

STATE OF MICHIGAN  
IN THE SUPREME COURT

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APPEAL FROM THE COURT OF APPEALS

Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

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PEOPLE OF THE  
STATE OF MICHIGAN,

Plaintiff/Appellee

VS.

RICKY ALLEN PARKS,

Defendant/Appellant

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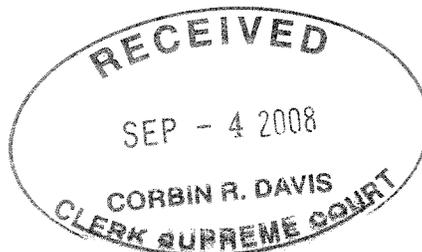
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SHIAWASSEE COUNTY  
NO. 02-007574-FC

THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN  
Amicus Curiae Brief  
IN SUPPORT OF PLAINTIFF/APPELLEE  
THE PEOPLE OF THE STATE OF MICHIGAN

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## SUMMARY OF ARGUMENT

The first issue presented is whether evidence of prior sexual assaults is barred by the rape shield law, MCL 750.520j. This issue encompasses questions 1, 2, 4 and 5 from the Court's May 16 order granting oral argument on the application for leave and inviting briefs *amicus curiae*. The statute bars admission of evidence of prior "sexual conduct" except for evidence of the victim's past sexual conduct with the actor, or evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. Though not defined in the statute, "sexual conduct" is a broad term which includes both consensual and non-consensual conduct. Evidence of prior sexual assaults is evidence of sexual conduct that is barred by the rape shield statute.

The second issue, which encompasses questions one, two and six in the order, is whether evidence of prior allegedly false allegations of rape are covered by rape shield, and if not, how to determine the admissibility of allegedly false prior accusations of sexual misconduct in a rape case. Prior practice, embodied in *People v. Hackett*, generally allowed a rape victim to be questioned about allegedly false prior allegations, and allowed extrinsic proof of the allegations and their falsity. This rule, sometimes couched in Confrontation Clause terms, is really one of allowing supposed evidence of untruthful character as proof that the victim lied once and is lying in this case. The attack thus allowed is a general attack on the credibility of a witness and should be governed by MRE 608's restriction on cross-examination and admission of extrinsic evidence. However, because the practice implicates the same policy considerations driving the rape shield law, similar protections should be in place. The proponent of the evidence must give notice of his intent to offer such evidence, and offer of proof of the nature of such

evidence by affidavit or otherwise. The court must determine from the offer whether the proponent has shown that the allegedly false allegations are in fact probative of untruthful character. A simple showing of falsity is insufficient. If the proponent's offer supports such a finding, the court should hold an in camera hearing to determine whether the allegations alleged by the proponent were in fact made, and are demonstrably false. This means something more than the presence of contradictory evidence. If the proponent is successful in overcoming both heavy burdens, the court may exercise its discretion in deciding if the victim can be cross-examined about the prior allegations, but in no case will extrinsic evidence be permitted.

Prior false allegations can also be offered under MRE 404(b). However, the additional burden of proving that the allegation is demonstrably false should be in place. Additionally, care should be taken that the proponent of the evidence actually establishes the logical relevance of the evidence to the enunciated proper purpose to avoid the danger that the evidence is used at trial to establish the character of the witness, circumventing both rape shield and MRE 608.

The third issue addressed is whether the trial court violated the Confrontation Clause by refusing to allow cross examination into prior sexual assaults. There is an important distinction between a general attack on the credibility of a witness and an attack offered to show a witness's bias. The latter implicates the Confrontation Clause while the former does not. The trial court did not err because cross examination into the prior sexual assault was a general attack on the credibility of the witness/victim, intended to give the jury a basis to infer that the victim is more likely to make up allegations because she had been victimized in the past.

## STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to hear this appeal in accord with MCL 770.3(6), MCL 770.12, MCR 7.301(A)(2) and MCR 7.302(G)(3). Defendant-Appellant was convicted by a jury of two counts of CSC 1<sup>st</sup> Degree. Defendant-Appellant filed an Appeal by Right on October 24, 2002, and his conviction was affirmed in an unpublished Court of Appeals decision, *People v. Parks*, , COA No. 244553.

Application for Leave to Appeal was filed, and by an Order date April 7, 2005, the application was held in abeyance pending a decision in *People. Jackson*, 475 Mich 909 (2006). On June 22, 2007, the Supreme Court ordered that this case be remanded to the trial court for an evidentiary hearing to afford the Appellant an opportunity to establish that the victim made a prior false allegation of sexual assault.

The trial court conducted the hearing and determined that there was no evidence of a prior false allegation. The Appellant testified at the hearing and asserted for the first time that the allegations of a prior sexual assault of the victim in this case by her grandfather were in fact true, and that he believed them.

On May 16, 2008, the Court ordered oral argument be set on the Appellant's application and asked for supplemental briefs from the parties addressing the following issues: (1) whether the evidence of prior accusations of sexual abuse 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 trial; (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.

The Court invited the filing of briefs amicus curiae from the Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan.

**STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

Amicus Curiae joins the Statement of Material Proceedings and Facts of the Plaintiff-Appellee, the People of the State of Michigan.

**STATEMENT OF QUESTIONS INVOLVED**

**I**

**ARE PRIOR SEXUAL ASSUALTS OF THE VICTIM PAST SEXUAL CONDUCT SUBJECT TO THE PROTECTIONS OF RAPE SHIELD?**

Amicus Curiae Answers “Yes”

**II**

**CAN ALLEGATIONS OF PRIOR SEXUAL ASSUALT BE INQUIRED INTO ON CROSS EXAMINATION AND PROVEN BY EXTRINSIC EVIDENCE UNDER MRE 608 OR MRE 404 IF NOT PROVEN DEMONSTRABLY FALSE?**

Amicus Curiae Answers “No”

**III**

**DOES BARRING THE ADMISSION OF EVIDENCE OF ACTUAL PAST SEXUAL ASSAULT OR PRIOR FALSE ALLEGATIONS CONSTITUTE A DENIAL OF THE CONSTITUTIONAL RIGHT TO CONFRONTATION OR THE RIGHT TO PRESENT A DEFENSE**

Amicus Curiae Answers “No”

## LAW AND ARGUMENT

### I

#### **PRIOR SEXUAL ASSUALTS OF THE VICTIM ARE PAST SEXUAL CONDUCT SUBJECT TO THE PROTECTIONS OF RAPE SHIELD**

Michigan's rape shield law reinforces that evidence of "past sexual conduct" is irrelevant unless offered for two specific, well-delineated purposes:

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.

The Court has asked, as a threshold matter, whether evidence of prior sexual assault committed on the victim is "sexual conduct" as that term is used in the rape shield statute. The courts of several other states have held that prior sexual assaults *are* sexual conduct and do fall within the ambit of rape shield. *Grant v. Demskie*, 75 F. Supp2d 201 (D NY, 1999) citing 21 states that do consider prior sexual assaults within the ambit of the rape shield law and only five holding prior assault outside the purview of rape shield's protection. See, also, *State v. Kobow*, 466 NW2d 747, 750 (Minn.App. 1991); *Hanlin v. State*, 356 Ark 516 (Ark. 2004) evidence of prior sexual assault properly excluded for failure to comply with rape shield notice and motion requirements; *State v Quinn*, 490 SE2d 34 (West Virginia, 1997) "...statements about sexual activity involving an alleged victim which are not false are evidence of the alleged victim's sexual conduct,

even though such conduct was involuntary – and such evidence is *per se* within the ordinary scope of rape shield laws.” *Quinn, id.* at 39.

A. Michigan has already Decided that “Sexual Conduct” Includes Prior Sexual Assaults

Michigan is in that majority of jurisdictions, and has been for some time. MCL 750.520j became effective in 1975. By 1982 this Court had before it a case involving the application of MCL 750.520j to prior sexual assaults. In *People v. Arenda*, 416 Mich 1 (1982), this Court upheld the trial court’s reliance on the provisions of rape shield to exclude evidence of prior sexual conduct between the eight-year-old victim and any other person. While it appears that the Court took for granted that prior sexual assaults are “sexual conduct” covered by rape shield, the good reason for doing so was expressed: “the only cases in which such evidence can arguably have more than a *de minimis* probative value are ones involving young or apparently inexperienced victims. **These children and others are the ones who are most likely to be adversely affected by unwarranted and unreasonable cross-examination into these areas. They are among the persons whom the statute was designed to protect.**” *Arenda*, 416 Mich at 13, emphasis added.

The application of rape shield to prior sexual assaults was further explained in *People v. Morse*, 231 Mich App 424 (1998). Important to this analysis, the Court of Appeals began by noting “our courts and others have ruled on the applicability of rape-shield statutes in cases of child sexual abuse.” *Morse, id.* at 430. The Court of Appeals continued by quoting the same passage from *Arenda* as quoted above. Ruling that “sexual conduct” as used in MCL 750.520j does not include sexual assault perpetrated on

young victims would necessarily mean that this Court would have to overrule, at least by implication, well-established precedent.

#### B. Michigan Should Remain in the Majority

There is good reason for Michigan to remain in the majority on this issue. None of the jurisdictions appear to have a statutory scheme similar to Michigan's, in which "sexual conduct" is used in both the penal law and the rape shield law, and the laws appear as a whole as they do in Michigan. Consequently none of the cases engaged in any textual analysis like the one that follows. Perhaps more compelling, some of the cases cited from other jurisdictions do not actually hold that prior sexual assaults are not "sexual conduct."

New Hampshire is a good example of how different laws will lead to different results. New Hampshire's rape shield law provides, in part, that "[p]rior *consensual* sexual activity between the victim and any person other than the [defendant] shall not be admitted into evidence in any prosecution under this chapter." RSA 632-A:6. Michigan has no such limitation in its law. Had the legislature intended to apply MCL 750.520j only to consensual sexual conduct it knew full well how to do it, and it did not.

Nevada is a good example of a state that may not actually be in the minority. The case cited, *Summitt v. Nevada*, 101 Nev. 159, 697 P.2d 1374 (1985), does not expressly hold that a prior sexual assault is not "sexual conduct" under its version of rape shield.<sup>1</sup> In fact, it appears to do just the opposite. Vernon Summitt was found guilty of two counts of sexual assault against a minor. At trial, the defendant offered evidence that the six year old victim had been sexually assaulted two years before. At least one act in the

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<sup>1</sup> NRS 50.090 states in part: "In any prosecution for sexual assault...the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness...."

prior assault was similar to one of the conviction offenses. Summit offered the evidence to show another source of the victim's sexual knowledge. The evidence was not admitted based upon rape shield. The Supreme Court of Nevada reversed the defendant's conviction. In doing so the Court actually applied the rape shield law, and held that the evidence was required to preserve the defendant's constitutional right to due process. Relying on a New Hampshire case, *State v. Howard*, 121 N.H. 53, 426 A.2d 457 (1981), the court held

in order to uphold the constitutionality of the statute, it would require that a defendant in a prosecution to which the shield law was applicable "must, upon motion, be given an opportunity to demonstrate that due process requires the admission of such evidence because the probative value in the context of that particular case outweighs its prejudicial effect on the prosecutrix. Such motion should, of course, be made out of the presence of the jury." 426 A.2d at 461. We are persuaded that this procedure would provide a proper means of deciding, on a case by case basis, whether such evidence should be admitted. *See Anaya v. State, supra*, 96 Nev. 119, 606 P.2d 156 (1980). *Summitt*, 697 P.2d at 1377.

Nevada, then, is in the majority of cases that consider prior sexual assaults to be sexual conduct under the rape shield law. Nevada is also in agreement with Michigan that such evidence should be admitted under limited circumstances to preserve the defendant's constitutional rights. Finally, like this Court in *Arenda* the Nevada Supreme Court ended with a caution to trial courts to "'be mindful of the important policy considerations underlying the rape-shield statute,' and accordingly 'should limit the admission of evidence of specific instances of the complainant's sexual conduct to the extent that it is possible without unduly infringing upon the defendant's constitutional right to confrontation.'" [*State v. Howard*, 121 N.H. 53, 426 A.2d at 462]" *Summitt*, 697 P.2d at 1377.

Missouri's place in the minority is not firm, either. In the case cited by *Demskie, State v. Lampley*, 859 S.W.2d 909 (1993), the Missouri court does not hold that prior sexual assaults are not sexual conduct under Missouri's rape shield law. Rather, the Missouri Court of Appeals split hairs. The defendant was convicted of two counts of sodomy against his nine year old step-daughter. The defendant was denied the opportunity to cross examine the victim about a prior complaint against another, which led to a conviction and removal of that person from the home. The defendant offered the facts of the prior sexual assault to prove prior knowledge, and offered the consequences of the complaint as proof of a motive to fabricate the charge to remove the present defendant from the home. The trial court denied the cross examination addressing only the prior sexual knowledge argument. The Missouri Court of Appeals upheld that decision, but reversed on the grounds that the defendant should have been allowed to cross examine on the *consequences* of the complaint. Rape shield is mentioned only in response to the dissent.

The dissent relies on application of § 491.015 RSMo 1986. That statute is intended to protect a complaining witness from questions regarding prior sexual conduct. Defendant in the present case never indicated an intention to go into prior sexual *conduct*. It was not necessary to the defense that a prior *complaint* which became beneficial to A.C. was substantial or not. Prior sexual activity of A.C. was not the stated subject of cross-examination. The subject was a prior *complaint* which resulted in a benefit and constitutes possible motive to fabricate the present complaint. *Lampley*, 859 S.W.2d at 911 [emphasis in original.]

The Court followed with a short example of a cross-examination illustrating how counsel could ask about the complaint without asking about specific sexual conduct that led to it. The gist of *Lampley* is that Missouri's rape shield did not apply because the prior complaint is not sexual conduct. *Lampley* did not decide that the prior assault was not

sexual conduct. That leaves a minority of two states that hold that a prior sexual assault is not sexual conduct.

### C. Analysis of the Text Compels the Conclusion that Sexual Conduct Includes Prior Sexual Assaults

Defining “sexual conduct” in such a crabbed manner would also do violence to the entire criminal sexual conduct statutory scheme. The phrase “sexual conduct” is not expressly defined, but clearly includes both consensual and nonconsensual sexual acts.

The universe of “sexual conduct” is further refined in MCL 750.520a into “sexual contact” and “sexual penetration.” Both “sexual contact” and “sexual penetration” are defined to include conduct *done to* and *done by* any person. MCL 750.520a(q) defines “sexual contact” as the “intentional touching<sup>2</sup> of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

- (i) Revenge.
- (ii) To inflict humiliation.
- (iii) Out of anger.”

By definition the sexual conduct described as “sexual contact” is engaged in by both the person being touched and the person doing the touching. If an eight-year-old touches the clothing covering the penis of an adult, both have engaged in “sexual conduct.” It is no less sexual conduct on the part of the adult being touched than child doing the touching. The “sexual contact” is not just “sexual conduct” but “criminal sexual conduct.” The fact

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<sup>2</sup> In this context, “intentional” means not accidentally.

that the child is under the age of thirteen years, or was forced to engage in the conduct makes the conduct criminal for one of those engaged in the conduct; it does not change its nature to something other than “sexual conduct” for both engaged in the conduct.

In the scenario above, the adult who is touched becomes the “actor” because he is the one charged with “criminal sexual conduct.” MCL 750.520a(a). The eight-year-old is the victim not because he was subject to a nonconsensual touching, but because he was the one who did the touching. MCL 750.520a(s).

The definition of “sexual penetration” is clearer still. MCL 750.520a(r) states: “‘sexual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.” The definition includes both consensual and nonconsensual acts. The lack of consent can make the “sexual conduct” of sexual intercourse criminal as to one of the parties engaged in the conduct: it does not make it anything other than “sexual conduct” on the part of either person.

Having established that rape shield’s “sexual conduct” includes prior sexual assaults, *People v. Morse*, 231 Mich App 424 (1998), sets out the procedure to determine whether prior sexual assaults on a child victim are admissible. First, the defendant must make an offer of proof showing that the evidence is relevant.

Second, the defendant must show that another was convicted of criminal sexual conduct against the complainant. The use of the word “convicted” is no accident here. Requiring proof of conviction avoids the waste of time and confusion that can attend a “trial-within-a-trial” if the defendant seeks to “prove” the prior event occurred.

Moreover, it gives full measure to the protection of victims inherent in the rape shield law. The prior acts of sexual abuse can be proven without resort to cross-examining the victim. To that end, the Court of Appeals directed trial courts to be mindful of the impact of cross-examination on a child, quoting the following with approval from *State v. Budis*, 125 N.J. 519, 533, 593 A.2d 784 (1991):

When assessing the prejudicial effect of such evidence, the court should consider the likely trauma to the child and the degree to which admission of the evidence will invade the child's privacy. Such prejudice may be diminished if the evidence can be adduced from sources other than the child. In the present case, as the Appellate Division suggested, the evidence could have been elicited from another witness, the official documents involving convictions arising out of prior abuse, or by stipulation. If the victim is questioned about the prior abuse, the court should guard against excessive cross-examination. [Id. (citation omitted).] *Morse*, 231 Mich App at 435, 436.

Third, and last, the facts underlying the previous conviction must be significantly similar to be relevant to the instant proceeding. This is especially true when the prior assault is offered to show an alternate source for a child victim's unique or advanced sexual knowledge. *Morse*, id.

Applying the law to the facts of this case is not a difficult task. The trial court did not do the analysis required in *Morse* because admission of a *true* allegation of a prior sexual assault was never at issue. This Court remanded the case to the trial court to conduct a hearing on whether there was evidence of any prior *false* allegations of sexual assault made by the victim. *People v. Parks*, 478 Mich 910 (2007). It wasn't until that hearing was held that the defendant asserted that the allegations made by the victim were true and that he believed them. Transcript of Remand Hearing at pages 35 and 36. In any event, any effort to admit such allegations fails in one important respect: the alleged

perpetrator of the prior sexual assault was never convicted. He was never charged. A conviction is necessary predicate to admitting such evidence under *People v. Morse*.

## II

### **PRIOR FALSE ALLEGATIONS ARE NOT SUBJECT TO RAPE SHIELD AND ADMISSIBILITY IS GOVERNED BY MRE 404 OR MRE 608**

This Court has addressed in recent years the attack on credibility that is made by offering evidence of allegedly false allegations of sexual assault. In *People v. Jackson*, 475 Mich 909 (2006), this Court held that evidence of a prior false allegation of sexual abuse is outside the coverage of the rape shield statute. Accordingly, the case was remanded to the trial court to determine whether defense counsel had a good-faith basis to present evidence regarding the alleged prior false accusation, and if so, whether the evidence of the alleged prior false accusation was offered as an attack on credibility or for some other proper purpose under MRE 404(b). If an attack on credibility, the exclusion of extrinsic proof from MRE 608 prevails. The case is silent on what procedure and burden of proof should be implemented to determine whether the allegation is actually false or not and whether it has any relevance on credibility, two touchstone requirements for admission.

#### A. False Allegations as an Attack on Character.

Evidence of an allegedly false prior allegation is most often used as an attack on the character of the victim. It is the simple argument that the victim lied once and must be lying again. This kind of attack is of ancient but thoroughly suspect lineage.

In *People v. Hackett*, 421 Mich 338; 365 NW2d 120 (1984) this Court, in ruling on the Constitutionality of the rape shield statute, said in *dicta* that “the defendant should

be permitted to show that the complainant has made false accusations of rape in the past.” *Hackett, id.* at 348. Although it is argued that admission of prior false allegations is constitutionally required, *Hackett* did not say so, and the cases cited in support of the notion are not grounded in the Confrontation Clause of the United States or Michigan Constitution.

In one cited case, *People v. Werner*, 221 Mich 123, 190 NW 652 (1922), the defendant sought to impeach the victim with a diary in which “obscene material” was written in English and German (the victim was a German immigrant with limited English skills). When the victim denied writing the material, the defendant sought to impeach her by asking whether she had admitted to the defendant that she wrote the material. The impeachment was denied, but first the Court noted “[m]uch latitude is allowed in permitting evidence to be introduced which may affect the credibility of a complainant in this class of cases. The fact that she has made similar charges against others may be shown. *People v. Evans*, 72 Mich 367, 40 NW 473 (1888); *People v. Wilson*, 170 Mich 669; 137 NW 92; 41 LRANS 216 (1912) We are impressed, however, that the language of the writing cannot be said to indicate a mania for accusing men of rape, or that it is of a nature to indicate such a morbid condition of mind or body as justified its reception.” *Werner, supra* at 127. The language plainly shows the basis for admitting false allegations is they represent a “mania for accusing men of rape” or “a morbid condition of mind or body” that is unique to women, and which has subsequently been extended to children. In other words, allegedly false allegations are proof of the victim’s character for credibility, or more accurately, lack of it **in sexual assault cases**.

Justification for this rule is sometimes made by reference to the unique nature of sexual assault cases, where the credibility of the complaining witness is critical to the prosecutor's case. *People v. Mikula*, 84 Mich App 108; 269 NW2d 195 (1978). There is no reason for including only rape in this class of cases, unless one buys into the myth of the lying woman. Nearly every case imaginable turns in some degree upon the testimony of a complaining witness. Innumerable examples can be imagined (or pulled from the published case reports) of robberies, assaults, or nearly any other type of crime where only two eye witnesses to the crime, the victim and perpetrator, exist. Yet in rape cases a special rule of impeachment has been created that would likely never be applied in any other class of cases.

Any case can involve a swearing match between two witnesses: an assault in which the defendant and the victim are alone and the defendant threatens the victim with imminent bodily injury; a kidnapping in which the defendant restrains the victim in an isolated location and the victim eventually escapes; an attempted theft in which the defendant and the victim are alone and the defendant grabs the victim's purse but is unable to get it away from the victim. In each of these examples, there is no physical evidence and there are no additional witnesses to the crime. In contrast, although some sex offenses have no corroborating physical evidence, many sex offenses do—such as evidence of victim penetration or traces of the attacker's DNA. So the complainant's and the defendant's credibility are no more critical issues in sex offense cases than in any other type of case.

*Lopez v. State*, 18 SW3d 220, 225 (Tex. Crim. App. 2000).

#### B. Procedure Governing Admission under MRE 608

How, then, should courts determine whether to admit allegedly false accusations as general attacks on character? There exists already a means to determine the admissibility of evidence of character for truthfulness. Properly understood as character

evidence, its admission should be governed by MRE 608 with its limitation on inquiry and proof by extrinsic evidence.

MRE 608(b) provides that a witness may be cross-examined on specific instances of conduct if the court first finds that the acts are probative of the witness's character for truthfulness or untruthfulness. However, extrinsic evidence to prove the prior act is not allowed; the cross-examiner must take the witness's answer. In a case of allegedly false prior allegations, the cross-examiner may ask "Isn't it true you falsely accused another of rape?" If the witness denies she made the allegation, the inquiry ends there. The cross-examiner may not call a witness or submit documentary evidence to contradict the denial.

It cannot be gainsaid that most every allegedly false allegation of rape will never get to the cross-examination stage. The court must determine first, that it is probative of character for truthfulness or untruthfulness; and, second, that the allegation was made and that it was false. It is here that the provisions of MCL 750.520j and the Rules of Evidence intersect.

The provisions of the rape shield law do not neatly fit allegedly false allegations. Such allegations have relevancy only to the extent that they are truly false. If they are true, the evidence is properly characterized as past sexual conduct, albeit non-consensual conduct. However, if the allegations are actually false, then the evidence is not of past sexual conduct but the absence of such conduct. Even so, the policy considerations behind the passage of MCL 750.520j are the same and a similar means of testing the relevance and admissibility should be in place. One need only look to the recent Kobe Bryant experience to see that a lengthy hearing at which witnesses are called to allege prior false accusations, and presumably witnesses to rebut that the allegations were made

or if made are false, creates for the victim the same problems – loss of privacy, being placed on trial as a crime victim, the trauma of reliving past rapes, and the resultant reluctance to report any rape- that the rape shield law tried to prevent. For this reason, while the allegations may fall outside the neat purview of the rape shield law, the same rules concerning notice, offer of proof, and in camera hearings ought to be provided. This is not as startling a suggestion as it may seem at first blush. Other jurisdictions have used the procedures from rape shield statutes in this way, most notably, *Graham v. State*, 736 NE2d 822 (Ind. Ct. App. 2000). Moreover, this Court’s decision in *Jackson*, *supra*, hints at just such a resolution when it remanded the case back for an evidentiary hearing.

The procedure which amicus suggests is this: that the defendant give notice of his intent to inquire by cross-examination into prior allegedly false allegations, sufficiently in advance of trial that an evidentiary hearing may be had. The notice must be accompanied by an offer of proof by affidavit or otherwise of the allegations and how they are false.

Moreover, the defendant’s notice and offer of proof must demonstrate how the prior false allegations are actually probative of character for untruthfulness. The focus on the initial inquiry is not on the falsity of the allegations, lest the court confuse falsity with probative value. “When evidence is admitted in this manner, the only nexus between the prior accusations and the current rape is that both charges concern sexual assault. This is insufficient evidence of context to show that the victim has a propensity to lie about rape.” D. Johnson, *Prior False Allegations of Rape: Falsus in Uno, Falsus in Omnibus?* 7 Yale J.L. & Feminism 243, 268 (1995). The focus at this stage is whether the proffered evidence is probative of character for untruthfulness, assuming that prior allegations of sexual misconduct were made and that they are false.

The probative value of the evidence is weak if it is doubtful that the alleged past events actually occurred. But even where there is no doubt as to their occurrence, the circumstances may be so different that they can have no bearing on the witness's veracity in the current case. Thus, even if the evidence showed that the witness made a false statement in the past, there must be a sufficient nexus between that statement and the current charge. Johnson, *Prior False Allegations*, *supra* at 627.

It is here that most proffers will fail. An analysis of the probative value will reveal that most allegedly false allegations are not probative of character for untruthfulness but rather rely on the “she lied once, she’s lying again” tautology.

Only if the proponent of the evidence can overcome this high burden should the court hold an in camera hearing. The issue at the hearing is primarily whether the proponent can prove that the allegations were actually false. To what burden should that proof be held? The burden should be a difficult one because of the danger of misuse of such character evidence:

The principal danger of character evidence is that it takes on an importance to the jury that may be disproportionate to its actual probative value, thereby prompting an improper decision. Psychological studies show that jurors infer that character evidence can be used to accurately predict behavior, but that this inference itself is doubtful. When rape mythology is added to the questionable proposition that behavior can be predicted by prior acts, the danger increases that the jurors will give disproportionate weight to the character evidence. The admission of such evidence is likely to give vent to the myth of the lying woman/innocent man on the part of the jury. As a result, the jurors may structure their beliefs in accordance with their preconceived ideas, rather than the actual events of the case. These risks are present whether or not extrinsic evidence is allowed, but if the inquiry moves beyond cross-examination, the danger is that they will rise to an unreasonable level. Johnson, *Prior False Allegations*, *supra* at 273.

Using the traditional “reasonable basis” test for cross-examination would eviscerate the necessary protections afforded by MRE 608; the cross-examination would be allowed in more cases than it is presently. An appropriate burden, and one applied in other

jurisdictions, *see, Graham v. State*, 736 NE2d 822 (Ind. Ct. App. 2000), is that the proponent of the evidence must show that the allegations were “demonstrably false.” An allegation is not “demonstrably false” if it is merely contradicted by some witness, or was reported to authorities but not charged<sup>3</sup>, or if charged and tried the defendant was acquitted.<sup>4</sup> “Demonstrably false” can mean only two things: that the proponent can produce evidence that the allegation was a physical impossibility or that the victim, in the in camera hearing, admits to making the allegation and admits to its falsity<sup>5</sup>.

If the proponent of the evidence can sufficiently show that the evidence is probative of character for untruthfulness, and it meets the balancing test of MRE 403, and that the prior allegations were made and are demonstrably false, the proponent will be allowed to cross-examine the victim. Even so, MRE 608 (b)’s proscription on proof by extrinsic evidence still holds; the defendant is left to accept the victim’s answer.

#### C. Admissibility of Allegedly False Allegations under MRE 404(b)

In the order of remand in *Jackson*, *supra*, the Court gave the defendant the opportunity to establish whether he sought to admit the evidence of an allegedly false allegation as an attack on the victim’s character, or for a proper purpose under MRE 404(b). Much ink has already been spilled over the procedure for admitting evidence pursuant to 404(b), most notably in *People v. Vandervliet*, 444 Mich 52 (1993). It has become axiomatic that the proponent of the evidence must establish that it is (1) offered

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<sup>3</sup> Rape is an underreported and undercharged crime. The propensity of law enforcement and prosecuting officials to refuse to investigate and charge rape cases has been well documented. “F.B.I. crime statistics show that rape has the highest percentage of “unfounded” complaints. 1993 FBI Uniform Crime Reports for the United States 24. Of all attempted rapes, only 52.5% were actually reported to the police. Bureau of Justice Statistics, U.S. Dep’t of Justice, *Criminal Victimization in the United States* 102 (1992).” Johnson, *supra*, note 166.

<sup>4</sup> See, generally, 71 A.L.R.4th 469 for case citations.

<sup>5</sup> Care should be taken in assessing a victim’s recantation. There can be many reasons why the recantation, and not the allegation, is false.

for a proper, non-character purpose, (2) the evidence must be relevant to proving that proper purpose, and (3) the evidence's probative value is not substantially outweighed by the danger of unfair prejudice.

But because evidence of a prior allegedly false allegation has relevance only if it is actually false, the proponent of the evidence bears the added burden of proving falsity under MRE 404(b). For the reasons argued above, the appropriate burden should be that the proponent of the evidence prove that the prior allegation is "demonstrably false" before the court can move on to consideration of relevance.

Relevance and proper purpose are, of course, intertwined. It is not enough for the proponent to announce a proper non-character purpose. The proponent must show how the evidence is logically relevant to prove that non-character purpose. In this case, any discussion of admitting the evidence of the victim's prior allegation under MRE 404(b) is speculative, at best. The Appellant did not offer the evidence for that purpose, and no record exists showing what a potential proper purpose may be and how the evidence offered is relevant to proving that proper purpose.

### III

#### **BARRING INQUIRY INTO PAST SEXUAL ASSAULTS DOES NOT VIOLATE THE CONSTITUTIONAL RIGHT TO CONFRONTATION OR THE RIGHT TO PRESENT A DEFENSE**

The Sixth Amendment to the United States Constitution protects the important trial right of confrontation in criminal cases. The principle means of confrontation is cross examination. This does not mean, however, that the right of cross examination is without limits. "The right of cross-examination is not without limit; neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant

evidence or cross-examine on any subject. *People v. Hackett*, 421 Mich. 338, 347, 365 N.W.2d 120 (1984); *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). The right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *People v. Arenda*, 416 Mich. 1, 8, 330 N.W.2d 814 (1982).” *People v. Adamski*, 198 Mich App 133, 138 (1993). One such limit is expressed in the distinction between general attacks on credibility, which are not constitutionally protected, and attacks on motive, bias or interest, which are.

The distinction between general attacks on credibility and attacks on motive, bias or interest of the witness is a crucial one, made clear in *Davis v. Alaska*, 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974):

One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, *Evidence* 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. [] *Greene v. McElroy*, 360 U.S. 474, 496 (1959). *Davis v. Alaska*, *supra* at 317.

#### A. Impeachment of General Credibility is not Constitutionally Protected

At trial it was clear that the Appellant intended to use the prior report of sexual assault as general impeachment. At the preliminary examination the victim she was asked whether she had made any reports of any other sexual assaults. She answered no. Vol. 1, pg. 170. This, of course, is not the case. She had made a report. If the questioning goes no further, and setting aside whether this is a collateral matter, this is garden variety impeachment. The Appellant could, one supposes, argue that the witness is not to be believed because she cannot remember the prior event. However, limiting cross examination for the purpose of general impeachment is left to the discretion of the trial court. *People v. Mumford*, 183 Mich.App. 149, 154, 455 N.W.2d 51 (1990).

#### B. If True, the Evidence of Prior Sexual Assault is a General Attack on Credibility

The suggestion that the victim's allegations of a prior sexual assault might be true first arose at the evidentiary hearing after remand. Were there to be another trial, the evidence would appear to be offered as a general attack on credibility. At the evidentiary hearing, and apparently to the surprise of his counsel, the Appellant made the argument this way: "Projection – prior, give prior knowledge and she – it's for projection images. ***She sees somebody else doing the act and claims me.***" Hearing Transcript, p. 38 [emphasis added]. In other words, a child who is victimized once is more likely to make up allegations than one who has not been victimized. It gives the jury a basis to infer that she is less trustworthy than the average citizen, i.e. one who has not been raped.

#### C. Evidence of Prior False Allegations is a General Attack on Credibility

The Appellant's argument fares no better if he maintains that the allegations against the victim's grandfather are false. The attack is still one on the general credibility

of the victim. That fact is eloquently made in *Boggs v. Collins*, 226 F3d 728 (CA 6, 2000). In that Ohio rape case, the defendant argued his Right to Confrontation was abridged when he was not allowed to cross-examine the victim on an alleged prior false allegation of rape. As an offer of proof, the defendant was prepared to call a witness named Copas to testify that the victim had accused Rick Yazell of sexually assaulting her one month prior to the assault by Boggs. In addition, the defendant was prepared to call Yazell to testify that he in fact did not rape the victim.

In his *habeas* proceeding Boggs asked the Federal Court to find that the trial court's restriction on cross examination into the allegedly false allegations violated the Constitution. The 6<sup>th</sup> Circuit disagreed. The decision is worth quoting at length.

Thus, although *Davis* trumpets the vital role cross-examination can play in casting doubt on a witness's credibility, not all conceivable methods of undermining credibility are constitutionally guaranteed. In particular, the *Davis* Court distinguished between a "general attack" on the credibility of a witness--in which the cross-examiner "intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony"--and a more particular attack on credibility "directed toward revealing possible biases, prejudices, or ulterior motives as they may relate directly to issues or personalities in the case at hand." 415 U.S. at 316. The Court, concluding that "[t]he partiality of a witness . . . is always relevant as discrediting the witness and affecting the weight of the testimony," found this latter type of attack to be part of the constitutionally protected right of cross-examination. *Id.* Faced with a situation where a trial court barred cross-examination bearing on a witness's bias and motive to testify, the Court concluded that the countervailing state interests "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320. In a concurrence, Justice Stewart underscored that the Confrontation Clause was implicated only because *Davis* was seeking to show bias or prejudice. "[T]he Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination" about past convictions. *Id.* at 321 (Stewart, J., concurring).

In *Van Arsdall*, the Court emphasized that *Davis* and prior decisions recognized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of

cross examination." 475 U.S. at 678-79 (quoting *Davis*, 415 U.S. at 316-17). It then elaborated that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to *show a prototypical form of bias* on the part of the witness." *Id.* at 680 (emphasis added). The Court therefore criticized the trial court's refusal to allow Van Arsdall to cross-examine a key prosecution witness about the fact that charges of public drunkenness had been dismissed in exchange for his testimony. *See id.* at 679. This limitation foreclosed investigation into an event "that a jury might reasonably have found [to have] furnished the witness a motive for favoring the prosecution in his testimony," and therefore violated the Confrontation Clause. *Id.* Courts after *Davis* and *Van Arsdall* have adhered to the distinction drawn by those cases and by Justice Stewart in his concurrence--that cross-examination as to bias, motive or prejudice is constitutionally protected, but cross-examination as to general credibility is not. *See Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (finding error in a trial court's refusal to allow cross-examination on a rape victim's extramarital relationship when that relationship would have shown the victim's bias or motivation); *United States v. Abel*, 469 U.S. 45, 56 (1984) (permitting impeachment evidence that a witness was a member of the Aryan Nation, which showed his potential bias against a black defendant); *see also United States v. Stavroff*, 149 F.3d 478, 481 (6th Cir. 1998) (discussing *Davis* and *Van Arsdall* in the context of witness motivation and bias); *Dorsey v. Parke*, 872 F.2d 163, 166 (6th Cir. 1989) (noting that in *Davis* and its progeny, courts have distinguished "between the core values of the confrontation rights and more peripheral concerns which remain within the ambit of the trial judge's discretion").

When faced with alleged prior false accusations of rape, federal courts have adhered to the fine line drawn in *Davis* and *Van Arsdall*, finding cross-examination constitutionally compelled when it reveals witness bias or prejudice, but not when it is aimed solely to diminish a witness's general credibility. In *Hughes v. Raines*, 641 F.2d 790 (9th Cir. 1981), the trial court refused to allow defense counsel to cross-examine an alleged rape victim about an alleged prior false accusation of rape. The Ninth Circuit relied on the distinction drawn in *Davis* "between an attack on the general credibility of the witness and a more particular attack on credibility" through revealing biases, prejudices or ulterior motives. *Id.* at 793. Looking closely at the defendant's purpose for introducing the testimony, the Court found that the defense was simply asking the jury to make an inference "that because the complaining witness made a false accusation of attempted rape on a prior occasion, her accusation in this case was false." *Id.* In other words, the intended cross-examination "was not to establish bias against the defendant or for the prosecution; it merely would have been to attack the general credibility of the witness on the basis of an unrelated prior incident." *Id.* Under *Davis*, the *Hughes* Court

concluded, limiting cross-examination for that purpose did not violate the Confrontation Clause. *See id.* at 793.

Similarly, in *United States v. Bartlett*, 856 F.2d 1071 (8th Cir. 1988), a rape defendant challenged as unconstitutional the district court's refusal to admit evidence of a victim's alleged prior false accusation of rape. Like the Ninth Circuit, the Eighth Circuit noted the distinction between cross-examination regarding a witness/accuser's possible biases, prejudices or ulterior motives and cross-examination and evidence introduced simply to attack her general credibility. *See id.* at 1088-89. The court found that the latter purpose--and the inference that "because the victim made a false accusation in the past, the instant accusation is also false," *id.* at 1089--fell below the Sixth Amendment threshold. Because in the case before it, "the evidence of the alleged prior false accusation of rape was offered solely to attack the general credibility of" the victim, the district court's refusal to allow the attempted cross-examination did not violate Bartlett's confrontation rights. *Id.* Other courts have echoed the reasoning from *Hughes* and *Bartlett*. *See, e.g., Hogan v. Hanks*, 97 F.3d 189, 191 (7th Cir. 1996) (noting that *Davis* and other cases did not suggest that "the longstanding rules restricting the use of specific instances and extrinsic evidence to impeach a witness's credibility pose constitutional problems"); *United States v. Berkley*, No. 96-4181, 1997 WL 657007, at \*2 (4th Cir. 1997) (unpublished opinion) (finding that alleged prior false accusation had little relevance "to the accuser's credibility or veracity respecting the charge being prosecuted"); *Rowan v. Kernan*, No. C95-01290, 1995 WL 674904, at \*1 (N.D. Cal. 1995) (unpublished opinion) (reading *Davis* and *Van Arsdall* to say that while the constitution protects cross-examination if it concerns bias, motive or prejudice, "general attacks on the credibility of a witness do not raise the constitutional concerns which the confrontation clause addresses"); Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. Legis. 125, 141 (1998) (noting that whether an alleged false accusation of rape must be admitted under the Confrontation Clause turns on the distinction between proving bias or prejudice and proving general credibility). *Boggs, id.* at 736-738.

In sum, whether the Appellant argues that the prior sexual assault actually occurred, or he argues that it is a false allegation, he is using the evidence as a general attack on the victim's credibility. As such, the Confrontation Clause is not implicated, never mind violated, by the trial court's refusal to allow the cross-examination.

**RELIEF REQUESTED**

Wherefore, amicus Prosecuting Attorneys Association of Michigan respectfully requests that application for leave to appeal be denied.

Respectfully Submitted,  
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September 4, 2008

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