

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

RICKY ALLEN PARKS

Defendant-Appellant.

Supreme Court No. 126509

Court of Appeals No. 244553

Lower Court No. 02-7574FC

_____/

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126509

APPELLANT'S SUPPLEMENTAL BRIEF
IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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2 Wigmore on Evidence § 293, at 23221

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STATEMENT OF QUESTIONS PRESENTED

- (1) Is the evidence of prior accusations of sexual assault made by the complainant against another person that was revealed during the evidentiary hearing on remand admissible under the Michigan Rules of Evidence?

Appellant answers, "Yes."

Court of Appeals made no answer.

Trial Court made no answer.

- (2) Does the truth or falsity of those accusations makes a difference in assessing their admissibility, given the young age of the complainant at the time of the trial?

Appellant answers, "No."

Court of Appeals made no answer.

Trial Court made no answer.

- (3) Does the circuit court's ruling at the defendant's trial prohibiting the further discovery and introduction of this evidence constitute reversible error?

Appellant answers, "Yes."

Court of Appeals answers, "No".

Trial Court made no answer.

- (4) Is such evidence is subject to the rape shield statute, MCL 750.520j?

Appellant answers, "No."

Court of Appeals answers, "Yes."

Trial Court answers, "Yes."

- (5) Does the sexual abuse of a young child constitute "the victim's past sexual conduct" within the meaning of MCL 750.520j(a)?

Appellant answers, "No."

Court of Appeals made no answer.

Trial Court made no answer.

(6) Must the defendant in this case be allowed to introduce the evidence of the complainant's prior accusations of sexual abuse in order to preserve his constitutional right of confrontation and to present a defense?

Appellant answers, "Yes."

Court of Appeals made no answer.

Trial Court made no answer.

(7) Did trial counsel offer constitutionally ineffective assistance requiring a new trial?

Appellant answers, "Yes."

Court of Appeals answers, "No."

Trial Court made no answer.

STATEMENT OF FACTS AND PROCEEDINGS

In 1996, the five year-old complainant describes sexual abuse by her grandfather to her step-father, Ricky Allen Parks, and her mother, Terry Parks.

Appellant, Ricky Allen Parks and his wife Terry Parks took custody of complainant, Terry's five year-old daughter, on May 15, 1996 in Durand, Michigan. (EH2¹, 12; EH1, 21). She had lived with her maternal grandparents in Missouri from 1993 through 1996. (EH2, 10-12).

Complainant almost immediately started to misbehave by running out of the house without clothes on, and on one occasion fondling her younger brother. (EH1, 21; EH2, 11). When Ms. Parks asked complainant about her behavior, she disclosed sexual abuse from her grandfather² to both Mr. and Ms. Parks. (EH1, 21-22). Mr. Parks recalled that complainant said her grandfather placed her in his bed, touched her vaginal areas, and "then he would make her touch his – what she called the weenie and how she had her put it in her mouth and talked about it getting sick on her belly..." (EH1, 22). Complainant also had behavioral problems, which Mr. Parks connected to a head injury from falling out a golf cart. (T3³, 39-40).

Following the complaints, Mr. and Ms. Parks made a report to the Family Independence Agency. (EH1, 21-22, 35). Mr. Parks accompanied complainant to a follow-up medical examination. (EH1, 35).

¹ "EH1" and "EH2" respectively refer to the two day evidentiary hearing on November 29, 2007 and February 25, 2008.

² The record of the evidentiary hearing sometimes refers to complainant's grandfather and sometimes her "step-grandfather" as the perpetrator of abuse. Complainant lived with Terry Parks' step-father and biological mother when this alleged abuse would have occurred, so the correct identity of the accused is her step-grandfather. (EH 2, 12). To parallel the language of the evidentiary hearing, this pleading will use the term "grandfather" to refer to complainant's maternal step-grandfather.

³ "T1-3" respectively refer to the trial transcript of July 16-18, 2002.

The original Michigan Department of Social Services complaint from June 5, 1996, reported that complainant “made a statement alleging that she touched her step-grandfather’s weenie when it got sick. Complainant also alleged that Nana and Poopoo stuck their fingers up her monkey, which is her vagina and her butt.” (EH2, 10). Ms. Parks also described both physical abuse that complainant’s grandparents inflicted, and the head injury complainant suffered from an accidental fall while under their care, that resulted in seizures. (EH 2, 13).

Complainant did not repeat this account of abuse to either the caseworker, Daniel Tomasek, or the examining physician, Dr. Stephen Guertin, the Director of the Pediatric Intensive Care Unit at Sparrow Hospital. (EH2, 6-9, 11). Nevertheless, Mr. Tomasek reported that the specific nature of complainant’s statements substantiated the case. (EH2, 11, 13-14). Dr. Guertin concluded that complainant “gave me no history of being touched improperly and her physical examination is normal. ... this, of course, does not rule out fondling and I cannot comment on anything she may have told other people.” (EH 2, 9).

Mr. Tomasek concluded that “the statements made to mother and step-father with detail indicate that this child has either been exposed to an extreme amount of sexual activity or that she has been abused in the past, possibly with threats of physical harm were she to reveal what has taken place.” (EH 2, 13). Following the investigation, Mr. and Ms. Parks tried, but failed to have complainant admitted into a counseling program. (EH 1, 25).

In 1999, complainant again comes to live with Ricky Allen Parks in Michigan, where she repeats the allegations involving her grandfather to Mr. Parks’ girlfriend. Mr. Parks reported these allegations of sexual abuse to the special needs program at complainant’s new school.

Complainant lived with Mr. Parks until November, 1998, when Terry Parks left him and went to Oregon with her three children. (EH1, 30, 34). In January, 1999, when Terry Parks faced narcotics charges in Oregon, Mr. Parks again took custody of the three children. (EH1, 30-

31; T3, 38). In addition to complainant, his step-daughter, Mr. Parks took responsibility for his step-son Christopher, and his daughter Sarah. (T3, 38).

That same month, Mr. Parks started dating Julie Hampton⁴, and they moved in together in March, 1999. (EH1, 33-34). In addition to complainant, Christopher, and Sarah, Mr. Parks and Ms. Hampton lived with her children, Bobby, Ray, and Katie. (T3, 24, 35). Ms. Hampton became the children's primary caretaker, while Mr. Parks spent very little time with them. (T3, 29-30, 37, 40-41).

From 1999 through 2002, Mr. Parks first worked at Regal Plastics, then Ernie's market in Owosso, then Hogan Dedicated, a trucking company. (T3, 42-44). He worked for the trucking company six days a week, sometimes as much as fifteen hours a day. (T3, 43).

Ms. Hampton noticed emotional problems with complainant. (T3, 30). The eight year-old kicked, punched, and swore at Ms. Hampton, and continuously threw temper tantrums. (T3, 30-31; EH1, 11). Complainant also displayed inappropriate sexual behavior by touching herself in the vaginal area. (T3,31; EH1, 9, 17). When Ms. Hampton confronted her about the inappropriate touching, complainant explained that her grandfather "used to do it." (EH1, 9). Complainant then described "sucking on it [his penis] hard enough she would get medicine out of it." (EH1, 9). According to Ms. Hampton, complainant made these allegations about her step-grandfather (Terry Parks' step-father) several times, in a nonchalant fashion. (EH1, 8-9, 12). Ms. Hampton never reported these allegations to the police because Mr. Park explained that he and Ms. Parks had reported them. (EH1, 9).

⁴ At the November 29, 2007 evidentiary hearing, Mr. Parks' girlfriend identified herself by a different last name, "Sutliff." To reduce confusion, this pleading will refer to her as Ms. Hampton when citing from both her trial and evidentiary hearing testimony.

In 1999, Mr. Parks enrolled complainant in Bryant Schools, where she became involved in a special program for children with behavioral problems. (EH1, 25). Mr. Parks disclosed complainant's allegations of her grandfather's abuse to the staff of the school. (EH1, 26-27). A May 28, 1999 report indicated that Mr. Parks informed Bryant School of complainant's abuse and neglect while she lived with her mother and maternal grandparents. (EH1, 28-29).

In school, complainant exhibits age inappropriate sexual behavior and discipline problems.

From the 2000 to 2001 school year, the nine year-old complainant attended Emerson Elementary School in Owosso for part of second grade and third grade. (T2, 146, 175, 198). Jessica Dryer, complainant's third grade teacher described her as an often "loving child," who occasionally threw unusually severe temper tantrums where complainant banged her head, and screamed, "I want to die." (T2, 148). Following these tantrums, complainant would often need a team of professionals to help her calm down. (T2, 149-150). When the school threatened to call Mr. Parks in response to complainant's behavior, she grew even more anxious and started to panic. (T2, 150-151). Diana Choate, a special education instructor at Emerson confirmed that complainant's tantrums often reached a point where she had to utilize "basketholds," which she learned from restraint training in Texas. (T2, 178).

Ms. Dryer discovered age inappropriate notes from complainant to classmates. (T2, 151-154). For example, one note from complainant said, "I will have sex with you. Okay? Okay. I love you Kyle. Please be mine. Please be my baby now. Yes." (T2, 154). Another note said "If you live with me I will have a baby. Okay? Okay, baby? Okay." (T2, 154). Ms. Dryer also observed that another special education student, Tommy refused to go to class with complainant because "[t]hrough notes and verbal communication he told her that he wanted to do it with her." (T2, 155, 182-183).

Ms. Choate also described the age inappropriate and overly sexual behavior of complainant. (T2, 179-183). Once, complainant complained of a “burning sensation in her private areas.” (T2, 179-180). Another time, complainant screamed “Don’t fuck me,” when Ms. Choate tried to restrain her after a tantrum. (T2, 180). On another occasion, complainant gyrated against a desk, “acting like a dog in heat.” (T2, 180). After this last incident, Ms. Choate reported complainant to the school social worker. (T2, 181).

After leading questions in an interview with the school social worker, complainant alleges sexual abuse by Mr. Parks. During follow-up interviews and investigations, Mr. Parks denies all allegations.

Cheryl Farver, the school social worker at Emerson Elementary, had complainant on her caseload as a special education student for the 2000 and 2001 school years. (T2, 196-197). Ms. Carver met with complainant when Ms. Choate reported her sexual gyrations on another student. (T2, 200-201). Ms. Farver, the former outreach specialist at the YWCA for domestic violence and sexual assault, talked to complainant about “good touch” and “bad touch.” (T2, 202). According to Ms. Farver, “[w]e talked about bad touch and she pointed to her genitals to say that would be a place where you would have a bad touch.” (T2, 203).

Ms. Farver then asked the leading question, “[w]ell, have you ever had a bad touch?” (T2, 202). Complainant responded “yes,” by her father, and pointed to her vaginal area. (T2, 203). Per Ms. Farver, complainant made a gesture showing that her father inserted his finger into her vagina. (T2, 203-204). Ms. Farver stopped the interview and contacted Child Protective Services. (T2, 204).

Yasheema Marshall, a Protective Services Worker for Shiawassee County received the referral of sexual abuse allegations from Ms. Farver. (T2, 102, 107). She interviewed Mr. Parks, who explained that complainant’s mother had left her in his care. (T2, 103). Mr. Parks also

described complainant's age-inappropriate behavior like masturbation and disciplinary problems like temper tantrums. (T2, 104-105). He expressed the same concerns with this behavior as complainant's school. (T2, 108-109).

Mr. Parks denied the allegations of sexual assault and further denied involvement in a situation where he was alone with complainant. (T2, 105). Mr. Parks explained that he never bathed the children, never applied medication to them, and generally never spent time at home with them because of his work. (T2, 106).

Ms. Marshall also conducted a forensic interview with complainant at the school. (T2, 111-114). She characterized the forensic interview as one where "you want to let the child kind of give you the information instead of saying the information and then asking the child to agree." (T2, 111). Following the interviews, Ms. Marshall temporarily removed Mr. Parks from the home while the investigation proceeded, and ultimately placed complainant in foster care. (T2, 106). Ms. Marshall also notified the police and prosecutor of the investigation. (T2, 118-120).

Detective-Sergeant Sharon Little of the Shiawassee County Sheriff's Department received the case in November, 2000 as a referral from Ms. Marshall. (T2, 70-72, 78). Per the report, complainant told the school social worker that Mr. Parks "sticks his finger in her privates while in the bathroom," and "puts cream on her privates." (T2, 79). Complainant told Detective Little that "I was on the stool, he came in and put his fingers inside me." (T2, 92). Detective Little also subsequently interviewed complainant in May 24, 2001, after she made additional disclosures. (T2, 92-93).

Detective Little interviewed Mr. Parks, Ms. Hampton, and complainant. (T2, 72-73). At the January, 2001 interview with his attorney, Mr. Parks explained that he had looked after

complainant for the last two years. (T2, 74). He denied the allegations, and he denied ever going into the bathroom with complainant. (T4, 76).

On November 28, 2000, Dr. Stephen Guertin, an expert on child sexual abuse again examined complainant. (T2, 138). Dr. Guertin had already examined complainant after the prior complaint in 1996. (T2, 139; EH 2, 6-9). According to Dr. Guertin, although complainant presented a normal physical examination, the significant history she provided indicated that she had likely been fondled in the vaginal area. (T2, 142). Per Dr. Guertin, an examiner would not expect to find physical evidence of fondling. (T2, 142).

Child Protective Services places complainant in foster care, where her disciplinary problems continue. Ultimately, she is sent to live with her paternal grandparents, and her behavior finally stabilizes.

After the investigation, Ms. Marshall placed complainant in foster care. (T2, 106). Ms. Dryer and Ms. Farver each felt that complainant's behavior and disposition improved with this development. (T2, 158, 204). In reality though, complainant's disciplinary problems and hypersexuality continued after her removal from the custody of Mr. Parks. (T2, 129-130, 181-182, 194). On one occasion, after complainant started in foster care, complainant told Ms. Choate that she felt hot, and took off her clothes in the middle of class. (T2, 181-82, 194). Dr. Purna Surapaneni, a psychiatrist also examined complainant in Flint on December 7, 2000, after she had behavioral problems at her foster home and school settings. (T2, 128-129).

Based on discussions with complainant's foster mother, Dr. Surapaneni diagnosed complainant as having "Disruptive Behavior Disorder, not otherwise specified." (T2, 130-131). Per Dr. Surapaneni, either complainant's childhood head injury and seizures, or past sexual abuse, or a number of other factors could have fostered her behavior. (T2, 132-133). Dr. Surapaneni recommended an inpatient program for complainant. (T2, 132).

On June 9, 2001, Julie Haymans, complainant's paternal grandmother⁵ in Missouri received custody of complainant per court order in Michigan. (T2, 53, 57, 67). Prior to that date, complainant lived in Saint John's Home in Grand Rapids, a Residential Treatment Center. (T2, 67-68). When complainant arrived to live with Ms. Haymans, she acted uncontrollably and threw multiple tantrums. (T2, 57-58). Ms. Haymans placed complainant in special attachment therapy. (T2, 58). When complainant arrived, she took seizure medication and anti-depressants, but after successful therapy, the seizures improved and she stopped taking anti-depressants. (T2, 59). Ms. Haymans also reported improved grades in school, no inappropriate sexual conduct, and no further disciplinary issues at school. (T2, 59).

Following a preliminary hearing, where complainant repeats the unusual language of the 1996 accusation, Mr. Parks is convicted by a jury of two counts of criminal sexual conduct. The jury does not hear any evidence of the 1996 allegations.

On January 23, 2002, complainant described Mr. Parks' alleged abuse at a preliminary exam. She alleged that "he put his wienie in my mouth," and then, "[i]t got sick." (PE⁶, 12, 14). At the preliminary exam, complainant also denied that anyone other than Mr. Parks had ever "touched you badly" or "gave you a bad touch." (PE, 19). At trial, complainant did not repeat this unusual language regarding a "weenie" getting "sick" that she first used in 1996. Instead, complainant described three episodes in the bathroom of the house where she lived with Mr. Parks and Ms. Hampton. (T2, 37-40).

According to complainant, as she sat on the toilet in the bathroom, Mr. Parks walked in, closed and locked the door, and made complainant get up and wipe. (T2, 37-38). He then placed her on the counter, and penetrated her vagina with his finger. (T2, 37-39). After the incident,

⁵ No connection to Mr. and Ms. Carney, complainant's *maternal* grandparents, with whom she stayed from 1993 to 1996, and the source of the original sexual assault complaints. (EH2, 10-12).

⁶ "PE" refers to the Preliminary Exam of January 23, 2002.

Mr. Parks unlocked the door and let complainant leave. (T2, 39). Complainant said there was another similar incident, and then a third incident, where Mr. Parks again walked into bathroom, locked the door, and “got me onto the counter or on to the potty thing so he can get to my mouth. He pulled it out and put it in my mouth. . . . He pulled his thingy out and put it into my mouth for a few minutes.” (T2, 40). Following this episode, Mr. Parks again unlocked the bathroom door and let complainant leave. (T2, 41). Mr. Parks threatened to kill complainant if she told anybody. (T2, 41-42, 51).

Complainant did not remember the time of year, time of day, or the day of the week of the first assault committed by Mr. Parks. (T2, 46-47). Nor did she remember whether anybody else was home during the assaults. (T2, 47). Finally, she did not remember how much later after the first incident, the second assault took place. (T2, 47). Although complainant described the sexual assaults as occurring on the bathroom counter at trial, in her interview with Detective Little, she mentioned a stool rather than the counter as the location of the assault. (T2, 92).

Mr. Parks testified in his own defense. He admitted to a theft of property conviction in 1998 in Alabama. (T3, 36). He denied all allegations of sexual assault towards complainant. (T3, 44). Three other witnesses, Kimberly Fraser, Mary Beach, and Michelle Henning all testified that they stayed with Mr. Parks and Ms. Hampton in 1999 or 2000. (T3, 9, 14-15, 20, 27-29). The three witnesses never observed Mr. Parks act in an improper sexual manner towards complainant. (T3, 10, 16, 22). Ms. Hampton also testified that she never saw Mr. Parks either act in an improper sexual manner or talk inappropriately about sex in front of the children. (T3, 32-33).

At trial, the court prohibited counsel from cross-examining complainant about the prior allegations of assault. (T1, 167-170). The court also instructed the jury on complainant's 1996 visit to Dr. Guertin:

And the instruction to you the Jury is that the purpose of the 1996 visit would have been independent and unrelated to this particular matter so that there's not going to be any further reference to the 1996 visit and the Jury is not to inquire of that event or wonder whether there was any tie-in between that visit and the visit in November, 2000. In other words, that visit in 1996 is not relevant to this case and to your purposes as a Jury. Okay? (T2, 143).

The prosecution's theory of the case linked complainant's behavioral problems and inappropriate sexual activity to the alleged assaults by Mr. Parks. In opening, the prosecuting attorney stated:

What this case is about is about [complainant] crying out for help in her own way. Her behaviors and her actions, she cried out until someone listened

What you will also hear is what everyone else heard and that was [complainant] crying out for help. You will hear her other teachers from Emerson, her social worker from Emerson, tell you about the behaviors that she was exhibiting, troubling behaviors from acting out, from horrible temper tantrums to being – having to be restrained in class to the point of having the class brought out and inappropriate sexual knowledge, inappropriate sexual behavior.

. . . . So, I ask you to look at that and look at [complainant]'s behavior at the time this was going on. . . .

. . . . It's [complainant] crying out and somebody finally is listening.

(T2, 15-18). In closing argument, the prosecuting attorney continued on this theme:

And for the last two days what you heard through [complainant] and through the other witnesses is [complainant] crying out for help because of what was going on to her in that house. It was eating her up, obviously, from everything that was going on. She was basically yelling out, "Make this stop." (T3, 55-56).

On July 18, 2002, a Shiawassee County convicted Ricky Allen Parks of two counts of Criminal Sexual Conduct, first degree, MCL 750.520b(1)(a). (T3, 98). On September 27, 2002, Judge Gerald Lostracco sentenced Mr. Parks to concurrent terms of imprisonment of 84 months to 180 months. (S⁷, 19).

When the Court of Appeals affirmed his convictions, Mr. Parks submitted a *pro per* application for leave to appeal to the Michigan Supreme Court. This Court first remanded for an evidentiary hearing, and subsequently scheduled oral argument on whether to grant the application.

On May 18, 2004, in an unpublished opinion, the Court of Appeals affirmed Mr. Parks' convictions. Attached as Appendix A. He subsequently applied to this Court for leave to appeal. On June 22, 2007, after initially holding the application in abeyance, this Court remanded to Circuit Court for an evidentiary hearing, "affording the defendant the opportunity to offer proof that the complainant made a prior false accusation of abuse against another person." Attached as Appendix B.

On February 25, 2008, after a two part evidentiary hearing, the trial court found "absolutely no evidence, zero evidence of any prior false accusations made by the child, any false accusation of sexual abuse against another person." (EH2, 19).

On May 16, 2008, following the trial court evidentiary hearing, this Court scheduled oral argument on whether to grant the application or take other preemptory action. Attached as Appendix C. This Court ordered supplemental briefing on multiple issues regarding complainant's 1996 allegations of sexual assault:

- (1) whether the evidence of prior accusations of sexual assault made by the complainant against another person that was revealed during the evidentiary hearing on remand is admissible under the Michigan Rules of Evidence;
- (2) whether the truth or falsity of those accusations makes a difference in assessing their admissibility, given the young age of the complainant at the time of the trial;

⁷ "S" refers to the sentencing transcript of September 27, 2002.

- (3) whether the circuit court's ruling at the defendant's trial prohibiting the further discovery and introduction of this evidence constituted reversible error;
- (4) whether such evidence is subject to the rape shield statute, MCL 750.520j;
- (5) whether the sexual abuse of a young child constitutes "the victim's past sexual conduct" within the meaning of MCL 750.520j(a); and
- (6) whether the defendant in this case must be allowed to introduce the evidence of the complainant's prior accusations of sexual abuse in order to preserve his constitutional right of confrontation and to present a defense.

Mr. Parks, through counsel, now supplements his original application for leave to appeal.

I. IN PROHIBITING ADMISSION OF COMPLAINANT'S PRIOR ALLEGATIONS OF SEXUAL ASSAULT, THE TRIAL COURT VIOLATED MICHIGAN RULES OF EVIDENCE, THE RAPE SHIELD STATUTE, AND THE CONSTITUTIONAL RIGHTS TO CONFRONTATION AND TO PRESENT A DEFENSE. A NEW TRIAL IS REQUIRED.

Issue Preservation / Standard of Review

On the first day of trial, the prosecuting attorney made a motion to exclude any evidence or questioning of complainant's prior allegations of sexual assault against her grandfather. (T1, 166-167). Trial counsel explained that he wanted to question her about any reports of sexual assault prior to the allegations against Mr. Parks. (T1, 168). Although he expected complainant to deny any prior complaints, counsel wanted to question other witnesses about the prior complaints for impeachment purposes.⁸ (T1, 170).

After initially agreeing to let counsel question complainant outside the presence of the jury, the court reversed itself and prohibited questioning of any witnesses regarding the prior allegations. (T1, 170).

Trial counsel also called for a sidebar conference prior to his cross-examination of Dr. Guertin. (T2, 143). Following this conference, the trial court instructed the jury that complainant's 1996 visit to Dr. Guertin were independent and unrelated to the allegations against Mr. Parks, and not relevant to his case. (T2, 143).

Evidentiary rulings are generally reviewed pursuant to an abuse of discretion standard. *People v Jehnsen*, 162 Mich App 171; 412 NW2d 681 (1987). Where the trial judge's decision

⁸ In initially raising this issue on appeal, Mr. Parks focused in argument on prior false allegations. However, neither trial counsel's initial arguments, nor the actual argument heading in the appellant brief characterized the admissibility of evidence of prior accusations as falling under a false complaints theory.

deprived Mr. Parks of his constitutional right to confrontation and to present a defense, the Court should use a *de novo* standard of review. *Sitz v Department of State Police*, 443 Mich 744; 506 NW2d 209 (1993). Questions of statutory interpretation are reviewed *de novo*. *Mayor of Lansing v Michigan PSC*, 470 Mich 154, 157; 680 NW2d 840 (2004).

To the extent any of the arguments for admissibility represent unpreserved claims of constitutional error, they are reviewed for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006) . The defendant must establish prejudice and show that the error affected the outcome of the lower court proceeding. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) . Reversal is warranted if the error resulted in the conviction of an actually innocent person or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764.

Summary of Argument

The prosecution entered evidence of complainant’s age inappropriate sexual behavior and linked this behavior to Mr. Park’s alleged actions as a “cry for help.” Complainant’s prior accusations of sexual abuse against her grandfather should have been admissible as an alternate source for this age inappropriate sexual behavior. Where the prosecution introduced comprehensive evidence of complainant’s sexual misconduct, this evidence of prior accusations adds little additional prejudice.

The evidence is admissible under the Michigan Rules of Evidence for both substantive and impeachment purposes. The accusations are relevant and more probative than prejudicial because they provide an alternate source for (1) complainant’s advanced sexual knowledge; (2) the expert witness diagnosis of “fondling;” and (3) the complainant’s use of unique language to

describe the assault. The multiple reports of the prior accusations by Mr. Parks are also relevant to demonstrate his lack of any intent or inclination to commit criminal sexual conduct.

This evidence is not precluded by Michigan's rape-shield statute for multiple reasons. First, the plain language allows admission of the accusations as an exception to the statute as a "source" of a particular "disease," the complainant's inappropriate sexual behavior. Second, Michigan law allows admission of the accusations as evidence of both the source of complainant's advanced sexual knowledge and her motive to fabricate charges. Indeed, the young age of the complainant makes the admission of the accusations particularly relevant to explore these concerns. Third, neither general accusations of assault, nor the abuse of a young child implicate the "specific instances" of "sexual conduct" as described in the statute. Finally, by describing at length complainant's inappropriate "sexual conduct" during opening arguments and the case in chief, the prosecution waived the protections of the rape-shield statute.

In a case where the evidence basically consists of complainant's allegations against Mr. Parks, and the corroborating nature of her age-inappropriate sexual behavior, the exclusion of the prior accusations implicates his constitutional rights to confrontation and to present a defense. The impact of the evidence of the accusations mandates a new trial.

1. The evidence of prior accusations of sexual assault made by the complainant against her grandfather that was revealed during the evidentiary hearing on remand is admissible under the Michigan Rules of Evidence.

As will be detailed in question four, MCL 750.520j, the rape-shield statute does not bar the admission of complainant's prior allegations against her grandfather. Nevertheless, Mr. Parks must show how this evidence is admissible under Michigan law. Michigan Rules of Evidence provide for multiple avenues of admission:

(a) The prior allegations provide an alternate explanation for complainant's disciplinary problems and inappropriate sexual knowledge.

The prosecution's principle theory of the case is summed up at the start of opening argument: "[w]hat this case is about is about [complainant] crying out for help in her own way. Her behaviors and her actions, she cried out until someone listened." (T2, 15). Complainant's temper tantrums, sexually explicit notes to classmates, statements of "don't fuck me" to a teacher, masturbatory gyrations against desks, and tendency to strip off clothes in school, all pointed to her victimization by Mr. Parks. The prosecution had basically two pieces of evidence at trial: (1) Complainant's testimony that abuse occurred; and (2) complainant's sexually inappropriate behavior that corroborated the abuse.

The only problem with this theory is that complainant's "crying out for help" is similarly explained by the allegations of her grandfather's sexual abuse. Indeed, both Mr. Parks and Ms. Hampton testified at the evidentiary hearing that after they questioned complainant about her inappropriate sexual behavior she alleged sexual abuse by her grandfather. (EH1 8-9, 21-22).

MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 allows for admissibility of relevant evidence. The prosecution's theory of the case depends on the link between Mr. Park's alleged sexual assault and complainant's behavior. Where allegations of a prior sexual assault could explain this behavior, this link is far "less probable" and the relevant evidence is admissible. MRE 401, MRE 402. *See People v Morse*, 231 Mich App 424; 586 NW2d 555 (1998) (finding evidence of prior sexual assaults admissible to show age inappropriate sexual knowledge not learned from defendant).

Complainant's prior allegations of abuse also should have been admissible under MRE 404(a)(3), character of alleged victim of sexual conduct crime, as an alternate source of "disease." MRE 404(a)(3) allows admission of "evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." *The American Heritage Dictionary of the English Language, 4th Edition, 2000* defines "disease" as ". . . 2. A condition or tendency, as of society, regarded as abnormal and harmful." Complainant's abnormal sexual behavior for a child of her age should certainly be regarded as an abnormal and harmful condition or tendency. Accordingly, the prior accusations of sexual assault should be admissible as an alternate source for complainant's discipline problems and improper sexual behavior under both MRE 402 and 404(a)(3).

(b) The prior allegations provide an alternate source of the expert witness diagnosis of "fondling."

At trial, Dr. Stephen Guertin, an expert witness in child sexual assault testified that "it was my impression based on the contents of the history that she likely had been fondled." (T2, 142). The only witness at trial to testify as an expert in child sexual assault diagnosed complainant's abuse. The evidence at trial only offered one source for this diagnosis – abuse by Mr. Parks. Under these circumstances, the identity of a second possible source of fondling certainly makes Mr. Parks guilty "less probable," and the evidence is relevant per MRE 401.

This connection between the prior allegations and the conclusion of the expert witness is especially relevant, because coincidentally, Dr. Guertin examined complainant after the allegations against her grandfather. He made a slightly less certain diagnosis that "does not rule out fondling." (EH 2, 9). Had the jury heard complainant's prior allegations of sexual assault and the prior conclusion of Dr. Guertin, they would have potentially linked the fondling diagnosis to complainant's grandfather rather than Mr. Parks. Nevertheless, the trial court

wrongly instructed the jury that Dr. Guertin's examination "in 1996 is not relevant to this case and to your purposes as a Jury." (T2, 143).

Additionally, a diagnosis of sexual fondling of a child provides another example of a "disease" per *The American Heritage Dictionary* as "a condition or tendency, as of society, regarded as abnormal and harmful." Complainant's allegations against her grandfather are admissible as an alternate "source or origin" of Dr. Guertin's diagnosis of a "disease." MRE 404(a)(3).

(c) The unique language of the prior allegations shows the potential for fabrication of charges against Mr. Parks.

At Mr. Parks' preliminary exam, complainant provided a unique and graphic description of oral sex: "he put his wienie in my mouth," and then, "[i]t got sick." (PE, 12, 14). The childlike language revealed an adult sexual knowledge. With admission of the prior allegations, counsel could have elicited this description as additional evidence of the source complainant's inappropriate sexual knowledge. The prior complaint from the June 5, 1996 social services report indicated that complainant "made a statement alleging that she touched her step-grandfather's weenie *when it got sick.*" (EH2, 10) (emphasis added).

The evidence of complainant's prior allegations of sexual abuse involving her grandfather again demonstrates the source of her advanced sexual knowledge. This evidence is admissible because it counters the prosecution's central claim linking complainant's adult sexual knowledge to the allegations against Mr. Parks. MRE 401; MRE 402. *See People v Morse, supra.*

(d) The reaction of Mr. Parks to the prior accusations shows his lack of any sort intent or inclination to commit criminal sexual conduct.

Even discarding the impact of the prior accusations on the complainant's improper sexual behavior, medical diagnosis, and use of language, the evidence is critical because of Mr. Parks' reaction to the prior complaints. After the complainant reported abuse by her grandfather, Mr. Parks and his wife reported the sexual abuse to the Shiawassee County Family Independence Agency and brought the complainant to Dr. Guertin for a physical examination. (EH1 9, 21-22, 35). Mr. Parks also attempted to set complainant up with counseling to help her cope with the alleged abuse. (EH1, 25). In 1999, when complainant returned to the custody of Mr. Parks, he informed her new school about the history of abuse. (EH1, 26-27). A May 28, 1999 report from the school documented the reports by Mr. Parks of complainant's abuse and neglect while living with her mother and her maternal grandparents. (EH1, 28-29).

In making these referrals and reports, Mr. Parks demonstrated the character of a concerned parent, rather than a sex offender. A jury convicted Mr. Parks for incidents of sexual assault that allegedly occurred between 1999 and 2000, when she moved back into his custody. There is no reasonable explanation for why somebody who abused his step-daughter would concurrently report her past abuse to her school – it would only make authorities more likely to investigate possible sexual abuse. There is also no reasonable explanation for why somebody would sexually assault a victim whose abuse he previously reported to a government agency.

This reaction of Mr. Parks to the prior allegations of abuse demonstrates it is highly improbable he sexually abused the complainant. MRE 404(a)(1) allows admission of “[e]vidence of a pertinent trait of character offered by an accused” and MRE 405(b) allows that “[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's

conduct.” Mr. Parks’ response to the previous accusation of abuse made by the complainant demonstrates the character of a responsible caregiver and provides a specific example of behavior that refutes the notion that he would commit sexual abuse.

As such, Mr. Parks’ reports of complainant’s abuse provide specific instances of conduct that are essential to his “claim” and “defense” that he did not commit abuse per MRE 405(b). In *People v Watkins*, the Michigan Court of Appeals described the proper use of specific incidents of defendant’s conduct in excluding opinion testimony as character evidence:

a defendant in a criminal case is permitted to open the door to scrutiny of his character and offer evidence that he is unlikely to have committed the crime. . . . Under the rule, two methods of proof are approved. Testimony of reputation for character or a given trait of character is permissible evidence in all cases where character is admissible. Testimony as to specific instances of conduct to prove character are also admissible, but only in the limited circumstances set out in MRE 405(b).

176 Mich App 428, 431-432; 440 NW2d 36 (1989). Mr. Parks’ understandable and legitimate reactions to the prior allegations of assault necessitate the admission of the allegations per MRE 404(a)(1) and MRE 405(b). *See also People v Golden*, 121 Mich App 490, 496-497; 328 NW2d 667 (1982) (finding error in prosecution’s use of evidence of defendant’s drinking problem because he did not choose to place his character for sobriety at issue); *Keefer v C.R. Bard, Inc.*, 110 Mich App 563, 574-576; 313 NW2d 151 (1981) (allowing specific character evidence in civil case regarding defendant’s competence, defendant’s promotion to supervisor status, and the lack of complaints about defendant).

Principles of relevancy also require admission of Mr. Parks’ response to complainant’s prior accusations of sexual abuse. “Just as flight or other evidence of ‘consciousness of guilt’ may sometimes be relevant, on some occasions evidence of ‘consciousness of innocence’ may also be relevant to the central issue at trial.” *US v Scheffer*, 523 US 303, 331; 118 SCt 1261

(1998) (Stevens, J., dissenting). The Sixth Circuit has indicated that defendants can sometimes admit evidence indicating an innocent consciousness. *US v Reifsteck*, 841 F2d 701, 705 (CA6, 1988). Dean Wigmore wrote “[l]et the accused’s whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth.” 2 *Wigmore on Evidence* § 293, at 232 (J. Chadbourn rev. ed. 1979). Federal courts of appeals have found reversible error based on the trial court’s error in failing to admit evidence of the defendant’s innocent state of mind. *See US v Biaggi*, 909 F2d 662, 691-692 (CA2, 1990); *US v Bucur*, 194 F2d 297 (CA7, 1952); *US v Detrich*, 865 F2d 17 (CA2, 1988).

Evidence that Mr. Parks reported complainant’s prior allegations would have demonstrated to the jury that he did not commit sexual assault. His actions are therefore admissible both as relevant evidence and as examples of specific instances of conduct that are essential to his defense and claims at trial. MRE 402, 404(a)(1); 405(b).

(e) Impeachment of complainant regarding her lack of prior reports of abuse against her grandfather would have raised doubts about her allegations involving Mr. Parks.

In responding to the prosecution’s motion to prohibit evidence of complainant’s prior accusations, trial counsel explained that he wished to cross-examine complainant “solely for impeachment purposes.” (T1, 170). At the preliminary exam, complainant denied any prior “bad touch” from people other than Mr. Parks. (PE, 19; T1, 170). Counsel intended to first elicit the same response, and then impeach with testimony from other witnesses that complainant did actually make prior complaints of sexual assault. (T1, 170).

MRE 607 allows impeachment of a witness by any party, while MRE 613 provides for impeachment via prior statements of witnesses. Once complainant denied making prior statements alleging sexual assault, counsel could have impeached through direct examination of

both Ms. Hampton and Mr. Parks. MRE 613(b); *see People v White*, 139 Mich App 484; 363 NW2d 702 (1984). The evidentiary hearing showed that complainant told each of them of sexual abuse by her grandfather. (EH1, 8-9, 21-22; EH2, 13).

Successful impeachment would have at a minimum showed the jury that complainant may not have testified truthfully in court about Mr. Parks' alleged abuse. As detailed in the prior sections though, the previous allegations also present substantive evidence. Proper impeachment therefore would allow the jury to evaluate the real problems with the prosecution's case: (1) the alternative explanation for complainant's "cry for help" and improper sexual behavior; (2) the alternative source of the "fondling" diagnosis; (3) the source of complainant's advanced sexual knowledge; and (4) the character of Mr. Parks as a concerned parent.⁹

(f) The probative value of this evidence is not outweighed by the danger of unfair prejudice or any other concerns implicated by MRE 403.

As detailed in the previous sections, several rules of evidence ranging from the character of the accused, to the character of an alleged victim of sexual assault, to impeachment justify the admission of complainant's prior allegations of her grandfather's sexual assaults. The probative value of this evidence is not outweighed by any prejudice. MRE 403.

MRE 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." None of these concerns is implicated by the admission of the prior assault complaints. "Evidence is unfairly prejudicial when there exists a danger that marginally

⁹ As substantive evidence, the prior complaints therefore are not subject to the limitations of MRE 608(b). Admission of this evidence is unrelated to complainant's character for truthfulness or untruthfulness. *Compare People v Jackson*, 477 Mich 1019, 1020 726 NW2d 727 (2007) (Weaver, J., dissenting) "On its face, MRE 608(b) bars the proposed direct testimony regarding the victim's alleged prior false allegation. Because the proposed testimony was not to be elicited during cross-examination..."

probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398, 585 NW2d 585 (1998).

The probative value of the evidence at issue certainly outweighs any danger of prejudice or confusion where it is the only method for the defense to effectively counter the prosecution. By showing an alternate source of complainant’s sexual knowledge, diagnosis of fondling, and inappropriate sexual behavior, the prior allegations demonstrate that Mr. Parks may not be responsible for her “cry of help.” Considering the power of this behavioral and diagnostic evidence for the prosecution, it is hard to exaggerate the probative value of an alternate explanation. In contrast, the evidence of complainant’s prior accusations involving her grandfather present minimal, if any, unfair prejudice. The jury heard evidence that complainant wrote sexually explicit notes in school, gyrated in a sexual manner against a desk, sexually harassed a classmate, and voluntarily removed her clothes. Under these circumstances, evidence of additional allegations of sexual abuse does not substantially add to the prejudice.

The complainant’s credibility was the crucial element in the prosecution’s case. In a child sexual abuse case, “because of the critical nature of evidence regarding credibility, the jury could hardly have given such evidence ‘undue weight.’” *People v Piscopo*, 480 Mich 966, 972; 741 NW2d 826 (2007) (Markman, J., dissenting).

Nor does the evidence of prior accusations create any risk of confusion or potential to mislead the jury. Instead, the accusations present an alternative source for analyzing the evidence and ultimately provide a larger context to the allegations against Mr. Parks. Finally, the evidence is neither cumulative nor likely to result in undue delay. MRE 403 does not restrict admission of the prior accusations at issue.

2. The truth or falsity of the accusations makes no difference in assessing their admissibility, especially given the young age of the complainant at the time of trial.

Complainant was five years old when she made accusations of sexual abuse against her grandfather, nine years old when she made accusations against Mr. Parks, and eleven years old at the time of trial. Complainant initially makes each set of accusations when she is confronted about her inappropriate sexual behavior. Although over four years apart, complainant presents similar allegations of sexual assault against both her grandfather and Mr. Parks. Even though the state only charged Mr. Parks, there is no definitive evidence to either corroborate or counter either set of allegations. Under these circumstances, it is likely that complainant's age of five contributed to this decision not to prosecute complainant's grandfather in 1996.

Although the trial court found that Mr. Parks presented no evidence of prior false accusations by complainant, there is simply no way to know whether complainant's prior accusations against her grandfather are true or false. This dynamic is problematic because the prior accusations fall into a middle ground between false complaints and actual past sexual abuse, either of which would be clearly admissible under the facts of the case. Michigan courts have held that the rape shield statute does not prohibit the admission of evidence pertaining to prior false accusations of sexual abuse made by a complainant. *People v Jackson*, 477 Mich 1019; 726 NW2d 727 (2007); *People v Hackett*, 421 Mich 338, 348-349; 365 NW2d 120 (1985). Michigan courts have also held that evidence of prior abuse providing an explanation for age-inappropriate sexual knowledge by a minor complainant can be admissible under the rape shield statute. *People v Morse*, 231 Mich App 424, 433-436; 586 NW2d 555 (1998).

If these cases are taken for the proposition that prior accusations must be definitively true or false, *even for a child*, then there is an implied recognition of the obsolete view that child victims have only been sexually assaulted if there is corroborating evidence. The state made a

decision in 1996 that in spite of the probability of abuse, the victim's age made it difficult to secure a prosecution. (EH2, 11-14). It would be ironic if this Court responded to this subjective decision by finding the prior complaints might not be true and prohibiting their admission as a source of the complainant's unusual knowledge. Complainant's youthful age means that the jury should have seriously considered the prior accusations. To rule otherwise victimizes youthful complainants by finding that their prior accusations without corroboration lacked truthfulness.

Additionally, the actual truth or falsity of the accusations makes no difference in assessing their admissibility given the questions raised by the age of the complainant. Her youth makes the accusations against Mr. Parks both harder to defend and less reliable. *See Kennedy v Louisiana*, __ U.S. __, 62-63; 128 S. Ct. 2641 (2008) ("The problem of unreliable, induced, and even imagined child testimony means there is a 'special risk of wrongful execution' in some child rape cases"). The existence of the prior accusations is therefore acutely relevant.

Finally, whether the accusations are true or false, each of the theories for admission described in the first section is applicable. First, regardless of the truth or falsity of their content, the mere fact of prior accusations presents an alternate source for complainant's inappropriate sexual knowledge and her language of the sexual assault accusations against Mr. Parks. Second, the fact that the accusations exist indicate that their might be a different explanation for the diagnosis of fondling. Third, the evidence of Mr. Parks' reaction to the prior complaints is identical, regardless of their truth or falsity. Finally, complainant's denial of prior complaints can be impeached, whether the prior accusation are true or false. Complainant's young age is connected to each of these avenues of admission of the accusations.

Simply put, the evidence is critical to the defense because of the nature of the accusations from a young girl, not because they are true or false. Once this dynamic is considered, Michigan

law on admissibility of prior accusations is perfectly applicable. Whether the prior accusations of sexual abuse made by the minor complainant in this case is true or false, they are clearly relevant. In either scenario, given the facts of this case, they present an example of “certain limited situations, [where] such evidence may not only be relevant, but its admission may be required to preserve a defendant’s constitutional right to confrontation.” *Hackett, supra*, 421 Mich at 348.

3. The circuit court’s ruling at the defendant’s trial prohibiting the further discovery and introduction of this evidence constituted reversible error.

By arguing that complainant’s disciplinary problems and inappropriate sexual behavior represented a “cry for help,” the prosecuting attorney directly linked the allegations against Mr. Parks to devastating evidence that could not be disputed. Basically, the jurors were left with one question – why did the nine year-old complainant act out sexually? The trial provided only one answer to this question – sexual abuse committed by Mr. Parks. Under these circumstances, the error in excluding the evidence of an alternative source for the “cry for help” eliminated any potential defense, and a new trial is required.

Once an alternate source is offered for complainant’s behavior, the case becomes a credibility contest between Mr. Parks and complainant. Mr. Parks is sure to prevail in this contest for multiple reasons. First, his testimony is buttressed by the virtual impossibility of the allegations. Multiple houseguests who stay concurrently with the time period of the allegations witnessed no inappropriate sexual behavior on his part towards children. (T3, 10, 16, 21, 32-33). At least two adults and six children lived in the house at all times. (T3, 24). Mr. Parks worked six days a week, often fifteen hours a day, and readily admitted that he spent minimal time with the children. (T3, 37, 40, 43).

Second, complainant provided significantly inconsistent accounts of the sexual abuse at trial and in her interview with Detective Little. At trial, she testified to sexual abuse that occurred on the bathroom counter, while she told Detective Little that the abuse occurred on a stool. (T2, 37-41, 92). At trial she described isolated incidents of abuse, while she told Detective Little of his practice to place “cream on her privates.” (T2, 79). Complainant alleged digital penetration during her initial disclosure at school and initial interview with Detective Little. (T2, 79, 87, 91-92). In contrast, at trial, and presumably at a much later interview with Detective Little, the allegations evolved to include forced oral sex. (T2, 92-93, 40-41).

Finally, the charges against Mr. Parks first stemmed from Cheryl Farver’s leading question, “[w]ell have you ever had a bad touch?” (T2, 203). This sort of suggestive interview created conditions for an unreliable disclosure process. Yasheema Marshall, the Protective Services Worker involved in the case explained that “you generally just do your interview process as you just want to make sure that you don’t – you want to let the child kind of give you the information instead of saying the information and then asking the child to agree to you and what you’re saying.” (T2, 111). Ms. Farver did exactly the opposite, suggesting to complainant that she had been victimized by a bad touch. Per Ms. Marshall, the failure to engage in a proper interviewing protocol could influence children’s recollections, contribute to suggestibility, and risk implanting their memory. (T2, 110). *See Kennedy v Louisiana*, __ U.S. __, 62-63; 128 S. Ct. 2641 (2008) (“The problem of unreliable, induced, and even imagined child testimony means there is a ‘special risk of wrongful execution’ in some child rape cases”).

Independently, the exclusion of evidence that Mr. Parks reported complainant’s prior allegations of sexual assault to both a state agency and to her school constitutes reversible error. The jury could not evaluate evidence that the actions of Mr. Parks demonstrated he likely did not

sexually assault the complainant. In a close contest based on credibility, this error warrants a new trial.

Mr. Parks submits that the issues involving exclusion of the prior accusations in his case is one of preserved constitutional error. Counsel attempted to impeach complainant with the evidence of her prior complaints against her grandfather. This impeachment would have been accomplished through testimony of Mr. Parks and Ms. Hampton after complainant's denial. (T1, 170). Counsel also objected when the court reversed its prior decision to allow further discovery through a hearing outside the jury. (T1, 169-170). As constitutional rights are implicated, the result is reversible error under a *de novo* standard of review. *Sitz v Department of State Police, supra*.

However, even assuming *arguendo* that counsel only preserved for impeachment purposes the evidence of prior accusations against complainant's grandfather, a new trial is still required for two reasons.

First, even solely as impeachment evidence, the prohibition evidence of prior accusations constituted reversible error. Complainant provided inconsistent accounts of abuse that initially stemmed from a flawed disclosure process, and Mr. Parks had very little opportunity to commit the offense. Accordingly, in an ultimate credibility contest between Mr. Parks and complainant, evidence causing the jury to directly question complainant's truthfulness would have resulted in an acquittal.

Second, the substantive impact of the evidence of prior accusations warrants a new trial even under the plain error standard for unpreserved claims of constitutional error. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Due to the multiple avenues for admission of the prior complaints under Michigan Rules of Evidence, the trial court's exclusion of this

evidence and the trial court's specific finding that Dr. Guertin's 1996 examination and report was not relevant each represented clear and obvious error. As already detailed, this error prejudiced Mr. Parks and likely precluded an acquittal where it would have directly responded to the prosecution's "cry for help" theory. The prosecution's link between the inappropriate sexual behavior of complainant and the alleged abuse by Mr. Parks so dominated the case, that the failure to offer evidence of an alternate source for this "cry for help" seriously affected the fairness, integrity, or public reputation of judicial proceedings. A new trial is required. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

4. The evidence of prior accusations of sexual abuse is not subject to the rape shield statute.

Notwithstanding all of the legitimate theories for admission of complainant's prior accusations per the Michigan Rules of Evidence, they still must be permissible under the rape-shield statute. MCL 750.520j. Determinations of the admissibility of evidence under the rape shield statute must be made on a case by case basis. *People v Adair*, 452 Mich 473, 484-485; 550 NW2d 505 (1996).

Michigan's rape shield statute, MCL 750.520j, and the corresponding section of the Michigan Rules of Evidence, MRE 404(a)(3), generally prohibit the introduction of evidence regarding a complainant's past sexual conduct. The Rape Shield law represents a legislative policy determination that the prejudicial effect of such evidence generally outweighs its potential probative value, justifying its exclusion. *People v Hackett*, 421 Mich 338, 346-348; 365 NW2d 120 (1985).

In this case evidence of the complainant's past accusations against her grandfather is admissible in spite of the rape-shield statute for four reasons: (1) the accusations are allowed by the text of the statute; (2) the accusations are allowed as an exception to the statute; (3) evidence

of accusations of sexual abuse, not actual conduct are at issue; and (4) by introducing evidence of complainant's sexual conduct, the prosecution waives any rape-shield protections.

- (a) **The rape-shield statute explicitly allows for the admission of sexual activity showing the source of "disease." In the instant case, both complainant's behavior and Dr. Guertin's diagnosis fit the definition of "disease."**

MCL 750.520j, the rape-shield statute states:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

- (a) Evidence of the victim's past sexual conduct with the actor.
(b) Evidence of specific instances of sexual activity showing the *source or origin of semen, pregnancy, or disease.*

(emphasis added). Per the meaning of the statute, complainant's disturbing sexual behavior qualifies as a "disease," and the prior accusations are therefore admissible for describing a source of this disease.

Providing the evidence is relevant, the statute quite clearly establishes two exceptions to the admission of evidence of the victim's prior sexual conduct – past sexual conduct with the actor, and "specific instances of sexual activity showing the source or origin of semen, pregnancy, or *disease.*" MCL 750.520j (emphasis added). The question for this Court is whether the legislative intent in establishing an exception for disease includes the inappropriate sexual conduct so emphasized by the prosecution at trial.

This Court's "goal in construing a statute is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v Gardner*, ___ Mich ___; ___NW2d ___ (No.

131942, July 23, 2008) (internal citations omitted). Thus, when the language of a statute is unambiguous, judicial construction is not required or permitted, and the court must act according to the Legislature's clear instruction. *Id.*

As MCL 750.520a does not define the term "disease," this Court must ascertain the "original" meaning of the word upon the statute's enactment in 1974. *Cain v Waste Mgmt., Inc.*, 472 Mich 236, 247; 697 NW2d 130 (2005). An authoritative 1971 dictionary defines "disease" as "...3. "any deranged or depraved condition, as of the mind, society, etc: Excessive melancholy is a disease." *The Random House Dictionary of the English Language: The Unabridged Edition*, 1971. More recently, *The American Heritage Dictionary of the English Language, 4th Edition*, 2000 defines "disease" as "... 2. A condition or tendency, as of society, regarded as abnormal and harmful."

Each definition quite clearly covers the inappropriate sexual behavior of complainant that the prosecution presents at trial. In school, complainant wrote sexually explicit notes, stripped off her clothes, gyrated against desks, and sexually harassed another student. (T2, 154, 155, 179-183, 200-201). Complainant's abnormal sexual behavior for a child of her age should certainly be regarded as both an "abnormal and harmful" condition or tendency, or a "deranged or depraved condition." Just as *The Random House Dictionary* lists "excessive melancholy" as a disease, excessive age-inappropriate sexual behavior fits the definition.

Although this behavior is depicted at trial as a "cry for help," in response to Mr. Parks' abuse, the jury never hears of the other potential source for this of abuse – complainant's grandfather. As discussed in response to this Court's first question, this evidence is "material to a fact at issue in the case and . . . its inflammatory or prejudicial nature does not outweigh its

probative value.” MCL 750.520(j). Accordingly, the prior accusations of sexual assault should be admissible as an alternate “source of semen, pregnancy, or *disease*.” MCL 750.520j.

Similarly, Dr. Guertin made an actual diagnosis of a “disease” per either dictionary definition when he found that complainant “had been fondled.” (T2, 142). Fondling a young girl certainly qualifies as either an “abnormal and harmful,” or “deranged or depraved” condition. Especially considering Dr. Guertin’s examination of complainant in 1996, her allegations against her grandfather are admissible as an alternate “source or origin” for Dr. Guertin’s diagnosis of a “disease.” MCL 750.520(j). As the only way for defense to counter the implication that Mr. Parks fondled complainant, this alternate diagnosis is “material” and not overly “inflammatory or prejudicial.” MCL 750.520j.

(b) Complainant’s prior accusations of sexual assault are admissible to demonstrate her source of inappropriate sexual knowledge.

Evidence of prior abuse providing an explanation for age-inappropriate sexual knowledge by a minor complainant can be admissible under the rape shield statute. *People v Morse*, 231 Mich App 424, 433-436; 586 NW2d 555 (1998); *Hackett, supra*, 421 Mich at 348. To evaluate admissibility of this evidence, *People v Morse* requires an in-camera hearing to determine (1) whether the evidence is relevant; (2) whether another person was convicted of prior sexual conduct; and whether (3) the facts underlying the previous conviction are sufficiently similar to the instant case. 231 Mich App 424, 437 (1998).

Aside from the absence of a conviction, the evidentiary hearing in the instant case demonstrated these factors. As argued in response to this Court’s first question, absent evidence of the prior accusations, only the allegations against Mr. Parks explained to the jury complainant’s age-inappropriate sexual knowledge and activities. In this case, complainant

made sufficiently similar allegations against both Mr. Parks and her grandfather regarding incidents of digital penetration and forced oral sex. (T2, 37-41; EH1, 9, 22-23; EH 2, 10).

Additionally, complainant exhibited her sexual knowledge with unique language that during the oral sex and touching, both her grandfather's and Mr. Parks' "weenie" "got sick." (PE, 12- 14; EH1, 22-23; EH2, 10). The childlike language revealed an adult sexual knowledge that made the prior accusations critical for an understanding of the potential source of this description.

In discussing the admissibility of sexual conduct under the rape shield statute, this Court has stated that:

determinations of relevance, materiality, prejudicial value, and the defendant's constitutional right to use the proffered evidence, depend on the facts of the case. Accordingly, the rape-shield statute should not be interpreted to foreclose consideration of such issues arbitrarily. Further, *Michigan v. Lucas*, 500 U.S. 145, 151, 111 S.Ct. 1743, 1747, 114 L.Ed.2d 205 (1991), suggested that an arbitrary interpretation and application of the rape-shield statute's provisions could violate the right to confrontation.

Adair, supra, 452 Mich at 484-485. "The Michigan Supreme Court therefore has made it clear that application of the rape-shield statute must be done case by case, and that the balancing between the rights of the victim and the rights of the defendant must be weighed anew in each case." *Morse, supra*, 231 Mich App at 433.

The accusations depict similar charges and an alternative explanation for complainant's bizarre behavior and advanced sexual knowledge. Where complainant's inappropriate sexual behavior is already at issue, these accusations do not further detract from complainant's rights. Accordingly, in the instant case, even though there was no actual conviction of complainant's grandfather for criminal sexual conduct, the accusations are admissible. As this Court has ruled, "in certain limited situation, such evidence may not only be relevant, but its admission may be

required to preserve a defendant's constitutional right to confrontation." *Hackett, supra*, 421 Mich at 348.

(c) The evidence at issue involves reports of abuse only, not actual sexual conduct.

The rape-shield statute explicitly refers to "[e]vidence of specific instances of the victim's sexual *conduct*, opinion evidence of the victim's sexual *conduct*, and reputation evidence of the victim's sexual *conduct*." MCL 750.520j (emphasis added). As described in question one, multiple theories for admission of this evidence simply implicate the victim's complaints, rather than her conduct. *See People v Ivers*, 459 Mich 320, 328-329; 587 NW2d 10 (1998) (finding relevant "statements" as opposed to "conduct" admissible unless they "*amount to or reference*" specific conduct) (emphasis in original).

In the instant case then, even if the rape-shield statute were to prohibit complainant's specific accounts of her grandfather's abuse, the mere fact that she made prior accusations would still be admissible. First, complainant's age-inappropriate sexual behavior is linked simply to the prior sexual assaults, not the specific nature of the assaults. Therefore, it is at a minimum proper for the jury to hear that complainant made prior accusations against somebody other than Mr. Parks. *See Ivers, supra*, 459 Mich at 326 (allowing admission of statements that complainant was "ready" for sex and wanted her friend to "find her a guy" because they did not implicate specific conduct). The jury must convict Mr. Parks absent the evidence that complainant made prior accusations against another, because he is the only source of complainant's sexual behavior.

The same analysis applies to the highly probative evidence of Mr. Parks' response to the prior assault accusations. It is implausible that someone intending to commit sexual abuse would bring a child to a government agency to report abuse. *See Section 1d, supra*. Accordingly,

should this Court find the specific allegations of the prior assaults inadmissible under the rape-shield statute, the jury should still hear of the general existence of the prior accusations.

- (d) The prior accusations are not subject to the rape shield statute because they demonstrate a motive to fabricate.**

This Court has held that:

. . . . in certain limited situations, such evidence [of sexual conduct] may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. . . . Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge.

Hackett, supra, 421 Mich at 348. In the instant case, the prior accusations may point to such a motive to fabricate.

The prosecution links complainant's inappropriate sexual behavior to abuse by Mr. Parks. Mr. Parks in turn submits that the prior accusations show an alternate source for this behavior. However, there is also another explanation for this dynamic – the complainant may make false complaints of abuse to justify her inappropriate behavior.

In 1996, complainant first accused her grandfather of sexual abuse after her mother confronted her for fondling her younger brother. (EH1, 21; EH2, 11). In 1999, when Ms. Hampton spoke to complainant about improper sexual touching, she explained that her grandfather “used to do it.” (EH1, 9). In 2000, when the school social worker spoke to complainant about her sexual gyrations in class, she accused Mr. Parks of abuse. (T2, 200-201). Each time complainant risks reprimand for her age inappropriate sexual activity, she accuses an adult of abuse. The prior accusations therefore are admissible as an exception to the rape-shield act to lend support to a theory that complainant has a motive to fabricate the charges against Mr. Parks to avoid discipline in school. *Hackett, supra*.

A motive to fabricate could be implied as the complainant could be seeking to explain her previous sexual exposure by accusing Mr. Parks or could have already demonstrated a tendency to fabricate by falsely accusing another person of sexual abuse. *See White v Coplan*, 399 F3d 18 (CA1, 2005). Without the opportunity to confront the complainant, the jury was not provided with any alternative explanation for the accusations and was left to infer that they were true.

(e) By presenting “specific instances” of complainant’s “sexual conduct,” the prosecution waived the applicability of the rape-shield doctrine.

Not only did the prosecution present “[e]vidence of specific instances of the victim’s sexual conduct” contrary to the rape-shield statute, this conduct became the central theory of the case. MCL 750.520j. Prosecution witnesses testified to a series complainant’s actions including sexual gyration against a desk, sexual harassment of a classmate, composition of sexually explicit notes, and use of sexual language. (T2, 151-55, 179-183). The prosecuting attorney referred to these incidents throughout opening argument. (T2, 16-18). Under these circumstances, where the prosecution opened the door to the use of complainant’s prior sexual conduct, any challenge to the admission of prior accusations of sexual assault is waived.

Dictionary definitions “suggest that ‘conduct’ refers to volitional actions undertaken by a person; such actions would constitute ‘personal behavior’ and ‘conducting oneself.’” *People v Piscopo*, 480 Mich 966, 970; 741 NW2d 826 (2007) (Markman, J., dissenting). Certainly complainant’s inappropriate sexual behavior in school qualifies as sexual conduct under this definition. The prosecution immediately begins in opening and continues throughout the trial to present evidence of complainant’s sexual conduct, in violation of the rape-shield statute.

In a civil case involving privilege, this Court has found that “[t]he protection of the statute was waived” where “the door was opened to testimony” by the other party. *Newton v. Freeman*, 213 Mich 673, 677; 182 NW 25 (1921). Mr. Parks submits that this rule, involving

two opposing parties subject to a privilege, is applicable to the rape shield statute. Since the prosecution introduced evidence of specific instances of complainant's sexual conduct, Mr. Parks, the opposing party, is entitled to introduce evidence of complainant's prior accusations of sexual abuse against another.

5. The sexual abuse of a young child does not constitute “the victim’s sexual conduct” within the meaning of MCL 750.520j.

Mr. Parks contends that the rape shield act should not affect the admission of evidence of complainant's prior accusations. The legislative intent of the rape-shield act as demonstrated by the clear language of the statute does not implicate the sexual abuse of a child. This argument applies to both MCL 750.520j, the section of the statute referring to “specific instances of the victim's sexual conduct, and MCL 750.520j(1)(a), referring to the exception for “past sexual conduct.”

Mr. Parks adopts the legal reasoning and analysis in Justice Markman's dissent in this Court's denial of leave in *People v Piscopo*, 480 Mich 966, 970; 741 NW2d 826 (2007) (Markman, J., dissenting). “[C]onduct refers to volitional actions undertaken by a person; such actions would constitute ‘personal behavior’ and ‘conducting oneself.’ Thus ‘conduct’ does not seem to encompass prior sexual abuse, which is involuntary and not a person's ‘behavior.’” *Id.* 480 Mich at 970. This dissent explains that an interpretation applying the rape-shield statute to child sexual abuse would actually allow a child victim to be charged with criminal sexual conduct if raped by an older juvenile. *Id.* Finally the dissent demonstrates that the distinction between “conduct” and “activity” in the statute shows that “‘conduct’ refers to volitional activity.” *Id.*

In denying leave to appeal, in *Piscopo, supra*, this Court expressed no findings on the statutory analysis of the dissent. Mr. Parks contends that complainant's prior accusations of

abuse in the instant case demonstrate that the rape-shield statute does not implicate sexual abuse of a child.

The Washington Court of Appeals analysis in *State v Carver* is instructive:

The evidence proffered in this case does not fit within the concepts and purposes of the rape shield statute. First, the evidence sought to be admitted here was prior sexual abuse, not misconduct, of a victim. Added to this is the fact that the victims were young girls who were incapable of consenting to such acts. Under these circumstances the evidence is not prejudicial to the victims nor does it tend to discourage prosecution. Merely because the evidence pertains to a sexual experience does not mean we must strain to fit it into the special confines of the rape shield statute. Rather, we must apply general evidentiary principles of relevance, probative value and prejudice.

37 WashApp 122, 124; 678 P2d 842 (1984) (emphasis in original). Rather than prejudice the complainant with evidence of past “conduct,” the evidence of her prior accusations merely displays a complete context for evaluating the sexual abuse allegations against Mr. Parks.

6. Mr. Parks must be allowed to introduce the evidence of complainant’s prior accusations of sexual abuse in order to preserve his constitutional right of confrontation and to present a defense.

Even if this Court finds that the rape shield statute properly excludes evidence of complainant’s prior accusations, the exclusion still violates Mr. Parks’ constitutional rights to confrontation and to present a defense. The United States and Michigan Constitutions provide a defendant with the right “to be confronted with the witnesses against him.” US Const, Am VI; Const. 1963, art. 1, § 20. The Supreme Court has held that the Sixth Amendment right applies to both federal and state prosecutions. *Pointer v Texas*, 380 US 400, 406; 85 S Ct 1065 (1965). A central element to the right to confrontation is the right to cross-examine witnesses as a way to test the credibility of their testimony. *Davis v Alaska*, 415 US 308, 315-316; 94 S Ct 1105 (1974). By not allowing Mr. Parks to cross-examine the complainant and test the credibility of her testimony, the lower courts violated Mr. Parks’ Sixth Amendment right to confrontation.

The United States and Michigan Constitutions also provide a general right for a defendant to present a defense. U.S. Const., Ams. VI, XIV; Const.1963, art. 1, §§ 17, 20; *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984). The Supreme Court has stated that defendants must “be afforded a meaningful opportunity to present a complete defense.” *California v Trombetta*, 467 US 479, 485; 104 SCt 2528 (1984). This right can be found in either the Due Process Clause of the Fourteenth Amendment or the Compulsory Process or Confrontation Clauses of the Sixth Amendment. *Crane v Kentucky*, 476 US 683, 690; 106 SCt 2142 (1986). Additionally, the Michigan Constitution provides that “[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.” Const.1963, art. 1, § 13. The Supreme Court has explained the right to present a defense as follows:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” (*Washington v Texas*, 388 US 14, 19; 87 SCt 1920, 1923 (1967).

By not allowing Mr. Parks to present his version of the facts and offer an alternative explanation for the complainant’s age-inappropriate sexual knowledge and behavior, the lower courts violated Mr. Parks’ constitutional right to present a defense.

This Court has recognized that a defendant’s constitutional right to confrontation can be violated by excluding evidence under the rape shield statute. In *People v Hackett*, *supra*, 348, this Court held that in some situations, evidence of a complainant’s past sexual conduct “may not only be relevant, but its admission may be required to preserve a defendant’s constitutional right to confrontation.” This Court made a similar holding in *People v Adair*, *supra*, 485, further

noting that “*Michigan v Lucas*, 500 U.S. 145, 151, 111 S.Ct. 1743, 1747, 114 L.Ed.2d 205 (1991), suggested that an arbitrary interpretation and application of the rape-shield statute’s provisions could violate the right to confrontation.” The Court in *Lucas* thus created a standard in which the constitutionality of excluding evidence under rape shield laws was to be evaluated on a case by case basis.

The credibility of complainant’s testimony was the determinative issue in the case. Mr. Parks could not cross examine her regarding an issue that could seriously call her credibility into question. The exclusion of the evidence concerning the prior accusation of abuse therefore constitutes a violation of the Confrontation Clause.

Federal habeas cases analyzing prior accusations of sexual abuse are instructive. The Ninth Circuit has held that the defendant’s Sixth Amendment rights were violated when the trial court excluded evidence of prior abuse suffered by the complainant because the evidence provided an alternative explanation for both medical evidence and the victim’s age-inappropriate sexual knowledge. *LaJoie v Thompson*, 217 F3d 663, 669, 671-672 (CA 9, 2000). Similarly, in *White v Coplan*, 399 F3d 18 (CA1, 2005), the First Circuit reversed the denial of a habeas petition, holding that by excluding the evidence of past accusations of sexual assault because they were not demonstrably false, state courts violated the constitutional right to confrontation. *See also Fowler v Sacramento County Sheriff’s Dep’t*, 421 F3d 1027, 1039-1040 (CA 9, 2005) (“Thus, although the trial court concluded that there was no ‘indication’ that Lara actually overreacted or lied in the prior incidents and that the facts of the prior incidents were ‘very dissimilar’ from those here, in fact, there can be no doubt that the precluded cross-examination sufficiently bore on Lara’s reliability or credibility such that a jury might reasonably have questioned it.”); *compare Boggs v Collins*, 225 F3d 728 (CA6, 2000) (denying petition relief for exclusion of

prior complaint evidence where an evidentiary hearing determined that complainant had *not* made any prior accusation of rape, true or false, and the evidence thus only represented an attack on general credibility).

Where the prosecution's case depended on linking the complainant's age inappropriate sexual behavior and knowledge to abuse by Mr. Parks, the evidence of another source of abuse is critical to attack the credibility of complainant. Excluding evidence of complainant's prior accusations of assault is therefore just the sort of situation anticipated by *Hackett, supra*, where a constitutional confrontation violation has occurred. The exclusion of both this evidence and Mr. Parks' response to these accusations which demonstrated his lack of inclination or intent to commit sexual abuse, prohibited Mr. Parks from properly presenting a defense and confronting the witness.

7. To the extent trial counsel did not properly preserve all avenues for admission of the prior accusations, he exercised constitutionally ineffective assistance necessitating a new trial.¹⁰

Mr. Parks submits that by attempting to cross-examine complainant for impeachment purposes on her prior accusations, trial counsel properly preserved the issue for appeal. Nevertheless, to the extent counsel might not have properly explored the theories for admission of this evidence, counsel offered ineffective assistance.

A defendant accused of a crime has the right under the federal and state constitutions to the effective assistance of counsel. U.S. Const., amend VI; Const. 1963, Art. 1, § 20; *Strickland v Washington*, 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prevail on an ineffective assistance of counsel claim, a defendant must meet two criteria. He must first "show

¹⁰ Although ineffectiveness of counsel for not properly presenting the prior accusations is not a question presented by this Court's order requesting supplemental pleadings, it is an issue in both appellant's brief on appeal to the Court of Appeals, and appellant's *pro per* leave application to this Court. Accordingly, this issue is appropriate for review by this Court. MCR 7.302(G)(4)(a).

that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra*, at 687. In so doing, the defendant must rebut a presumption that counsel's performance was the result of sound trial strategy. *Id.* at 690. Second, the defendant must show the deficient performance was prejudicial. *Id.* at 687. Prejudice is established where there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694; *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995).

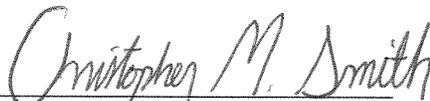
In the instant case, counsel failed to properly move for admission of evidence of complainant's prior accusations as permitted by the rape-shield act, the Michigan Rules of Evidence, and as required by Mr. Parks' constitutional rights to present a defense and confront his accuser. In a close credibility case, this evidence is necessary to counter the link between complainant's age-inappropriate sexual behavior and the allegations against Mr. Parks. Accordingly, counsel's deficient performance is prejudicial, and a new trial is required. *Strickland, supra*.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, Defendant-Appellant RICKY ALLEN PARKS asks that this Honorable Court either grant leave to appeal, or reverse and remand for a new trial.

Respectfully submitted,

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