

In the
Supreme Court of the United States

BRUCE H ZITKA and
SUSAN K. HERNANDEZ-ZITKA,

Petitioners,

v.

STATE OF MICHIGAN,

Respondent.

**On Petition for a Writ of Certiorari to the
Michigan Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Were the Zitkas denied the right to present evidence to show the jury a prior court order authorized their conduct and to show they acted as they did because governmental officials told them it was legal?

LIST OF PROCEEDINGS

Michigan Supreme Court

SC: 162479

People of the State of Michigan, *Plaintiff-Appellee, v.*
Susan K. Hernandez-Zitka, *Defendant-Appellant.*

Date of Final Order: June 2, 2021

Court of Appeals State of Michigan

No. 349491

People of the State of Michigan, *Plaintiff-Appellee, v.*
Bruce H. Zitka, *Defendant-Appellant.*

No. 349494

People of the State of Michigan, *Plaintiff-Appellee, v.*
Susan K. Hernandez-Zitka, *Defendant-Appellant.*

Date of Final Opinion: December 10, 2020

Publication Number: 959 NW2d 527 (Mich. 2021)

Circuit Court for the County of Ingham

Case Nos: 17-102-FH, 17-105-FH

People of the State of Michigan, *Plaintiff-Appellee,*
v. Susan K. Hernandez-Zitka, Bruce H. Zitka,
Defendants-Appellants.

Date of Final Order: June 12, 2019

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PROCEEDINGS.....	ii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE.....	4
A. Overview.....	4
B. The City of Norton Shores Litigation.....	5
C. State of Michigan Litigation.....	7
D. <i>Zitka I</i> – Michigan Court of Appeals’ Decision	8
1. On Remand	9
2. Jury Trial	11
3. The Defense.....	12
4. Jury Verdict and Sentence	13
E. <i>Zitka II</i> – Michigan Court of Appeals’ Decision	13

TABLE OF CONTENTS – Continued

	Page
REASONS FOR GRANTING THE PETITION	14
I. THE ZITKAS WERE DENIED THE RIGHT TO PRESENT EVIDENCE TO SHOW THE JURY A PRIOR COURT ORDER AUTHORIZED THEIR CONDUCT AND TO SHOW THEY ACTED AS THEY DID BECAUSE GOVERNMENTAL OFFICIALS TOLD THEM IT WAS LEGAL.....	14
A. Entrapment by Estoppel	15
B. <i>Res Judicata</i>	18
C. Summary.....	21
CONCLUSION.....	23

TABLE OF CONTENTS – Continued

	Page
APPENDIX TABLE OF CONTENTS	
Order of the Michigan Supreme Court (June 2, 2021)	1a
Order of the Michigan Supreme Court (June 2, 2021)	2a
Opinion of the Court of Appeals State of Michigan (December 10, 2020)	3a
Order of the Circuit Court for the County of Ingham (January 10, 2019).....	29a
Bench Ruling Transcript, Relevant Excerpts (January 10, 2019).....	31a
Motion Hearing Transcript, Relevant Excerpts (April 29, 2019)	36a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Brownback v. King</i> ,	
____ U.S. ___, 141 S.Ct. 740,	
209 L.Ed.2d 33 (2021)	19
<i>Brownridge v. Michigan Mut. Ins. Co.</i> ,	
115 Mich. App. 745,	
321 N.W.2d 798 (1982)	19
<i>Chambers v. Mississippi</i> ,	
410 U.S. 284 (1973)	21
<i>Crane v. Kentucky</i> ,	
476 U.S. 683, 106 S.Ct. 2142,	
90 L.Ed.2d 636 (1986)	21
<i>Estes v. Titus</i> ,	
481 Mich. 573, 751 N.W.2d 493 (2008)	19
<i>Halbert v. Michigan</i> ,	
545 U.S. 605, 125 S.Ct. 2582,	
162 L.Ed.2d 552 (2005)	15
<i>In re Certified Question from U.S. Dist. Court for E. Dist. of Michigan</i> , 465 Mich. 537,	
638 N.W.2d 409 (2002)	20
<i>Jacobson v. United States</i> ,	
503 U.S. 540, 112 S.Ct. 1535,	
118 L.Ed.2d 174 (1992)	16, 17
<i>Mundy v. McDonald</i> ,	
216 Mich. 444, 185 N.W. 877 (1921)	20
<i>People v. Carpenter</i> ,	
464 Mich. 223 (2001)	21
<i>People v. Hernandez-Zitka</i> ,	
959 N.W.2d 527 (Mich. 2021)	passim

TABLE OF AUTHORITIES – Continued

	Page
<i>People v. Maffett,</i> 464 Mich. 878, 633 N.W.2d 339 (2001)	15
<i>People v. Pierce,</i> 272 Mich. App. 394, 725 N.W.2d 691 (2007)	17
<i>People v. Woods,</i> 241 Mich. App. 545 (2000)	17
<i>Sherman v. United States,</i> 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958)	15, 16
<i>Sorrells v. United States,</i> 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932)	15, 16, 17
<i>United States v. Jimenez Recio,</i> 537 U.S. 270, 123 S.Ct. 819, 154 L.Ed.2d 744 (2003)	17
<i>Washington v. Texas,</i> 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI	2
U.S. Const. amend. XIV § 1	2
U.S. Const. art. 1, § 17	21
U.S. Const. art. 1, § 20	21

STATUTES

28 U.S.C. § 1257(a)	2
---------------------------	---

TABLE OF AUTHORITIES – Continued

	Page
MCR 7.215(C)(2)	14
MCL 14.28.....	22
MCL 14.101.....	22
MCL 432.218(1)(a)	3, 9
MCL 752.796.....	3
MCL 752.797(3)(e)	4

JUDICIAL RULES

Fed. R. Crim. P. 12.3.....	15
----------------------------	----

OTHER AUTHORITIES

Ariana Figueroa,

<i>Months into the Pandemic, Digital Divide Still Leaves Poor Kids at a Disadvantage, MICHIGAN ADVANCE (September 28, 2020)</i>	7
---	---

Jennifer Chambers,

<i>Hundreds of Thousands of Michigan Students Lack Internet or Computer, THE DETROIT NEWS (April 17, 2020).....</i>	6
---	---

Teece Aronin,

<i>Internet Access for Underserved Areas in Michigan, 517 BUSINESS AND LIFE (September 2019) https://517mag.com/ business/internet-access-for-underserved- areas-in-michigan/.....</i>	6
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PETITION FOR A WRIT OF CERTIORARI

Petitioners Bruce H. Zitka and Susan K. Hernandez-Zitka¹ respectfully petition for a writ of certiorari to the Supreme Court of the State of Michigan in *People v. Bruce H. Zitka*, Ingham County Circuit Court criminal case number 17-000105-FH and *People v. Susan K. Hernandez-Zitka*, Ingham County Circuit Court criminal case number 17-000102-FH, consolidated in the trial and appellate courts.



OPINIONS BELOW

Attached at App.1a-2a is the order of the Michigan Supreme Court entered on June 2, 2021 denying review of the Michigan Court of Appeals' conclusion that the Zitkas were not denied the right to present a defense. The published opinion of the Michigan Court of Appeals is attached at App.3a-28a. *People v. Zitka*, No. 349491, 2020 WL 7310514 (Mich. Ct. App., December 10, 2020), *app. den.* 959 N.W.2d 527 (Mich. 2021), and *app. den. sub. nom. People v. Hernandez-Zitka*, 959 N.W.2d 527 (Mich. 2021). A copy of the portion of the transcript in the trial court where Petitioner sought to present a defense is attached at App.31a-50a, along with the accompanying order at App.29a-30a.

¹ Referred throughout the Petition as "the Zitkas."



JURISDICTION

On June 2, 2021, the Michigan Supreme Court issued its order denying leave of the Michigan Court of Appeals' conclusion that the Zitkas' right to present a defense was not denied. App.1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. VI

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 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 defense.

U.S. Const., amend. XIV § 1

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MCL 432.218(1)(a)

Michigan Gaming Control and Revenue Act (Excerpt)
Initiated Law 1 of 1996. Prohibited conduct; violation as felony; violation as misdemeanor; penalties; presumption; venue.

(1) A person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$100,000.00, or both, and is barred from receiving or maintaining a license under this act for doing any of the following:

(a) Conducting a gambling operation in which wagering is used or to be used without a license issued by the board.

MCL 752.796

Fraudulent Access to Computers, Computer Systems, and Computer Networks (Excerpt)

Use of computer program, computer, computer system, or computer network to commit crime.

(1) A person shall not use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit a crime.

(2) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate this section, including the underlying offense.

(3) This section applies regardless of whether the person is convicted of committing, attempting to commit, conspiring to commit, or soliciting another person to commit the underlying offense.

MCL 752.797(3)(e)**Penalties; Prior Convictions; Presumption;
Reimbursement Order; Definition**

(3) A person who violates section 6 is guilty of a crime as follows:

(e) If the underlying crime is a felony punishable by a maximum term of imprisonment of 10 years or more but less than 20 years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$10,000.00, or both.

**STATEMENT OF THE CASE****A. Overview**

You really can't fight City Hall—at least according to the State of Michigan—because even if you win, you still lose. The case against Defendant-Appellants Bruce H. Zitka and Susan K. Hernandez-Zitka has its origins in the City of Norton Shores and Muskegon County Circuit Court where the Zitkas were investigated for engaging in gambling operations of their three business locations, all located within Muskegon County, which were places where people rented computers with internet access. The Muskegon County case was litigated and the Zitkas were determined not to be in violation of the law and were allowed to continue operating as they always had been operating.

In particular, the Norton Shores case was dismissed upon the agreement of the parties with a Muskegon County Circuit Court judge approving the

stipulated dismissal via a court order. The order from the Muskegon County Circuit Court states in part that: “Defendants agree to operate the Landing Strip LLC without violation of any applicable gambling laws or ordinances as it is currently operating.” This emphasized phrase was specifically added into the language after Ms. Hernandez-Zitka consulted with her attorney to make sure the businesses could continue to operate as they were “currently operating”—an added assurance the Zitkas wanted to continue conducting business and let it be known they were obedient to the law. (Transcript, “Hearing,” pp. 13-14, 1/10/19.)

The present prosecution brought by the Attorney General’s Office is interrelated with the prior litigation involving the City of Norton Shores, where both city and state governmental officials were involved.

Almost immediately after the conclusion of the Muskegon County case, the Attorney General’s Office renews its investigation and prosecution in draconian fashion by raiding the businesses, closing them down, and seizing assets. After much litigation, which included a dismissal and an appeal to the Michigan Court of Appeals, the case is remanded and goes to trial where nothing could be said about the Norton Shores litigation. (“Order,” 1/10/19.) The end result was predictable guilty verdicts with the jury not being provided with relevant facts and the whole story involving defenses the Zitkas desired to pursue.

B. The City of Norton Shores Litigation

The opening of the Zitkas’ three internet places came after much research, seeing a need for the service because there were areas within the county that did

not have internet access.² Despite the allegations of an illegal gambling operation, the businesses were set up as computer rental businesses, where people could check email, Facebook, search the internet, and that for every dollar spent the customer would receive one free entry into a sweepstakes promotion where the outcome was predetermined.³ (Transcript, “Preliminary Examination—Volume II of II,” pp. 8-9, 13 and 22-26, 1/11/17.) A license is not required for a sweepstakes promotion in Michigan. (*Id.*, p. 151.)

In May 2015, Investigators from both the Attorney General’s Office and City of Norton Shores began

² In an article, the Michigan Governor is quoted as saying: ““Access to high-speed internet is a must to compete in today’s society,” said Whitmer. “Connecting all Michigan communities with broadband service is about leveling the playing field for every child and small business in the state. Everyone should be able to fully explore their passions and talents, no matter where they live, and not be held back by a lack of infrastructure.” Teece Aronin, *Internet Access for Underserved Areas in Michigan*, 517 BUSINESS AND LIFE (September 2019) <https://517mag.com/business/internet-access-for-underserved-areas-in-michigan/>

³ The lack of internet access in Michigan for those in rural or low-income environments was highlighted during the COVID-19 pandemic. Jennifer Chambers, *Hundreds of Thousands of Michigan Students Lack Internet or Computer*, THE DETROIT NEWS (April 17, 2020). <https://www.detroitnews.com/story/news/education/2020/04/17/hundreds-thousands-michigan-students-lack-internet-computer/5137377002>. Ariana Figueroa, *Months into the Pandemic, Digital Divide Still Leaves Poor Kids at a Disadvantage*, MICHIGAN ADVANCE (September 28, 2020). <https://www.michiganadvance.com/2020/09/28/months-into-the-pandemic-digital-divide-still-leaves-poor-kids-at-a-disadvantage/#:~:text=Pandemic%20highlights%20gaps%20in%20internet%20access%20in%20Michigan,lacking%20access%20is%20as%20high%20as%2016%20million.>

surveillance of the Landing Strip located in the City of Norton Shores, Michigan, resulting in the Attorney General's office turning the case over to the City of Norton Shores. (*Id.*, pp. 40-41 and 142; "Hearing," p. 24, 1/10/19.) Thereafter, Mr. and Mrs. Zitka received a summons and complaint from the City of Norton Shores.

After much litigation, it was determined the Zitkas were not in violation of any gambling laws and an agreement was reached to dismiss the case. When Ms. Hernandez-Zitka's attorney approached her with the offer of dismissal she was skeptical and wanted language added to the proposed stipulated order, which was in fact added, being assured the business was running legally. (Transcript, "Hearing," pp. 13-14, 1/10/19.)

The Judge signed-off on the stipulation/dismissal. (Transcript, "Preliminary Examination—Volume I of II," pp. 4-6, 1/5/17.) The pertinent language was: "Defendants agree to operate the Landing Strip, LLC without violation of any applicable gambling laws or ordinances as it is currently operating." (*Id.*, p. 9.)

C. State of Michigan Litigation

Four days later, Investigators from the State were back looking into the Zitkas' businesses. (Transcript, "Motion To Quash," pp. 10-12, 4/12/17.) The renewed investigation, despite the agreement in the Norton Shores litigation, occurred over the next few months with a raid eventually occurring in June 2016. (Transcript, "Hearing," pp. 47-49, 1/10/19.) Despite the Zitkas "currently operating" as it had, authorities froze all business accounts, tax accounts, personal accounts, and put a forfeiture lien on the couple's home.

Inexplicably, and even though they were well aware of the prior litigation, the State agents proceed with criminal action, indicating the Zitkas had been operating illegally all along and that the order signed in Muskegon County should not suggest the Zitkas were conducting business in conformity with the law. (Transcript, “Preliminary Examination—Vol II of II,” pp. 155-57, 1/11/17.)

After the case gets bound over from district court to circuit court, the defense files a motion to quash which was granted, dismissing all charges. (Transcript, “Motion To Quash,” pp. 13-14, 4/12/17.) The judge expressed dismay over the handling of the investigation and the eventual criminal charges after the matter had been resolved in Muskegon, saying the “Attorney General of this state in part has the authority to intervene in any litigation that they want to that would be something that relates to state law. I believe they could have gone back to the circuit judge in this case and asked to intervene and have this reargued in some fashion as to its applicability.” (*Id.*, pp. 14-15.)

D. *Zitka I* – Michigan Court of Appeals’ Decision

The prosecution appeals. The defense argued that the gambling-nuisance suit against them had been settled, claiming that the settlement should preclude prosecution “because the stipulated order dismissing the civil case reflected a judicial determination that defendants were operating legally, defendants were acting under a mistake of law that negated the mens rea elements of both offenses.” *People v. Zitka*, 325 Mich. App. 38, 42-43; 922 N.W.2d 696 (2018). The Michigan Court of Appeals disagreed and reversed the quashing of the Information, holding there was no “collateral estoppel” through the settlement of the

civil suit because “the issue whether defendants violated state criminal laws by conducting an unlicensed gambling operation was not actually litigated in the civil proceedings,” even though the underlying zoning violation pertained to gambling. *Id.* The Court also found that MCL 432.218(1)(a) is a general intent crime, and thus a claim of mistake of law was unavailing. The Court determined the Zitkas reliance on the city attorney and circuit court judge’s order was unreasonable and/or unjustified. *Id.*, at 52-53. Therefore, the Court reversed and remanded.

1. On Remand⁴

The Attorney General’s Office, with great zeal and a mandate from the Michigan Court of Appeals, presses forward with the defense hamstrung to present evidence. Nevertheless, the defense filed another motion to quash, arguing that Mr. and Mrs. Zitka did not have intent to commit crimes. (“Defendants’ Joint Motion To Quash (And Brief) For An Evidentiary Hearing,” 6/1/18.) Although stating it would construe the Court of Appeals’ Opinion in a “narrow” way, the trial court holds an evidentiary hearing that results in a significant restriction of defense evidence. (Transcript, “Hearing,” pp. 25-26, 10/3/18.)

At the evidentiary hearing, the attorney who had represented the Zitkas in the Muskegon County case testified he had been a former prosecuting attorney and circuit court judge, revealing his understanding of the agreement reached with the City of Norton Shores on behalf of the Zitkas. (Transcript, “Hearing,”

⁴ A successor judge heard the case as the initial trial court judge retired.

pp. 4-12, 1/10/19.) The attorney said that in exchange for the Zitkas testifying as expert witnesses in futures cases, the civil matter against them would be dismissed. (*Id.*, pp. 12-13.) Testimony revealed that Mrs. Hernandez-Zitka “wanted some extra assurance that what she was doing was okay, and so I got on the phone right away with the city attorney and got the—the result was the second stipulation, and an additional phrase in—on this one, it’s number one, which says that the defendants agree to operate without violation of applicable gambling laws and ordinances. The key is, as it is currently operating, and with that addition my client approved for me—gave me authority to sign that stipulation, which resulted in the judge’s order.” (*Id.*, pp. 13-14.) (Emphasis added.) Mrs. Hernandez-Zitka testified that her understanding after the City of Norton Shores case was that “I was reassured that everything we was doing was fine and we were okay. I had a lot of questions before I signed that dismissal.” (*Id.*, pp. 45 and 53.) Mrs. Hernandez-Zitka articulated that the Attorney General’s Office was involved with the city case, saying “you guys were already involved in the investigation in the beginning when the City of Norton Shores was. If you thought that I was committing felonies, why would you guys close—in my mind, why would you close your case and let them litigate the case, and then how am I supposed to know that, okay, you’re letting them litigate it, but if you don’t like the outcome, you’re still coming after me?” (*Id.*, p. 79.)

After hearing the testimony, the court ruled that despite the statute clearly having “holes,” the Court of Appeals made its ruling that mistake of law does not negate general intent; that it would not allow evi-

dence of the Norton Shores/Muskegon County case to be entered into the trial, including testimony of the Zitkas prior counsel; and that it will be for a jury to decide the case with these limitations. (*Id.*, p. 88.)

The defense objected to the court's ruling, preserving the issue for appellate purposes. (*Id.*, pp. 89-90.) The court reiterated that the defense was not to bring into evidence the City of Norton Shores case. (Transcript, "Motion Hearing," pp. 35-39, 4/29/19.) Also, the defense desired to call character witnesses, which was denied by the court. (*Id.*, pp. 4-10.)

As an offer of proof on character, the court created a separate record, hearing from defense counsel that Mrs. Hernandez-Zitka's witnesses would have shown she was an upstanding and law-abiding citizen, who is a guardian with her husband for their grandchildren, suggesting she would not have continued running the businesses had she not been given the green light by those in power. (*Id.*, pp. 9-15.)

2. Jury Trial

The jury trial was a sanitized version of events rather than what actually transpired. (Transcript, "Trial," pp. 7-14, 5/2/19.) Testimony revealed that each business was registered with the State of Michigan as being a Limited Liability Corporation ("LLC") and that Mr. and Mrs. Zitka were never sent a cease and desist letter by the State informing them they were doing something purportedly illegal. (*Id.*, pp. 157-59.) Without advanced warning and even though the Zitkas were in compliance with the prior litigation by "currently operating" as they always had been, search warrants were executed on the three businesses as well as the Zitkas home, resulting in the businesses

being shut down, the confiscation of personal property, and the seizure of money and bank accounts. (*Id.*, pp. 16-22 and 24-25.)

3. The Defense

Because of household demands, Ms. Zitka quit her initial job but still needed a way to make money, so she started looking into running her own computer rental business because “there was a lot of people in our area complaining about not having internet service, so we started researching that and found a bunch of articles all about pockets in Muskegon County that they did not have internet service. (*Id.*, p. 185.) After much research, the Zitkas found locations; established the businesses with the State; set up their tax documentation; and went into business thinking there was nothing illegal or untoward about what they were doing, saying “[o]ur business plan was to try to reach people that couldn’t get the internet service so we went with the sweepstakes promotion.” (*Id.*, pp. 185-91.) The research that Ms. Zitka conducted was to make sure they were not in violation of any state or federal laws, so she contacted the state and researched “sweepstakes,” finding it is not a term defined by state law, but was informed there are no licenses issued by the state for sweepstakes promotions. (*Id.*, pp. 193-94.) All of this was done to make sure they conformed to the law. (*Id.*, pp. 194-95.)

Ms. Zitka mentioned never receiving a cease and desist letter and had she received one they would not have continued with the sweepstakes promotion and would not have opened up two other locations. (*Id.*, pp. 212.)

4. Jury Verdict and Sentence

Without being informed the whole story of the prior litigation and character witnesses, the jury found the Zitkas guilty as charged. (*Id.*, pp. 159-61.) Both were given probationary sentences. (*Id.*, pp. 21-29.)

E. *Zitka II* – Michigan Court of Appeals’ Decision

In their appeal, the Zitkas raised three issues: 1) the right to present a defense; 2) *res judicata* and entrapment by estoppel; and 3) invading the province of the jury.⁵ The Court of Appeals, relying in large part on its decision in *Zitka I*⁶, denied relief, affirming the convictions. *People v. Zitka*, ___ Mich. App. ___; 2020 WL 7310514 (2020)⁷. The Court mentions: “We are bound by the earlier decision in *Zitka* under both the law-of-the-case doctrine and because this Court’s prior decision is published. *See MCR 7.215(C)(2)* (‘A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.’)” *Id.*⁸

⁵ An additional issue was raised regarding ineffective assistance of counsel for failing to seek introduction of the evidence of the order in the civil case to rebut the prosecution’s repeated introduction of evidence that defendants knew what they were doing was illegal. This issue is subsumed in the other three issues.

⁶ The prior Court of Appeals’ decision (*Zitka I*) was not appealed to the Michigan Supreme Court.

⁷ Publication request granted on January 7, 2021.

⁸ The Michigan Supreme Court denied leave on June 2, 2021. *People v. Hernandez-Zitka*, 959 NW2d 527 (Mich., 2021).



REASONS FOR GRANTING THE PETITION

The Michigan Court of Appeals relied almost exclusively upon its prior decision when affirming the convictions, relying in large part on the law-of-the-case doctrine. The Zitkas asked the Michigan Supreme Court, not being bound by the law-of-the-case doctrine, to right the wrong and reverse the Court of Appeals because the trial court rulings denied the Zitkas from presenting a defense to show the jury governmental officials should not be allowed to inform a citizen they are conforming to the law but thereafter charge them for previously condoned conduct. The Michigan Supreme Court issued a pro forma denial.

The Zitkas were denied the right to present a defense when not being allowed to have evidence admitted of the prior case that authorized the conduct.

I. THE ZITKAS WERE DENIED THE RIGHT TO PRESENT EVIDENCE TO SHOW THE JURY A PRIOR COURT ORDER AUTHORIZED THEIR CONDUCT AND TO SHOW THEY ACTED AS THEY DID BECAUSE GOVERNMENTAL OFFICIALS TOLD THEM IT WAS LEGAL

They were told by the government they could do something; they did it; and they were charged and convicted. To add insult to injury, the appellate courts found nothing wrong, remarking it was unreasonable to rely upon the governmental officials.

The Zitkas are merely asking for fairness. But for the blessing of governmental officials, the Zitkas would not have continued running their businesses.

They were lured into a false sense of security, rightfully thinking they were within the confines of the law. The Zitkas were foreclosed, however, from presenting evidence that established they continued to run their businesses because those in authority said they could.

A. Entrapment by Estoppel⁹

The Zitkas were not allowed to show the jury they were entrapped into committing the crimes. “The [entrapment] defense is available, not in the view that the accused though guilty may go free, but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct.” *Sorrells v. United States*, 287 U.S. 435, 452; 53 S.Ct. 210, 216; 77 L.Ed. 413 (1932). The *Sorrells* case appears to be the genesis of the entrapment defense and survives to this day in both Federal and Michigan jurisprudence.¹⁰ The bottom line in *Sorrells* was: “We are of the opinion that upon the evidence produced in the instant case the defense of entrapment was available and that the trial court was in error in holding that as a matter of law there was no entrapment and in refusing to submit the issue to the jury.” *Id.* The Zitkas deserve the same remedy.

In *Sherman v. United States*, 356 U.S. 369, 372; 78 S.Ct. 819, 820; 2 L.Ed.2d 848 (1958), based on the holding in *Sorrells*, “[t]he issue of entrapment went

⁹ Referred to as the “public-authority defense” in the Federal realm. Fed. R. Crim. P. R 12.3.

¹⁰ *Halbert v. Michigan*, 545 U.S. 605, 622; 125 S.Ct. 2582, 2593; 162 L.Ed.2d 552 (2005); *People v. Maffett*, 464 Mich. 878; 633 N.W.2d 339, 342 (2001).

to the jury.” In the present case, the Zitkas were prevented from defending on the issue of entrapment and were prevented from showing the jury the injustice of their plight.

In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. *Sorrells, supra*, 287 U.S., at 442, 53 S.Ct., at 212; *Sherman, supra*, 356 U.S., at 372, 78 S.Ct., at 820. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.

Jacobson v. United States, 503 U.S. 540, 548-49; 112 S.Ct. 1535, 1540; 118 L.Ed.2d 174 (1992).

In Michigan, there is a four-part test applied to claims of entrapment by estoppel: The doctrine of entrapment by estoppel applies to preclude prosecution when a defendant establishes by a preponderance of the evidence: 1) that a government official advised the defendant that certain illegal conduct was legal; 2) that the defendant actually relied on the government official’s statements; 3) that the defendant’s reliance was reasonable and in good faith given the identity of the government official, the point of law represented, and the substance of the official’s statements; and 4) that, given the defendant’s reliance, prosecution would

be unfair. *People v. Pierce*, 272 Mich. App. 394, 725 N.W.2d 691, 694 (2007). “The defense is, in essence, a significant exception to the basic legal maximum that ignorance of the law is no excuse.” *People v. Woods*, 241 Mich. App. 545, 548 (2000). The *Woods* Court noted that “[i]n essence, it applies when acting with actual or apparent authority, a government official affirmatively assures the defendant that certain conduct is legal and the defendant reasonably believes that official.” *Id.*, at 557. (Emphasis added.)

In the present case, not only did Government agents implant in the Zitkas’ mind they were acting lawfully, they induced the acts with the approval of the Muskegon County Circuit Court and then went forward with prosecution, arguing with the approval of the Ingham County Circuit Court that the entrapment defense could not be pursued, allowing the prosecution a free pass towards conviction. The Zitkas, being told they could continue to run their businesses by those in authority, should have been able to rely upon the governmental officials without the fear of being prosecuted. Essentially, the Attorney General’s Office was lying in wait and pounced once the Zitkas finished their Muskegon County litigation even though the Attorney General’s Office was initially involved in that litigation and acquiesced in the city attorney handling the matter.

If it is still true that “[t]he law independently forbids convictions that rest upon entrapment,” *United States v. Jimenez Recio*, 537 U.S. 270, 276; 123 S.Ct. 819, 823; 154 L.Ed.2d 744 (2003)¹¹ then the Zitkas

¹¹ Citing *Jacobson v. United States*, 503 U.S. 540, 548-549, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992) and *Sorrells v. United States*, 287 U.S. 435, 442-445, 53 S.Ct. 210, 77 L.Ed. 413 (1932).

should have their convictions vacated because these law-abiding citizens were blindsided by the government, entrapping the Zitkas into believing they were in the right. Agreeing to a resolution with the City of Norton Shores regarding purported gambling operations, which contained pertinent assuring language, the Zitkas thought their legal battles and expense that go along with them were over. Now, however, with assets seized and finances depleted, the Zitkas each have six felonies on their records and are in a state of financial ruin. Something is not right here.

In the appeal after an evidentiary hearing and a trial, the Michigan Court of Appeals, opining it was bound by its prior determination, denies relief despite the showing of the injustice of the prior decision. *People v. Zitka*, ___ Mich. App. ___, 2020 WL 7310514 (2020).

B. Res Judicata

After an evidentiary hearing, the trial court determined the Zitkas were not going to be allowed to argue the facts of the City of Norton Shores/ Muskegon County case, saying “the Court of Appeals painstakingly goes through and decides what they think the legislature intended as a general intent crime, so it really doesn’t matter about all of the various research and this and that that was done because people are presumed to know the law.” (Transcript, “Hearing,” p. 87, 1/10/19.) (Emphasis added.) It would be reasonable to believe that “people” also includes the attorney for the City of Norton Shores and a circuit court judge, who had conceded and/or authorized that the Zitkas were within the confines of the law and were not operating a gambling operation. To suggest

a reliance on these facts to be unreasonable, belies what an ordinary citizen would think. After a clear and unambiguous statement (court order) that the Zitkas were conducting a legal business, being criminally charged with multiple felony counts by the State of Michigan without any advance notice was something that should never have occurred.

Res judicata precludes a cause of action when the latter case arises from the same transaction or involves a common nucleus of operative facts. *Brownback v. King*, ___ U.S. ___, 141 S.Ct. 740, 747; 209 L.Ed.2d 33 (2021). “The doctrine of *res judicata* bars a subsequent action when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies.” *Id.*; *Estes v. Titus*, 481 Mich. 573, 585, 751 N.W.2d 493, 499 (2008).

First, regarding the City of Norton Shores litigation, it was decided on the merits: “A voluntary dismissal with prejudice is a final judgment on the merits for *res judicata* purposes.” *Brownridge v. Michigan Mut. Ins. Co.*, 115 Mich. App. 745, 748, 321 N.W.2d 798, 799 (1982).

Second, the matter contested in the second action was or could have been resolved in the first because the matter involved gambling laws and was resolved by an agreement and order that allowed the Zitkas to continue to operate as they were “currently operating.”

Third, both actions involve the same parties or their privies. The Attorney General could have intervened into the case had they wanted to, but instead waited until after an agreement was reached, where

the parties agreed to voluntarily dismiss the case, and where the court order allowed the Zitkas to continue to operate as they were “currently operating.”

In Michigan, the State Attorney General has broad statutory discretion when determining whether to intervene or whether to bring an action. These statutes, MCL 14.28 and MCL 14.101, explicitly provide that the Attorney General may become involved “in any action” “when in his own judgment the interests of the state require it” *See also Mundy v. McDonald*, 216 Mich. 444, 450, 185 N.W. 877 (1921); *In re Certified Question from U.S. Dist. Court for E. Dist. of Michigan*, 465 Mich. 537, 547, 638 N.W.2d 409, 414-15 (2002).

The Michigan Court of Appeals determined it was “bound by the earlier decision in *Zitka I* under both the law-of-the-case doctrine and because this Court’s prior decision is published.” *People v. Zitka*, ___ Mich. App. ___, 2020 WL 7310514, at 4 (2020) The “law-of-the-case” doctrine, however, did not inhibit the Michigan Supreme Court from overruling the Court of Appeals, but the Michigan Supreme Court lets the unjust Court of Appeals’ decision to stand.

Whether or not the State decided to close its eyes to what was transpiring should not be held against the Zitkas. The State was involved in starting the investigation; relented to the city; and had an interest since the underlying case involved alleged gambling and not merely an obscure zoning issue. The Zitkas should have been allowed to show the jury these pertinent facts.

C. Summary

The Zitkas were denied their constitutional right to present a defense. They relied upon a court order issued by a circuit court judge after agreement by a city attorney. One would not expect the Zitkas to defy a court order if it were rendered against them and the converse should also be true—relying on such an order when it is favorable.

The Sixth Amendment to the United States Constitution and article 1 of section 20 of the Michigan Constitution guarantee defendants a right to a fair trial which includes the right to present a defense to the charges against them and the right to call witnesses in their defense. U.S. Const. Ams. VI, XIV; Const. 1963, art. 1, § 17. A long list of cases enforce the Sixth Amendment right as applied to the states in the Fourteenth Amendment. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Michigan v. Lucas*, 500 U.S. 145 (1991); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *People v. Carpenter*, 464 Mich. 223, 241-242 (2001).

The Zitkas should have been allowed to present evidence of the Norton Shores/Muskegon County case because entrapment by estoppel and *res judicata* apply to the present matter and would have been influential to a jury. The city attorney and a circuit court judge advised the Zitkas that their conduct was legal since they could operate as they were “currently operating”—there is nothing vague or contradictory about this statement and reliance upon it was completely reasonable. The subsequent criminal charges were unfairly lodged against the Zitkas when the Attorney General’s Office began the investigation and abated their case

in favor of the city, giving everyone involved the idea the State would be allowing the city to have the ultimate authority on the issue. Only after the agreement and the court order did the Attorney General reappear to the dismay of the Zitkas.

The convictions against the Zitkas should be vacated. They were denied the right to present a defense and wrongly convicted. *Id.* They should have been allowed to present evidence of the prior litigation and they should have been able to present evidence they were law-abiding citizens who would not have broken the law had it not been for governmental actors approving the conduct.



CONCLUSION

Petitioners Bruce Zitka and Susan K. Hernandez-Zitka respectfully request that this Honorable Court vacate the convictions. The Zitkas were denied the right to present a defense when not being allowed to bring forth the prior litigation showing they were within the confines of the law. It is hoped the Court will see the unfairness of the case of not being allowed to show evidence of the city attorney and circuit court judge authorizing the Zitkas to continue to operate as they were “currently operating,” yet the government being allowed to charge them for maintaining a gambling operation.

Respectfully submitted,

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