STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

(Borrello, S.L., Kelly, M.J., Krause, A.R.)

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Supreme Court No.

Court of Appeals No. 315722

Lower Ct No. 12-000595-FC

Berrien County Circuit Court
Hon. Charles T. LaSata

LARRY ROBERT HALE

Defendant-Appellant,

DEFENDANT-APPELLANT LARRY ROBERT HALE'S

APPLICATION FOR LEAVE TO APPEAL

Submitted By:

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July 19, 2013

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCR 7.301(A)(2). Defendant Larry R. Hale (Larry) timely appealed the decision of the Court of Appeals denying leave, issued May 24, 2013 (05/24/13 COA Order, attached the this Application at **Tab1**). MCR 7.302(C)(2). The application to the Court of Appeals came following a decision by the Berrien County 2nd Circuit Court-Criminal Division in which Defendant was convicted of a felony count of Criminal Sexual Conduct in the 3rd Degree MCL 750.520(d) by plea of no contest, and Larry's application for leave was denied by the Court of Appeals. (05/24/2013 COA Order).

STATEMENT IDENTIFYING THE ORDER ON APPEAL AND RELIEF SOUGHT

Larry challenges the May 24, 2013 Order of the Court of Appeals, which denied his application for leave to appeal. The Court of Appeals assigned the case to Panel of Judges; Owens, D.S., Presiding Judge, Whitbeck, W.C., and Meter, P.M.) An Order was issued by that panel that treated the defendant's delayed application for leave to appeal as filed within the deadline set forth in MCR 7.205(F)(3), imposed a fine on defense counsel, and noted that the delayed application for leave to appeal filed after entry of the judgment of sentence in the case was plainly not an interlocutory criminal appeal and , thus was not entitled to be expedited under MCR 7.213(C)(1). After that Order of the Court issued on 04/26/13 by Presiding Judge Donald S. Owens (See **Tab 2**), without notice to counsel the case was reassigned to a different Panel of Judges (Borrello, S.L., Presiding Judge, Kelly, M.J., and Krause, A.R.) The Defendant questions that after Judge Owen issues the Order that the delayed application is not to be given interlocutory treatment, in less than a month a new panel issues an order stating, "The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented. See Order COA 05/24/13. Did the second panel treat the case as interlocutory? How could a decision be reached so quickly that the case had lack of merit if it wasn't expedited? The defense did not file a motion to seek expedited consideration after reading and reviewing Presiding Judge Owens Order. COA 04/26/13. It is not clear to defense counsel why a different panel is assigned to Mr. Hale's case and how the case can be reassigned and ruled on in less than a month without expedited consideration. If Mr. Hale's case was not expedited then it did not receive the proper consideration that it was due and should be remanded. Mr. Hale was put into the position where the crux of his case is that he did not wish

to plead to any charge because he was innocent of any such behavior, but because his counsel convinced a severely mentally challenged man to say no contest when the judge asked him to. Now that man because of that unknowing statement gave up his freedom and the right to appeal that he would have had if convicted by trial.

Larry asks this Court to peremptorily reverse the Court of Appeals' decision and remand to the Trial Court for a trial, or remand to the Court of Appeals as on leave granted, because the Court of Appeals ignored glaring issues that took place during Larry's plea hearing where he pled no contest to something he did not understand and was denied his right to withdraw his plea prior to sentencing under MCR 6.310(B)(1). The no contest plea was the basis of his conviction so he thereby lost his appeal by right even though he had timely filed a motion to withdraw the plea prior to sentencing but was denied following a hearing.. Defendant-Appellant is appealing the Order Denying Motion to Withdraw Plea entered on July 12, 2012. (see **Tab 2**) Defendant-Appellant requests that his conviction be reversed and that he be granted his right to a jury trial. If that issue is not decided in Defendant-Appellant's favor then the Defendant is also asking for leave to appeal, the Judgment of Sentence of Commitment to State Prison Southern entered on July 18, 2012 by the Berrien County 2nd Circuit Court-Criminal Division, of his sentence of 10 to 15 years. (see **Tab 2**) Defendant-Appellant requests that his case be remanded back to the Trial Court for resentencing within the Michigan sentencing guidelines.

STATEMENT OF GROUNDS ON APPEAL AND WHY THIS COURT SHOULD PEREMPTORILY REVERSE OR GRANT LEAVE TO APPEAL

There are two reasons why this Court should peremptorily reverse or grant leave. First this Application will give this Court the opportunity to provide guidance to the lower court of Michigan on what is necessary in the way of statements by the Court to make clear to a Defendant what he is pleading no contest to. In a case where there is no allocution and the information in the form of the probable cause sheet is read by the judge silently to himself as the basis for the no contest plea. MCR 7.302(B)(3) In Larry Hale's case we have the additional issue of a severely mentally retarded man who is unable to read and not able to understand the proceedings against him, and who later says that his lawyer tricked him and that he thought he was getting a trial. Larry's statements in Court clearly showed a man who did not fully understand the questions when he was asked by the Court, nor did he understand the proceedings against him causing a material injustice to occur. Larry was not allowed his to withdraw his plea with substituted counsel and proceed to trial even when it was in the interest of justice to do so, and where the Trial Court erroneously found substantial prejudice to the prosecutor do to reliance on the plea MCR 7.302(B)(5) It is also a material injustice that the Defendant Larry Hale is currently imprisoned wrongfully for an offense he did not commit. His prior defense counsel had been ineffective when he did not cross-examine witnesses on prior inconsistent statements because he hadn't bothered to read or review the discovery prior to the preliminary examination. There could not be any sound trial strategy for not asking the prosecution witnesses about the girl's prior statements to professionals that no one other than a man named Michael Barrett had done bad things to them. The only reason is a failure to be prepared which is ineffective assistance per se. Larry Hale's counsel was ineffective for not

reading Larry Hale his rights prior to the plea hearing, asking that the Judge do it, because he had yet, even though he had already been retained by Larry's family for several months. Larry's defense counsel was ineffective in not having Larry Hale tested for mental competency but instead used Larry's limited mental capabilities against him by having him plead no contest while Larry was still thinking that he would have a trial. MCR 7.302(B)(5)

It is a material injustice to have Larry Hale in prison for 10 to 15 years based upon a involuntarily taken plea without understanding or knowledge of the facts he was pleading "no contest" to. It is unjust to allow such a plea agreement to control when the sentencing guidelines for the pleading to the offense provide for a much lower sentence. (see **Tab 5**) It is unjust and erroneous for the Trial Court not to have sentenced Larry Hale within the guidelines or give substantial reasons why he departed.

STATEMENT OF QUESTIONS PRESENTED

I. Whether Larry Robert Hale was denied his constitutional right to a jury trial when the trial court refused to grant Defendant Appellants motion to withdraw his no contest plea that was made prior to his sentencing under MCR 6.310(B)(1)?

Defendant-Appellant answers, "yes"

II. Whether the trial court judge abused his discretion when he refused to grant Defendant Appellants motion to withdraw his no contest plea that was made prior to his sentencing under MCR 6.310(B)(1)?

Defendant-Appellant answers, "yes"

III. Whether Larry Robert Hale was denied his constitutional right to counsel of his choice when the trial court refused to grant Defendant Appellants motion to withdraw his no contest plea that was made prior to his sentencing under MCR 6.310(B)(1) by not having a jury trial with substituted counsel and without involvement of counsel of his choice in the plea agreement?

Defendant-Appellant answers, "yes"

IV. Whether Larry Robert Hale was denied his constitutional right to counsel as guaranteed by the U. S. Constitution's 6th and 14th Amendments because his counsel handling his case up to his plea hearing was not functioning as such, due to deficient performance).

Defendant-Appellant answers, "yes"

V. Was Larry Robert Hale's counsel ineffective for failure to have Larry Hale tested for mental compentancy prior to committing him to a plea without full knowledge or comprehension.

Defendant-Appellant answers, "yes"

VI. Whether the Trial Court Judge committed error or abused his discretion by sentencing Larry Robert Hale to prison for 10 to 15 years when the Trial Court Judge failed to state adequate reasons on the record for an upward departure from the sentencing guidelines?

Defendant-Appellant answers, "yes"

VII. Whether the Trial Court Judge committed error or abused his discretion by sentencing Larry Robert Hale to prison for 10 to 15 years when the Trial Court Judge failed to give due consideration to the 55 point reduction in OV points that defense counsel was able to obtain through argument prior to sentencing.

Defendant-Appellant answers, "yes"

STATEMENT OF FACTS

This case came about following the accusations of two minor children females that the Defendant Larry Robert Hale had committed acts on them that constituted felony criminal sexual conduct in the First Degree. Both minor children had been sexually assaulted prior to the accusations against Larry Hale, by a man named Michael Barrett. Michael Barrett pled guilty to the charges and made courtroom admissions of his culpability and guilt to the offenses. Mr. Michael Barrett's case had been handled and investigated by police and Child Protective Services. Both girls were interviewed extensively by professionals prior to the charges being brought against Mr. Michael Barrett. There were no disclosures of other perpetrators during the professionally conducted interviews of Angel Kaeding and Mckyndsie Kaeding in the case against Michael Barrett.

Sixth months after the arrest of Michael Barrett, the minor girl's uncle Jason Kaeding was driving around with the two girls looking for a garage sale. When they went past Larry Hale's rented duplex that he lives in with his wife Sandra Hale, the girls began to act up and scream out that Larry lives there. After getting home, Jason Kaeding questioned both girls

more thoroughly, and they told him that Larry Hale had done things to them. Jason Kaeding reported the matter to the Lincoln Township Police. The police did an investigation, and the girls were interviewed once again by Child Protective Services specialists. This time they disclosed for the first time to the professionals that Larry Hale had committed sexual acts on them when they were visiting at the Hale's home. Larry and Sandra Hale have a son Mark Osborne who lived full time at the residence when not working as a truck driver. Mr. Osborne has two sons ages at the time 10 and 14, who regularly visited and stayed overnight with their grandparents Larry Hale and Sandra Hale. During a period of time between September 2009 and August 2011 the two minor children Angel Kaeding and Mckyndsie Kaeding would be dropped off from time to time by their parents, to the Hales home to babysit. Another male minor child Preston Kaeding, age 3 would come to visit on occasions with his sisters at the Hale home. On some of those occasions the girls would stay overnight and other times they would not. On most of those occasions the Hale's two grandsons would also be present and stay overnight. The duplex is very small, so the two girls were sleeping on the living room couches. The accusations stated that Mr. Hale would commit the acts when his wife was away shopping, or at the laundry mat, or at night when everyone was asleep, or while Ms. Hale was in the bathroom. Larry Hale denied doing anything improper to either girl. His wife claimed that she was present at all times and that when she would go to the store that she would take her grandsons and the girls and their brother with her. During this period both girls continually asked their parents to be able to stay over at Larry and Sandy Hale's house. The girls stopped visiting the Hales' after their uncle Jason Kaeding gained control as a foster parent over the children following neglect and abuse court proceedings against the girl's mother and father.

Melissa Kaeding reported the case against Michael Barrett to the police. Six months later it was Jason Kaeding who reported the accusations to the police against Larry Hale.

Larry Hale was arrested on February 21, 2012 on six felony counts of Criminal Sexual Conduct in the First Degree and two counts of Criminal Sexual Conduct in the Second Degree. On February 22, 2012 an arraignment was held in Fifth District Court before the Honorable Gary J. Bruce, Trial Court Judge. Mr. Hale was read the charges by the court, count by count saying that he understood. (see arraignment transcript pages 3-6) Then the trial court judge informed Mr. Hale of his right to a preliminary examination. Mr. Hale said he understood. (see arraignment page 6) The trial court judge then informed Mr. Hale of his right to remain silent and his right to counsel. Mr Hale said he understood (see arraignment page 6) The trial court judge went on to further inquiry whether Mr. Hale would be hiring a lawyer, and questions about whether Mr. Hale was on probation or parole and whether Mr. Hale had been arrested before. Mr. Hale answered no to each of those questions. (see arraignment page 7) Then the trial court judge set Mr. Hale's bond at $500,000 cash or surety. The judge also listed several conditions on the bond. (see arraignment page 7-8) When finished with the bond and bond conditions, and Mr. Hale saying he understood. The Court: "You're all set for today." Mr. Hale: "Your Honor, I had a question, sir before --- (see arraignment page 8, lines 18-19) The trial judge cautioned the defendant about saying anything that might be used against him by the prosecutor. (see arraignment page 8, lines 22-25) Mr. Hale told the judge "No, it's none of that." (see arraignment page 9, line 1) The Court: "Okay" (see arraignment page 9, line 2) The Defendant: "I bought the vans under his father. Now, we owe him payments. So I have to have my wife deal with that?" (see arraignment page 9, lines 3-5) The Court: "That's got

absolutely nothing to do with what we're talking about today." (see arraignment page 9, lines 6-7) The Defendant: "Okay" (see arraignment page 9, line 8) The trial court went on to explain that the defendant was facing life in prison on 8 counts. The defendant said he understood. (see arraignment page 9, lines 8-17) The Court: "--- and with a $500,000 bond. That's the only thing before the Court at this time." (see arraignment page 9, lines 18-19) The Defendant asked: "I have to have $5,000 to get out---?" (see arraignment page 9, line 20) The Court: "Five—" The Defendant: "—correct?" (see arraignment page 9, line 22) The Court: "—hundred thousand." (see arraignment page 9, line 23) The Defendant: "Okay. Thank you." (see arraignment page 9, line 24)

The Defendant's family hired Attorney Tat Parish of Watervliet. The Preliminary Hearing was held on March 6, 2012 before the Honorable Circuit Court Judge Charles T. LaSata. Testimony was heard from Jason Kaeding, Angel Kaeding and Mckyndsie Kaeding. Following the testimony the prosecution dismissed the counts against the Defendant concerning the youngest child Angel Kaeding. Angel Kaeding's testimony was not credible. (see preliminary examination, page 16) When asked by prosecutor Sepic to point to the perpetrator of the crimes, Angel Kaeding pointed at the trial judge himself. This was acknowledged by the prosecution and defense counsel. (see preliminary examination, pages 17-18) The Defendant was bound over to the Circuit Court on six counts for trial.

On June 11, 2012 a plea was taken in the Berrien County Second Circuit Court before the Honorable Charles T. LaSata, Circuit Court Judge. The Court: "Alright, I understand that we have a plea agreement in this case, Mr. Parish?" (see plea, page 3, lines 14-15) Mr. Parish: "We do, your Honor. The agreement is that Mr. Hale will plead no contest to a single count of

Criminal Sexual Conduct in the Third Degree in return all the other charges will be dismissed. It's also part of the agreement, on both sides, that there be an agreed sentence in this matter of not less than 10, nor more than 15 years? Do you understand all that?" (see plea, page 3, lines 16-22) The Defendant: "Yes." (see plea, page 3, line 23) Mr. Parish: "And that's what you wanna do?" (see plea, page 3, line 24) The Defendant: "Yes." (see plea, page 3, line 25) The Court: "Okay" (see plea, page 4, line 1) Then Mr. Parish says, "We do have one small problem I want to call to your Honor's attention and that's this . My client does not read and as a result, while I can have him sign the Advice of Rights, I have not had an opportunity until just this moment to go through those with him, so I would suggest that, perhaps, it might be quickest just to read them aloud when we reach that point." (see plea, page 4, lines 2-8) The Court: " Okay, that's fine." (see plea, page 3, line 9)

The Trial Court Judge swore in the Defendant to testify. The judge inquired about Mr. Hale's education. He said he quit in the 10th grade. (see plea, page 5, line 3 and 7) Defendant said his education was bad. (see plea, page 5, line 12 and 14) The Court read the Defendant the charged offense, the allegation, and the possible penalties and actions as a result. (see plea, page 6, lines 1-21) The Court: "You understand the charge against you, sir?" (see plea, page 6, line 21) The Defendant: "Correct" (see plea, page 6, line 22) The Court: "You have to say, yes or no." (see plea, page 6, line 23) The Defendant: "Yes" The Court inquires: "And how do you wish to plead, guilty, not guilty, no contest?" (see plea, page 6, line 25, page 7, line 1) The Defendant responds: "No contest." (see plea, page 7, line 2) 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?"

(see plea, page 7, lines 3-6) The Defendant responds with a question. The Defendant: "No trial?" (see plea, page 7, line 7) The Court answers: " Right" (see plea, page 7, line 8) The Court goes on to read to the defendant his rights. (see plea, page 7, lines 8-25, and page 8, lines 1-2) The Court asked the Defendant: "---; do you understand that if I accept your no contest plea all of these rights that I just read to you are gone? "(see plea, page 8, lines 1-2) The Defendant: "Yes" The Court: "An that's what you want me to do, sir?" (see plea, page 8, line 6) The Defendant: "Yes" (see plea, page 8, line 7) The plea was put on the record by the prosecutor and Mr. Parish confirmed. The Court: "Okay. And finally, Mr. Hale, is that your understanding, sir?" (see plea, page 10, lines 8-9) The Defendant answers: "(Inaudible)" (see plea, page 10, line 10) The Court asks: "Can you speak up, please?" (see plea, page 10, line 11) The Defendant responds to the question: "Yes. Sorry." (see plea, page 10, line 12) The court inquires further of the Defendant of any threats or promises made. The court asked counsel if he may use his notes from the preliminary examination and review the probable cause sheet in order to establish the factual basis for the no contest plea. Both counsel agreed. (see plea, page 11, lines 8-9) No admissions of guilt, no facts were stated or allocution was given by the Defendant Larry Hale. The Trial Court set sentencing for July 16, 2012.

The Defendant was returned to his cell in the Berrien County Jail. He called his family the night following the plea. It was on that phone call that Larry Hale learned that he was going to prison. Mr. Hale tried to get Attorney Parish to withdraw the plea. Mr. Parish would not, so the family hired present counsel Attorney Martin O. Kirk. Attorney Kirk on June 28, 2012 filed and noticed out a Motion to Withdraw Plea under MCR 6.310(B)(1). The prosecutor filed an Answer to Motion to Withdraw Plea. A hearing was held on the Defendant's Motion to

Withdraw Plea on July 12, 2012. The court had read the parties pleadings, then heard the arguments of both counsel before the Court Denied the Motion to Withdraw Plea and stated the reasons on the record. Of that Order Denying the Motion to Withdraw Plea the Defendant/Appellant asks for leave to appeal.

On July 16, 2012 the Trial Court conducted a sentencing hearing. The Pre-Sentence Report was issued to counsel and the Trial Court Judge. The investigating agent Dennis F. Kuczinski of MDOC wrote in the PSI Report that he supported the plea agreement made between the Prosecutor and former counsel Tat Parish of a sentence to the MDOC for a period of 10 to 15 years with credit for 147 days in jail before the sentencing date. (see Exhibit 5 PSIR)

The Trial Court began the sentencing hearing: "For purposes of sentencing as a result of a no contest plea which you entered on June 11th of 2012 to the felony offense of Criminal Sexual Conduct in the 3rd Degree, using force or coercion. This is a felony. The maximum penalty is 15 years in a Michigan state prison; however, sentencing guidelines in your particular case are 36 to 60 months with a prior record variable score of 0. The is also a---a sentencing agreement on this file." (see sentencing, page 3, lines 8-9)

The Trial Court inquired at sentencing whether there were errors or additions to the PSI. The prosecutor stated: "No, your Honor" (see sentencing, page 3, lines 8-9) Attorney Kirk pointed out a error in the PSIR: "they're describing the two Kaeding children as children or stepchild, and I don't' believe they're --- they're children but I don't believe they were stepchild in any way. It was a babysitting situation." (see sentencing, page 4, lines 1-4) Prosecutor Sepic did not object to the correction.

Then as to scoring, Mr. Kirk had no objection to the prior record score of Zero (0) for Mr. Hale. Mr. Kirk then objected to the scoring of OV 7 variable. Mr. Kirk: "He was scored with 50 points, saying that there was particular sadism, torture, excessive brutality, and I would ask that your Honor score that at 0 because I think the standard of sadistic and torture, what -- what was not really brought out in any kind of thing-→" (see sentencing, page 4, lines 24-25 and page 5, lines 1-3) Mr. Kirk: "—prior testimony." (see sentencing, page 5, lines 7) The prosecutor and Trial Court tried to recall such testimony but could not. Mr. Kirk: "The point I'd make, your Honor, is that it's to substantially increase the fear. I'm not gonna claim that there's no fear or anxiety, but it has to be an action that's substantially increases that, so." (see sentencing, page 6, lines 18-21)

The Trial Court deferred decision on OV 7 variable and went on the Mr. Kirk's objection to the scoring of OV 10 variable scoring by the investigating agent. Mr. Kirk: " They scored him at 15 points, predatory conduct was involved. I would say it would be more appropriately scored at 10 points because he – the offender exploited a person's youth or "—youth or abused their – his or her status as authority; being the babysitter in this case and being them young children. I'd say that would be more appropriate than the predatory conduct, that's a definition that was scored I think it's very similar the OV 7 argument." (see sentencing, page 11, lines 1-8) Mr. Sepic: " Well, judge , I don't really think I disagree. I – Although, we don't know entirely what the ---we don't have a video of the precursor to all these events. But I don't believe it was Mr. Hale, necessarily, for instance that solicited the children going there. They were taken there by their parents, etcetera, by mutual agreement. So, I don't know that there was pre-offense conduct that necessarily led to these acts. So, I think ten probably fits a little

squarer." (see sentencing, page 11, lines 10-17) The Court: "All right. OV 10, I'll modify it from a 15 to 10 points." (see sentencing, page 11, lines 20-21)

After further discussion between the Trial Court and the prosecutor they were unable to find any reference supporting the claim of sadism and torture. The Court: "Alright, I'll modify OV 7 from 50 to 0. That changes the total OV score to, 110?" (see sentencing, page 13, lines 18-19) The Trial Court Judge sentenced the Defendant Larry R. Hale to a minimum of 10 years in prison.

As reasons for the sentencing decision the Trial Court stated: "your prior counsel is extremely thorough, and, in the Court's opinion, you know, turned over every rock and tree and visited every crevice in this case to, in his effort, try to get the best possible plea arraignment for you that he could." (see sentencing, page 20, lines 5-8) " I would note that this plea agreement that was reached and ultimately entered into on June 11th of 2012, you were looking at spending life in a Michigan state prison, and , after consulting with your able attorney at that time, arrive at – at this plea agreement. It's not as if this was just plucked out of the air for a man that had no prior convictions." (see sentencing, page 20, lines 14-20) "Your guilt was established and you knowingly, freely, voluntarily entered into that plea agreement. You chose to take a--a sentencing agreement of 10 years to give you a chance at a life-after-prison rather than risk what I--I think would've been a conviction had you gone to trial by jury, because I listened to the children testify under oath on March 6 of 2012 and I found their testimony to be compelling and truthful." (see sentencing, page 21, lines 8-15)

Prosecution counsel when asked if he had anything to say prior to the sentencing said: "Judge, really, just, I think they've said it all here and I think the 10 years agreed upon is an appropriate sentence. Thank you." (see sentencing, page 18, lines 4-6)

Defense counsel had argued: "---that it was a no contest plea, that Mr. Hale has maintained his innocence on this, I was not part of a plea agreement for 10 years so I'm gonna be asking that it be within the guidelines itself." (see sentencing, page 18, lines 9-12) "—he did plead no contest. A person with no record. The offense variables score out pretty high in themselves. But I would ask, your Honor, that---that you sentence him within the guidelines and look for a sentence, you know , at the 36-month category or thereabouts, and not go departing higher based on a plea agreement that I don't think my client understood at all, let alone I wasn't part of. So, I'm arguing that if he's pled guilty to--- you, pled no contest to the CSC 3rd, and that the guidelines themselves provide very adequate punishment and that you stay within those guidelines when you sentence Mr. Hale. (see sentencing, page 19, lines 7-17) The Court: " Accordingly it is the sentence of the Court, again, the plea agreement entered into on June 11th of 2000 and --- and 12, that you are to serve 10 to 15 years in a Michigan state prison, with credit for time served as of today's date of 147 days." (see sentencing, page 21, lines 16-19) It is that sentence that Defendant-Appellate asks for leave to appeal the sentencing decision of the Trial Court Judge, and asks that his case be remanded back to the Trial Court for resentencing within the Michigan Sentencing Guidelines.

Following Larry Hale's sentencing Defendant-Appellate counsel had Larry Hale tested by professionals to refute the claim that he knowingly, voluntarily made his plea and demonstrate that Larry Hale lacked the capacity to fully and adequately understand the proceedings against

him. Appellate counsel requested a Forensic Psychological Report be conducted at the MDOC by Dr. Paul Kitchen PhD. Dr. Kitchen's report states that Mr. Hale's intellectual capacity suggest a limited cognitive function. He demonstrates an intellectual ability within the mentally deficient range (Full Scale IQ = 62, 1st percentile). He appears to have significant problems with abstract reasoning or his ability to retain information facts. His response to The Evaluation of Competency to Stand Trail protocol suggest a very concrete and limited perception of the roles and responsibilities of the leading actors in the judicial process. He has a limited capacity to understand the complexities of a plea bargain. (see **Tab 3**, attached report Dr. Paul Kitchen, PhD). The Michigan Department of Corrections-Bureau of Health Care Services conducted an evaluation of the defendant Larry Hale. The clinical assessment results confirm the Mr. Hale has a Low IQ, and Mental Retardation, Unspec (319) (see **Tab 3**, attached report MDOC Hale, Larry Robert, Inmate ID: 844194)

ARGUMENT

ISSUE OF DENIAL OF MOTION TO WITHDRAW PLEA

I. **Whether Larry Robert Hale was denied his constitutional right to a jury trial when the trial court refused to grant Defendant Appellants motion to withdraw his no contest plea that was made prior to his sentencing under MCR 6.310(B)(1).**

Defendant-Appellant answers, "yes"

II. **Whether the trial court judge abused his discretion when he refused to grant Defendant Appellants motion to withdraw his no contest plea that was made prior to his sentencing under MCR 6.310(B)(1)?**

Defendant-Appellant answers, "yes"

III. **Whether Larry Robert Hale was denied his constitutional right to counsel of his choice when the trial court refused to grant Defendant Appellants motion to**

withdraw his no contest plea that was made prior to his sentencing under MCR 6.310(B)(1) by not having a jury trial with substituted counsel and without involvement of counsel of his choice in the plea agreement?

Defendant-Appellant answers, "yes"

Standard of Review:

The standard for review on a trial court's denial of a defendant's motion to withdraw a plea is did the trial court abuse its discretion. The standard is de novo review for the constitutional issues such as the violation of defendant's 5th and 14th Amendments right to due process, and his 6th Amendment right to a trial by jury and counsel of his choice.

> *In People v. Fonville* 291 Mich.App. 363 (2011) This Court also reviews for an abuse of discretion a trial court's denial of a defendant's motion to withdraw a plea. An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. Moreover, this Court reviews de novo constitutional issues.

"This Court reviews constitutional questions de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

Analysis:

There was no factual basis established at the plea hearing in Mr. Hale's case. That omission is significant and a key issue that this Court should address in deciding this case in Defendant-Appellants favor.

> *People v. Fonville* 291 Mich.App. 363 p 377-378 (2011) When reviewing whether the factual basis for a plea was adequate, this Court considers whether the fact-finder could have found the defendant guilty on the basis of the facts elicited from the defendant at the plea proceeding. "A factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant has admitted. This holds true even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference. Even if the defendant denies an element

> of the crime, the court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant says." Additionally, MCR 6.310(B) provides, in pertinent part, that a motion to withdraw a plea before sentencing should only be granted if the defendant is able to show that withdrawal of the plea is "in the interest of justice," meaning that the defendant has to articulate "a fair and just reason" for withdrawing the plea. Fair and just reasons include reasons like a claim of actual innocence or a valid defense to the charge. Things that are not considered fair and just reasons are dissatisfaction with the sentence or incorrect advice from the defendant's attorney.

The Trial Court Judge used as the factual basis to accept the Defendant-Appellant's no contest plea, was his recollection of the testimony given during the preliminary examination, and his review in court of the probable cause sheet. Both counsel agreed that that review and the Judge's recollection of testimony would be a factual basis for the plea. (see plea, page 11, lines 3-17) The problem with that is that Mr. Hale has not heard facts that would make it clear to him that he was admitting to vile sexual acts on a child. The Trial Court Judge read the probable cause sheet to himself. Mr. Hale cannot read so he needs something read to him for it to be fair that he understood that matter. This was a key error committed by the Judge and is reversible error. It might have been clear to the Trial Court Judge, the prosecutor and defense counsel that the probable cause sheet was adequate for a factual basis, but they cannot say that Mr. Hale knowingly and understandingly knew what the lawyers and judge were talking about. This might be a different case, if the Trial Court Judge had read out loud the probable cause sheet to the Defendant, but he did not. It cannot be said, that Mr. Hale had any idea that he was accepting a plea and was not contesting the claims that he committed sexual acts on a child. Had those alleged sexual acts been read out loud in Court Mr. Hale would have said that he did nothing of the kind. Larry Hale has always maintained his innocence to the charges against him. Not only did the Defendant not make any admissions of guilt, or any kind of allocution at all, but there was no specific claims of conduct mentioned by

the Trial Court when it decided to accept the Defendant's no contest plea. Subjects such as graphic descriptions of sexual acts committed on a child, can be uncomfortable for everyone involved. It may have seemed unnecessary for the Trial Court Judge to read out loud the descriptions of the alleged acts when he knew that counsel all knew what the allegations were and what the plea was about. The Court abused its discretion and committed reversible error when it failed to read out loud the probable cause sheet to make Defendant fully aware and informed about what he was pleading no contest to. It might be embarrassing and distasteful to read such vile acts alleged to have been committed by Defendant in open court, but it needs to be done in order for a plea to be of the type that is made knowingly, freely, voluntarily and understandingly.

The Trial Court relied heavily on his belief that defense counsel Tat Parish had been very thorough in his investigation and preparation of his case, so therefore the plea was appropriate. That assessment of the Trial Court is an abuse of discretion. I would specifically note that defense counsel Parish told the Trial Court at the beginning of the plea hearing that he had not had the opportunity until just this moment to go through those with him (see plea, page 4, lines 5-6). The plea is taken in June 11, 2012 the preliminary examination is held on March 6, 2012 yet after three months on the case defense counsel had not yet explained to Defendant his rights. Counsel asks the Trial Court Judge to read to Mr. Hale his rights. (see plea, page 4, lines 6-8) It was an abuse of discretion for the Trial Court Judge to continue with a plea to a very serious charge when defense counsel admits his failure to inform his client of his rights in open court just before the taking of the plea. The Trial Court Judge should have stopped the hearing for some period of time or adjourned the plea hearing, for defense counsel and defendant to go

over rights. Simply reading rights to a defendant is not enough. Defense counsel must often explain those rights or possible outcomes to a client. It is presumptuous to believe that everyone clearly knows the rights, the specific meanings of terms, and the consequences of giving up those rights without the opportunity to talk to a lawyer. There is more to the defendant's rights then simple recitation. An explanation may be needed even if a client is fully educated and literate. That is what lawyers are there for, to explain terms and concepts in language that clients can understand. When you have a client with extremely low intellectual capabilities, a lawyer should clearly, slowly and carefully explain those rights to an accused. Mr. Hale was given the quick and easy version of recitation of his rights without explanation adequate for his understanding and capabilities.

The Trial Court Judge relies upon the responses of Defendant Larry Hale such as "yes" answers to questions to say that the plea was fully explained and knowingly given, and freely and voluntary, and understandably taken. People who cannot read or that function on a lower intellectual level often cope by saying "yes that they understand", or act like they understand something to cover up their deficiency to others. Mr. Hale is clearly doing this when he tells the Trial Court Judge that he quit school after the 10th grade. (see plea, page 5, line 4) What Mr. Hale failed to mention due to embarrassment, that although he made it into the 10th grade he was in special education during his entire schooling, that he was only at 3rd grade functioning, and that he had attending numerous programs and night classes to learn to read without success. The Trial Court incorrectly assessed Mr. Hale's ability to understand the proceeding, and defense counsel did very little to make the Trial Court aware of it. Saying only that: "My client does not read ----" (see plea, page 4, lines 3-4)

The Trial Court incorrectly believed that because Mr. Hale had managed to make it into the 10th grade that he had essentially at least 9th grade abilities. The Court: " I—I read each of his rights--- ---- to him because I was aware of him stopping school in 10th grade. That was my recollection. I listened to the tape this morning to make sure my recollection was accurate and I did go through each point with the defendant." (see plea, page 9, lines 1-7) More consideration should have been given by the Trial Court to Mr. Hale's comprehension problems, especially when substituted defense counsel's made those claims in his motion to withdraw the plea. The arraignment of Mr. Hale makes clear his inability to comprehend things even when stated clearly and directly to him. Judge Bruce goes through 8 separate felony counts with the Defendant many of which carry life in prison as the possible sentence. The Defendant responds with some bizarre unrelated question about van payments. Judge Bruce scolds the Defendant saying that's got absolutely nothing to do with what we're talking about today. (see arraignment, page 9, lines 3-8)

Also in the arraignment Judge Bruce clearly told Mr. Hale that his bond was set at $500,000 more than once. The Court: " Alright, Mr. Hale, your bond is set at $500,000 cash or surety." (see arraignment, page 7, lines 24-25) "---and with a $500,000 bond. That's the only thing before the Court at this time." (see arraignment, page 9, lines 18-19) Mr. Hale responds with a question: "I have to have $5,000 to get out----" (see arraignment, page 9, line 20) The Court: "Five---" (see arraignment, page 9, line 21) Mr. Hale interrupts with another question: "correct?" (see arraignment, page 9, line 22) The Court: "---hundred thousand." (see arraignment, page 9, line 23) Mr. Hale says: " Okay. Thank you." (see arraignment, page 9, line 24) No one can say that after that exchange that Mr. Hale was clear on his bond. Mr. Hale

simply cannot comprehend what the Trial Judge is saying and resorts to a defense mechanism by saying "Okay".

The van question and inability to understand the bond amount set by the judge at the arraignment, demonstrate and bolster the Defendant-Appellants claims that he did not understand the plea proceedings and that matters have to be carefully and slowly gone over with the defendant in order for him to understand and comprehend.

The importance of the plea hearing and Mr. Hale's comprehension and understanding of the proceedings were central to Defendant's Motion to Withdraw Plea, yet the trial court did not listen to the entire plea before making his decision to deny the Defendant's Motion to

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The importance of the plea hearing and Mr. Hale's comprehension and understanding of the proceedings were central to Defendant's Motion to Withdraw Plea, yet the trial court did not listen to the entire plea before making his decision to deny the Defendant's Motion to Withdraw Plea. The Court: "--- and finally, I didn't listen to the entire plea, but I listened to a good portion of the actual plea, the recorded transcript--- recorded record, rather, of that plea from June 11th of 2012. I presided over all proceeding related to this I—I feel that I've got a good grasp of—of the situation here." (see motion to withdraw plea, page 10, lines 14-19) The Trial Court Judge admits that didn't listen to the entire plea before making his decision that took away Mr. Hale's fundamental constitutional rights to a jury trial with counsel of his choice. The Trial Court did not preside over the arraignment of the defendant. That matter was handled by Judge Gary J. Bruce. The Trial Court abused its discretion when it summarily ruled against Defendant's Motion to Withdraw Plea without taking the due consideration by listening to the entire plea hearing to see if anything could support Defendant's position. That is the minimum that should have been done before the Trial Court committed the Defendant to a

horrible plea deal made by his former dismissed defense counsel that would send him to prison for ten years or more.

The Trial Court abused its discretion and committed reversible error when the Trial Court acknowledged that the defendants understanding and comprehension was the key issue. The Court: "The main thrust of the Defense motion in this case is contained in paragraph 6, where Mr. Hales indicates he's not able to read or write and did not understand or comprehend his no contest plea to a CSC 3rd Degree. And I just find that completely without merit." (see motion to withdraw plea, page 12, lines 4-8) "---the Court went through each prong of his rights form with the defendant, individually. So I am completely convinced that the plea was just and proper as it relates to an deficiencies that the defendant may have with regard to reading and/or writing." (see motion to withdraw plea, page 12, lines 12-15) So the Trial Court believes that if a right is read to a defendant that is all that is needed, regardless of the intellectual capability of the specific defendant. If the Trial Court read the rights clearly and concisely in English to a person who only spoke Spanish, can it be said that the defendant understood? It is the same with a person of limited intellectual functioning. Just like the Spanish speaking person needs an interpreter the special needs person needs extra time and explanations in order to fully comprehend their rights let alone the consequences of relinquishing those rights. It was an abuse of discretion for the Trial Judge not to take into account Mr. Hale's limitations when he stated that Mr. Hale fully understood all of his rights because he read them out loud.

The Trial Judge abused his discretion and committed reversible error when he ruled that withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the

plea. The prejudice to the prosecutor was simply that the victim witnesses had been told that it was over three weeks before and would now have to be told that the jury trial was on again. The prejudice is simply asking witnesses who are available to come into Court and tell the truth under oath. How can that be prejudice let alone substantial prejudice. It is also interesting that it was the prosecution who told the victim witnesses that the case was over following the plea. The prosecution was making a false promise that should not bind the defendant. The MCR 6.310(B)(1) makes clear that a defendant may motion for withdraw of plea before sentencing, yet the prosecutor tell the girls that it is over. Just because a prosecutor gives improper legal advice to a witness doesn't make everyone else bound to that false promise. The prejudice to the prosecution was all of their own doing and creation. Telling witnesses that they are excused from a case before it is over and then claiming estoppel is laughable if it didn't involve the serious matter of Mr. Hale being denied his fundamental rights.

It was an abuse of discretion for the Trial Court to use the prosecution's premature promise to the witnesses that the matter was over as a basis to deny the Defendant's Motion to Withdraw Plea.

Preservation of Error:

"Any plain error that affects a party's substantial rights may be considered even though it was not brought to the court's attention." *Cameron*, *supra*, at 8; citing *Carines*, *supra*, at 763; quoting *FR Crim P 52(b)*. A constitutional right "may be forfeited by a party's failure to timely assert that right." *Carines*, *supra*, at 763; citing *Olano*, *supra*, at 731. "To avoid forfeiture, the

defendant bears the burden to show that (1) an error occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error prejudiced substantial rights, i.e., the error affected the outcome of the lower court proceedings." *Cameron*, *supra*, at 8; citing *Carines*, *supra*, at 763. In addition, "once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse." *Cameron*, *supra*, at 8. Even then, reversal is only warranted when the plain, forefeited error . " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence.'" *Cameron*, *supra*, at 8; citing *Carines*, *supra*, at 783; quoting *Olano*, *supra*, at 736-737.

Analysis

This case presents an undecided issue and novel issue that has not yet been decided by the Michigan Courts as far as counsel has been able to determine. That is the issue of the standards and considerations that trial courts should use when confronted with an issue of a defendant seeking to withdraw his plea prior to sentencing when the conviction was obtained by way of a **no contest** plea. Defendant-Appellant argues that those standards and considerations that the trial courts should use in such cases, should be different then the case where a Defendant pleads guilty and or makes inculpatory statements or admissions of guilt or statements inferring guilt such as the Defendant in the cited case below.

People v. Fonville 291 Mich.App. 363 p 378-379 (2011) At the plea proceeding, Fonville testified that he "pretty much endangered two young kids[.]" He did this by "doing drugs and driving around with them in the car." He admitted that he and his friend were driving around with the children while getting crack cocaine. He admitted that he knew that he was supposed to return the children to their mother at 11:00 p.m. and that he had told both the children and their mother that this was what he was going to do. "But [he] ended up because of getting crack and

everything keeping the kids with [him], driving around from 11 p.m. at night through 2 p.m. in the afternoon the next day. . . ." Fonville agreed that he had "fraudulently detained" the children. Given that Fonville's admissions were in line with the elements of the charged crime, we conclude that the trial court did not abuse its discretion by denying his motion to withdraw his plea. An inculpatory inference can be drawn from what Fonville admitted. That is, although he originally might have had consent to take the children, he admitted that he later fraudulently detained them by driving around and doing drugs until the next afternoon while the children were in the car instead of returning them at 11:00 p.m. as agreed upon with their mother. Fonville did not sufficiently demonstrate that withdrawal of his plea was in the interest of justice. Moreover, although Fonville claimed that he was innocent of the crime as charged because he did not have an "evil intent," he never argued that he was actually innocent of the alleged conduct. The prosecution has authority to choose appropriate charges, [fn15]and Fonville voluntarily pleaded guilty to the charge pursuant to a valid plea agreement placed on the record.

In *Fonville* the Court ruled against the defendant allowing withdraw of his plea saying that he made several inculpatory admissions during his plea hearing, like he pretty much endangered two young kids, doing drugs and driving around with them in the care, and agreed he fraudulently detained the children. In this case the Defendant-Appellant Larry Hale made no such statements. Larry Hale only said no contest without any type of inculpatory statements or admissions. Mr. Fonville never argued that he was actually innocent of the alleged conduct. Larry Hale has consistently maintained his innocence to the charges.

The Defendant-Appellants claims of innocence are backed up by the victim witnesses late disclosure of the alleged sexual abuse by the Defendant Larry Hale. (see prosecution's answer to motion to withdraw, page 3, paragraph c) Prosecutor Sepic wrote that "Around the time that case was over, the children disclosed this defendant's abuse" So it was around the end or after the time that the Michael Barrett had been prosecuted, pled guilty and was sentenced that Angel and McKenysis first disclosed the alleged abuse Larry Hale. The allegations against Larry Hale go back to September 2009. It seems logical that if the two girls were interviewed by the professionals in the investigation of Michael Barrett, that they would

have disclosed the sexual conduct they later allege against Larry Hale. It is a defense and very plausible that there was no conduct by Larry Hale to disclose since none of it had ever happened. It was only when the Michael Barrett case was ending that the girls said Larry did things too. That is not plausible that professionals would not have discovered all the perpetrators during their professionally conducted interviews. It would be a standard question of the interviewers to ask after disclosure by a child victim of a perpetrator to follow up with questions on whether there were other persons who have done such things to you too. That question was asked to both children and the answer was that nobody but Michael Barrett did things to them. (See **Tab 4**, Forensic Reports Mckyndsie Kaeding and Angelique Kaeding concerning Michael Barrett) The fact that there was no disclosure of sexual abuse by Larry Hale during the interviews on the Michael Barrett case would be evidence to show that the girls were lying in the case against Larry Hale. That alone is reasonable doubt pointing toward the actual innocence of Mr. Hale.

The Prosecutor also says about the two victim witnesses testifying again against Larry Hale. "They will likely not testify in the same way as before." . (see prosecution's answer to motion to withdraw, page 3-4, paragraph e) That is an admission that the witnesses will be changing their stories. That is how juries decide if someone is telling the truth or not. That is a fundamental right under the confrontation clause. Defendant has a right to have a jury trial, and one where the attorney of his choice is allowed to cross examine the witnesses against him. One of the victim witnesses story completely collapsed on relatively soft cross examination during the preliminary hearing. All charges against Angel Kaeding were dismissed. (see Preliminary Examination p. 41) It seems likely that on more thorough cross examination

the other child McKyendsie Kaeding answers would demonstrate clearly to a jury that she is not telling the truth about Larry Hale. There are numerous inconsistencies in girl's stories. A significant falsehood is the story that Larry Hale would commit the sexual acts on a girl when Sandra Hale was shopping or doing laundry at the laundry mat. The problem with that story is that Sandra Hale does not drive. The Hale's have a washer and dryer and don't go to the laundry mat. Larry Hale did most of the driving so it would not likely for Sandra to be away and Larry at home still with a child to commit a sex act.

> "The Confrontation Clause guarantees an accused the right to confront witnesses against him. US Const, Am VI. In *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court overruled its prior decision in *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), and held that testimonial hearsay evidence, such as a statement made to police, is admissible only in circumstances in which the declarant is unavailable, and only if the defendant had a prior opportunity to cross-examine the declarant. The *Crawford* Court noted that although the ultimate goal of the Confrontation Clause is to ensure the reliability of evidence, it is a procedural rather than a substantive guarantee, and held that admitting a hearsay statement deemed reliable by a judge pursuant to various factors was at odds with the right of confrontation guaranteed by the Confrontation Clause. The *Crawford* Court reasoned that the Confrontation Clause demanded not only that evidence be reliable, but also that its reliability be assessed by testing it by cross-examination. *Crawford, supra* at 60-68.

Mr Hale should have been able to have counsel of his choosing cross examine the prosecution's witnesses in a jury trial. In that way the truth could come out. Prior counsel did a poor job during the preliminary examination of cross-examining the witnesses for the prosecution. The defendant had a constitutional right to a trial by jury, with counsel of his choosing. By denying the defendant his right to a jury trial on the charges the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution were violated and he had no effective ability

to confront the witnesses as required by the confrontation clause of the Sixth Amendment with a lawyer of his choice.

Actual innocence is also shown by the fact that there were no opportunities for these acts to occur. The duplex was a very small two bedroom. There were always plenty of people around. Those persons were not questioned by police in this case. The Hale's two grandson's were never questioned or interviewed. Both of them were present at the times when these acts were said to have occurred. If Mr. Hale was supposedly committing these acts on the two minor Kaeding children that were sometimes in his care it seems reasonable and proper to have authorities interview the two Hale grandsons on whether they had ever been touched inappropriately or sexually by Larry Hale or whether or not they witnessed any acts by defendant on the two girls.

The defense believes that there is a financial motive in the girls lying that would cast doubt on the case. The case against Larry Hale came as a result of reports made by the Kaeding children's uncle Jason Kaeding. The whole garage sale story where the girls were said, to have acted up, that led to the disclosures on Larry Hale was not credible. Jason Kaeding through CPS has been able to get the minor children away from their biological parents. (see Preliminary Examination, lines 15-22 p. 5) The defense believes that Jason Kaeding is receiving foster parent benefits for Angel, McKendsie, and Preston Kaeding. That is a substantial amount of monthly income leading to an incentive and motive to get the girls to lie about Larry Hale, to show that the biological parents are unfit because they leave the children with sexual predators.

There is also evidence that the girls witnessed their mother perform sexual acts on men while the girls were present. The witnessing of those acts could be a basis for the girl's allegations, claims and descriptions of what Larry Hale supposedly did to them. There are numerous inconsistencies areas of questioning that point toward Larry Hale's actual innocence to these charges. He has absolutely no history of such behavior at 54 years old. That Larry Hale has a severe heart condition that would make sexual intercourse impossible and possibly fatal. Larry Hale carries nitro pills. His wife Sandra Hale would testify that Larry hasn't been able to have sex for ten years.

The Trial Court Judge abused his discretion when he took as a fact that former defense counsel Tat Parish was extremely thorough and zealous in his advocacy of Larry Hale. Prosecutor Sepic bolstered that view in his statements during oral argument, praising Attorney Parish's work and dedication. A lawyer could have a reputation for doing things right in most cases but totally fail in one. That is for the Court to consider on a case by case basis based upon the specific facts and situation in that case. Larry Hale wasn't happy with Attorney Parish and did not feel that his case was being handled properly when he found out that he had agreed to something he never would have knowingly agreed to.

Larry Hale immediately requested that Attorney Parish withdraw his plea after he talked with his family following the plea hearing. When Attorney Parish refused to do that, Larry Hale fired Attorney Parish and retained substituted Attorney Martin Kirk. The trial court allowed the substitution but ruled that the plea negotiated between Attorney Parish and Prosecutor Sepic was binding on defendant. This implicated Larry Hale's constitutional right to counsel of choice

under the Michigan Constitution, the Sixth Amendment and the Due Process Clause, *United States v Gonzalez-Lopez*, 548 US 140, 126 SCt 2557, 165 Led2d 409 (2006).

The Defendant has a constitutional right to have the attorney of his choice defend him. Substituted Attorney Kirk told the Trial Court in his motion to withdraw plea that at the time of filing his motion he had received no discovery whatsoever. Yet the Motion to Withdraw Plea is heard without giving Attorney Kirk adequate time to articulate all of the possible defenses that would be available to Mr. Hale at jury trial.

Substituted defense counsel would not have taken the case if he did not believe that Mr. Hale had a very good chance of acquittal at trial. Attorney Kirk spoke with Larry Hale in the Berrien County Jail and explained to him the consequences and risks involved in going to jury trial facing life in prison. Larry Hale was not hesitant in wanting to go to trial to prove his innocence and to clear his name. The Trial Court Judge attributes it to buyer's remorse and points to the quick decision to change his plea only after talking to family that caused defendant to want to change and withdraw as reasons for his decision. It was only when Larry Hale heard from his family on the telephone in jail was the first time he had understood that he had taken a plea bargain. He told his family that he thought he was going to trial. Recall his question to the Trial Judge during the plea hearing. "No Trial?" (see plea, page 7, line 7) When they told him what he had agreed to, he immediately became upset and wanted that changed. He tried to get Attorney Parish to withdraw the plea but he wouldn't. His family contacted Attorney Kirk and he agreed to meet with Larry Hale. Attorney Kirk then took the case and filed the Motion to Withdraw Plea expecting that Mr. Hale's rights would be honored and that he

would be given the jury trial. Since that was denied, the substituted counsel for the defense was left with sentencing issues, and this appeal which is Interlocutory , since it came before trial, but Mr. Hale is incarcerated until he can get his jury trial to be acquitted and then free. Could it be possible that Attorney Parish after taking a retainer, believed that this was a good case for the prosecution without much investigation, and manipulated the defendant into a no contest plea so that he could pocket the retainer and move on to other cases. Less likely is that substituted counsel seeking a depleted retainer with no more family support coming would agree to conduct a criminal jury trial for a defendant that he believes is guilty? Or to continue with an appeal in order to get a chance at that jury trial? Defense counsel Attorney Kirk believes that Larry Hale is innocent of the charges against him that is why he is now getting zealous representation, but that requires this court to overturn the Trial Judge and send this matter back to the Trial Court for a jury trial.

This Honorable Court should reverse the Trial Court's decision to deny Defendant-Appellant's Motion to Withdraw Plea and remand back to Trial Court for jury trial or further proceedings.

ISSUE INEFFECTIVE ASSISTANCE OF COUNSEL

IV. Whether Larry Robert Hale was denied his constitutional right to counsel as guaranteed by the U. S. Constitution's 6th and 14th Amendments because his counsel up to his plea hearing was not functioning as such, due to deficient performance).

Defendant-Appellant answers, "yes"

V. Was Larry Robert Hale's counsel ineffective for failure to have Larry Hale tested for mental compentancy prior to committing him to a plea without full knowledge or comprehension.

Defendant-Appellant answers, "yes"

Standard of Review:

People v Armstrong, 490 Mich.281 at 289 (2011)

"Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law. "A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." We review the trial court's factual findings for clear error. Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake. We review de novo questions of constitutional law".

The standard for review on a trial court's denial of a defendant's motion to withdraw a plea is did the trial court abuse its discretion. The standard is de novo review for the constitutional issues such as the violation of defendant's 6th and 14th Amendments right to due process,

"This Court reviews constitutional questions de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

Analysis:

As counsel has pointed out in earlier argument that both girls were interviewed by Child Protection specialists in the prior case of Michael Barrett. At those earlier interviews that girls gave direct answers to questions on whether anybody else had done bad thing to them. Both answered only Michael. Just Mike" (see **Tab 4** reports) Yet counsel at the preliminary hearing did not ask either girl questions about those earlier inconsistent statements. He was woefully deficient in his performance for not asking such relevant and outcome determinative questions. The only explanation is that Attorney Parish had not reviewed the prior reports that contained the summary of the interview and the DVD of the actual interview that were in the prosecution's prior discovery. Failure to review the file prior to a significant event such as a

preliminary hearing.to discover impeachment materials that would have likely ended the case at that stage is ineffective counsel per se. It is basic tenant of competency that the lawyer would have reviewed the materials provided by the prosecution at some point prior to pleading his client to a prison sentence of 10-15 years. It is grossly incompetent not to review the file and materials. Any objective standard of reasonableness would require retained counsel to actually read the discovery materials at least once? Yet Attorney Parish apparently did not and was therefore unaware of the extremely exculpatory prior statements of the two girls, otherwise it would have been asked of them under cross examination during the preliminary examination on held in the Trial Court on March 2012. Prevailing professional norms would require retained counsel in a serious criminal case to read the discovery materials at some point. The only reason not to challenge the older girl McKyndsie on her prior statements to child protective specialist Brooke Rospierski was that Attorney Parish was not aware of the prior inconsistent statement was because he hadn't read the reports. That is gross incompetency and ineffective assistance of counsel. It likely would have resulted in a recant of the incriminating statements made up about the Defendant Larry Robert Hale.

People v. Buie, 298 Mich. App. 50 at 61-62 (2012)

The Sixth Amendment, as applied to states by the Fourteenth Amendment, guarantees that the accused in a criminal prosecution "shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. Am VI; *People v. Russell*, 471 Mich. 182, 187; 684 N.W.2d 745 (2004). This right to counsel "extends to all 'critical' stages of the proceedings where counsel's absence might harm defendant's right to a fair trial." *People v. Burhans*, 166 Mich. App. 758, 764; 421 N.W.2d 285 (1988), citing *United States v. Wade*, 388 U.S. 218, 228; 87 S.Ct. 1926; 18 L.Ed.2d 1149 (1967). "The right to counsel attaches and represents a critical stage 'only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment.'" *People v. Anderson (After Remand)*, 446 Mich. 392, 402; 521 N.W.2d 538 (1994) (citation omitted). "It is well established that a total or complete deprivation of the right to counsel at a critical stage of a criminal proceeding is a structural error requiring automatic reversal." *People v. Willing*, 267 Mich. App. 208, 224; 704 N.W.2d 472 (2005).

To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test stated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984). *People v. Carbin*, 463 Mich. 590, 599-600; 623 N.W.2d 884 (2001). First, defendant must show that his counsel's performance was so deficient "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To do so, defendant must show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms. *Id.* at 687-688. This Court presumes that counsel rendered adequate assistance. *Id.* at 690. Second, defendant must show that his counsel's deficient performance prejudiced his defense. *Id.* at 687. To do so, "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" *Id.* at 694.

Larry Robert Hale has been suffering from mental retardation and extremely low intellectual functioning all of his life. Attorney Tat Parish should have recognized the Defendant had comprehension difficulties and was not fully understanding him. Attorney Parish should have asked for testing of his client prior to a plea hearing where he was fooled into accepting responsibility for acts that he did not commit. Attorney Parish took advantage of obviously mentally deficient man to get him to plea no contest to a refutable charge that he did not understand at all not as sound strategy after full consultation with client but in order to avoid the work of a trial after getting a nice retainer even though his client was innocent and had always maintained his innocence. The evidence that Defendant did not understand that he was pleading to a criminal sexual act on a child is that immediately after being informed what he had done in court the Defendant sought to withdraw the plea.

After Defendant's sentencing hearing, Defendant-Appellate counsel had Larry Hale tested by professionals to refute the claim that he knowingly, voluntarily made his plea and demonstrate that Larry Hale lacked the capacity to fully and adequately understand the proceedings against him. Appellate counsel requested a Forensic Psychological Report be conducted at the MDOC by Dr. Paul Kitchen PhD. Dr. Kitchen's report states that Mr. Hale's intellectual capacity suggest a limited cognitive function. He demonstrates an intellectual

ability within the mentally deficient range (Full Scale IQ = 62, 1st percentile). He appears to have significant problems with abstract reasoning or his ability to retain information facts. His response to The Evaluation of Competency to Stand Trail protocol suggest a very concrete and limited perception of the roles and responsibilities of the leading actors in the judicial process. He has a limited capacity to understand the complexities of a plea bargain. (see **Tab 3**, attached report Dr. Paul Kitchen, PhD). The Michigan Department of Corrections-Bureau of Health Care Services conducted an evaluation of the defendant Larry Hale. The clinical assessment results confirm the Mr. Hale has a Low IQ, and Mental Retardation, Unspec (319) (see **Tab 3**, attached report MDOC Hale, Larry Robert, Inmate ID: 844194)

The reports clearly demonstrate a low intellectual capacity of the Defendant Larry Robert Hale and supports the proposition that his plea was not knowingly and voluntarily made.

SENTENCING ISSUES

VI. Whether the Trial Court Judge committed error or abused his discretion by sentencing Larry Robert Hale to prison for 10 to 15 years when the Trial Court Judge failed to state adequate reasons on the record for an upward departure from the sentencing guidelines?

Defendant-Appellant answers, "yes"

VII. Whether the Trial Court Judge committed error or abused his discretion by sentencing Larry Robert Hale to prison for 10 to 15 years when the Trial Court Judge failed to give due consideration to the 55 point reduction in OV points that defense counsel was able to obtain through argument prior to sentencing?

Defendant-Appellant answers, "yes"

Standard of Review:

The issues in this case concern the proper interpretation and application of the statutory sentencing guidelines, MCL 777.11*et seq.*, which are both legal questions that this Court reviews de novo. *People v. Morson*, 471 Mich 248, 255; 685 NW2d 203(2004).

Analysis:

The sentencing guidelines called for a sentence for the CSC 3 degree offense of 36 to 60 months. The trial court judge sentenced the defendant Larry Hale to a term in prison of 10 to 15 years without adequate reasons for such a departure. The trial court judge never stated any substantial and compelling reasons for giving Mr. Hale a term in prison clearing outside of the Michigan sentencing guidelines making the sentence given to the defendant Larry Hale in violation of MCL 769.34(3) *People v. Lathrop*, 480 Mich. 1036 1036-37 (2008) "---, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock* 469 Mich. 247 (2003).

The PSIR had recommended a sentence of 10 to 15 years based upon the scoring in the report. (see **Tab 5**) That 10 to 15 year sentence was based upon falsely scored offense variables. The report had claimed that Mr. Hale had done acts involving predatory conduct, with sadism and torture. There was no evidence that backed up those scoring decisions. No predatory conduct because Larry Hale had never tried to have the girls come over or stay over. There was absolutely no threats made or claimed made by the defendant. There were no alleged acts of torture or sadism even if you take the girls stories as true. In fact, 55 points were removed at sentencing by defense counsel challenges to scoring errors. It was error for the trial judge not to take into account those mitigating factors when he sentenced Mr. Hale to

the recommended sentence in the PSIR of 10 to 15 years. The recommended sentence was based upon false premises that Mr. Hale had engaged in predatory conduct, made threats against the victims, engaged in acts of sadism and torture on the victims. None of that was true or even alleged to be true, or backed up by any stated facts or evidence. The trial court judge should have reduced the minimum sentence to some term less than ten years when it became clear that the recommendation was based upon significantly false premises of fact not present in this case.

People v Francisco 474 Mich. 82, 88-89 (2006) "A defendant is entitled to be sentenced by a trial court on the basis of accurate information. MCL 769.34(10) states, "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing *absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."* (Emphasis added.) In other words, if a minimum sentence falls within the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon. As we explained in *People v. Kimble,*470 Mich 305, 310-311; 684 NW2d 669 (2004), "if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." MCL 769.34(10) makes clear that the Legislature intended to have defendants sentenced according to accurately scored guidelines and in reliance on accurate information (although this Court might have presumed the same even absent such express language). Moreover, we have held that "a sentence is invalid if it is based on inaccurate information." *People v. Miles,* 454 Mich. 90, 96; 559 NW2d 299 (1997). In this case, there was a scoring error, the scoring error altered the appropriate guidelines range, and defendant preserved the issue at sentencing. It would be in derogation of the law, and fundamentally unfair, to deny a defendant in the instant circumstance the opportunity to be resentenced on the basis of accurate information. A defendant is entitled to be sentenced in accord with the law, and is entitled to be sentenced by a judge who is acting in conformity with such law.

It was not factual or true for the reporting agent to claim that the victims were children or step-children of the defendant when it was a babysitting situation. It was not accurate or factual or true to say that sadism or torture or actions that substantially increased fear or anxiety when no such facts existed to back up that claim. It was not factual or accurate or true to say that defendant acted in a predatory fashion when no facts existed to back up that claim.

The courts stated reasons for the sentence on the record; was that "your prior counsel is extremely thorough, and, in the Court's, opinion, you know, turned over every rock and tree and visited every crevice in this case to, in his effort, try to get the best possible plea arraignment [sic] for you that he could. (see sentencing lines 5-8 p 20) and "you were looking at spending life in a Michigan state prison, and, after consulting with your able attorney at that time, arrived at, -- at this plea agreement." Another reason given by the trial court was that, "the children were interviewed on January 20th of 2012, a forensic interview, prepared---or, conducted by the Berrien County Child Assessment Center, and they were found to be truthful and the statements that they were making were found to be meritorious." Those same two girls made statements to forensic interviewers at the Berrien County Child Assessment Center on June 7th 2011 to Brooke Rospierski and Barb Welke where they said that no one other than Michael Barrett had touched them inappropriately. (see **Tab 4**) Brooke Rospierski conducted both interviews of McKyndsie concerning Michael Barrett and later Larry Hale, yet she fails to ask McKyndsie why she denied being touched by anyone else in the earlier interview. Those statements were also made under circumstances that would be found to be truthful and meritorious, but clearly lies are being told in one interview, or the other by both girls. The fact is that prior counsel did not take the due care and consideration of Mr. Hale's case that the trial court gives credit for. It was an untrue assertion of the trial court that Mr. Hale's guilt was established and that Mr. Hale voluntarily entered into the plea agreement.

The girl's false statements to forensic professionals, their late disclosure issues, Angel Keading pointing out the trial court judge as the perpetrator of the crime at the preliminary examination, the defendant's lack of access to the alleged victims while alone, the financial

motive of the uncle Jason Keading who was the instigator of the allegations against the defendant, all point to success at jury trial for the defense. The trial court is improperly giving credit to prior defense counsel's assessment of the case and giving no credit to substituted counsel's arguments of innocence.

In *People v Lathrop*, the Court of Appeals, "Absent any indication in the record that the trial judge would have departed upward to the same extent if the guidelines had been properly scored, the prosecution's admission that prior record variable 5, MCL 777.55, was improperly scored establishes a plain error affecting the defendant's substantial rights." In Mr. Hale's case offense variables OV7 and OV10 were miss-scored requiring the trial court judge to indicate somehow on the record that he had taken that into account when he departed upward. That was plain error affecting Mr. Hale's substantial rights.

If the sentence recommendation of 10 to 15 years is based upon premises that the Defendant engaged in predatory conduct, sadism and torture, and it is then discovered that Defendant did not engage in any predatory conduct, sadism or torture, but the trial court gives the same sentence as the recommendation based upon the false premises, without giving some reason that the false facts in the recommendation made no difference in the sentence. The trial court needed to state that it was giving Mr. Hale a sentence of 10 to 15 years regardless of those missing factors by stating other viable reasons or grounds for the failure to give credit to the defendant in his sentence.

It was error for the trial court not to state grounds conforming to MCL 769.34(3) when the trial court departed from the guidelines with an upward departure from the 36 to 60 months to a sentence of 10 to 15 years. It was error for the trial court not to give credit in

defendant's favor when significant scoring errors were discovered by defense counsel at sentencing that made the scoring recommendation of ten to fifteen years grossly unfair.

CONCLUSION

The Trial Court abused its discretion when it denied the Defendant's Motion for Withdraw of Plea. The Defendant-Appellant should have been allowed his constitutional rights to a trial by jury and to have counsel of his choice defend him.

Larry's prior counsel who conducted the premliminary examination and negotiated the no contest plea was deficient and ineffective and his performance fell below an objective standard of reasonableness, and that but for that deficienct performance by counsel Larry Hale would not have been convicted of Criminal Sexual Conduct.

The Trial Court committed error in the sentencing of the Defendant-Appellant and that if Defendant-Appellant does not prevail on his issue requesting a jury trial, then this case be remanded back for resentencing.

RELIEF REQUESTED

Larry respectfully requests this Court grant his application for leave to address the important issues raised. Alternatively, Larry request this Court either peremptorily reverse his conviction and remand this case to the Trial Court for a new trial, or remand to the Court of Appeals as on leave granted.

That should this Court deny Defendant-Appellant's application for a jury trial, that this Court remand the case back to the trial court for resentencing within the Michigan Sentencing Guidelines.

NOTICE OF HEARING

Pursuant to MCR 7.302(A)(2), this Application will be submitted to the Court on a date which is on or after August 9, 2013.

RESPECTFULLY SUBMITTED:

_____

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PROOF OF SERVICE

I certify that on July 19, 2013 that I served the Application for Leave to Appeal, by placing the same in an envelope with postage prepaid addressed to the parties below:

Aaron J. Mead (P49413)

Berrien County Prosecutor's Office

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St. Joseph, MI 49085

_____

Martin O. Kirk (P43330)

PROOF OF SERVICE

I certify that on July 19, 2013 that I served the Notice of Filing, by placing the same in an envelope with postage prepaid addressed to the parties below:

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Berrien County Prosecutor's Office

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Martin O. Kirk (P43330)