UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LARRY ROBERT HALE,

Petitioner,

v.

CASE NO. 14-14600
HON. STEPHEN J. MURPHY
MAG. MONA K. MAJZOUB

STEVEN RIVARD, WARDEN OF THE
ST. LOUIS CORRECTIONAL FACILITY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254

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I. Mr. Hale's No Contest Plea Was Not Voluntarily, Knowingly and Understandably Made in Violation of the Due Process Clause of the Fourteenth Amendment.

At the outset, it is important to underscore what is at stake for the accused when a plea of guilty or no contest is entered in a state criminal trial. As pointed out in *Boykin v. Alabama*, 395 U.S. 238, 243-244 (1969):

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy v Hogan*, 378 U.S. 1. Second, is the right to trial by jury. *Duncan v. Louisiana*, 391 U.S. 145. Third, is the right to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400. We cannot presume a waiver of these three important federal rights from a silent record.
>
> *What is at stake for an accused facing death or imprisonment demands* ***the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence****. . . ."* [Emphasis added.]

In *Boykin*, the Court added in a footnote:

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, ***it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts****." Id.*, at 466. [393 U.S. at 243 n. 5 (emphasis added)]

In this case, the state trial court simply did not ensure that Mr. Hale, in pleading no contest, had "a full understanding of what the plea connotes and of its consequences," *Boykin, supra*, or that he "possesse[d] an understanding of the law in relation to the facts" at the time that he entered the plea. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The test for whether a defendant is competent to plead guilty is the same as the test for whether a defendant is competent to stand trial: whether the defendant comprehends the proceedings against him and has the ability to consult with a lawyer with reasonable understanding. See *Dusky v. United States*, 362 U.S. 402, 402-403 (1960) (test for competency is defendant's "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him"); *Godinez v. Moran*, 509 U.S. 389, 396-99 (1993) (standard for competent guilty plea is whether defendant "competent to stand trial"). As the Supreme Court has explained, competency to stand trial involves "the capacity [of a defendant] to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. *Drope v Missouri*, 420 U.S. 162, 171 (1975).

However, as the U.S. Supreme Court made abundantly clear in *Godinez*, the evaluation of the constitutionality of a guilty or no contest plea also involves an analysis of whether it is "knowing and voluntary." 509 U.S. at 401, n. 12; see also *Santobello v. New York*, 404 U.S. 257, 261 (1971)("The plea must, of course, be voluntary and knowing. . . ."). Specifically, the focus of the "knowing and voluntary" inquiry is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced. *Godinez, supra.* Thus, under *Godinez*, waiver of constitutional rights requires that criminal defendants have an actual understanding of the constitutional rights they are waiving, not simply the mental capacity to understand these rights.[1]

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[1] As explained by Professor Richard J. Bonnie, the *Godinez* standard involves decisional competence, a context-dependent inquiry, which requires (1) a capacity to understand information relevant to the specific decision at issue; (2) a capacity to appreciate the significance of the decision as applied to one's own situation; (3) a capacity to think (logically) about the alternative courses of action; and (4) a capacity to express a choice among alternatives. See Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10

Contrary to the State of Michigan's contention (Res. Br., p 19), Mr. Hale's plea was not entered voluntarily, knowingly or understandably as required by the Due Process Clause of the Fourteenth Amendment. Specifically, even though the State claims that the plea transcript is adequate to show that the plea was voluntary and intelligent and entitled to the "presumption of correctness," a close examination of the transcript shows that the trial court did not "scrupulously follow[] the required procedure," and that Mr. Hale's plea was hardly voluntarily, knowingly, and understandably made as required by the Due Process Clause. See *Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986).

For starters, it is embarrassingly obvious from the transcript of the plea hearing on June 11, 2012 that Mr. Hale signed the Advice of Rights card (before the actual hearing) but without understanding what he was signing (and signing away) (Plea Transcript, p 4). While his trial attorney sought to minimize Mr. Hale's inability to read as "one small problem," it was not only that Mr. Hale does not read or write, it also was that he did not have the cognitive capacity to understand fully what he was signing when he entered into the plea agreement, let alone the legal significance of his waiver. Yet, even though Mr. Hale lacked the cognitive capacity to understand or comprehend the specific decisions that he was making, his trial attorney (Mr. Parish) admitted that he had not gone through the Advice of Rights form with Mr. Hale "until just this moment," suggesting that "it might be ***quickest*** just to read them aloud when we reach that point." (*Id.*)(Emphasis added.) And the trial court agreed, reading in rapid-fire fashion the rights contained in the Advice of Rights form that Mr. Hale had already signed that morning (even though he could not have possibly understood what he signed since he could not read, which the trial court minimized as "some difficulty reading")! (*Id.* at p 5). This can hardly be

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Behav. Sci. & L. 291 (1992); see Norman G. Poythress *et al.*, *Adjudicative Competence: The MacArthur Studies* 39, 47-48, n. 7 (2002).

called "scrupulously" following the required procedure. See *Baker, supra.* The purpose of the plea process, after all, is not speed – to get through the proceeding as fast as possible, but rather to ensure that the defendant has a full understanding of what the plea connotes and the constitutional rights that he is waiving.

Nor could it be said with a straight face that the trial court, in his rapid-fire reading of the rights contained in the Advice of Rights form, exercised "***the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.***" *Boykin, supra.* As the following limited colloquy conducted by the trial court shows, it was painfully obvious that Mr. Hale did not have anywhere near a "full understanding of what the plea connotes and its consequence" or "*an understanding of the law in relation to the facts,*" especially the fact that he was giving up his constitutional right to a jury trial.

> THE COURT: . . . It is alleged that from September 20th of 2009 to on or about August 24th of 2011 in Berrien County, Michigan, you committed the offense of Criminal Sexual Conduct in the 3rd Degree by . * * * penetration, penis to vagina, with McKyndsie Kaeding, a person under 13-years old of age. This is charged as Criminal Sexual Conduct in the 3rd Degree. It is a felony. The maximum penalty is 15 years in a Michigan State prison, mandatory collection of a DNA sample, fines, costs, probation, as well as, registration under the Michigan Sex Offender Act. You understand the charge against you, sir?
>
> THE DEFENDANT: **Correct**.[!?]
>
> THE COURT: You have to say, yes or no. [sic]
>
> THE DEFENDANT: Yes [!?]
>
> * * *
>
> THE COURT: You understand, sir, that if I accept your no contest plea here this morning, you'll not have a jury trial of any kind and you'll be giving up all the rights you'd have had at that jury trial? You understand that?
>
> THE DEFENDANT: **No trial?**

THE COURT: **Right. And, do you understand that all the rights that you would have at that jury trial are contained in this Advice of Rights Circuit Court Plea form, which you've signed this morning**; they include: The right to be tried by a jury; to be presumed innocent until proven guilty; to have the Prosecutor, in this case, Mr. Sepic, prove beyond a reasonable doubt that you are guilty; to have the witnesses against you appear at your trial; to question the witnesses against you – Mr. Parish, your attorney, would question them for you; to have the Court . . . – order any witnesses that you want for your defense to appear at trial – in other words, if you believe this charge, they would be subpoenaed and I would require them to be here and attend; to remain silent during your trial – you don't have to testify; to not have that silence used against you – I would give the jury an instruction that they've not to consider the fact that you didn't testify; and finally, if you choose to, you have the right to testify at your own felony jury trial; do you understand that if I accept your no contest plea all of these rights that I just read to you are gone?

DEFENDANT: Yes.

Thus, contrary to the State's claim, the transcript reveals that the trial court's expeditious dispatch of the plea proceeding is clear and convincing evidence that Mr. Hale did not actually understand the significance and consequences of pleading no contest and waiving his constitutional rights, including the right to a jury trial. *Godinez, supra.* This particularly came out when the trial court had to direct Mr. Hale to answer "yes" or "no" after Mr. Hale answered "correct" when being asked whether he understood the charges brought against him. His answer of "correct" indicates that he did not understand. But it was clearly manifested when Mr. Hale gave the answer "No trial?" after being informed that he was waiving his constitutional right to a jury trial by pleading no contest. Here, there can be little question that Mr. Hale was completely surprised because he expected to have a jury trial. But rather than proceed with "***the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence,"*** the trial court brusquely answered "Right," not bothering to ensure that Mr. Hale knowingly and voluntarily wanted to waive his constitutional rights in exchange for his plea. The trial court then raced through a recitation of the rights contained in the Advice of Rights card (which Mr. Hale had

already signed even though he could not possibly have understood what he was waiving since he cannot read or write).

For that reason, immediately after the plea hearing, Mr. Hale asked his trial counsel (Mr. Parish) to withdraw the plea, but his counsel refused and so substitute counsel (Mr. Kirk) filed the motion to withdraw, claiming that withdrawal was in the interests of justice since Mr. Hale did not understand or comprehend the no-contest plea, that he was innocent of the charges and that he had viable defense to them. Nevertheless, the trial court brushed aside his request at the motion hearing on July 12, 2012, again misrepresenting Mr. Hale's inability to read or write and his limited cognitive capacity to understand as merely that "Mr. Hale had problems reading and writing and comprehending things." (7/12/12 Mt to Withdraw Tr, p 12). Thus, the trial court concluded that "I am completely convinced that the plea was just and proper as it relates to any deficiencies that the defendant may have with regard to reading and/or writing" because "the Court went through each prong of his rights form with the defendant, individually." *Id.* Once again, the trial court violated the standards set by the United States Supreme Court in *Boykin* and *Godinez* that waiver of constitutional rights requires that criminal defendants have an actual understanding of the constitutional rights they are waiving in entering a plea. What was at stake was not whether the trial court read the Advice of Rights form correctly but whether Mr. Hale actually understood the constitutional rights that he was waiving by pleading no contest.

In any event, after Mr. Hale was sentenced, it was conclusively determined in an independent forensic examination by Paul Kitchen, PhD, on September 10, 2012, that "[h]e has a limited capacity to understand the complexities of a plea bargain." (Forensic Psychological Report dated 9/10/12, p 6). This forensic diagnosis was then confirmed on October 1, 2012 by the Michigan Department of Corrections' Bureau of Health Care Services for a Treatment

Plan/Review, which observed that he suffers from a "[l]ack of undertstanding, impaired judgment." (10/1/12 MDOC Treatment Plan/Review, p 2). Contrary to the State's assertion (Res. Br., p 30), both of these assessments were attached as exhibits to Mr. Hale's Delayed Application for Leave to Appeal to the Michigan Court of Appeals and his Application for Leave to Appeal to the Michigan Supreme Court. Thus, the State is simply wrong to accuse Petitioner of "an impermissible attempt to expand the state-court record." (Res. Br., p 30). Indeed, the state appellate courts were given the full opportunity based upon the existing record to grant his leave applications, reversing the trial court's order denying Mr. Hale's motion for withdrawal of his plea and remanding the case to Berrien Circuit Court for a trial on the charges, but they refused to do so in violation of the Due Process Clause.

Finally, contrary to the State's claim (Res. Br, pp 31-32), this case is markedly different from *Warren v. Lewis*, 365 F.3d 529 (6th Cir. 2004) since there is clear and convincing evidence, as confirmed by the undisputed forensic psychological reports, that Mr. Hale did not actually understand the significance and consequences of pleading no contest and that he was waiving his constitutional rights, including the right to a jury trial. *Godinez, supra.* Contrary to the State's speculation (Res. Br, p 33), this is not a case of "buyer's remorse," but rather of Mr. Hale's actual innocence and his right to a jury trial to prove it. Accordingly, Mr. Hale asks this Court to grant his habeas petition so that he can proceed to a jury trial on the charges against him.

II. Alternatively, the Trial Court Violated the Due Process Clause by Failing to Conduct a Competency Hearing Where There Was Substantial Evidence that Mr. Hale Did Not Understand the Plea and that He Was Giving Up His Constitutional Right to a Jury Trial.

Assuming *arguendo* that this Court does not grant his habeas petition so that he can proceed immediately to a jury trial on the charges against him, Mr. Hale requests that a competency hearing be ordered. Specifically, the Due Process Clause of the Fourteenth

Amendment is violated by a trial court's failure to hold a competency hearing where there is substantial evidence of a defendant's incompetency. *Pate v. Robinson*, 383 U.S. 375, 385-386 (1966). "To safeguard the process, the Supreme Court has established a separate right to a competency hearing." *Doughty v. Grayson*, 397 Supp.2d 867, 875 (E.D. Mich 2005)(citing *Drope*, 420 U.S. at 172). "Under the Due Process Clause, a trial court must hold a competency hearing whenever the evidence before it raises a "sufficient doubt" about the accused's mental competency to stand trial." *Doughty, supra.* (citing *Drope*, 420 U.S. at 180). Here, the question is whether a reasonable judge should have experienced a "bona fide doubt" about the defendant's competency. *Warren, supra.*, 365 F.3d at 533 (citing *Drope*, 420 U.S. at 173) (quoting *Pate*, 383 U.S. at 385). "The Sixth Circuit has held that where the trial judge 'should have experienced doubt with respect to competency to stand trial,' there is sufficient grounds [sic] to require a competency hearing." *Doughty, supra.*, 397 Supp.2d at 875 (citing *Mackey v. Dutton*, 217 F.3d 399, 414 (6th Cir. 2000)).

Here, Mr. Hale's clear failure to have a full understanding of his no-contest plea and that he was waiving his right to trial, among other fundamental rights, created, at the very least, a real and substantial doubt as to warrant a competency hearing. As already stated, Mr. Hale's inability to enter a no contest plea knowingly, understandingly and voluntarily was confirmed by Mr. Kitchen's Psychological Report and the Michigan Department of Corrections' own assessment, both of which were attached as exhibits to Mr. Hale's Delayed Application for Leave to Appeal to the Michigan Court of Appeals and his Application for Leave to Appeal to the Michigan Supreme Court. Because there was substantial evidence that Mr. Hale did not have an actual understanding of the constitutional rights that he was waiving at the plea proceeding due to his limited cognitive abilities, he is entitled as alternative relief to a competency hearing under the

Due Process Clause, in the event that this Court does not grant his habeas petition so that he can proceed to a jury trial on the charges.

III. Assuming *Arguendo* that this Court Denies Habeas Relief to Mr. Hale, a Certificate of Appealability Should Issue.

A certificate of appealability ("COA") may be issued "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(C)(2). The substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the court's assessment of the constitutional claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Here, Mr. Hale submits that he more than satisfied this standard because there is clear and convincing evidence that he did not knowingly, understandingly or voluntarily enter a plea of no contest since he did not actually understand the significance and consequences of pleading no contest and waiving his constitutional rights, including the right to a jury trial. *Godinez, supra.*

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Petitioner Mr. Larry Hale respectfully requests that this Court grant his habeas petition pursuant to 28 U.S.C. § 2254(d)(1) because the decisions of the state courts of Michigan were contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court because Mr. Hale's no-contest plea was not voluntarily, understandingly and knowingly made under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Therefore, Mr. Hale is entitled to withdraw his no-contest plea and proceed to a jury trial on the charges against him. Alternatively, assuming *arguendo* and contrary to law and fact that this Court does not grant

habeas relief that allows him to withdraw his plea and proceed to a jury trial, Mr. Hale requests that this Court grant him a competency hearing to determine whether he had an actual understanding of the constitutional rights that he was waiving when he pleaded no contest. Finally, assuming *arguendo* and contrary to law and fact that this Court denies him any habeas relief, Mr. Hale requests that this Court issue a certificate of appealability.

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Dated: July 10, 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2015, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Honorable Stephen J. Murphy, III
Magistrate Judge Mona K. Majzoub
Assistant Attorney General John S. Pallas

/s/Gary P. Supanich
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