

STATE OF MICHIGAN  
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS  
Bandstra, P.J., Sawyer and Fitzgerald, JJ.

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

vs

No. 126509

RICKY ALLEN PARKS  
Defendant-Appellant.

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COA NO. 244553

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126509

BRIEF OF THE WAYNE COUNTY PROSECUTING ATTORNEY  
AS AMICUS CURIAE  
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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## Statement of the Question

### I.

Extrinsic proof of prior bad acts bearing on untruthfulness is not permitted under Rule 608, though cross-examination may be allowed. A claim that a victim in a criminal sexual conduct case has made previous unrelated false claims of sexual assault falls squarely within Rule 608, so that extrinsic proof is prohibited. Before cross-examination is permitted must the defendant show by proof that is virtually dispositive that a prior allegation was made and that it was false?

Amicus answers: "YES"

## Statement of Facts

Amicus joins the statement of facts of the People of the State of Michigan.

## Argument

### I.

Extrinsic proof of prior bad acts bearing on untruthfulness is not permitted under Rule 608, though cross-examination may be allowed. A claim that a victim in a criminal sexual conduct case has made previous unrelated false claims of sexual assault falls squarely within Rule 608, so that extrinsic proof is prohibited. Before cross-examination is permitted the defendant must show by proof that is virtually dispositive that a prior allegation was made and that it was false.

A. Preface: "Nutshell" answers to the court's questions; preservation of issues

(1) Nutshell answers

The questions of the court, and the short answers of amicus to the questions, are:

- "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."

No; further, amicus submits that the matter must be judged as it was presented to the trial court at the time of the *trial*, and not later, and the question is whether the trial judge erred, and erred reversibly, and he did not.

- **"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."**

Yes, different principles apply depending on whether the allegations were true, or whether they were claimed to be false.<sup>1</sup> In addition, amicus would note that an offer of proof that the victim had made a previous allegation, that there was an investigation, and that no criminal charges resulted is no proof at all that the allegations were false. Moreover, even had a proper offer of proof been made, inquiry, rather than intrinsic proof, might have been permissible, but only on a showing that the previous allegations were "demonstrably false." See *infra*.

- **"Whether the circuit court's ruling at the defendant's trial prohibiting the further discovery and introduction of this evidence constituted reversible error."**

Respectfully, this framing begs a question; that is, whether the trial judge "prohibited the further discovery and introduction" of this evidence. Trial is not the time to "discover" the evidence one seeks to introduce. If the defense had evidence that there were prior allegations that were demonstrably false nothing prevented it from saying so; if the defense instead believed that prior allegations were made which were *true* and had a theory of admissibility on that basis, nothing prevented it from saying so. In truth, it seems that all the defense wanted to do was to present evidence that the victim had, while very young, claimed an assault by a family member, and would now say she had never made such a claim (recalling her age at the time of the prior allegation is important here), so that, as to this unrelated matter, the victim was making inconsistent statements, and this undermined her credibility. The evidence is plainly not admissible for this purpose, and the theories discussed now have arisen only on appeal.

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<sup>1</sup>See e.g. *State v Quinn*, 490 S.E.2d 34, 39 (West Virginia, 1997), observing that "most if not all jurisdictions" that have considered the applicability of rape shield laws have taken the view that without a threshold showing of falsity prior actual assaults are within rape-shield protections.

- **"Whether such evidence is subject to the rape shield statute."**

Again, this depends on whether prior allegations are offered as true or false. If offered as true, then except to show the origin of pregnancy, semen, injury or disease, which is permissible on a proper showing, or to show "age-inappropriate" knowledge of a child, again on a proper showing (see *infra*), that a victim was *actually* previously assaulted would simply be irrelevant, and covered by the rape-shield protection. See e.g. *State v Quinn*, 490 S.E.2d 34, 39 (West Virginia, 1997), observing that "most if not all jurisdictions" that have considered the applicability of rape shield laws have taken the view that without a threshold showing of falsity prior actual assaults are within rape-shield protections.

- **"Whether the sexual abuse of a young child constitutes 'the victim's past sexual conduct' within the meaning of MCL 750.520j(1)(a);"**

Again, yes, "most if not all jurisdictions" that have considered the applicability of rape shield laws have taken the view that without a threshold showing of falsity prior actual assaults are within rape-shield protections.

- **"Whether the defendant in this case must be allowed to introduce the evidence to show the complainant's prior accusations of sexual abuse in order to preserve his constitutional right of confrontation and to present a defense."**

Refusal to allow admission of an *actual* past assault here would *not* fall within those narrow circumstances—to be discussed subsequently—that might implicate the Constitution. And defendant made no attempt to offer any prior allegation as *true* in any event. Further, MRE 608(b), with regard to prior false accusations, is not unconstitutional.

Amicus will argue that the controlling principle of law with regard to claims of prior false allegations is contained in MRE 608, and that, in regard to alleged prior false claims of sexual assault, MRE 608 and rape-shield principles coalesce. That is, if the alleged false claim of a prior sexual assault is determined by the trial judge *not* to be false, then both Rule 608 as well as the rape-

shield provisions prohibit either questioning or evidence regarding the prior assault, the rape-shield provisions because involved is then a prior sexual act (albeit nonconsensual), and Rule 608 because since the claim is true rather than false it is not relevant to untruthfulness and defendant's theory of admissibility disappears. Similarly, if it is determined by the trial judge that the allegation that a prior claim of sexual assault was even *made* is insufficiently supported, no cross-examination or extrinsic proof can be permitted, as there can be no relevance under Rule 608 if no claim, false or otherwise, was even made. Finally, if the trial judge determines that the allegation of a false claim *is* sufficiently supported,<sup>2</sup> Rule 608 permits only cross-examination, prohibiting any extrinsic proof on the matter. Procedurally, then, in order for the trial judge to make these determinations, notice as provided in the rape-shield statute should be provided and an in camera hearing held. Alternatively, simply as a foundational matter under Rule 608 an in camera hearing is required, where the proponent of the evidence must make the necessary evidentiary showing. Either way, one comes out the same place.

**(2) The issues now being litigated were not properly preserved below**

Here, complex theories of admissibility have arisen only on appeal, and primarily in this court; at trial, the defense appears to have wished only to bring out that while at the preliminary examination the victim had denied ever making claims of sexual misconduct against her grandfather, she had actually (when very young) made such a claim, resulting in an investigation but no charges. The defense "point" was that the victim's current testimony about that unrelated event was inconsistent with her allegations at that time, and that these inconsistencies regarding this wholly unrelated event undermined the victim's credibility (defense counsel specifically stated, in response

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<sup>2</sup> See section C.,*infra*, for argument as to the appropriate foundation.

to the prosecution's motion in limine, that he wanted to ask "'Did she ever indicate to you if anyone else had touched her inappropriately?' solely for impeachment purposes."). Nothing prevented defense counsel from arguing that he had information that the prior claim was demonstrably false, and nothing prevented him from saying that the prior claim was true but admissible on some basis. Neither argument was made.

Defendant's theory in the Court of Appeals differed from that offered in the trial court. Rather than the victim having once alleged an unrelated assault, while now she said no one else had ever touched her inappropriately (the prosecution told the trial judge she simply had no memory of it, given her age at the time of the prior allegations), with this inconsistency undermining her credibility, defendant for the first time alleged that the purpose of the evidence sought to be introduced was "to show that the alleged victim had made prior false allegations against others" so as to undermine her credibility on *that* basis. As Justice Corrigan aptly pointed out in her dissent to the initial order of remand from this court, this new theory of admissibility was forfeited by failure to raise it in the trial court. MRE 103(a). Justice Markman's point in concurring with the order of remand, and in disagreement with Justice Corrigan, that because the "substance of the evidence" was "apparent from the context" defendant thereby satisfied MRE 103(a)(2) is not well taken. One must not make only an offer of proof as to the substance of the evidence, but the *theory of admissibility* (this is inherent in offering the evidence as *proof* of something; it is proof of nothing if it is not admissible), and cannot change admissibility horses on appeal.<sup>3</sup> The theory offered at trial was not

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<sup>3</sup> In the federal system plain-error review is routinely applied under FRE 103(a)(2) to claims that evidence was improperly excluded where the theory of admissibility pressed on appeal was not pressed in the trial court. See *e.g.*, *United States v. Seymour*, 468 F.3d 378, 387 (CA 6, 2006) (applying plain-error review to exclusion of evidence where ground for admission pressed on appeal was not raised below); *United States v. Humphrey*, 279 F.3d 372, 377-78 (CA

the theory offered on appeal (or now); as to defendant's "new" theory (that the prior allegations were false) he made no offer of proof whatsoever—that an investigation had been undertaken and no charges brought is no evidence whatsoever that the acts did not occur (especially the acts alleged, which left no physical trauma on the person of the victim). Review is for plain error, which can be shown neither on the theory that the victim made a prior false accusation, or that the victim made a prior accusation which was true. The Court of Appeals should simply be affirmed without further ado, the defense not having preserved the claim that the victim made a prior false accusation, this court having remanded for an evidentiary hearing nonetheless and the trial court having found no evidence of a prior false accusation (even the defendant testified he believed the victim *had* previously been assaulted), and no theory of admissibility on the basis that the victim had *actually* previously been assaulted *ever* having been offered.

**B. Prior False Accusations: Michigan Case Law**

*People v Hackett*<sup>4</sup> is on occasion<sup>5</sup> cited regarding alleged false accusations of sexual assault, but *Hackett* is a rape-shield case. It involved issues of admissibility of prior specific acts of the

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6,2002) (similarly); *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 748-49 (6th Cir.2005) (offer of evidence failed to satisfy Rule 103(a)(2) because theory offered on appeal differed from that offered in trial court); *Reese v. Mercury Marine Div. of Brunswick Corp.*, 793 F.2d 1416, 1421 (CA 5, , 1986)("in asserting objections to a trial court's exclusion of evidence, a party is required under Fed.R.Evid. 103(a)(2) to carefully articulate every ground for which the evidence is admissible. . . . Failure to do so renders the district court's ruling reversible only upon a finding of plain error"). See also McCormick, *Evidence* § 51, at 112 (1972). (" . . .if evidence is excluded because it is inadmissible for its only articulated purpose, the proponent of the evidence cannot challenge the ruling on appeal on the ground that the evidence 'could have been rightly admitted for another purpose'").

<sup>4</sup> *People v Hackett*, 421 Mich 338 (1984).

<sup>5</sup> See order in *People v Jackson*, 472 Mich 884 (2005).

victim and reputation of the victim, but in neither *Hackett* nor its jointly decided companion case was the question of admissibility of alleged prior false claims of sexual assault presented. Justice Boyle's statement in the case, made in passing, that "the defendant should be permitted to show that the complainant has made false accusations of rape in the past"<sup>6</sup> is dicta.<sup>7</sup> What of cases preceding *Hackett*?

In a case decided over a century ago, the defendant, one Evans, was charged with the rape of his daughter, a girl of 14 years. The child was asked on cross-examination if she had not made charges of the same nature against other men who were perfectly innocent. On objection, the trial court allowed the answer, but noted to counsel that he would be bound by the answer. The victim answered, "no." Defense counsel attempted to admit evidence that the girl had made accusations of a similar nature against her brothers which were untrue, and also against other persons. Though the trial judge allowed the questions, he again held that extrinsic proof was not permitted, finding the matter to be collateral. This court found error:

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<sup>6</sup> *Hackett*, at 348-349.

<sup>7</sup> *Hackett* cites *People v Werner*, 221 Mich 123 (1922), but the case is not a "false claim" case. Rather, the question in *Werner* went to what today would be termed the "source of injury." As confirmation of rape, the doctor testified that the victim had a ruptured hymen. To counter this evidence, the defense wished to show that the victim had had intercourse with other men. The trial judge allowed cross-examination but not extrinsic proof, and this court found error because "[S]pecific acts with others than defendant may be shown to rebut corroborating circumstances, as when the woman is pregnant or has miscarried or given birth to a child, or where she was infected with venereal (sic) disease, or where a physician has testified that the hymen was re-ruptured"(sic). This principle is carried forward under the rape-shield provisions. The court did note in passing that evidence that a rape complainant has "made similar charges against others may be shown," but this remark was made as the court was holding that certain allegedly obscene material—the content of which was not revealed in the opinion—that defendant claimed the victim had written (she denied it) and which the trial judge refused to admit could *not* "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." 221 Mich at 127.

...[the jurors] ought to have been made acquainted...with the mental and moral qualities of the girl. If she was accustomed, and had on numerous occasions, as claimed by counsel for respondent, made statements charging, not only her brothers, but numerous other men of that community, with other similar offenses, and then admitted the falsity of such charges, it would have a tendency to show a morbid condition of mind or body, and go a long way in explaining this charge....It is claimed that the testimony offered would tend to show that she was the subject of hallucinations upon this subject, and is in its nature independent evidence, and in no sense collateral.<sup>8</sup>

That the case, and the principle expressed, are from a by-gone time is revealed by its reliance on a holding by Justice Cooley writing for the court in *Derwin v. Parsons*.<sup>9</sup> In an assault and battery tort case, the court said that "[T]o the question whether [the victim] had not made charges similar in nature against two other persons objection was made, but we have no doubt it was proper to allow them, and also to prove the facts if she denied having made the charges. The probability that a woman who conducts herself properly will be frequently assaulted is very small, and every new complaint therefore tends to cast doubt upon those which preceded it." This quaint notion ("the probability that a woman who conducts herself properly will be frequently assaulted is very small") belongs to a different age and is now outmoded; this statement was made, after all, at a time when rape trials were governed by principles which have in more modern times been repudiated, as evidenced by this instruction, unexceptionable at the time: "*First*. 'The jury must be satisfied the connection was had by force, against the will of the prosecutrix, and that there was the utmost

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<sup>8</sup> *People v Evans*, 72 Mich 367, 380 (1888). See also *People v Wilson*, 170 Mich 669, 671-673 (1912), where the defense wished to cross-examine the victim regarding alleged prior false claims of rape made against three different men (the victim allegedly having admitted the falsity after making the accusations), and also to admit the extrinsic evidence, in order to show that the victim was "subject to hallucinations in making charges of this kind," this court finding error in the failure to allow the proof under *Evans*.

<sup>9</sup> *Derwin v. Parsons* 52 Mich. 425, 427 (1884).

reluctance on her part; otherwise, they must acquit the defendant.' *Second*. 'if the jury have any reasonable doubt as to whether the complaining witness made as much resistance as she could have done, either by physical resistance or outcry, then they must acquit.'<sup>10</sup>

The more modern Michigan "false accusation" cases fail to take note of the promulgation in this state of an evidence code. These cases simply make the statement that "[I]n a prosecution for a sexual offense, the defendant may cross-examine the complainant regarding prior false accusations of a similar nature and, if she denies making them, submit proof of such charges,"<sup>11</sup> citing the earlier cases. But this "principle" does not, with regard to extrinsic proof, survive the promulgation of the Michigan Rules of Evidence, and as to cross-examination both those rules and the rape-shield provisions require certain procedural protections by way of foundation.

### **C. Rule 608 and the Rape-Shield Provisions Interact and Overlap**

#### **(1) The Rules**

Rape-shield protections are found both in statute and in our evidence code. MRE 404 prohibits the use of character proof with regard to any victim other than a homicide victim where self-defense is raised, and then reputation or opinion evidence may be offered on the trait of

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<sup>10</sup> *People v. Crego*, 70 Mich. 319, 320 (1888). And see *People v. Geddes*, 301 Mich. 258, 261 (1942)("The degree of resistance required to be shown in rape cases is generally said to be 'resistance to the utmost"). And there is the rather remarkable statement of Dean Wigmore that "[N]o judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician" (emphasis in the original). 3 Wigmore, *Evidence* (Chadbourn Revision) § 924a, p. 736. As one court has well put it, "[N]otwithstanding our great respect for this eminent authority on the law of Evidence, this statement never has been and is not in accord with the law of this State and is, in our opinion, completely unrealistic and unsound." *State v. Looney*, 240 S.E.2d 612, 622 (N.C. 1978).

<sup>11</sup> See *People v. Mikula*, 84 Mich.App. 108, 115 (1978); *People v. Slovinski*, 166 Mich.App. 158, 170 (1988).

aggression. Even where character proof is allowed, specific acts are barred as a form of proof by MRE 405(a).<sup>12</sup> MRE 404(a)(3) allows evidence of specific acts of the victim's past sexual conduct with the defendant (the evidence goes to a defense of consent), and evidence of past sexual activity with third parties that goes to showing the source or origin of semen, pregnancy, or disease.<sup>13</sup> These uses of specific acts are not character proof at all, the evidence being offered for purposes other than the character of the victim. The statute contains the same limitations, and adds a procedural requirement<sup>14</sup> should the defendant seek to offer evidence of sexual activity of the victim for a permissible purpose. MCL §750.520j(2) provides:

If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

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<sup>12</sup> MRE 405(b) allows admission of specific acts as a permissible form of proof of character where "character or a trait of character" is an "essential *element* of a charge, claim, or defense...." (emphasis supplied). Amicus is unaware of any crime or any defense where character is an "essential element." See e.g. *United States v Keiser*, 57 F3d 847 (CA 9, 1995) ("The relevant question should be: would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense? If not, then character is not essential and evidence should be limited to opinion or reputation.... We conclude...that...violent character (of the victim) does not constitute an essential element of...the claim that the shooting was justified ...").

<sup>13</sup> Though the Rule does not include source of injury, its is doubtless true that if the source of injury to the victim was relevant, evidence that the injury could have been caused during sexual activity with a third party would be admissible.

<sup>14</sup> The notice and hearing requirement is not in conflict with Rule 404(a)(3), but complementary to it. See *In Re Proposed Michigan Rules of Evidence*, 399 Mich 899, 972 (1977).

MRE 608 governs character proof with regard to the credibility of a witness. Cross-examination is permitted on specific acts of the witness, within the discretion of the trial judge, where the acts bear on the character of the witness for truthfulness or untruthfulness, but these alleged acts may not be proven by extrinsic evidence (other than conviction of crime, governed by rule 609). The questioner is bound by the answer of the witness, and must have a good-faith basis—some basis in evidence—in order to ask the question.<sup>15</sup>

## (2) The Interaction and Overlapping

A number of cases have held that a false accusation of sexual assault made by the victim is not within rape-shield provisions; assuming, for the moment, the truth of the allegation of false accusation, then either no sexual conduct took place at all, or any sexual conduct that occurred was consensual. In either case, it is not sexual conduct that is relevant to credibility, but the false statement regarding it. Amicus has no quarrel with these principles.<sup>16</sup>

But the assumption above engaged hypothetically—that the allegation of false accusation of sexual assault is true—cannot be indulged by the trial judge in an actual case. The theory of relevance of the cross-examination is that it bears on credibility, but a prior accusation of sexual assault only bears on credibility of the accuser if 1) it was made, and 2) *it was false*. If a previous

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<sup>15</sup> See, e.g., *United States v. Adames*, 56 F.3d 737, 745 (7th Cir.1995). And see *infra*.

<sup>16</sup> See e.g., among others, *State v. Raines*, 118 SW 3d 205, 212 (Missouri Ct. App., 2003) ("evidence of a victim's prior complaints, as opposed to prior sexual conduct, does not fall within the ambit" of rape-shield provisions); *People v. Grano*, 676 N.E.2d 248,257 (Ill.App. 2 Dist.,1996))..." the legislature intended to exclude the *actual sexual history* of the complainant, not *prior accusations* of the complainant. Language or conversation does not constitute sexual activity"); *State v. Bray*, 813 A.2d 571, 577 (NJ Super, 2003); *Miller v Nevada*, 779 P.2d 87, 89 (Nev, 1989) ("...prior false accusations of sexual abuse or sexual assault by complaining witnesses do not constitute 'previous sexual conduct' for rape shield purposes").

accusation or accusations had in fact been made, but there is not a sufficient showing of falsehood, then the evidence goes to prior sexual activity by the victim, and is barred both by rape-shield principles, as well as the simple fact that it is irrelevant, defendant's only theory of relevance—that the claim was false—having disappeared. And if there is an insufficient showing that such a claim was even made by the victim, then the evidence is simply irrelevant. On the other hand, if a sufficient showing both of a prior accusation and its falsity is made (for example, if the victim admits or has previously admitted making a prior false accusation), then this conduct of the victim is a prior act probative of credibility, and Rule 608 comes into play, permitting cross-examination but prohibiting extrinsic proof.<sup>17</sup> But before the trial judge can determine whether the cross-examination is permitted, notice under the rape-shield provisions and an in camera hearing must be held. But avoidance of re-victimization of the victim by exploration of prior assaults that *actually* occurred is a serious concern here. That charges were never brought, or that a victim, though telling others of an assault, never went to the police, hardly means that a sexual assault did not occur. The policy behind the rape-shield provision informs the inquiry, and counsels against routine in camera hearings on a bare claim of a prior accusation having been made that was false. The law should not return to the time when it was necessary to advise a victim that her prior sexual history would be

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<sup>17</sup> Application of Rule 608 to bar extrinsic proof of an alleged false accusation as an attack on veracity raises no constitutional difficulties, and is purely a matter for the law of evidence. See e.g. *Boggs v. Collins*, 226 F.3d 728, 738 (CA 6, 2000)(because "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 [defendant's] confrontation rights.... *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'....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'")(internal citations omitted). To the same effect see *Hogan v Hanks*, 97 F.3d 189, 191-192 (CA 7, 1996).

explored in court (even if at an in camera hearing). To obtain an in camera hearing, then, based on a claim that the a prior accusation or accusations of sexual assault have been made by the victim that are demonstrably false, at least a prima facie showing by affidavit or offer of specific proof should be required.<sup>18</sup>

Even if rape-shield provisions did not exist, Rule 608 would both limit the defendant to cross-examination of the accused with regard to alleged prior false accusations of sexual assault, barring extrinsic proof, and require an evidentiary basis—proof to substantiate that such an allegation was made, and that it was false—*before* cross-examination is allowed. Thus, Rule 608 and rape-shield provisions both interact and overlap.

MRE 608 admits of no exceptions with regard to attacks on character for veracity. Specific instances of conduct of a witness, including the complaining witness, may be inquired into on cross-examination if probative of truthfulness or untruthfulness, but "may not be proved by extrinsic evidence." Period. Of course, under the principle of limited admissibility evidence admissible for one purpose but not another is to be admitted, though with a limiting instruction,<sup>19</sup> and evidence barred by MRE 608 to impeach character for veracity may be admissible for some other relevant purpose, most likely to show *bias or interest* when the facts support that inference (and when the foundational showing that the prior allegation was made, and was false, has been made).<sup>20</sup> But the

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<sup>18</sup> Compare MCR 6.201(C)(2).

<sup>19</sup> MRE 105.

<sup>20</sup> See e.g. *Redmond v. Kingston*, 240 F.3d 590, 593 (CA 7, 2001), noting that cases which apply Rule 608 to exclude extrinsic proof with regard to alleged prior false accusations of sexual assault are "cases in which the defendant wanted to use the falsity of the charges to demonstrate that the complaining witness was a liar, rather than to demonstrate that she had a motive to lodge a false accusation against the defendant. The use of evidence that a person has lied in the past to

notion that cases of sexual assault should be treated differently, so that extrinsic proof of an alleged prior false accusation of sexual assault should be allowed, finds support only in company with other evidentiary principles regarding sexual assault cases that have long been denounced and repudiated. The pre-MRE principle that "the defendant should be permitted to show that the complainant has made false accusations of rape in the past" simply does not survive promulgation of the Michigan Rules of Evidence, which, as stated in Rule 101, supply the rules that "govern proceedings in the courts of this state," save for the "exceptions stated in Rule 1101." Only cross-examination—and then only when an appropriate foundation has been laid—regarding an alleged prior false accusation is permissible; extrinsic proof is barred.

Many jurisdictions have held their analogue to Rule 608 applicable to alleged false claims of prior sexual assault, barring extrinsic evidence, and those few that have gone the other way should not be followed.<sup>21</sup> The textual argument under Rule 608(b) is irrefutable; extrinsic proof of prior conduct bearing on untruthfulness is barred. This is not to say that no common-law evidentiary principles survive the promulgation of the rules of evidence; any evidence that is relevant under MRE 401 is admissible under MRE 402, unless it falls within some specific prohibition in the rules themselves, or unless under MRE 403 its probative value is outweighed, and substantially, by the

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show that she is lying now is questionable, quite apart from rape-shield laws, since very few people, other than the occasional saint, go through life without ever lying, unless they are under oath....But while 'generally applicable evidentiary rules limit inquiry into specific instances of conduct through the use of extrinsic evidence and through cross-examination with respect to general credibility attacks, ... no such limit applies to credibility attacks based upon motive or bias....'"

<sup>21</sup> Amicus will not attempt to either catalogue or discuss all the cases; a helpful review appears in *State v Wyrick*, 62 SW 3d 751, 771 ff (2001), see particularly section B. of the opinion.

danger the jury will use it for an impermissible purpose. But that common-law evidentiary principles *in conflict* with the rules of evidence did not survive adoption of those rules is demonstrated by *People v Kreiner*.<sup>22</sup> There this court found that the common-law "tender-years" hearsay exception did not survive the rules of evidence, as no such exception appears in the rules.<sup>23</sup> The court observed that under MRE 101 the rules govern proceedings in the courts of this state save for the exceptions stated in MRE 1101, and found that none of them applied. But it was not the simple absence of a tender-years hearsay exception from the rules that led to the result that this exception did not survive promulgation of the rules; rather, it was the language in MRE 802 that "hearsay is not admissible *except as provided by these rules*."<sup>24</sup> Thus, the rules themselves provide that *as to hearsay* nothing survives the creation of the hearsay rules, as no hearsay is admissible but for those exceptions listed in the rules.

On the other hand, the principle of impeachment of the credibility of a witness by bias or interest—rather than veracity generally, which is governed by Rule 608 and Rule 609—appears nowhere in the rules of evidence, and yet there is no doubt that evidence impeaching a witness on this basis is admissible.<sup>25</sup> Indeed, amicus agrees that even extrinsic proof going to bias or interest, assuming a sufficient foundation is laid, must be admitted when offered by the defense as a matter of Confrontation Clause principles; the evidence is not barred by Rule 608 because offered for a different purpose than to impeach veracity generally. This is not inconsistent with *Kreiner*, or with

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<sup>22</sup> *People v Kreiner*, 415 Mich 372 (1982).

<sup>23</sup> Now see MRE 803A, promulgated in 1991.

<sup>24</sup> *People v Kreiner*, 415 Mich at 377-378 (emphasis added).

<sup>25</sup> See e.g. *United States v Abel*, 469 US 45, 83 L Ed 2d 450, 105 S Ct 465 (1984).

a recognition that Rule 608 bars extrinsic proof of prior acts going to character for veracity of a witness. The rules *themselves* state that no hearsay is admissible if not within the exceptions covered by the rules, and Rule 608 states itself that extrinsic proof of prior acts bearing on character for veracity is barred. Where, then, there is no express prohibition on evidentiary principles derived from without the rules, Rules 401 and 402 provide the basis for use of common-law evidentiary principles, as Rule 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 or less probable than it would be without the evidence, and Rule 402 provides that all relevant evidence is admissible except as otherwise provided.

Given the unambiguous bar of extrinsic proof of prior acts to impeach character for veracity, and the lack of any constitutional objection to it,<sup>26</sup> defendant can only prevail by arguing for creation of an exception to it for allegedly false accusations of sexual assault (and here, by arguing for the admissibility of the prior accusations as "false" when there is absolutely no evidence to that effect), treating these differently than other specific instances of conduct bearing on untruthfulness. But as a matter of principled rule-making, rules of procedure or evidence should not be modified through case decision unless that result is found necessary under some statute or the constitution; unless so

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<sup>26</sup> Again, understanding that the bar does not apply when, under the principle of limited admissibility, the evidence is offered—and appropriately so—not to impugn character for veracity, but as going to motive or bias in the particular case; the constitution requires this sort of evidence be admitted, and Rule 608 does not bar it in any event. Though admission of the evidence may be required by the constitution, this fact does not create an "exception" to the Rule 608 bar on extrinsic evidence. Rather, when the evidence is offered to show bias instead of to attack character for truthfulness it simply is not within the Rule 608 bar, whether its admission is required by the constitution or not. See 2 Graham, *Handbook of Federal Evidence* (5<sup>th</sup> Ed., 2001), § 608.4, p. 156, fn 16 (noting that on occasion courts mistakenly treat "the admissibility of extrinsic evidence of bias as an exception to Rule 608(b) instead of as falling outside of Rule 608(b))."

compelled, modifications to rules should occur through the ordinary rule-making and amendment process, with announcement of a proposal to the bench and bar, and an opportunity for comment. Even more critically here, no modification of the bar to create an exception for alleged false claims of sexual assault should be considered in any event. As noted in *State v Wyrick*, supra, the majority of jurisdictions to consider the question apply Rule 608(b)'s prohibition on extrinsic proof to allegations of prior false claims of sexual assault, where offered as probative of character for untruthfulness. Some courts that permit extrinsic proof do so because in the jurisdiction involved the admissibility of prior sexual assaults by the defendant has been broadened substantially.<sup>27</sup> Some have held extrinsic proof admissible on a misunderstanding of constitutional requirements, taking the requirement of admission of extrinsic evidence for a non-character purpose such as bias or interest as a general requirement of admission of extrinsic proof where probative of character for untruthfulness,<sup>28</sup> where there is no such constitutional requirement.<sup>29</sup> And some create an exception for this sort of intrinsic proof for reasons which are simply unfortunate, a throwback to an earlier

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<sup>27</sup> See e.g. *Miller v State*, 779 P2d 87, 89-90 (Nev, 1989), creating, by case decision, an exception to the Nevada rule against extrinsic proof of prior acts probative of untruthfulness for sexual assault cases ("...we carve out an exception for sexual assault cases") largely because to do so was "in *pari ratione* with this court's current position regarding sexual assault cases and the admissibility of extrinsic impeachment evidence against defendants."

<sup>28</sup> Making this error see *State v Walton*, 715 NE2d 824, 827 (Indiana, 1999).

<sup>29</sup> See *Boggs v Collins*; *Redmond v Kingston*, supra.

error, echoing the suspicion of rape victims voiced decades ago by Wigmore.<sup>30</sup> This court should not go down that path, particularly by way of opinion rather than proposed court-rule amendment.

To sum up, under the rape-shield provisions the defendant must file notice and an in camera hearing must be held, for the mere assertion that the victim has made a previous accusation of sexual assault, and that the prior accusation was false, does not make it so, and if it is *not* so then the evidence is generally either irrelevant (if no claim was ever made) or both irrelevant and barred by rape-shield principles (if a prior claim was made but was not false). And even if rape-shield provisions are wholly inapplicable, the foundational requirement for cross-examination on a prior act bearing on untruthfulness also requires some demonstration that the claim was made, as well as that it was false. Even if this foundation is met, only cross-examination is permitted, not extrinsic proof. "This brings us to the question: how does a defendant prove that a complaining witness has made false accusations of sexual assault?"<sup>31</sup>

**D. The Foundational Requirements for Cross-examination on an Alleged Prior False Accusation of Sexual Assault: There Must Be a Showing That a Claim Was Made That Is "Demonstrably" False**

To escape the bar of the rape-shield provisions, and at the same time to establish an appropriate foundation for cross-examination on an alleged prior false claim of sexual assault under Rule 608, what evidentiary burden must the defendant shoulder regarding whether such a claim was made at all, and if so, that it was false? It must be remembered that involved here is *evidence* itself

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<sup>30</sup> See *Lopez v State*, 18 SW3d 220, 223-224 (Ct. Crim. App, Texas, 2000), observing that those states that have creating a special exception for sexual offenses to the Rule 608(b) bar have done so for a rationale that "is not at all clear," the court rejecting any "sexual offenses are different" rationale for avoiding the extrinsic proof prohibition.

<sup>31</sup> *Morgan v. State*, 54 P.3d 332, 336 (Alaska App.,2002).

viewed as collateral—and so the evidence is not permitted, but only cross-examination as to it. Where that collateral evidence carries with it a substantial possibility of confusing the issues and causing unfair prejudice under Rule 403, as here, it is appropriate to apply a strict foundational standard before the cross-examination is permitted.

The ordinary foundational requisite for cross-examination on a prior act bearing on untruthfulness is that the proponent of the cross-examination demonstrate a "good-faith basis" that the act occurred.<sup>32</sup> This notion is only vaguely defined in the cases; the clearest statement is that "the general rule is that the questioner must be in possession of some facts which support a genuine belief that the witness committed the offense or the degrading act to which the questioning relates."<sup>33</sup> With regard to sexual conduct, the rape-shield rules, as well as Rule 403, counsel something more strenuous.

It is important to bear in mind the nature of the cross-examination permitted—when the trial judge allows it—under Rule 608. The extrinsic proof that is disallowed by Rule 608(b) cannot be smuggled into the questioning itself. While it is perfectly appropriate to ask a witness—where cross-examination has been permitted—whether he once falsified his time-card so as to gain extra pay, it is inappropriate to ask whether he was once *discharged from employment* for falsifying his time-card.

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<sup>32</sup> In this circumstance Rule 104(a) on preliminary questions of admissibility, under which the trial judge makes a determination by a preponderance of the evidence as to whether foundational requirements have been met, with the rules of evidence themselves, except those with respect to privileges, inapplicable, is not the governing rule. Here the *evidence* itself is not admissible, but only cross-examination, and the rule is not designed for this situation. See 2 Graham, *Handbook of Federal Evidence*, § 608.4, p. 145 (fn 3, beginning on p.144)

<sup>33</sup> *United States v. Fowler*, 465 F.2d 664, 666 (CA DC, 1972); *United States v. Sampol*, 636 F.2d 621, 657 (CA DC, 1980); *United States v. Ovalle-Marquez*, 36 F.3d 212, 218 (CA 1, 1994).

And where cross-examination is permitted on alleged prior false claims of sexual assault, it is appropriate for the questioner to ask "in May of 1994 did you not accuse John Smith of sexually assaulting you in your home, an accusation that was false?" But the questioner may *not* ask "in May of 1994 did you not accuse John Smith of sexually assaulting you in your home, an accusation that was false *and for which John Smith was acquitted by a jury?*" (assuming the latter point to be true).

This is so because extrinsic proof, or the opinion of someone else about the alleged event, cannot be smuggled in through the questioning:

Cross-examination as to a specific instance relating to the character for untruthfulness of the particular witness being examined...should be phrased in terms of the underlying event itself...the question should not inquire about rumors, reports, arrests, or indictments, but rather about the underlying specific event of misconduct itself. The fact of misconduct alone is relevant when cross-examining the alleged actor, not whether someone else might think that the witness committed the act.<sup>34</sup>

In the time-card example, it may be true that the witness was fired for this reason, but the witness may insist that the firing was unjust. *That* matter cannot be tried in the case, as it is collateral. The questioner can only ask about the underlying *event*—the forgery of the time-card—and if the witness denies it, that ends the matter. So also with alleged false allegations of sexual assault. An acquittal at a trial shows that those jurors in that trial had a reasonable doubt, but it does not prove the allegation was false, and it is wholly appropriate for the victim to testify that he or she did not make a false allegation. Again, that matter cannot be tried, as it is collateral, and extrinsic proof (the jury acquittal, though it is not even proof that the allegation was false) cannot be smuggled into the case through the questioning.

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<sup>34</sup> 2 Graham, *Handbook of Federal Evidence*, § 608.4, p.153.

Only two possibilities exist, then, when a victim is cross-examined about an alleged prior false allegation of sexual assault, that questioning being restricted to that which is relevant—"the underlying specific event of [alleged] misconduct itself": 1)the witness will admit that a prior false claim was made, or 2)the witness will deny it. If the witness admits making a prior false allegation, then the witness may explain why this occurred, the admission of the allegation is itself substantive evidence, and the parties may make of the testimony what they will in arguing the credibility of the witness. But if the witness denies making a prior false allegation (which may either be because no allegation was made, or an allegation was made which was not false), all that is left before the jury is innuendo, with which the questioner may do nothing in argument. Unless, then, it is determined at a pretrial in camera hearing that the witness will admit having made a prior false allegation, or that there exists some form of almost indisputable proof that a prior false allegation was made, the cross-examination is substantially more prejudicial than probative—indeed, not probative *at all*—and should not be permitted. Indeed, one respected commentator has suggested that allowing cross-examination on prior acts of misconduct bearing on character for untruthfulness under Rule 608(b) is "too inherently prejudicial in light of probative value and thus should rarely if ever be permitted."<sup>35</sup>

Those jurisdictions that have considered the foundation for permitting cross-examination on alleged prior false accusations have reached a variety of results. As to whether the accusation was

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<sup>35</sup> 2 Graham, *Handbook of Federal Evidence*, § 608.4, p.161. Graham goes so far as to state that in this regard "Rule 608(b)(1) is simply a mistake." See, to the same effect, McCormick, *Evidence* (4<sup>th</sup> Ed, 1992) § 41, p. 138-139, commenting that the view that prohibits cross-examination on prior acts as going to credibility (other than convictions) is "arguably the fairest and most expedient practice because of the dangers otherwise of prejudice....., of distraction and confusion, of abuse by the asking of unfounded questions, and of the difficulties, as demonstrated in the cases on appeal, of ascertaining whether particular acts relate to character for truthfulness."

even made, and that it was false, some jurisdictions require a finding by the trial judge by a preponderance of evidence, some require clear and convincing evidence, some state the test as a "reasonable probability of falsity," some state the test as whether "reasonable jurors could find, based on the evidence presented by the defendant, that the victim had made prior false accusations," and some require that the defendant show that there was a prior accusation that was "demonstrably false."<sup>36</sup> For the reasons stated above—that a denial leaves the jury simply with innuendo but no evidence—amicus submits that this court should require as a foundation that at a pretrial hearing the defendant must show that a "demonstrably false" prior accusation was actually made, or it must be demonstrated that the victim-witness will admit to having made a prior false claim. "Demonstrably false" must mean more than simply "contradicted," as by the claimed perpetrator of the prior event, but proven false in some way, as when rebutted by physical evidence.<sup>37</sup>

The use of a "demonstrably-false" foundational standard, by reading MRE 104(b) in the context of the rape-shield statutes and Rule 403, has an additional benefit—it avoids the innuendo often caused when Rule 608(b) is employed. In the ordinary case, a question may be asked on cross-examination regarding prior misconduct bearing on credibility, and if that conduct is denied, counsel may not argue the point, as there is no evidence before the jury, extrinsic evidence being prohibited.

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<sup>36</sup> See listing in *State v Guenther*, 854 A2d 308, 322 (New Jersey, 2004). But see *State v Miller*, 921 A.2d 942 (New Hampshire, 2007), where the court, in light of the *Coplan* case discussed *infra* at footnote 47, backed off such a rule, giving the trial court broader discretion.

<sup>37</sup> See *Fugett v State*, 812 NE2d 846, 849 (Ct App Indiana, 2004): "...evidence of prior false accusations may be admitted, but only if (1) the complaining witness admits he or she made a prior false accusation of rape; or 2) the accusation is demonstrably false....Prior accusations are demonstrably false where the victim has admitted the falsity of the charges or they have been disproved."

There is simply innuendo, from which the jury is left to speculate.<sup>38</sup> But if a "demonstrably-false" standard is employed, then at the in-camera hearing<sup>39</sup> a determination would be made as to whether evidence meeting that standard exists. If it does, it is very likely that when asked the "false-accusation" question on cross-examination the victim will admit to it, and then have the opportunity to explain. There will be no guesswork left for the jury. But if in the face of evidence showing that the victim made a prior allegation that is demonstrably false the victim denies it nonetheless (as by insisting the allegation is true), *the prosecutor's duty with regard to correction of false testimony arises*. Though extrinsic proof showing the denial to be false is not permitted by Rule 608(b), the prosecutor would have the duty in such a case to correct the matter before the jury. As the Court of Appeals has said in a similar circumstance, "[a] prosecutor has a duty to correct his witness' false testimony, without regard to whether evidence to rebut the witness would be admissible for impeachment under MRE 608(b)."<sup>40</sup> And a federal court has observed that "[w]hile defense counsel would be bound by the witness' answers under Rule 608(b), the government could not sit idly by if the witnesses testify falsely and the government knows it. That is because the government is

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<sup>38</sup> Acting in its rulemaking capacity, the court might find it appropriate at some point to consider whether Graham and McCormick are right that Rule 608(b) should not exist. See footnote 35.

<sup>39</sup> See section B(2), *supra*.

<sup>40</sup> *People v. Lester* 232 Mich App 262, 277 (1998). See also *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

obligated to correct statements of its own witnesses it knows to be false."<sup>41</sup> Again, innuendo and speculation are avoided, without the need to call witnesses on the matter.<sup>42</sup>

**E. Rule 404(b) Is Inapplicable Here**

In its order in *People v. Jackson*, 477 Mich. 1019 (2007) this court said that "Upon retrial, the defendant must be afforded the opportunity to introduce testimony that the complainant has previously been *induced by his father* to make false allegations of sexual abuse against other persons *disliked by the father*. MRE 404(b)" (emphasis supplied). On this statement of the evidence, amicus submits, the evidence would be offered on the theory of relevance as going to bias or interest, because of the nature of the claim—false charges to "get" individuals disliked by the complainant's father, who induced the false charges. Nothing like that exists here, where there is no proof of falsity at all. Should this court at an appropriate time wish to explore the circumstances under which MRE 404(b) might apply to prior false allegations because they go to motive or bias, or some common scheme or plan, taking them outside of Rule 608, then when that case arises it should do so. This is not that case.<sup>43</sup>

**F. Admissibility of Actual Prior Assaults**

This court remanded this case for a hearing to allow the defendant a second opportunity to "offer proof that the complainant made a prior false accusation of sexual abuse against another person" (and see Justice Markman's concurring statement that asserting that "the trial court's ruling

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<sup>41</sup> *Alvarez v. United States*, 808 F.Supp. 1066, 1096 (S.D.N.Y.,1992).

<sup>42</sup> This may be handled by way of stipulation and/or instruction.

<sup>43</sup> Indeed, there is a paucity of case authority throughout the nation employing Rule 404(b) as a basis for admission of extrinsic proof of a false claim (where falsity is proven).

prevented defendant from presenting *any* evidence of a prior false accusation"). Even to the time of this court's remand order, then, no theory of admissibility had been based on the prior allegation being true. And the trial judge found, at the hearing ordered by this court, that there was no evidence the prior accusation was false. There may be circumstances where, in cases involving young children, actual previous assaults might be relevant.<sup>44</sup> If this court wishes to consider those circumstances, then amicus submits it should wait for a case properly presenting the question, but it would be grossly inappropriate to do so here.

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<sup>44</sup> The defendant in *People v Morse*, 231 Mich.App. 424 (1998) was charged with sexual assault of his former wife's daughters. These unfortunate children had previously been assaulted by the ex-wife's boyfriend, who had pled guilty to offenses against them. Defendant wished to admit evidence of these assaults, arguing that the victims' allegations against him were "highly similar" to the prior sexual abuse, and that without evidence of that assault before the jury the jury would "inevitably conclude that the complainants' highly age-inappropriate sexual knowledge could only come from *defendant* having committed such acts." After a survey of cases from other jurisdictions, the court concluded that this evidence is admissible if the defendant meets a rather stringent foundation:

Accordingly, Michigan law dictates that an in-camera hearing is appropriate to determine whether: (1) defendant's proffered evidence is relevant, (2) defendant can show that another person was convicted of criminal sexual conduct involving the complainants, and (3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding.

And this foundation was required for the admission of extrinsic proof; that is, as to evidence *not* deemed collateral. A strict evidentiary foundation before cross-examination is permitted on a matter that is, as to actual proof, collateral, is thus appropriate, at least where the matter is itself fraught with the possibility of undue prejudice. See also *Ellsworth v. Warden*, 333 F.3d 1 (CA1, 2003)(exclusion of evidence regarding sexual history of an alleged victim of sexual abuse did not violate defendant's rights under Confrontation Clause; evidence of abuse when victim was three was not highly probative as to his sexual knowledge at age twelve); *United States v. Torres* 937 F.2d 1469, 1474 (CA 9, 1991)("We need not decide whether such evidence might be admissible in a proper case. Here, the victim's testimony did not demonstrate any unusual knowledge of sexual techniques or nomenclature. Rather, her testimony was replete with simple references to 'private spot,' 'private parts' and 'private places.'").

## G. Conclusion

Amicus first urges this court to deny leave without further comment. Any claim of a prior false accusation was forfeited at trial, and wholly unproven at the hearing ordered by this court. And no claim of admissibility based on the prior assault being *true* has ever been pressed. If this court nonetheless discusses the questions framed in its order, amicus urges the following points on the court:

- While a prior false claim of sexual assault is not within rape-shield protections, an *allegation* that a prior false claim was made is not necessarily true. Because a prior claim may have been made but which was *not* false, implicating prior sexual activity of the victim (albeit nonconsensual), the notice and hearing provisions of the rape-shield statute should be followed. Even an in camera hearing should be precluded absent allegations of specific facts by way of affidavit or offer of proof that could lead to the conclusion that a prior accusation or accusations had been made that were demonstrably false.
- Independent of the rape-shield provisions, an alleged prior false accusation of sexual assault is an allegation of a prior act of misconduct going to the victim's character for untruthfulness. It is not relevant unless in fact 1)it was made, and 2)it was false. A foundation prior to cross-examination must be laid. Further, under Rule 608(b) only cross-examination, and not extrinsic proof, is permitted on the point.
- An allegation of a prior false claim that is demonstrated, at a pretrial hearing, to be relevant not to character for untruthfulness but to bias or interest in bringing the current charges, is not within Rule 608(b) and may be proven with extrinsic proof. An additional purpose of the pretrial hearing, then, is, where appropriate, to determine whether the allegation of a false claim is relevant to this non-character purpose.
- Where permitted, cross-examination as to an alleged prior false claim of sexual assault allowed as going to character for untruthfulness must "be phrased in terms of the underlying event itself....The fact of misconduct alone is relevant when cross-examining the alleged actor,

not whether someone else might think that the witness committed the act."

- Because a denial of an allegation on cross-examination that the victim made a prior false claim of sexual assault leaves nothing before the jury but innuendo, this cross-examination should—when offered only as going to character for untruthfulness—rarely be permitted. As a foundational matter, the defendant should be required first to prove that the defendant made a prior allegation that was demonstrably false. "Demonstrably false" means disproved, not simply contradicted.<sup>45</sup>
- If the victim denies making a prior false accusation where the allegation has been demonstrated to have been made and to have been demonstrably false, the prosecution must correct that testimony. Speculation and innuendo are avoided.
- No issue regarding use of a prior *true* allegation of sexual assault is presented in this case.

Because there is no error here, plain or otherwise (and plain-error review is the proper standard), the Court of Appeals should be affirmed.

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<sup>45</sup> A brief discussion of *White v Coplan*, 399 F3d 18 (CA 1, 2005) is likely appropriate. Two young girls accused a male visitor, who had spent much of the evening watching television with them in a room apart from the other adults, with molestation. He wished to cross-examine the children about accusations of sexual assault they had made against a neighbor, a cousin, and another individual, all involving separate incidents. Defendant pointed to a similarity between the nature of some of the accusations. The trial judge precluded the cross-examination because New Hampshire required a showing that the accusations were demonstrably false, and though the judge found the accusations had been shown false to a "reasonable probability," they had not be shown to be "demonstrably false." The First Circuit found constitutional error, for reasons which are doubtful in the extreme. The court did not quarrel with the exclusion of extrinsic proof, so that if the girls denied the prior accusations were false all that would be before the jury was the innuendo of the questions. But in an analysis that amicus submits should not be followed, the court said that simply asking the questions and getting the denials of the witnesses "is worth a great deal," finding that from the inquiry itself the defense might have benefitted. More importantly, the case is readily distinguishable from the instant case. The court found that the *pattern* of multiple false accusations, with fair similarity to the present charge, raised the issue of *motive* to testify falsely, even though the motive might be unknown (perhaps to garner attention). Though amicus believes this analysis a tenuous application of the "bias or interest" principle, it nonetheless is also simply inapplicable to the present case.

**Relief**

WHEREFORE, amicus requests that the Court of Appeals be affirmed.

Respectfully submitted,

KYML. WORTHY  
Prosecuting Attorney  
County of Wayne

A handwritten signature in black ink, appearing to read 'Timothy A. Baughman', with a long horizontal line extending to the right.

TIMOTHY A. BAUGHMAN  
Chief of Research,  
Training and Appeals