STATE OF MICHIGAN
IN THE COURT OF APPEALS

(ON APPEAL FROM THE 16TH CIRCUIT COURT FOR THE COUNTY OF MACOMB)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v-

Court of Appeals Case No.
Macomb Circuit Case No. 2008-5092-FC

DAVID SCOTT ALBERS,
Defendant-Appellant.

/

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DEFENDANT-APPELLANT'S DELAYED APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Caselaw

United States Supreme Court

Federal Caselaw

Michigan Supreme Court

Michigan Court of Appeals

Unpublished Michigan Court of Appeals Decision

Constitutional Authority

Michigan Statutes

Michigan Court Rules

STATEMENT OF QUESTIONS PRESENTED

Issue I:

Whether Defendant's conviction should be reversed on the basis of entrapment where the police played on Albers' involvement in protracted custody and parenting struggles with his ex-spouse in the Macomb County Family Court; where the police exploited an acquaintance to make the initial contacts with Albers; where the police initiated each and every contact with Albers thereafter; where no valuable consideration was exchanged for the illegal services sought to be rendered; and where the police-initiated contacts were drawn out over a period of two months 14

Defendant-Appellant answers, "yes".

Appellee answers, "no".

The trial court would answer, "no."

Issue II:

Whether Defendant was denied his Sixth Amendment right to counsel where, at the time he was being represented by court-appointed counsel, his counsel was himself being charged with misdemeanor assault and disturbing the peace by the Macomb County prosecutor and where trial counsel coerced Albers to accept a no contest plea with threats that he would lose his trial and end up doing more time that offered by the prosecutor in a tendered plea bargain..... 19

Defendant-Appellant answers, "yes".

Appellee answers, "no".

The trial court would answer, "no"

Issue III

Whether the lower court abused its discretion in denying Defendant's motion to withdraw his no contest plea where trial counsel verbally assaulted Defendant and threatened him with a life sentence if he did not take the plea bargain offered by the prosecutor or, in the alternative, abused its discretion by not scheduling an evidentiary hearing, as requested by Defendant, to explore the nature of the purported threats made by trial counsel to Defendant on the eve of trial..... 22

Defendant-Appellant answers, "yes".

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to decide this delayed application for leave to appeal pursuant to MCR 7.205 (F)(3)(a), and Appellant asserts that this application is timely under the court rule as it has been filed within 12-months of the entry of the 06/23/2009 judgment of sentence.

STATEMENT OF FACTS

Defendant was sentenced on June 23, 2009, to a term of nine to 30-years in the Michigan Department of Corrections pursuant to a "no-contest" plea of solicitation to murder, contrary to MCLA 750.157(B)(2). The Judgment of Sentence and the order appointing undersigned appellate counsel are attached hereto at **Exhibit A**. The register of actions reflecting the proceedings in the lower court is attached hereto at **Exhibit B**.

Note regarding transcript references: the preliminary examination transcript references are designated by "PE", and the references to the 04/23/2009 evidentiary hearing on Defendant's entrapment defense are designated by "TR". The preliminary exam transcript is attached hereto at **Exhibit C**; the transcript of the entrapment hearing is attached hereto at **Exhibit D**.

Defendant filed a timely motion with the lower court to withdraw his plea based on ineffective assistance of counsel; asserting his plea essentially was coerced by his trial counsel. From the 01/25/2010 order denying Defendant's motion, he now files a delayed application for leave to appeal. Defendant also appeals the lower court's denial of his motion to dismiss for entrapment. The lower court's 04/24/2009 denial of Defendant's motion to dismiss was not reduced to a written order but was ruled on from the bench. The transcript of the 04/24/2009 proceedings are attached hereto at **Exhibit E**.

The order denying Defendant's motion to withdraw no contest plea is attached hereto at **Exhibit F**, along with the transcript from the hearing conducted on said motion.

Following a preliminary examination conducted on 10/22/2008, this case was bound over to the Macomb Circuit Court. The prosecutor moved to amend its complaint at the exam to allege that Defendant solicited the murder of his ex-spouse and her boyfriend between 05/28/2008 through 07/28/2008; as opposed to the single date of 07/28/2008, set-out in the initial

complaint. Mr. Albers' trial counsel, Timothy S. Barkovic, objected to the amendment on the basis the new charging period sought an overly broad time-frame to defend and as such, Defendant would be compromised in terms of lack of notice, Due Process concerns, and lack of an opportunity to prepare for the charges brought against him. The district court judge granted the People's request and allowed the charging amendment. (PE at pp. 5-8)

At the exam, the People called a single witness; Detective Brian Shock of the Roseville Police Department. Shock testified about his undercover work relating to Mr. Albers' alleged solicitation to murder which purportedly began on May 28, 2008. On that date at approximately 7:30 pm, Shock met with Albers at a National Coney Island located at Groesbeck and 12 Mile Road in Roseville. (PE at p. 9) Shock testified that he was "wired" for a sound recording of his meeting with David Albers. (PE at pp. 10, 36)

According to Detective Shock, Albers stated that he wanted his ex-wife, Andrea Albers, "terminated", and that it would be nice if she could disappear. (PE at p. 15) Shock testified that discussion ensued about a "drive-by style" shooting, deemed too difficult in Rochester (where Ms. Albers worked), and a "murder-suicide" which would include her boyfriend, Guy Anzell. (PE at p. 16, 19, 31) Killing Anzell would cost Albers an additional $1500, according to Detective Shock. (Id. at p. 32)

Shock testified that Albers told him his buddy could secure a weapon for use in the murder(s). Shock told Albers the murder(s) would cost $3500. (PE at p. 19) Albers allegedly indicated to Shock that he did not want his kids around when the murder was to occur; that it should be on a weekend when Albers had his three young children and Andrea would be alone. (PE at p. 21)

An incident that purportedly occurred on June 4, 2008, was referenced by Shock. He testified that a phone conversation occurred with Albers involving police finding narcotics at Andrea's residence. He testified that Albers told him things were "heated up". Police were at Andrea's home so Defendant allegedly indicated to Shock that he wanted to cool things down for a while. (PE at p. 23) Note: Rather than pursue charges against Albers along these lines (i.e. planting narcotics) the Shelby Police Department was asked to stand down as the Roseville PD had an open investigation involving Albers and his ex-spouse. (TR at pp. 60, 64, 73)

Another meeting between Albers and Shock was set-up for July 28, 2008. When Shock arrived at the same Coney restaurant, Albers was at an adjacent 7-11 store with his girlfriend and all three of his children. (PE at p. 25) When Albers got into Shock's vehicle, he produced a photo of his ex-wife, vehicle license plate information on Andrea and Anzell, and a map to her apartment, according to Shock. (Id. at pp. 26, 27)

Shock told Albers that the murder would take about 30-days to accomplish and that Albers would not hear from Shock again, "until it was done." (PE at p. 33) Albers wanted to be sure his children were not around when the murder occurred, according to Shock. (Id.) Shock testified that during his conversation with Albers on May 28th, he asked Albers whether he was sure he wanted the deed completed and Albers affirmed; Shock testified that Albers did not withdraw his request to have the murder completed. (PE at p. 34)

When questioned about the overall costs for killing two persons, Shock stated that he made the offer to Albers to kill both targets for $3500. (PE at p. 35)

Shock and Albers concluded their July 28th meeting, Albers left Shock's vehicle, and was arrested as he was walking back to his own vehicle. (Id.)

On cross-examination, Shock testified that he had prepared and reviewed transcripts of his meetings with Albers. Trial counsel's questioning about the source of some of Shock's information about Defendant, a person named "Johnny", drew an objection from the prosecutor. The prosecutor argued that it was irrelevant how Detective Shock came into information about Defendant; that it was not necessary in order to bind him over on a solicitation to murder charge. Defendant's trial counsel asserted that "Johnny" made the introduction between Albers and Detective Shock. The district court judge sustained the objection. (PE at p. 37) When asked who "Johnny Phillips" was, the trial court again sustained the prosecutor's objection. Mr. Barkovic was not allowed to elicit testimony relative to Shock's relationship with the so-called "confidential" informant. (PE at p. 39)

Barkovic made several attempts to elicit testimony as to how Shock came into contact with Albers; how, for example, he was provided Albers' phone number in order to make the initial contact with the Defendant. In arguing over the prosecutor's series of objections, counsel asserted that Shock's testimony was relevant and germane to advance Albers' "entrapment" defense. The district judge repeatedly sustained the prosecutor's objections on this point. (PE at pp 42-44)

At the beginning of Detective Shock's first cell phone contact with Albers in May 2008, he asked Albers if he needed Shock's services and asked if Albers like to meet with Shock to discuss the situation. A meeting was arranged for the coney restaurant. "Murder" was not discussed over the phone. (PE at p. 49) At their meeting on May 28, 2008, Albers had no money to retain Shock. No money ever exchanged hands between the men. (PE at p. 56) The conversation that took place in Shock's undercover vehicle on this date was taped. (PE at p. 57)

Detective Shock went by the name "Dutch" and let Albers know that he didn't want Albers to know much about him. Shock testified on cross examination that he contacted Albers "several times" via phone. (PE at pp 57-59) and each time, it was Shock who initiated the callsl and prompted the series of conversations. Shock would not provide Albers with his cell number. (PE at p. 64) There was no testimony that Albers called Shock. (PE at p. 60)

Although money was discussed, Albers never did come up with any of the money requested for this purported "hit", making some excuse about having to pay child support. (PE at p. 61; TR at p. 66) The cost of the operation, the actual price for the killing(s), was brought up by Shock. (PE at p. 67) Shock testified that money would need to be paid up front, and "on the back end." According to Shock, Albers assured him he would, "hold up his end of the bargain." (PE at p. 72) Upon request for clarification by the district judge, however, Shock testified that he never asked Albers for money up-front. Rather, the deal was simply sealed with a hand-shake. (PE at pp. 74, 75) When Albers finally left Shock's vehicle, it supposedly taken as a matter of faith or trust by Shock that Albers would come-up with the required $3500 for the purported murders.

Other than a series of cellular telephone conversations between Shock and Albers, all of which were arranged by the former, these men met-up on only two occasions: May 28 and July 28, 2008, when Albers was arrested. (PE at p. 66) Shock testified that several days, even weeks would pass when he attempted to reach Albers but Albers would not pick-up his phone or, during one particular stint, Albers' cell phone was turned off for failure to pay the bill. (PE at p. 67)

At the conclusion of the preliminary examination, Barkovic clarified that the district judge granted Defendant's motion to produce his cell phone records, but denied Defendant's

request that Detective Shock's phone records be produced. (PE at p. 87) Defendant was bound over on the solicitation of murder charge.

Defense counsel filed motions to dismiss in April 2009, based on entrapment and entrapment by estopple.

An evidentiary hearing was conducted pursuant to Defendant's motions and affirmative defense of entrapment on April 23 and 24, 2009. At this hearing, Detective Shock testified again as to the circumstances surrounding his conversations and meetings with Albers, leading to his arrest. Det. Shock was involved with "Special Investigations" for more than 3-years. (TR 23 p.10) Detective Shock testified that his department does not engage in entrapment of suspected individuals. (TR pp. 11, 12) There are "checks and balances" in the unit. His is not a "rogue unit". (TR p. 12)

Shock's first contact with Albers involved information he received from a confidential informant that the Defendant was seeking to have his ex-wife killed. (TR pp 12, 13). The informant was seeking favorable consideration for his own case; he was under arrest at the time he gave information about Albers to the police. (TR p.16) Shock did not recall whether promises had been made to the confidential informant. He further testified, however, that it was not his practice to make promises to informants.

The confidential informant had worked with Detective Shock on prior narcotics-related SID cases. (TR p. 18) The informant had a criminal history. Shock did not know whether any component of his confidential informant's criminal history involved convictions for crimes of theft or dishonesty. He did conclude, however, based on corroborated evidence that his source was credible. (TR p. 20) Shock also testified his informant may have been addicted to narcotics.

(TR pp. 20-21) The informant was provided consideration for one of his criminal charges, or pending cases, in exchange for his cooperation on the Albers' matter. (TR at p. 21)

According to Det. Shock, his confidential informant had Albers' telephone number. (TR p. 21) Further, the Roseville Police informant agreed in writing to work on the Albers case. The cooperation agreement was executed on or about May 28, 2008. (TR p. 24)

The police and the informant agreed that Albers would be contacted and provided a false lead relative to his "hit man" request. The informant was advised not to use Shock's first name; that the informant could determine whether Defendant remained interested in hiring somebody interested in carrying out his offer. (TR p. 25) The initial call to Defendant was not taped. Albers purportedly stated in the first phone call, however, that he still wanted the job done. (TR p.26)

Shock did not identify himself as a "hit man" but rather, as the individual referenced from the "source"; as someone who could, "do what he needed to have done." (TR at pp. 35, 51) Shock showed Albers his weapon to convince Albers he was the real deal; that he was not "kidding" about the purported assignment. (TR at p. 51)

Once this arrangement was put into place by the informant, Det. Shock met with David Albers later that evening at the National Coney Island parking lot located at Groesbeck and Twelve Mile Road in Roseville. (TR p. 38) At their meeting, Detective Shock used the name "Dutch". (TR pp.41, 42)

Albers met up at the appointed time and place and got into Det. Shock's truck. Shock testified that, "I remember Mr. Albers got in the vehicle and pretty much immediately he said he wanted his ex-wife killed". (TR p. 42) Shock requested $3500 for the "hit". (TR p. 44) All phone contact between Defendant and Shock was initiated by the detective. Shock made

approximately 27 calls to Albers; all initiated by Shock as Albers did not have Shock's cell number. None of the phone contacts between Shock and Albers were recorded. (TR pp. 45,46,50)

Between Shock's initial contact with Albers in May and his arrest on July 28th, there was a period of time when Albers' cell phone was disconnected (for his failure to pay his cell bill). (TR at pp. 46, 74)

Shock was unaware of the relationship between his so-called confidential source and Albers; he was unaware that they were acquaintances but hinted that the two men had a working relationship. Shock was unaware that both the Chesterfield Township Police Dept and the Clinton Township PD had dismissed Shock's "source" as unreliable. Shock did not know that the Michigan State Police had conducted an investigation on behalf of Andrea Albers but was unable to conclude that Albers was trying to arrange for Andrea to be killed. Nor did Shock know Albers' criminal history, if any. (TR at p. 48)

There was some discussion about including Andrea's boyfriend in the assignment; Albers mentioned him, provided an address and a license plate. (TR at p. 53)

On cross-examination, the prosecutor established that Shock had a conversation with his "informant" on May 28, 2008, followed by the informant's call to Albers. This conversation between the informant and Albers was then followed-up by a telephone conversation between Shock and Albers, followed-up by a meeting between these two men. (TR at p. 62)

Attorney Barkovic's re-direct examination elicited testimony from Detective Shock that his feigned "services" would be provided on a "deferred" basis; based on Albers' promise to pay for those services in the future. No money was ever exchanged. (TR at p. 66)

Next, Barkovic called Roseville Sergeant Jerome Urbaniak, Chief of the Special Investigations Division. Urbaniak testified that no promises were made to the Roseville PD

"source"; that he disappeared shortly after connecting Detective Shock with Albers. (TR at p. 70) Shortly after that initial contact with Albers was made, Urbaniak contacted Andrea Albers to inform her of their planned "sting" operation. (TR at p. 72) In addition to asked the Shelby PD to back down from their planned charges of alleged "narcotics planting", Urbaniak also contacted the Department of Human Services to request that they "hold off" on their planned petition to terminate Albers' parental rights. (TR at pp 74, 75)

On cross examination, Urbaniak testified that he was aware that Albers had made efforts in the past to kill his ex-spouse. He claimed to be aware of Albers' suggestions to his children as to how they could kill their Mother. He provided vague testimony of an unknown and unspecified investigation undertaken by the Michigan State Police. (TR at pp76, 77)

Attorney Barkovic's next witness was Johnny Phillips, who was not available to testify on April 23, 2009, the day of the entrapment evidentiary hearing. The prosecutor announced that Phillips had been declared a "confidential informant." On this basis, the prosecutor argued pursuant to *People* v *Underwood*, 447 Mich 695 (1994) that Phillips' testimony should be precluded. (TR at pp 78, 79) During her argument, the prosecutor commented that the Roseville PD's confidential informant has conversations and a meeting in the Macomb County Jail with Attorney Barkovic.

For his part, Barkovic made an offer of proof as to Phillips' relevance and materiality on the entrapment issue. Barkovic stated that when they met, Phillips admitted he was the source for Roseville PD's investigation and subsequent sting operation of Albers. Further, Barkovic offered that at the time Phillips shared information about Albers with Roseville, he had been arrested on theft charges. Phillips had shopped his information about Albers to two other police

departments (Chesterfield Township and Clinton Township); neither department was interested in what Phillips had to say; apparently they did not believe Phillips. (TR at pp 82, 83)

Barkovic further offered to the trial judge that Phillips would testify that he had been contacted by the Roseville PD and was instructed to make-up a "story" for Albers that he knew someone, "willing to do certain things." (TR at p. 83) In addition, Barkovic pointed out to the trial court that the exploitation of a friendship was one of the entrapment factors for the court's consideration. Phillips could certainly have testified as to his work and social relationship with Albers. (TR at p. 84) Also, that Phillips was not provided a specific set of instructions relative to David Albers; that he was simply told to manipulate Albers in a manner Phillips believed to be appropriate under the circumstances. (TR at p. 85)

According to Barkovic's offer of proof, Phillips would testify that he was offered valuable consideration (another entrapment factor) for his services of linking Detective Shock to Albers. (TR at pp. 85, 86) Barkovic also offered that Phillips' testimony about what was said relative to Albers would be different that Shock's and Urbaniak's testimony. Attorney Barkovic offered that Phillips' testimony would suggest that Albers was an untargeted person and finally, that the government controlled the informant through threats of prosecution. (TR at p. 87) The Roseville PD's informant had been arrested at times relevant to the Albers' sting. (TR at p. 88)

Transcript Note One: At the conclusion of the hearing, the trial judge stated he was inclined to allow Phillips to testify and scheduled that testimony for the following day, April 24, 2009. The next day, however, the record ordered by undersigned appellate counsel only contains the legal argument on Defendant's motion to dismiss on the basis of entrapment and entrapment by estopple. In preparation of the application for leave to appeal, undersigned counsel recently conferred with both Defendant and his trial counsel who confirmed that Johnny Phillips testified

at the conclusion of the entrapment hearing. Undersigned appellate counsel's written request for a complete transcript of the 04/24/2009 proceedings to Certified Court Reporter Deborah J. Doyle (CSR 2179) is attached hereto at **Exhibit G**.

Transcript Note Two: At the entrapment hearing, Attorney Barkovic referenced the transcripts from Albers' two meetings and one telephone conversation with Shock which had been recorded by the police. The first meeting occurred on May 28, 2008; the first recorded telephone call occurred on June 4, 2008; the second meeting took place on July 28, 2008. These transcripts are attached to this application for leave to appeal at **Exhibits H, I & J**, respectfully.

On May 27, 2009, a scheduled trial date for this matter, following extensive plea negotiations, a plea hearing of sorts was conducted. The transcript of the plea hearing is attached hereto at **Exhibit K**.

First, Attorney Barkovic indicated on the record that he was supplied with additional police reports in the matter which led to serious plea negotiations and consultations with his client. Second, Defendant indicated to the trial court that he did not wish to take a plea of no contest on Count I in exchange for a sentence guarantee of 108 months and a dismissal of Count II. (05/27/09 TR at pp. 6, 7) Third, Albers requested that he be allowed to substitute counsel for Mr. Barkovic. The trial court denied Defendant's request. The prosecutor advised the trial court that Albers had already been allowed to change his court appointed counsel once, in the district court. (05/27/09 TR at p. 7)

Following the events preceding the plea, outlined above, the Court swore the witness and again attempted to take his plea; this time successfully.

Defendant was sentenced on June 23, 2009; the sentencing transcript is attached hereto at **Exhibit L**. The presentence investigation report is attached hereto at **Exhibit M**.

Albers' trial attorney objected to scoring OV #4 (psychological injury to victim) at 10 points and OV #5 (serious psychological injury to victim's family) at 15 points, asserting these variables should have been scored zero based on the complete lack of evidence in the record that the children of David and Andrea Albers were in any way adversely affected by this criminal case. Barkovic also asserted that scoring both OV #4 and OV #5 constituted double counting under the guideline scoring. (S at p. 12)

Next, Mr. Barkovic contested scoring OV #6 (defendant's intent to kill) at 50 points, as that scoring level is reserved for a premeditated intent to kill. Counsel argued that scoring the 50 points was essentially reserved for cases of first degree murder, not for a general intent crime such as solicitation to murder. An actual murder, rather than solicitation, would be required according to counsel's argument at Albers' sentencing. (S at pp. 14, 15)

Finally, trial counsel also challenged scoring OV #10 (victim's vulnerability) at 15 points, asserting that this case did not include the type of "predatory conduct" contemplated by this offense variable. (S at p. 16)

Each of Barkovic's challenges to the guideline scoring was denied by the trial court. The court sentenced Albers to 9 to 30 years; credit for 330 days served. In so sentencing Defendant, the lower court acknowledged the existence of evidentiary issues relative to Albers' entrapment offense and essentially indicated that it was providing him some credit with sparing two victims, "the trauma of a trial." (S at pp. 28, 29)

Following Defendant's plea and sentence, the undersigned appellate counsel filed a timely motion to withdraw no contest plea in the lower court pursuant to MCR 6.310(C). The trial court denied Defendant's motion, from which denial Defendant now applies for leave to appeal. The basis for Defendant's motion to withdraw his plea was that his trial counsel coerced

him into pleading guilty. In support of and attached to his motion, Defendant swore out an affidavit attesting to the facts and circumstances involved with his plea, and the purported pressures brought to bear upon him by Attorney Barkovic. Albers also attached the affidavit of Vincent Bowden-Bey, who purportedly witnessed the aforestated coercion of the Defendant at the time his no contest plea was tendered. Bowden-Bey's and Albers' respective affidavits are attached hereto at **Exhibit N**.

Finally, while this case was pending, the Macomb County Prosecutor was simultaneously prosecuting Attorney Timothy Barkovic in the 41A District Court for assault (Count I) and for disturbing the peace (Count II). The complaint against Barkovic along with the police report and the 10/15/2009 order granting defendant's motion to disqualify the Macomb County Prosecuting Attorney are attached hereto at **Exhibit O**. Although the complaint is undated, the attached police report indicates the case against Barkovic arose on or about 03/10/2009.

Argument I – Entrapment

Defendant's conviction should be reversed on the basis of entrapment where the police played on Albers' involvement in protracted custody and parenting struggles with his ex-spouse in the Macomb County Family Court; where the police exploited an acquaintance to make the initial contacts with Albers; where the police initiated each and every contact with Albers thereafter; where no valuable consideration was exchanged for the illegal services sought to be rendered; and where the police-initiated contacts were drawn out over a period of two months.

Standard of Review.

The issue of whether entrapment occurred is determined in this case by considering the totality of the facts and circumstances of the lower court record and is a question of law for this Court to decide *de novo*. The trial court is required to make specific findings regarding entrapment, and this Court reviews those findings pursuant to the "clearly erroneous" standard. Factual findings are clearly erroneous if this Court is left with a firm conviction that a mistake was made. *People* v *Milstead* 250 Mich App 391, 397 (2002)

In the case at bar, Appellant contends that the Macomb Circuit Court's findings in this case were clearly erroneous.

Legal Analysis

Entrapment occurs when either of the following occur: (1) the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances, or (2) the police engage in conduct so reprehensible that the court cannot tolerate it. Reprehensible conduct alone is sufficient to constitute entrapment. *People* v *Fabiano*, 192 Mich App 523, 529 (1992).

Entrapment is defined many different ways at common law. The Michigan Supreme Court, in *People* v *Taylor*, 390 Mich 7, 21 (1973), borrowed language from the United States Supreme Court to describe the defense of entrapment:

> [W]hen the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that *could induce or instigate the commission of a crime by one not ready and willing to commit it, then-regardless of the character or propensities of the particular person induced*-I think entrapment has occurred. For in that situation, the Government has engaged in the impermissible manufacturing of crime… Emphasis in *Taylor*, quoting from Justice John Steward's dissent in *US* v *Russell*, 411 US 423, 445; 93 S Ct 1637, 1649; 36 L Ed 366 (1973)

Conceptually, entrapment is not a defense that negates an element of a charged crime; in this case, solicitation for murder. Rather, entrapment allows a defendant to present evidence that is collateral to the charged crime but that justifies barring the prosecution because the manufacturer or inducement of criminal activity on the part of the police is reprehensible in our criminal justice system. *People* v *D'Angelo*, 401 Mich 167, 179 (1977).

On the other hand, when a defendant is merely afforded an opportunity to commit a crime, "or is given aid in furthering an already committed conspiracy so that the government can acquire evidence of that crime, the defendant cannot claim entrapment as a defense." *People* v *Smith*, 296 Mich 176, 182 (1941). Accordingly, given the nature of this defense, each case must be decided individually on the specific circumstances of the case.

More recently, the Michigan Supreme Court has enumerated a dozen factors for the lower court to consider when assessing whether a particular police conduct constitutes entrapment:

> (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted.

People v *Johnson*, 466 Mich 491, 498-99 (2002). In applying these factors, Michigan utilizes the objective test, which focuses on evidence gathering and the investigative process of the government agents; in this case, a so-called confidential informant, and an undercover police detective. Other states and the federal government use the subjective test; focusing on a particular defendant's predisposition to commit a new crime. See the plurality opinion of *People* v *Jamieson*, 436 Mich 61, 72 (1990). The Michigan Supreme Court has also held that factors from both the objective and subjective test can be utilized to assess whether an entrapment has occurred. *People* v *Juillet*, 439 Mich 34, 53 (1991).

Applying the Johnson factors to the case at bar and utilizing the objective test, leads to the conclusion that Defendant was entrapped to commit the offense of solicitation to commit murder. First, the so-called confidential informant was a person who himself was experiencing great and repeated difficulties with local law enforcement on the East-Side. Johnny Phillips was a person known to Albers. Phillips knew of Albers' post-divorce-judgment custody and parenting-related difficulties he was having with his ex-spouse.

Second, there was a significant lapse of time between Detective Shock's first contact in May 2008, and Albers' arrest in July. In the intervening months, Shock repeatedly placed calls to Albers, then a law-abiding citizen under the objective test. More than 20 calls were placed by Shock to Albers' cell phone during those weeks. At one point, Albers' phone was dead for his failure to pay the bill. That still did not stop Shock from pursuing him for a murder contract.

Third, the government had complete control over the confidential informant, Johnny Phillips. (Note: transcript of Mr. Phillips was timely ordered but not supplied due to court-reporter's lapse.) Phillips had criminal legal troubles of his own. He hoped to gain favor with

the Roseville PD in exchange for his cooperation as liaison between the Roseville PD and David Albers.

Fourth, the investigation appeared targeted. Sergeant Urbaniak testified about the on-going investigation involving Albers and his ex-spouse relative to the former's alleged planting of drugs in his ex-spouse's home and vehicle. Also, Urbaniak knew of an earlier attempt whereby Albers purportedly secured a "hit" on his ex-wife. In addition, all contacts between the undercover detective and Albers were initiated by the police. Further, the initial contact made with Defendant was initiated by Shock's so-called confidential informant; a person well-known to Albers. None of the contacts involved in this case were initiated by Albers.

Fifth, this case possessed circumstances that could be objectively considered as both inducements and enticements to solicit murder which Detective Shock capitalized upon. The inducement was the opportunity to finally end years of post-divorce discord over the three Albers' children as well as the prospect of prevailing in the parties' protracted custody battle if Andrea was suddenly removed from the equation. Further, Albers was repeatedly quoted a fee for the purported murders but then told that he would not have to come up with the money; that the deal could be done on a simple hand-shake, with no money changing hands whatsoever. This arrangement, testified to by Detective Shock, constituted a huge inducement and incentive for Albers. He was basically offered a deferred "hit" contract whereby he did not have to come up with any of the consideration to secure the desired result.

Thus, in the case at bar, the Roseville police offered far more enticement than a mere opportunity to commit the charged crime. Rather, Detective Shook virtually hounded Albers, peppering him with calls over the span of two months. He displayed a weapon which any

objective individual would have interpreted as a potential threat from such a determined operative.

Cases analogous to the fact pattern above establish precedent for this Court to reverse Defendant's conviction. In *People* v *Killian*, 117 Mich App 220 (1982), Defendant's guilty plea conviction was reversed where police, knowing defendant was a cocaine user and sometime marijuana peddler, persuaded him, through the use of a friend, to make a significant purchase of the drug. In reversing his conviction, this Court was most concerned with the police conduct of inducement. The *Killian* panel also considered the police use of one of defendant's friends to be significant. Similar factors under the objective test are present in the lower court record in the instant matter. In addition to constantly pestering Albers, Detective Shock exploited Defendant's relationship with Phillips to jump-start the entire transaction. Further inducement was supplied by Shock's eventual waiver of the "up-front" requirement for the murder fees. When the officer repeatedly brings up the cost of the transaction, but ultimately does not insist on advance payment, indicating that the deed would nevertheless be completed, a significant inducement along the lines recognized in the *Killian* case is persuasive.

Similarly, in *People* v *Soper*, 57 Mich App 677 (1975), defendant's conviction was reversed where the police were found to induce the individual, recently released from prison for a narcotics conviction, into distributing heroine to a childhood friend and acquaintance's daughter; the friend was an undercover detective. This case is also analogous to the instant matter. The police utilized an acquaintance of Albers to make contact with Defendant at a time when he was experiencing an especially heightened level of stress due to the custody and parenting battles he was having with his ex-spouse.

Argument II – Ineffective Assistance of Counsel

Defendant was denied his Sixth Amendment right to counsel where, at the time he was being represented by court-appointed counsel, his counsel was himself being charged with misdemeanor assault and disturbing the peace by the Macomb County prosecutor and where trial counsel coerced Albers to accept a no contest plea with threats that he would lose his trial and end up doing more time that offered by the prosecutor in a tendered plea bargain.

Standard of Review.

Defendant's appellate counsel filed a motion seeking to withdraw his no contest plea based on the purported coercion from trial counsel. In that motion, the undersigned appellate counsel requested an evidentiary hearing under *People* v *Ginther*, 390 Mich 436 (1973), to determine whether the purported coercion from defense counsel rose to the level of ineffective assistance. Since this relief was denied and no *Ginther* hearing was conducted, this Court's review of Defendant's ineffective assistance of counsel claim is now limited to mistakes apparent on the record. See *People* v *Riley* (*Aft Rem*), 468 Mich 135, 139 (2003).

Whether Albers was denied the effective assistance of counsel is a mixed question of constitutional law and fact. The constitutional determinations are reviewed by this Court *de novo* while the lower court's fact findings are reviewed for clear error, as defined above in the standard of review set forth in Argument I, *supra*. *People* v *LeBlanc*, 465 Mich 575, 579 (2002).

Legal Analysis.

The constitutional right to effective counsel is inherent within the accused's fundamental right to representation by counsel. US Const, Ams VI, XIV; Const 1963, art 1, §§17, 20; *Powell* v *Alabama*, 287 US 45, 71; 53 S Ct 55; 77 L Ed 158 (1932); *Strickland* v *Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Beasley* v *United States*, 491 F2d 687 (CA 6, 1974).

Pursuant to the United States Constitution, a defense attorney is ineffective when his actions or omissions are not the result of "reasonable professional judgment", and when his

performance is "deficient". *Strickland* v *Washington, supra*, at 2064-2066. A defendant can establish ineffectiveness under the federal standard by showing that counsel's errors were so serious that he was not functioning as counsel guaranteed by the Sixth Amendment and that the errors prejudiced the defense. *Strickland, supra* at p. 2064. Prejudice exists where "there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt". *Id* at 2068-2069.

The Michigan Supreme Court has held that:

> [T]he intention underlying the Michigan Constitutional does not afford greater protection than federal precedent with regard to a defendant right to counsel when it involves a claim of ineffective assistance of counsel. Thus, to find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, *a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.* (Emphasis added) *People* v *Pickens*, 446 Mich 298 (1994).

Effective assistance of counsel is strongly presumed thus, a defendant cannot exercise the benefit of "hindsight" when asserting this argument on appeal. *People* v *Toma*, 462 Mich 281, 302 (2000).

An attorney's representation may be deficient in any number of ways. Trial counsel might be determined ineffective for having failed to present evidence which could have exculpated a defendant. *People* v *Johnson*, 451 Mich 115, 122 (1996); *People* v *Hoyt*, 185 Mich App 531, 537-538 (1990). In the instant matter, Defendant alleges that counsel was deficient in two ways: a) by coercing Albers to accept a no contest plea after Defendant insisted on his right to conduct a trial; and b) by representing Albers in a fatally compromised fashion due to Barkovic's own criminal charges leveled by the Macomb County Prosecutor. The former argument is addressed in Argument III, *infra*.

At a minimum, Albers' constitutional right to counsel was compromised during this case when his trial counsel, Barkovic, was enduring assault and disturbing the peace charges sponsored by the Macomb County Prosecutor. Under such circumstances, the presumption of effective assistance cannot be presumed. This is especially true under the facts of this case where Albers and a cell mate basically alleged that Barkovic verbally assaulted him and threatened that he would do life in prison if he took the case to trial. See the affidavits attached hereto at Exhibit N. The inference here is that Barkovic was playing to dual masters. On the one hand, he would naturally be concerned about his own case pending before the Macomb County Prosecutor. On the other hand, with his own matter pending, there would be a strong bias toward getting a case like Albers' settled with a plea.

Serving such dual masters would get very complicated very quickly. At the time Barkovic was charged with assault and disturbing the peace around March 2009, the Albers case was grinding toward the entrapment hearing. It was Barkovic's burden to demonstrate more than mere opportunity at the hearing. While he had the burden of production and persuasion, both sides were entitled to call witnesses. *Jamieson, supra*. Whether he could do this effectively while simultaneously navigating a dismissal on his own case not only raises a strong suggestion of ineffective assistance of counsel, the ordinary presumption of effective assistance is destroyed under such circumstances.

Argument III – Withdraw of No Contest Plea

The lower court abused its discretion in denying Defendant's motion to withdraw his no contest plea where trial counsel verbally assaulted Defendant and threatened him with a life sentence if he did not take the plea bargain offered by the prosecutor or, in the alternative, abused its discretion by not scheduling an evidentiary hearing, as requested by Defendant, to explore the nature of the purported threats made by trial counsel to Defendant on the eve of trial.

Standard of Review.

This Court reviews a lower court's decision on Defendant's motion to withdraw a plea after sentencing pursuant to the "abuse of discretion" standard. Such an abuse of discretion occurs when the trial court's decision falls outside what is considered to be a range of "principled outcomes". *People* v *Babcock*, 469 Mich 247, 269 (2003); *People* v *Hannold*, 217 Mich App 382, 388-89 (1996); and *People* v *Harris*, 224 Mich App 130, 131 (1997). In the instant case, the lower court abused it's discretion by denying Defendant's motion where Barkovic bullied Albers into accepting the no contest plea with verbal assaults and with the threat that Albers would do a life sentence. At a minimum, a principle outcome would have been for the lower court to schedule an evidentiary hearing to explore whether Defendant's no contest plea was voluntarily tendered to the court.

Legal Argument.

This issue was timely raised below pursuant to MCR 6.310, the relevant portions of which provide:

> **C) Motion to Withdraw Plea After Sentence.** The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

> **(D) Preservation of Issues.** A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

In the case at bar, the error in the plea proceeding entitling Defendant Albers to withdraw his plea is that undue pressure was placed upon him by his trial attorney, Timothy Barkovic. Defendant asserts this undue pressure to take the proffered plea agreement amounts to manifest injustice in the plea proceedings.

Also, due to the pressure which Barkovic brought to bear on Albers to get him to reluctantly plead no contest on the day of trial, his plea was not voluntary within the meaning of MCR 6.310 (D).

Attached to this application for leave is Defendant's affidavit, offered to the court below and constituting a part of the record, which attests to the manner in which Barkovic secured the plea. First, trial counsel ignored his client's insistence on exercising his right to trial, telling Albers he would lose at trial. Second, trial counsel threatened to withdraw as counsel on the day of trial; counsel's motion to withdraw was denied by this Court. Third, trial counsel purportedly pressured Defendant into taking the plea because he had already promised the judge and prosecutor that Defendant would be tendered to this Court for a plea of "no contest", and that Barkovic would be embarrassed if the plea was not made. Third, Barkovic purportedly terminated his counseling session with Albers by stating that Defendant had no choice but to take the plea.

Alber's offer of proof in this regard is corroborated by a fellow inmate, Vincent Bowden-Bey, that overheard the conversation in the Macomb County Jail. Bowden-Bey's affidavit is also

attached to this application for leave to appeal. Like Albers, the jail inmate attests to the fact that Barkovic pressured Albers into taking the no contest plea.

This type of unwarranted –and Defendant argues, unconstitutional- pressure was held to be sufficient to withdraw a plea in *People* v *Terrence James Jones*, unpublished per curiam opinion of the Michigan Court of Appeals, docket no. 282170, [decided 10/07/2008].

Under such circumstances, the lower court should have granted Defendant's request to at least conduct an evidentiary hearing in order to thoroughly explore the nature of the threats brought to bear upon Defendant on the eve of his trial.

Argument IV – Erroneous Scoring on Defendant's Sentencing Guidelines

The lower court abused its discretion in scoring OV 4, 5, 6, and 10 with no factual basis whatsoever in the lower court record, particularly regarding psychological injury to the family of the victim and predatory conduct, making re-sentencing appropriate.

Standard of Review.

MCLA 769.34(10) provides for appellate review of scoring decisions made under the sentencing guidelines. This Court reviews a lower court's scoring on sentencing guidelines (offense variables and prior record variables) with an "abuse of discretion" standard such that the evidence considered at sentencing adequately supported a particular scoring on a given variable. *People* v *McLaughlin*, 258 Mich App 635, 671 (2003).

Legal Analysis.

Since 1999, Michigan has utilized an established set of sentence guidelines for all felonies. MCLA 777.1, et seq. A sentencing court must impose a sentence in accord with the appropriate sentence range. MCLA 769.34(2); and *People* v *Hegwood*, 465 Mich 432, 438 (2001). If a particular sentence is imposed within the properly scored guideline range, then it is an appropriate sentence within the statute. *People* v *Babcock*, 244 Mich App 64, 73 (2000).

When scoring a defendant's minimum sentencing range, factual findings require a preponderance of the evidence in support of a particular score. The information relied on by the trial court may come from a variety of sources. *People* v *Perez*, 255 Mich App 703, 712-713 (2003), vacated in part on other grounds, 469 Mich 415 (2003). Resentencing is required when this Court determines that a scoring error by the lower court occurred and the applicable range was lower than the one used at sentencing. *People* v *Freeman*, 476 Mich 863 (2006).

Defendant should not have been scored for both OV #4 (psychological injury to victim) at 10 points and OV #5 (serious psychological injury to victim's family) at 15 points. These variables should have been assessed at zero based on the lack of evidence in the record that the children of David and Andrea Albers were in any way adversely affected by this criminal case, as manufactured by the Roseville PD. Trial counsel correctly argued that scoring both OV #4 and OV #5 constituted double counting under the guideline scoring. (S at p. 12) In this case, the lower court did not cite to any of the purported DHS reports referenced in Defendant's PSI. The trial judge merely stated,

> [t]he report it references I'm assuming that information is in the report. Your contention is that the reports are wrong. I don't believe it should be stricken from the p.s.i. on that basis. It is, the p.s.i. is accurate in that the reports do contain that information. So I will allow it to stand. (S at p. 6)

However, as pointed out by defense counsel, there were no DHS reports attached to the PSI, nor reviewed by counsel. Thus, in this case, there was not a preponderance of evidence in support of this scoring but rather, a complete lack of evidence to support the scoring. As such, resentencing is appropriate.

Trial counsel's contested scoring of OV #6 (defendant's intent to kill) at 50 points merits resentencing, as that scoring level is reserved for a premeditated intent to kill. Counsel correctly argued that scoring the 50 points was essentially reserved for cases of first degree murder, not for

a general intent crime such as solicitation to murder. The lower court committed an abuse of discretion by scoring 50 points for solicitation. Finally, trial counsel also properly challenged scoring OV #10 (victim's vulnerability) at 15 points, as this case did not include the type of "predatory conduct" contemplated by this offense variable. MCLA 770.40 defines predatory conduct as "pre-offense conduct directed at a victim for the primary purpose of victimization." In this case, when asked whether Albers wanted Shock to state anything to his ex-spouse prior to killing her, Albers was alleged to have stated no, as he wanted no connection to the killing whatsoever. The entire lower court record does not contain any other facts that would sustain predatory conduct under the statutory meaning of that phrase.

Thus, under this analysis, Defendant's offense variables should have been scored at a single point, placing Defendant in the "B-I" block with a minimum sentence range from 27 to 45 months rather than the "B-V" block.

CONCLUSION AND RELIEF REQUESTED

Defendant was entrapped into committing the solicitation for murder for which he was subsequently coerced into offering a no contest plea and was sentenced on trumped-up guidelines by a trial attorney who was himself under the pressure of criminal charges brought by the Macomb County Prosecutor. This conclusion is based on the fact that all 25-plus contacts between Defendant and the Roseville PD were initiated by an undercover officer posing as a hit man. Defendant was lured into position by a friend and co-worker, Johnny Phillips. Defendant was offered a deferral on the cost of doing business with the would-be assassin.

Under such circumstances, Defendant was denied the effective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution. At a minimum, his motion to withdraw his plea should have been granted so that Defendant could at a minimum secure

effective legal counsel to determine whether he should exercise his right to trial, or whether an appropriate plea bargain would be in his best interests; a plea bargain that is based on the proper scoring of the sentencing guidelines.

For these reasons, Defendant's conviction should be reversed or, in the alternative, this matter should be remanded to allow Defendant to withdraw his plea of no contest. At a minimum, Defendant should be re-sentenced.

WHEREFORE your Defendant respectfully requests that this Honorable Court reverse his conviction and remand this matter for trail or, in the alternative, remand this matter for re-sentencing.

Respectfully submitted,

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By: Timothy P. Flynn (P42201)
Attorney for Appellant-Defendant

DATED: June 23, 2010