

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
David H. Sawyer, Joel P. Hoekstra, and Jane E. Markey, JJ

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

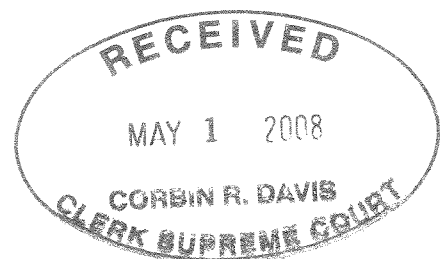
Supreme Court No. 135247
Court of Appeals No. 279776
Circuit Court No. 2006-002343-FH

BRIAN LAMORAND,
Defendant-Appellant.

BRIEF *AMICUS CURIAE* OF
CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

135247
Amicus by COAM

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INTEREST OF *AMICUS*

Since its founding in 1976, Criminal Defense Attorneys of Michigan [CDAM] has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the state's criminal defense bar in a wide array of matters. CDAM currently has over six hundred members.

As reflected in its by-laws, CDAM exists to, *inter alia*, “promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy”, “provide superior training for persons engaged in criminal defense”, “educate the bench, bar and public of the need for quality and integrity in defense services and representation” and “guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws”. Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles on various subjects relating to criminal law and procedure, provides relevant information to the state legislature regarding contemplated changes of laws, engages in other educational activities and participates as an *amicus curiae* in litigation of relevance to the organization's interests.

As in this case, CDAM is often invited to file briefs *amicus curiae* by Michigan appellate courts.

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STATEMENT OF JURISDICTION

The jurisdictional statement in the Briefs of the parties on appeal is complete and correct.

STATEMENT OF QUESTION PRESENTED

- I. SHOULD THE COURT FIND THE GUILTY PLEA WAS COERCED AND INVOLUNTARY DUE TO PRESSURE PLACED UPON THE DEFENDANT TO ACCEPT THE PLEA BARGAIN IN ORDER TO BENEFIT OTHER FAMILY MEMBERS ?**

The trial court answered “No.”
The Court of Appeals answered “No.”
Plaintiff-Appellee answers “No.”
Defendant-Appellant answers “Yes.”
Amicus Curiae CDAM answers “Yes.”

STATEMENT OF FACTS

Amicus Curiae accepts the Statement of Facts set forth by Defendant-Appellant Brian Lamorand.

I. THE COURT SHOULD FIND THE GUILTY PLEA WAS COERCED AND INVOLUNTARY DUE TO PRESSURE PLACED UPON THE DEFENDANT TO ACCEPT THE PLEA BARGAIN IN ORDER TO BENEFIT OTHER FAMILY MEMBERS.

Amicus supports the position of Defendant-Appellant Brian Lamorand that the guilty plea was involuntary due to pressure placed upon Mr. Lamorand to protect family members who had connected plea bargains. Amicus seeks to answer the first question posed by the Court in its order granting oral argument: “[W]hether requiring a defendant to plead guilty in order to preserve the right of his family members to benefit from plea bargains is coercive”? The answer is “Yes,” and Amicus would urge the Court to adopt a complete ban on package or contingent plea bargains. At the very minimum, the Court should mandate close scrutiny of all such bargains.

What case law exists in Michigan on package plea bargains is found mostly in cases from the 1960’s and 1970’s.¹ See e.g., *People v James*, 393 Mich 807-808; 225 NW2d 520 (1975) (“While a promise of leniency for a relative does not in itself amount to coercion so as to make a guilty plea involuntary as a matter of law, we recognize that it may render a plea involuntary as a matter of fact.”); *People v Smith*, 37 Mich App 264, 266; 194 NW2d 561 (1971) (“While it is true, as the prosecution contends, that a fulfilled plea bargain is not a ground for a withdrawal of a guilty plea, it does not follow that bargaining regarding the fate of a member of defendant’s family does not constitute coercion.”); *People v Whitmer*, 16 Mich App 703; 168 NW2d 908 (1969) (finding involuntary plea where defendant pled guilty out of concern for his brother and promises of lenient consideration toward brother); *People v Holman*, 12 Mich App 231; 162 NW2d 817 (1968) (trial

¹ Amicus uses the term “package plea” bargains in the broad sense to refer to plea bargains that entail a promise of leniency for another. The instant case deals more specifically with what might be called a true “package plea” bargain because the bargain apparently offered benefits on an all-or-nothing basis and required the acceptance of all family members.

court abused discretion in denying plea withdrawal where defendant claimed he pled guilty to gambling charges so that similar charges would be dismissed against his wife who was too ill to withstand the pressures of trial).² The dearth of recent opinions on the subject may suggest that the practice is neither widespread nor employed with great frequency. This may be true in part because it is unusual to see an entire family charged with crime, as occurred in the instant case. Scenarios certainly exist where spouses are linked in crime or brothers are considered co-defendants (or there are multiple unrelated co-defendants), but the package plea bargain requires an additional component often not present in the traditional plea bargain: that is, the plea bargain offered to an individual defendant is conditioned on acceptance of the plea bargain offered to another defendant. Amicus would suggest that this practice is unessential to the prosecutor's arsenal of concessions used to induce a guilty plea and should be banished given the inherent danger and coercion involved.

The factual, legal and policy implications behind package plea bargains have been set forth by numerous courts. Suffice it to say, package plea bargains are "fraught with danger." *State v Solano*, 150 Ariz 398, 402; 724 P2d 17 (Ariz, 1986); *State v Dahn*, 516 NW2d 539, 542 (Minn, 1994). Package plea bargains are "dangerous because of the risk of coercion; this is particularly so in cases involving related third parties, where there is a risk that a defendant, who would otherwise exercise his or her right to trial, will plead guilty out of a sense of family loyalty." *State v Dahn*, 516 NW2d at 541.

Threats to prosecute third parties "can carry leverage wholly unrelated to the validity of the underlying charge" against the defendant. *United States v Nichols*, 606 F2d 566, 569 (CA 5, 1979).

² In *People v James*, *supra*, the Michigan Supreme Court remanded for an evidentiary hearing as to the voluntariness of the defendant's plea where there was a promise of leniency to defendant's wife. In *People v Smith*, *supra*, the Court of Appeals remanded for consideration of whether the promise not to prosecute the defendant's wife placed undue pressure on the defendant to plead guilty.

The “pressure created by such an offer is an ‘extraneous factor not related to the case or the prosecutor’s business . . .’” Green, “*Package*” *Plea Bargaining and the Prosecutor’s Duty of Good Faith*, 25 Crim L Bull 507, 534 (1989), quoting *In re Ibarra*, 34 Cal 3d 277, 287; 666 P2d 986; 193 Cal Rptr 538, 544 (1983). As the California Supreme Court explained in the *Ibarra* opinion:

Single plea-bargains, as opposed to “package-deal” ones, although containing some elements of coercion, have nevertheless been upheld as proper [citations omitted]. In the normal bargain, a defendant must choose between pleading guilty and receiving a lesser sentence, or taking his chances at trial (in which he may be convicted and receive a greater sentence). The prosecutor seeks to avoid the time and expense of trial. These are proper considerations by both parties that do not amount to such coercion as to unduly force a defendant to plead guilty [citation omitted.]

Package-deal” plea bargains, however, may approach the line of unreasonableness. Extraneous factors not related to the case or the prosecutor’s business may be brought into play. For example, a defendant may fear that his wife will be prosecuted and convicted if he does not plead guilty; or, a defendant may fear, as alleged in this case, that his codefendant will attack him if he does not plead guilty. Because such considerations do not bear any direct relation to whether the defendant himself is guilty, special scrutiny must be employed to secure a voluntary plea. [*In re Ibarra, supra.*]

Some believe package plea bargains should be banned outright if only for practical reasons.

The package nature of the plea bargain may make it impossible to determine the voluntariness of the guilty plea, and the nature of a package plea bargain places too great of pressure on trial judges to accept or reject *all* of the pleas:

The majority opinion illustrates that the trial court felt powerless in this situation, even after expressing concern that the sentences of two of the three defendants were possibly not justified. I agree with the majority of the court of appeals which would invalidate package plea deals. While such deals may not be so offensive to be declared unconstitutional per se, we should not be required to stretch our rules of criminal procedure to their absolute breaking point. As the majority points out at p. 21, “package deal plea agreements are fraught with danger.” If they are, why should we encourage parties to travel down this treacherous path and establish such an elaborate and subjective five factor test?

* * * [W]hen large family members are involved in such pleas I seriously question whether an accurate assessment of voluntariness can be made and believe the pressure on the trial court to accept all of the contingent pleas will be overwhelming. To believe otherwise is to ignore human experience and the strength of family bonds. [*State v Solano*, 150 Ariz at 403-404 (Gordon, Vice C.J., dissenting).]

Even courts that allow the use of package plea bargains recognize that such bargains are involuntary *per se* when the prosecutor does not have probable cause to charge the third party. *See e.g., United States v Nichols*, 606 F2d at 569.

Should this Court wish to consider a helpful analogy, it might look to improper police tactics used during custodial interrogation.³ In a number of cases, the Courts have questioned the voluntariness of a confession where the police used family members or friendship to coerce the defendant into providing a statement. *See e.g., Rogers v Richmond*, 365 US 534; 81 S Ct 735; 5 L Ed 2d 760 (1961) (defendant confessed after police pretended to order the arrest of his sick wife for questioning); *Lynumn v Illinois*, 372 US 528; 83 S Ct 917; 9 L Ed 2d 922 (1963) (involuntary confession where defendant told state financial aid for her children would be cut off and her children taken from her if she did not “cooperate” with the police); *Spano v New York*, 360 US 315; 79 S Ct 1202; 3 L Ed 2d 1265 (1959) (fledgling police officer who was also defendant’s childhood friend pretended defendant’s call to him put the friend’s job in jeopardy and the loss of the job could prove disastrous to the friend’s wife and children). The Pennsylvania Supreme Court recognized that package plea bargains are similar to the use of improper police tactics to gain a confession. In *Commonwealth v Dupree*, 442 Pa 219; 275 A2d 326 (1971), the Court held that the threat to prosecute the defendant’s spouse - the mother of his three children, based on her mere presence in

³ The comparison is not a perfect one in that the defendant is often unrepresented at the time of police questioning, while this is not true of defendants engaged in plea bargaining. *Brady v United States*, 397 US at 754. The comparison is nevertheless helpful to illustrate the types of coercion that may overcome the will of an individual defendant.

the home when the loot from one or both robberies was being divided was an impermissible plea bargaining tactic. Using language that seems to refer to an involuntary confession, the Court stated: “On these facts, the alleged threat to prosecute appellant’s wife cannot be termed a permissible police tactic unlikely to produce a false confession.” 275 A2d at 327. The case was remanded for an evidentiary hearing to determine whether the defendant’s desire to protect his wife from prosecution was the primary motivation for entering the guilty plea. 275 A2d at 328.

The United States Supreme Court has questioned the validity of package plea bargains as well. In *Bordenkircher v Hayes*, 434 US 357, 364 fn. 8; 98 S Ct 663; 54 L Ed 2d 604 (1978), the Court noted that plea bargains involving family members “might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider.”

Given the grave concern with package plea bargains, this Court should consider a complete ban on this type of bargain. Very little is to be gained by the use of package plea bargaining, and much is to be lost. The practice encourages false pleas and makes appellate review exceedingly difficult. The practice also threatens the independence of the judiciary by placing unnecessary pressure on trial judge to resolve a number of cases at the same time. The United States Supreme Court has already recognized that some forms of plea bargaining are improper *by their very nature*. *Brady v United States*, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747, 755 (1970) (“[A] plea of guilty . . . must stand unless induced by . . . promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes),” quoting *Sheldon v United States*, 242 F2d 101, 115 (CA 5, 1957)). *See also*, *Newton v Rumery*, 480 US 386, 401; 107 S Ct 187; 94 L Ed 2d 405 (1987) (O’Connor, J., concurring in part, “No court would knowingly permit a prosecutor to agree to accept a defendant’s plea to a lesser charge in exchange for the defendant’s cash payment

to the police officers who arrested him.”)⁴ This Court should conclude that package plea bargains are a form of improper plea bargaining.

At the very minimum, this Court should mandate close scrutiny by reviewing courts. *In re Ibarra, supra*, the California Supreme Court set forth a number of factors to consider when evaluating package plea bargains:

1. Whether the inducements for the plea are proper (no misrepresentation of facts and the prosecutor has a “reasonable and good faith case against the third parties, with probable cause to believe the third party has committed a crime).
2. Whether the plea is supported by an adequate factual basis.
3. The nature and degree of coerciveness (unacceptable psychological pressure may be present when a family member or close friend is promised leniency).
4. Whether the promise of leniency to the third party is a significant consideration in the decision to plead guilty.
5. The age of the defendant.
6. Whether the prosecutor or defendant initiated plea negotiations.
7. Whether the third party has already been charged. [*In re Ibarra*, 34 Cal 3d at 289-290; 666 P2d at 986-987; 193 Cal Rptr at 544-545.]

To this list, Amicus would add one additional factor: *the severity of the charges or likely consequences to others*. In the similar setting of a promise not to prosecute if the defendant signs a release of civil liability (release-dismissal agreements), former Justice Sandra Day O’Connor suggested that the severity of the charges should be considered in evaluating the voluntariness of

⁴ In *State v Horning*, 761 P2d 728, 732 (Ariz Ct App, 1988), the court found improper inducement for the guilty plea where the prosecutor promised not to oppose the defendant’s efforts to obtain conjugal jail visits with his wife. The Court held that a defendant’s interest in sexual relations with his wife “is a manifestly irrational basis for embracing the long-term consequences of a guilty plea”

Michigan courts have recognized that threats of physical harm to a defendant if he or she does not plead guilty will render a plea involuntary. *People v Johnson*, 386 Mich 305, 312; 192 NW2d 482 (1971); *People v Coates*, 337 Mich 56, 75; 59 NW2d 83 (1953).

the release because “[t]he nature of the criminal charges that are pending is also important, for the greater the charge, the greater the coercive effect.” *Newton v Rumery*, 480 US at 403; 107 S Ct at 1198; 94 L Ed 2d at 401. Amicus would add that the severity of the likely consequences to another should be an additional consideration.⁵

At a minimum, special care should be taken with package plea bargains:

Taking special care means that when a court is informed that a plea is part of a package deal, the court must specifically inquire about whether the codefendant pressured the defendant to go along with the plea and carefully question the defendant to ensure he is acting out of his own free will. The most crucial inquiry is whether the codefendant pressured the defendant into going along with the plea. It is also important to determine whether the defendant has had sufficient opportunity to meet and discuss the case and alternatives with his attorney. [*State v Williams*, 117 Wn App 390, 400; 71 P3d 686 (Wash App, 2003).]

Amicus would conclude with a final point: close scrutiny does not mean that a reviewing court should satisfy itself with the conclusion that the defendant made a reasoned choice among various options. Courts must always consider the likely guilt or innocence of the defendant. “The thought implicit in this rationale [that sparing a loved one is a valid consideration in plea bargaining] is that a guilty plea will be deemed voluntary even if the accused was innocent but pled guilty solely to eliminate the possibility of another’s jeopardy. We cannot agree.” *Commonwealth v Dupree*, 275 A2d at 327. Put another way: “Our criminal justice system does not operate along the lines of the Union Army, which allowed a conscripted soldier to avoid military service in the Civil War by paying someone else to take his place. Ordinarily, we do not allow one defendant to get out of jail by finding another defendant to serve his time.” Green, “*Package*” *Plea Bargaining*, *supra* at 541.

For the above reasons, the Court should grant leave to appeal and find an involuntary plea

⁵ It is alleged in the instant matter that a felony conviction for the defendant’s father (if convicted as charged without the plea bargain) would result in the loss of his job and the loss of the sole source of income for the defendant’s parents.


given the facts of this case. A plea that is the product of duress or coercion is not a voluntary plea. *People v Taylor*, 383 Mich 338, 361; 175 NW2d 715 (1970). An involuntary plea violates the state and federal due process clauses. *McCarthy v United States*, 394 US 459; 89 S Ct 1166; 22 L Ed 2d 418 (1969); *People v Schluter*, 204 Mich App 60, 66; 514 NW2d 489 (1994); US Const Amends V & XIV; Const 1963, art 1, § 17.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Amicus Curiae, in support of Defendant-Appellant Brian Lamorand, requests that this Court grant leave to appeal and find that the plea was coerced and involuntary which requires withdrawal of the plea.

CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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Dated: April 29, 2008

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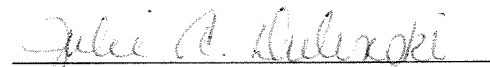
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CERTIFICATE OF SERVICE

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