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTS CIRCUIT

Donald Wayne Lamoureaux
12511-010
Low Security Correctional Inst.
P. O. Box 999
Butner, N.C. 27509

1. Can a person acting under the mandate of a federal statute be criminally prosecuted under another federal statute for such actions if this prosecution is specifically prohibited by the original statute?

2. Are the terms "as soon as possible", "good faith", and "public authority" unconstitutionlly vague and imprecise under due Process standards when used in the language of applicable federal statutes?

3. Was the defendant's right to Due Process violated when the District Judge failed to fully develop a factual record of the case by not ensuring that the Defendant had an understanding that "intent" was an element to which he would be pleading?

4. Has a person's right to effective counsel been abridged if his counsel misrepresented the consequence of a guilty plea, resulting in the forfeiture of a jury trial?

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Jurisdictional Statement

The district court had jurisdiction over petitioner's motion pursuant to 28 U.S.C. 2255 and the Eighth Circuit had jurisdiction pursuant to 28 U.S.C. 2253(a) and 28 U.S.C. 1291. This court possesses jurisdiction under 28U.S.C. 1254 inasmuch as application was made to the United States Eighth Circuit Court of Appeals for a Certificate of Appealability, (denied September, 2018) as well as Petitions for Rehearing and Hearing en banc on the same issue, and imposed it's final Judgement on February 4, 2019. Their Mandate was issued on February 11, 2019.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases rising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district it shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

The federal statute stating the crime alleged is 18U.S.C. 2422.

The federal statute outlining consequences of failing to report child abuse is 18U.S.C. 2258.

The federal statute defining child abuse reporting is 34U.S.C. 20341. (formerly 42U.S.C. 13001)

§ 2422. Coercion and enticement

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

§ 2258. Failure to report child abuse

A person who, while engaged in a professional capacity or activity described in subsection (b) of section 226 of the Victims of Child Abuse Act of 1990 [42 USCS § 13031(b)] on Federal land or in a federally operated (or contracted) facility, or a covered individual as described in subsection (a)(2) of such section 226 [42 USCS § 13031(a)(2)] who, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, as defined in subsection (c) of that section [42 USCS § 13031(c)], and fails to make a timely report as required by subsection (a) of that section [42 USCS § 13031(a)], shall be fined under this title or imprisoned not more than 1 year or both.

REPORTING REQUIREMENTS

§ 20341. Child abuse reporting

(a) **In general.**

(1) Covered professionals. A person who, while engaged in a professional capacity or activity described in subsection (b) on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d) and to the agency or agencies provided for in subsection (e), if applicable.

(2) Covered individuals. A covered individual who learns of facts that give reason to suspect that a child has suffered an incident of child abuse, including sexual abuse, shall as soon as possible make a report of the suspected abuse to the agency designated by the Attorney General under subsection (d).

(b) **Covered professionals.** Persons engaged in the following professions and activities are subject to the requirements of subsection (a)(1):

(1) Physicians, dentists, medical residents or interns, hospital personnel and administrators, nurses, health care practitioners, chiropractors, osteopaths, pharmacists, optometrists, podiatrists, emergency medical technicians, ambulance drivers, undertakers, coroners, medical examiners, alcohol or drug treatment personnel, and persons performing a healing role or practicing the healing arts.

(2) Psychologists, psychiatrists, and mental health professionals.

(3) Social workers, licensed or unlicensed marriage, family, and individual counselors.

(4) Teachers, teacher's aides or assistants, school counselors and guidance personnel, school officials, and school administrators.

(5) Child care workers and administrators.

(6) Law enforcement personnel, probation officers, criminal prosecutors, and juvenile rehabilitation or detention facility employees.

(7) Foster parents.

(8) Commercial film and photo processors.

(c) **Definitions.** For the purposes of this section--

(1) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(2) the term "physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(g) **Immunity for good faith reporting and associated actions.** All persons who, acting in good faith, make a report by subsection (a), or otherwise provide information or assistance in connection with a report, investigation, or legal intervention pursuant to a report, shall be immune from civil and criminal liability arising out of such actions. There shall be a presumption that any such persons acted in good faith. If a person is sued because of the person's performance of one of the above functions, and the defendant prevails in the litigation, the court may order that the plaintiff pay the defendant's legal expenses. Immunity shall not be accorded to persons acting in bad faith.

Ark. Code Ann. 12-18-402 (2012). Mandated Reporters

(a) An individual listed as a mandated reporter under subsection (b) of this section shall immediately notify the Child Abuse Hotline if he or she:
(1) has reasonable cause to suspect that a child has:
(A) been subjected to child maltreatment; or
(2) Observes a child being subjected to conditions or circumstances that would reasonably result in child maltreatment.
(b) The following individuals are mandated reporters under this chapter:
(17) An osteopath;
(B) Received the knowledge of the suspected child maltreatment from the alleged offender in the context of a statement of admission;

Ark. Code Ann. 12-18-102 (2012). Purpose
The purpose of this chapter is to:
(4) Provide immunity from criminal prosecution for an individual making a good faith report of suspected child maltreatment;

Ark. Code Ann. 12-18-303 (2012). Minimum requirements for a report to be accepted
(a) Except as otherwise provided in this section, the Child Abuse Hotline shall accept a report of child maltreatment or suspected child maltreatment if:
(1) The allegations, if true, would constitute maltreatment as defined under this chapter;
(2) Sufficient identifying information is provided to identify and locate the child or the child's family;

Ark. Code Ann. 5-14-125. Sexual assault in the Second Degree.
(a) A person commits sexual assault in the second degree if the person:
(3) Being eighteen (18) years of age or older, engages in sexual contact with another person who is:
(a) less than fourteen (14) years of age;

Statement of the Case

The petitioner was arrested on February 6, 2015 and charged with Enticement of a Minor, in violation of 18 U.S.C. 2422(a) and (b). He initially pleaded not guilty. A pretrial motion to dismiss the first indictment was filed but denied on May 28, 2015. (App 4) During a Change of Plea hearing on June 23, 2015 the petitioner accepted a conditional plea arrangement and changed his plea to guilty. He was convicted on Count 1 of the indictment and sentenced to 180 months confinement, with ten years of supervised release to follow. He subsequently filed a Direct Appeal challenging the sufficiency of the indictment, but the Eighth Circuit Court affirmed his conviction on October 18, 2016. (App 8) Lamoureaux went on to file a 28 U.S.C. 2255 motion attacking his conviction, arguing 1) ineffective assistance of counsel in violation of the Sixth Amendment's guarantee of effective counsel, and 2) the District Judge conducted a flawed Change of Plea colloquy, in violation of Rule 11 of the Federal Rules of Criminal Procedure and the provisions of the Fifth Amendment's guarantee of Due Process.

An evidentiary hearing was held on January 29, 2018. The above 28 U.S.C. 2255 motion, along with a Certificate of Appealability were subsequently denied by the court on April 10, 2018. (App 64) Lamoureaux petitioned the Eighth Circuit Court for a Certificate of Appealability arguing the same grounds as presented in his 2255 motion. This request was denied without comment on September 7, 2018 (App 68) as were the follow-on petitions for rehearing (App 70) and en banc hearing on February 4, 2019. (App 70) The Eighth Circuit Mandate was issued on February 9, 2019. (App 71)

Reasons for Granting the Writ

This court should grant the writ of certiorari. Under civil liability statutes (42U.S.C. 1320c, 42U.S.C. 1983, e.g.) absolute and qualified immunities protect individuals from suit while exercising their duties "under color of law." Summary judgement is available for those actors via pretrial motions. Criminal defendants, however, enjoy little relief from analagous criminal statutes. One such statute is 34U.S.C. 20341, which specifically shields a mandated reporter of suspected child maltreatment from criminal prosecution. This defense requires attention from competant counsel to first recognize the cited immunity, and then to submit a pretrial motion under Rule 12(b) or 12.3 of the Federal Rules of Criminal Procedure for relief. Each element of Rule 12 suffers defects, specifically in relying on the above statute's vague language to qualify the defendant as having "good faith', and on its reliance of a time frame for reporting as being "as soon as possible". In this case, counsel never offered evidence that he had actively considered this federal statute in developing a defense. The defendant coud not find a single instance in case law where this statutory immunity was utilized. Since this prosecution arguably could have been avoided at the interrogtion stage, or at the grand jury level, or at initial plea entry, Lamoureaux's rights under both the Fifth and Sixth amendments were violated.

The defendant accepted conditionl guilty plea without an understanding of the legal definition of "attempt", or that one of it's components was "intent", an element of the crime not specifically enumerated by the statute, by the district judge, or by counsel. The district judge failed in his duty to expose he motive and intent of the defendant during the Rule

11 plea coolquy, a defect which could have been avoided by simply asking a few questions of the defendant, for example. such an issue may be endemic to the Eighth District, or it may be a sporadic deficiency among all the District Courts, but in any event, the Supreme Court should extend its oversight mandate to ensure that this circumstance does not affect the Due Process right of any other defendants as it has with Lamoureaux.

Finally, counsel failed to understand, or intentionally misrepresented he consequences of prevailing on direct appeal. He mistakenly assured the defendant that the case would be dismissed if the Eighth Circuit remanded the case. This was in direct contradiction to the District Judge's interpretation of such a remand, which he stated would result in a trial on the merits of the case. Had the defendant been properly advised that his options were to go to trial before or after a direct appeal, or going directly to prison without an appeal, reason dictates that he would have rejected the plea offer. This is a clear violation of the defendant's Sixth amendment right to effective counsel.

The defendant will demonstrate that his counsel was deficient in his pretrial responsibilities and in his advice vis-a-vis the consequence of accepting a plea of guily, all of which affected the outcome of the proceedings, or in this case, the forfeiture thereof.

A. <u>The Defendant's actions were mandated by federal and state statutes.</u>

In the instant case, the defendant asserts that he was acting pursuant to both federal and Arkansas state statutes (34 U.S.C. 20341(a) and (b), A.C.A. 12-14-402(a) respectively), which require healthcare providers to report suspected child maltreatment. The Federal Rules of Criminal Procedure which governs due Process in prosecutions fails to provide an appropriate affirmative defense option in this case because

Rule 12.3 (Notice of Public Authority Defense (App 80)) does not acknowledge the public authority status of mandated reporters. If the above governmental statutes cannot serve to create a duty to report as a Public Authority, they cannot then be used to justify conduct under Rule 12(b). (App 79)

Rule 12.3's plain language title is Notice of Public Authority Defense, however it has been interpreted to encompass Entrapment by Estoppel and Outrageous Government Conduct, in that the defendant must rely on the real or assumed authority of a government agent to justify his actions. See U.S. v Pitt, 193 F.3d 751 (Third Cir, 1999). Each of the above require pretrial motions for viability. This court now has before it a case which applies to defendnts who perform acts mandated by law, acts which are clearly conveyed by plain language and do not require sanction by a government agent. The defendant has effectively been "deputized" and becomes an instrument of the state. Thus, the defendant becomes a Public Authority in his own right, and Rule 12.3 should reflect this reality. The court should evolve a new interpretation of Rule 12.3, as it is the most appropriate affirmative defense pathway in this case.

As an osteopathic physicial employed by the United States government in a Veteran's Affairs facility, the defendant clearly qualifies as a mandated reporter in both state and federal jurisdications (34 U.S.C. 20341(b)(1) and A.C.A. 12-18-402(b)(7). Both statutes require reporting of virtually the same behaviors, that being "reasonable belief" that child maltreatment was occurring. They also require that reports be submitted "as soon as possible" (federal statute) or "immediately" (state statute).

1. The terms "as soon as possible" and "immediately" are subjectively vague.

Guidance in interpreting the subjective term "as soon as possible" used in the federal statute can be found in A.C.A. 12-18-303(a)(2) which specifies the "minimum requirements for a report to be accepted: sufficient identifying information is provided to identify and locate the child...". Since the superseding indictment relies on Arkansas law (A.C.A. 5-14-125) as the predicate offense, it is both legally defined and reasonably obvious that any report submitted to law enforcement without identification of a victim would be a fruitless exercise. It reasonably follows that there is a threshold of investigation required by a covered entity to ensure 1) the identification of a victim, and 2) that there is reasonable cause to submit a report. There is no specific time frame for a reporter to determine these two elements in either statute, nor is there a specific prohibition against sufficient investigation to determine these issues, thus "as soon as possible" and "immediately" become subjective and relative terms.

> The statute mandates that the officials "shall immediately report abuse. But to trigger the reporting requirement, there must be "reasonable cause" to suspect abuse, and that "reasonable cause" determination "requires an exercise of discretion and personal judgement which takes it out of the realm of a ministerial act". K. B. v Waddle, 764 F.3d 821 (Eighth Cir, 2014), quoting Larson v Miller, 76 F.3d 1446 (Eighth Cir, 1996)(en banc).

The Sixth Circuit takes an alternative view. In Thomas v National Childrens Hospital, 882 F.3d 608 (Sixth Cir, 2018) the court ruled that "the state law establishes a duty to report, but a duty to investigate...". As a result, the court concluded that "the duty to report does not make...its doctors state actors." Lamoureaux was clearly under state and federal mandate to investigate suspected abuse to the extent that reasonable cause to suspect abuse was actually occurring and that identification of

the potential victims could be reported to law enforcement. Only at such time would his responsibility under these statutes be satisfied. Thus, the Thomas interpretation of what constitutes "state actors" is flawed.

Lamoureaux contends that he was acting under Public Authority by virtue of a mandate established by federal and state legislatures. Since "authority" is vested through legislation, and there are no intermediaries between 34U.S.C. 20341 and its principle actors, it necessarily requires that mandated reporters be "public authorities" while performing their official duties pursuant to this statute.

2. The term "Public Authority" is not narrowly defined in case law.

Nowhere in case law is "public Authority" clearly defined. The spirit of the term is embodied in Supervisors Rock Island Co v U.S., 18 Led 419, when the Supreme Court ruled:

> When power is given to public officers, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory...the intent of the legislature was not to devolve a mere discretion, but to impose a positive and absolute duty."

Also, "when private...individuals are endowed by the state with powers for functions governmental in nature, they...become instrumentalities of the state." Evans v Newton, 15 Led2d 373 (1966). Guidance may also be found in Edmonson v Leesville Concrete Co, 114 Led2d 660 (1991) where this court ruled: "in a civil case which originates in a United States District Court, a private litigant must in all fairness be deemed a government actor...", and in Brentwood Acad v Tennessee SSA, 148 Led2d 807:

> a challenged activity my be state action when it results from the State's exercise of "coercive power". When the state provides "significant encouragement, either overt or covert" or when a private actor operates as a "willful participant in joint activity with the state or its agents".

Lamoureaux was acting as a "willful participant" in joint activity with the state. The Eighth Circuit found in Roe v Humke, 128 F.3d 1213 (Eighth Cir, 1997) that "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law".

3. The Defendant enjoys Statutory Immunity from criminal prosecution.

Lamoureaux was given an "absolute duty" by both federal and state legislatures to report suspected abuse. The two jurisdictions have also legislated immunity for those who make such reports (34 U.S.C. 20341(g) and A.C.A. 12-18-102). The federal statute, paralleled by state stature, bestows this immunity:

> All persons who, acting in good faith, make a report or otherwise provide information or assistance in connection with a report, investigation, or legal intervention pursuant to a report, shall be immune from civil and criminal liability arising from such action. There shall be a presumption that any such person acted in good faith.

In U.S. v Lilly, 810 F.3d 1205 (Tenth Cir, 2016) the court states "Express actual authority to bind the federal government exists if, and only if- the Constitution, a federal statute, or a duly promulgated regulation grants such authority in clear and unequivocal terms."

(a) The term "good faith" is unconstitutionally vague.

The statutory language is clear, except in each case for the term "good faith", which is open to interpretation by the court, but the individual jurors, and by the defendant. Thus, the intended immunity is compromised by the vague and imprecise term. Because of this, Rule 12 (b)(1) may not be utilized, even though otherwise appropriate, leaving into question what mechanism is available to put statutory immunity before the court.

"Good faith" is defined by The Law Dictionary, (2002, Anderson Publishing Co) as "honesty of purpose which negates an intent...a legal

standard of motivation for a person's acts or conduct when dealing with his fellow man. The Eighth Circuit reflects that "good faith" is an "amorphous concept, capable of many forms yet requiring none." K.C. Power and Light v Ford Motor Credit, 995 F.2d 1422 (Eighth Cir, 1993) and "A comprehensive definition of good faith is not practicable, In re Le Maire, 883 F.2d 1373 (Eighth Cir, 1989). The Ninth Circuit weighed in with U.S. v Wallen, 874 F.3d 620 (Ninth Cir, 2017) with "statutes referring to a good faith belief ordinarily construed as calling for a subjective inquiry", and Owens v U.S., 713 F.2d 1461 (Ninth Cir, 1983) "formulation of a precise definition of good faith is neither possible nor practicable." The Tenth Circuit makes a clear statement that "any but the most vacuous general definitions of good faith will fail to cover all the many and varied specific meanings that it is possible to assign the phrase". Flood v Clear One Cummens, Inc, 618 F.3d 1110 (Tenth Cir, 2010).

Perhaps recognizing that the term "good faith", when used in federal and state statutes is unconstitutionally vague in that it fails to inform the defendant of what quantifiable objective element constitute "good faith", this court ruled in Harlow v Fitzgerald, 73 Led2d 396 (1982) that substitution of the phrase "objective legal reasonableness" for the term "good faith" be employed in order to "permit the defeat of insubstantial claims without resort to trial". This new standard of "objective reasonableness" requires an investigation by the court into the motivation and intent of the defendant, as well as to the legality of his actions. As applied to mandatory reporting statutes,

> The requirement that the conduct in issue be necessary and proper does not demand proof of necessity and propriety in fact, but only that at the time of the occurrence the agent honestly and reasonably thought the conduct necessary and proper in the discharge of his federally imposed duty. State v Ivory, 906 F.2d 999 (Fourth Cir, 1989)

> Evidence which establishes only that a person made a mistake in judgment, or an error in management, or was careless, does not establish fraudulent intent. U.S. v Sirang, 70 F.3d 588 (Eleventh Cir, 1995) quoting U.S. v Cheatham, 899 F.2d 747 (Eighth Cir, 1989)

This subordination of subjective good faith to the more objective standard of legal reasonableness is well founded. In the instant case, the Government asserts that the defendant's actions were, in effect, indicative of "bad faith". These allegations were untested, whether through a pretrial hearing or by a jury. Because the defendant was never interviewed in the presence of his attorney, and none of his evidence was presented during the pretrial process, there was no opportunity for rebuttal. There is, therefore, no basis for "legal reasonableness" to justify wholesale disregard of the legislative mandate by concluding that Lamoureaux acted in "bad faith". Lamoureaux is therefore legally innocent of the indictment and was entitled to consideration for immunity by whatever mechanism is appropriate to put statutory immunity before the court prior to trial.

The plain language reading of both statutes is clear, both as to the reporter's duties and to the legislature's intent to shield reporters from criminal prosecution.

> Judges interpret laws rather than reconstruct legislator's intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent. INS v Cardoza-Fonseca, 480 US 421 (1987)

In Ardestani v INS, 116 Led2d 496 (1991), this court found that "Congressional intent is rebutted in only rare and exceptional circumstances, when a contrary intent is clearly expressed", and finally "courts, in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language". Salinas v U.S., 139 Led2d 352, quoting U.S. v Albertini, 472 US 675 (1985). Although the term "immediately" is later quantified in Arkansas statute by associating it

with the minimum requirements for submitting a report, the federal statute relies solely upon a constitutionally infirm "as soon as possible" standard. Likewise, the vague and indefinable term "good faith" in both statutes cannot withstand constitutional scrutiny.

Additionally, each statute has been interpreted by various jurisdictions to mean that mandated reporters have a duty to report, but not to investigate. A generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible application of the statute.

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential Due Process law. Connelly v General Construction Co, 70 Led 322

And Without a definition binding on a jury, words would be too indefinite and vague and subject to interpretation. U.S. v Kelly, 328 F.2d 277 (Sixth Cir, 1964)

Also A statute fails to meet the requirements of the due process clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits, or leaves judges or jurors free to decide, without any legally fixed standards, what is prohibited and what is not. Giacco v Pennsylvania, 15 Led2d 447 (1965)

Although the terms "good faith" and "bad faith" are used in multiple criminal and civil statutes, their incorporation in 34U.S.C. 20341(a)(1), along with "as soon as possible", combines a clearly worded mandate to report with qualifying phrases which are unconstitutionally vague and ripe for misinterpretation. This directly impacts Lamoureaux's right to due process, for "when a court concludes that the statute does bar a given prosecution, it must give effect to the clear expression of congressional will that in such a case "no person shall be prosecuted, tried or punished". Toussie v U.S., 25 Led2d 156 (1970)

Lamoureaux therefore argues that his duty to report was clearly contingent on sufficient investigation to produce a report which demonstrates probable cause and identifies the perpetrator and the victims, and is entitled to the protections legislated by congress.

B. The District Judge failed to fully develop a factual basis for the crime.

Rule 11 of the Federal Rules of Criminal Procedure governs the entering of pleas before the district judge. Subsection 11(b)(2) (App 78) requires that the district judge "address the defendant personally" to ensure that the plea is voluntary, but it does not specify that the plea must also be knowingly and intelligently entered. Subsection 11(b)(3) (App 78) requires the court to establish the factual basis for a plea, but does not require that the defendant participate in this determination. As a result, the defendant may be asked to change his plea to guilty after already pleading not guilty to the same unchallenged evidence base used by the grand jury to indict him. There is no mechanism to guarantee him the opportunity to query the court about the nature of the charge, or to question how his conduct falls within the nature of the charge, or to enter evidence of his own which may shed light on why he was about to change his plea. The transcript of the Change of Plea Hearing in this case indicates that the judge never inquired as to why the defendant had a change of heart and elected to change his plea. Understandably, this hearing was not a trial, but the defendant had the presumption of innocence until he formally entered a guilty plea. Without input from the defendant, other than simple responses to questions, it is not possible to gauge his true understanding of the consequences of his plea

> While the exact method of producing a factual basis on the record is subject to a flexible standard of review, the need to have some factual basis continues to be a rule subject to no exceptions. U.S. v Goldberg, 862 F.2d 101 (Sixth Cir, 1988)

The record shows that the judge relied on the indictment's wording when addressing the term "knowingly" and "attempted" as surrogates for "intent". (App 100, 106, 107). The Law Dictionary defines intent as: "denotes the desire of an actor (q.v.) to cause consequences of his act or his belief that the consequences are substantially certain to result from it" But "to render an act criminal, wrongful intent must exist, but the wrongful intent may be presumed if the necessary or probable consequences of the act were wrongful or harmful, and the act was

deliberately committed."

The defendant had no opportunity to defend his actions as lacking intent to cause harm because he was not informed that, nor did he understand that, intent was implied by "knowingly" and "attempts". Because he did not specifically address intent, by the above definition wrongful intent can be presumed.

> It is not necessary for a particular word or phrase to appear in the indictment when the element is alleged in a form that substantially states the element. If an essential element is omitted from the indictment, then the defendant's Fifth Amendment right to be tried on the charges found by a grand jury has been violated. U.S. v O'Hagan, 139 F.3d 641 (Eighth Cir, 1998)

The Eighth Circuit states that "the elements of attempt are (1) intent to commit the predicate offense, and (2) conduct that is a substantial step toward its commission". U.S. v Spurlock, 95 F.3d 1011 (Eighth Cir, 2007). In U.S. v Lee, 603 F.3d 90 (Eleventh Cir, 2010) the court explains "with regard to intent, the government must prove that the defendant intended to cause assent on the part of the minor." The Fifth Circuit states "Put another way, section 2422(b) criminalizes an intentional attempt to achieve a mental state-a minor's assent...", U.S. v Howard, 766 F.3d 414 (Eighth Cir, 2014). Neither the statute, nor the indictment enumerate "intent" as an element. Consequently,

> the failure of the indictment to allege all the essential elements of an offense is a jurisdictional defect requiring dismissal. This type of fundamental defect cannot be cured by the absence of prejudice to the defendant...." U.S. v Prentiss, 206 F.3d 960 (Tenth Cir, 2000)

While no specific format for the Change of Plea colloquy is required, Rule 11(b)(1) states: "During this address, the court must inform the defendant of, and determine that the defendant understands, the following: (G) the nature of each charge to which the defendant is pleading." This is critical to provide a complete record, because "appellate review of the factual basis for a guilty plea is limited...the language of the plea agreement itself, a colloquy between the defendant and the district court, and the stipulated facts...are sufficient to find a factual basis for a guilty plea." U.S. v Johnson, 715 F.3d 1094 (Eighth Cir, 2013)

The format used in the case at hand does not ensure that a voluntary plea was entered. Several cases suggest avenues which the district judge may have pursued to effect a proper colloquy:

> Before accepting a guilty plea, the trial court must determine...that if a defendant pleads guilty...he understands the court may ask him questions about the offense to which he pleaded. U.S. v Dayton, 604 F.2d 931 (Fifth Cir, 1979)
>
> factual basis for a guilty plea can be established "by having the accused describe the conduct that gave rise to the charge." Timeo v U.S., 977 F. Supp. 245 (Second Cir, 1996) quoting Santobello v New York, 404 US 257 (1971)
>
> The court next explored at length the factual statement, asking Ellis, among other things, whether he "did those things" of his own free and voluntary will, Ellis v U.S., 356 F.3d 1198 (Ninth Cir, 2003)
>
> During the plea colloquy, the court repeatedly asked Garcia to describe the factual basis for his plea. U.S. v Garcia, 577 F.3d 1271 (Tenth Cir, 2009)

Perhaps the most onpoint case finding was made by the Seventh Circuit:

> Whatever the exact nature of the colloquy at a hearing pursuant to Fed. R. Crim. P. 11, it is essential that it be meaningful. Simple affirmative or negative answers or responses which merely mimic the indictment or the plea agreement cannot fully elucidate the defendant's state of mind as required by Rule 11. For this reason the trial court should question the defendant in a manner that requires the accused to provide narrative responses. Questions concerning...the motives of the defendant for instance, will force the defendant to provide the factual basis in his own words. U.S. v Groll, 992 F.2d 755 (Seventh Cir, 1992)

The change of plea transcript confirms that Lamoureaux provided "simple affirmative or negative answers" which "cannot fully elucidate the defendant's state of mind as required by Rule 11." Lamoureaux's right to Due Process under the Fifth Amendment was violated by this casual disregard of Rule 11's mandate. During the colloquy, the district judge erred in failing to make even a cursory attempt to expose Lamoureaux's motivation or intent relating to the stipulated facts. He also failed to enumerate "intent" as an element of the crime in his listing of those elements. (App107). Had he done so, Lamoureaux's true motivation in this matter as expressed in his collateral appeal and subsequent evidentiary hearing, would have been elicited and shown to be incompatible with the presumed mens rea alleged by the prosecution.

Lamoureaux, up to this point, had uniformly acknowledged that he did perform the actions detailed in the superseding indictment. These were facts, but the conclusion that criminal intent was the driving force behind

these actions is untested speculation. A fair and complete colloquy would have led to Lamoureaux's admission that his motivation, therefore his intent, was to comply with legal and moral mandates regarding the welfare of a child. Lamoureaux entered an unintelligent, therefore involuntary plea of guilty. This court should review the Rule 11 colloquy for plain error. "Plain error exists if the district court deviates from a legal rule, the error is clear under current law, and the error affects substantial rights, U.S. v Davis, 452 F.3d 991 (Eighth Cir, 2006) and "defendant who seeks reversal of his conviction after a guilty plea on the grounds that the district court committed Plain Error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea, U.S. v Davila, 569 US 597 (2003).

C. Counsel's representation was ineffective in multiple aspects.

Compounding this matter, Lamoureaux asserts that another source of misinformation led to an improper change of plea, that being his advice from counsel.

> Although the defendant must receive notice of the true nature of the charge rather than a rote recitation of the offense, (Henderson v Morgan, 49 Led2d 108 (1976), the defendant "need not receive this information at the plea hearing itself. Rather, a guilty plea may be knowingly and intelligently made on the basis of detailed information received on occasions before the plea hearing." U.S. v Defusco, 949 F.2d 114 (Fourth Cir, 1991) quoting LoConte v Duggar, 847 F.2d 745 (Eleventh Cir, 1988).

> A guilty plea waives a defendant's Fifth and Sixth Amendment rights. Because such a waiver is valid only if made intelligently and voluntarily, an accused who does not receive reasonably effective assistance from counsel in deciding to plead guilty cannot be bound by his plea", Wofford v Wainwright, 748 F.2d 1505 (Eleventh Cir, 1984)

Lamoureaux is significantly handicapped in this argument because his attorneys failed to produce copies of his written communications with their office, or contemporaneous notes regarding his oral communications with them. (App 73, 74) Some of the originals of his letters were presented to the court on the morning of the evidentiary hearing. The District Judge also declined to supply a written transcript of the evidentiary hearing. (App 76). Lamoureaux therefore relies on indirect evidence available to this court and must assume that the above materials submitted as evidence are also available to substantiate his assertions.

There are several issues of consequence here: 1) The attorneys never investigated the law and facts of the case vis-a-vis the previously discussed federal and state statutes regarding mandated reporting and the immunities associated with them, and did not move for summary dismissal under Rule 12 based on these statutes, 2) Counsel never addressed the issue of "intent" as it relates to the indictment, and 3) the attorneys erred in their appraisal of the consequences of prevailing on Direct Appeal. All of these issues prejudiced the defendant at various stages of the case.

It is well established that "a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." U.S. v Rice, 449 F.3d 897 (Eighth Cir, 2006). This is because

> where the defendant allegedly forfeits a judicial proceeding to which the defendant is otherwise entitled the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty" Roe v Flores-Ortega, 145 Led2d 985

1. Counsel did not research and prepare a pretrial motion under Rule 12.

During the evidentiary hearing, Lamoureaux's attorneys admitted that their client appeared to suffer from extreme performance anxiety. He goes on to testify that when Lamoureaux told him emphatically that he could not testify at trial due to his stage fright, "it was like cold water was thrown in my face", (App 57). The defendant first broached this issue when Chronister brought up the topic at a meeting prior to seeking a plea agreement. At that time, the defendant was still committed to going to trial. Fueling his anxiety was the fact that the attorneys never discussed the existence of, or whether they had researched a defense incorporating the Mandated Reporter laws previously discussed, nor did they mention the immunity from criminal prosecution associated with these statutes. Fields did testify that "the public authority defense would have to be proven at trial...Fields stated he was prepared to present the defense at trial. If indeed that was the case, then Fields was required to submit a pretrial motion under Rule 12.3, as a public authority is lost if the case mistakenly goes to trial. His assertion that he was prepared to take this case to trial is undermined by his basic misunderstanding of this critical defense resource.

Lamoureaux had no means to independently research this or any other legal issue, since the county detention center where he was housed had no law library.

> when a lawyer fails to conduct substantial investigation into any of his client's plausible lines of defense, the lawyer has failed to render effective assistance of counsel. McCoy v Newsome, 453 F.2d 1252 (Eleventh Cir, 1992)(per curiam). See also Holder v U.S., 721 F.3d 979 (Eighth Cir, 2013)
>
> The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the Strickland analysis, as such an omission cannot be said to fall within the wide range of professionally competent assistance. Finch v Vaughn, 67 F.3d 909 (Eleventh Cir, 1995), see also Foster v Lockhart, 9 F.3d 722 (Eighth Cir, 1993).

Prejudice exists if counsel bypassed a nonfrivolous argument that, if successful, would have resulted in the vacation of a defendant's conviction, Shaw v Wilson, 721 F.3d 908 (Seventh Cir, 2013). The attorneys have nothing but their testimony at the evidentiary hearing to rebut this assertion, as none of their contemporaneous notes are available.

2. Counsel never discussed the issue of "intent" with the defendant.

The attorneys have an additional responsibility to both the defendant and the court. "The federal constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by the defendant's competent counsel." Bradshaw v Stumpf, 62 Led2d 143 (1976). While Lamoureaux concedes that his attorneys discussed the indictment, he was never made aware that "intent" was an element of the crime, possibly due to their client's continuing assertions that he had no such intent.

Because the indictment uses the terms "knowingly" and "attempt", the defendant could not be adequately informed of their legal interpretations without input from counsel. Indeed, the common usage of the term "knowingly" is "having knowledge or information, implying shrewd understand or possession of secret inside information, deliberate, intentional" Webster's New World College Dictionary, 4th Edition, 2007. The Law Dictionary, however, defines it as "in criminal prosecutions, knowledge that one is acting in violation of some law or knowledge that the act done is illegal." Lamoureaux, who was ignorant of this legal definition, was

using the common meaning of "knowingly" to communicate that he fully intended to entice and persuade the mother to commit an illegal act for which she could be prosecuted. During the colloquy, the court, in its only exchange with counsel, asked Chronister "are you satisfied, after serving as Mr. Lamoureaux's counsel, the government could prove all the essential elements of the offense beyond a reasonable doubt?" (App 110) Thus, there is no representation by counsel on the record that they ever explained to their client all of the elements of the charge, specifically that intent was an element. The Defendant was unaware of this omission when he agreed that he had fully discussed with defense counsel the facts of this case and the elements of the crimes... (App 83) Since counsel did not address as an element, and the defendant made no admission implying his understanding of "intent" as couched in the term "attempt", and the judge did not enumerate intent in his list of elements of the crime, Lamoureaux received no "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." Smith v O'Grady, 85 Led 859.

> Where the record discloses that defense counsel did not purport to stipulate that respondent had the requisite intent or explain to him that his plea would be an admission of that fact, and he made no factual statements or admission necessarily implying that he had such intent, it is impossible to conclude that his plea was voluntary. Henderson v Morgan, 49 Led2d 108.

3. Counsel Misrepresented the Consequence of Prevailing on Direct Appeal.

Over the course of the pretrial period both the Court and the prosecutor stated, on the record, that if Lamoureaux prevailed on his Direct Appeal, he would be allowed to withdraw his guilty plea. An examination of the Plea Agreement shows that it offered only to dismiss the least punitive of the two indictments, and to permit a Direct Appeal in return for foregoing trial on the merits of the case. (App 81) Additionally, it clearly states that "if the defendant prevails on appeal, the defendant shall be allowed to withdraw the plea of guilty." (App 81)

Counsel, on the other hand, in their appeal brief, state "The judgment (of the District Court) should be vacated and the indictment dismissed," and "Lamoureaux respectfully requests that this court vacate the conviction and dismiss the indictment." (See Brief and Addendum of Direct Appeal, pg and 33, Eighth Circuit Court records). Indeed, counsel assured the

defendant before entering his guilty plea, that the only remaining indictment would be dismissed and that he would be released if he prevailed on appeal. The District Judge seems to settle this contradiction when he states "Because Defendant could be able to withdraw his plea and raise his innocent intent defense at trial if his appeal of the court's order denying defendant's motion to dismiss the indictment were successful..." (App 67) This was an astonishing revelation. The plea agreement states that "counsel has explained the ramifications of the plea agreement to the defendant" (App 96) and that "counsel has carefully reviewed every part of this agreement with the defendant..." (App 95) "Carefully reviewed" is a subjective standard. Counsel provided a general overview of the document, but not a line-by-line scrutiny of each issue. Consequently, the conflict in interpretation of this issue was overlooked.

> When addressing a guilty plea, counsel is required to give a defendant enough information to make a reasonably informed decision whether to accept a plea offer and an attorney's ignorance of a point of law that is fundamental to the case, combined with the attorney's failure to perform basic research on that point, is a quintessential example of unreasonable performance under Strickland. U.S. v Bui, 769 F.3d 831 (Third Cir, 2014)

Lamoureaux has demonstrated counsel's deficient performance, in not investigation and acting upon a viable defense theory, in not communication such to the defendant, in not ensuring that the defendant understood the critical component of intent implied in the indictment, and most importantly, misrepresenting the consequence of prevailing in his Direct Appeal. In examining the reasonableness of Lamoureaux's plea change, one must look at the totality of the case as it unfolded. He was led to believe that he had no substantial defense. He was told that he and his testimony would be the focus at trial, a jarring prospect for this defendant as already noted, but that all of this could be circumvented with a conditional plea of guilty. Lamoureaux rationalized this as being similar to a Nolo Contendre or Alford plea, since he would only be pleading guilty to the unrebutted facts of the case as presented in the plea agreement, and immediately upon sentencing, declaring his innocence by filing a direct appeal stating such. In the defendant's estimation, each option was reasonable, but only when one other consideration is factored in, that being the prospect of automatic dismissal of the case if he prevailed on appeal, does the balance shift in favor of accepting a plea. If any of these

elements were different, if the judge had queried the defendant during the plea colloquy questioning the motives for his actions, he would have determined that Lamoureaux did not have the requisite intent to commit the crime, if counsel had provided a pretrial defense involving defendant's duties or his statutory immunity for attempting to comply with federal law, had defense counsel not intentionally introduced performance anxiety to a client who was, at the time, dedicated to going to trial, then Lamoureaux would have persisted in his plea of not guilty. The final argument is this: if the defendant had been told that the consequence of not accepting a guilty plea was to proceed to trial, but that the possibility of prevailing on appeal would also result in going to trial, the choice is reasonable and clear - the only pathway to dismissal was to go to trial. Lamoureaux was prejudiced by all of the above actions, and as a result, forfeited his right to trial by jury. "To be valid, a plea must represent a voluntary and intelligent choice among the alternatives available to the defendant. Counsel's alleged deficient performance arguable led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of the proceeding itself." Hill v Lockhart, 88 Led2d 203, Headnotes. See also Lockhart v Fretwell, 122 Led2d 180 (1993)(errors deprived defendant of a fair trial) and Thompson v U.S., 872 F.3d 560 (Eighth Cir, 2017)("When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant has to show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty..."), and finally,

> Assessing the effect of some types of attorney errors on defendants' decision making involves predictions of the outcome at a possible trial...Such a prediction is neither necessary or appropriate where the error is one that is not alleged to be pertinent to a trial outcome, but is instead alleged to have affected a defendant's understanding of the consequences of his guilty plea. Lee v U.S., 198 Led2d 476 (2017)

A well known adage is that "ignorance of the law is no excuse" for violating the law. This applies equally to the Court Officers and to the Defendant. If Lamoureaux's statements are true, then he did not violate 18 U.S.C. 2422, but the court officers share equally in violating 34 U.S.C. 20341.

Conclusion

Lamoureaux has made compelling arguments regarding his rights under the Fifth and Sixth Amendments, and how they were abridged by both the District Court and his own counsel. He respectfully requests that certiorari be granted.

Donald W. Lamoureaux