

6 APRIL

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
No. 146296

v

Court of Appeals
No. 312638

VITA DUNCAN,

Defendant-Appellee.

Macomb Circuit Court
No. 2011-004401-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
No. 146295

v

Court of Appeals
No. 312637

STANLEY DUNCAN,

Defendant-Appellee.

Macomb Circuit Court
Nos. 2011-004304-FC
2011-003839-FC

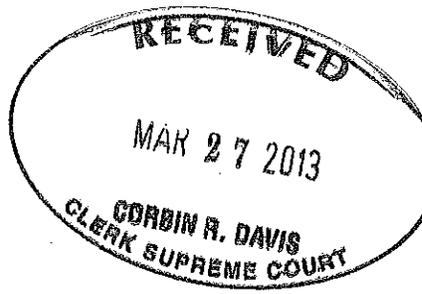
**AMICUS BRIEF OF ATTORNEY GENERAL BILL SCHUETTE
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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INTEREST AND STATEMENT OF POSITION OF AMICUS CURIAE

The Attorney General is the chief law enforcement officer for the State of Michigan. In recognition of this role, the court rules allow the Attorney General to file a brief as amicus curiae without seeking permission from this Court. MCR 7.306(D)(2).

The Attorney General has a responsibility to ensure that criminal trials comply with constitutional, statutory, and court rule requirements. He has an equally important duty to ensure that crime victims, including young children, are protected.

STATEMENT OF QUESTION PRESENTED

1. Is a four-year-old witness, whom the trial court determines is incompetent, "unavailable" to testify under MRE 804(a)?

Plaintiff-Appellant's answer: Yes.

Defendant-Appellee's answer: No.

Trial court's answer: No.

Court of Appeals' answer: No.

Attorney General's answer: Yes.

COURT RULE INVOLVED

MRE 804:

(a) *Definition of unavailability.* "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) has a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

* * *

(5) *Deposition Testimony.* Testimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now

offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

For purposes of this subsection only, "unavailability of a witness" also includes situations in which:

(A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(B) On motion and notice, such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

INTRODUCTION

Child sexual abuse is a devastating crime. It is one of the most difficult to detect and prosecute.

It is most often committed in secret with the child as the only witness. When a child is young, she may not even recognize the wrongfulness of the defendant's assault and may delay in disclosing it.

But when it is disclosed, even a young victim may be unable to testify for a variety of reasons – fear of the defendant, trauma resulting from the assault, or her own immaturity. Given this, parents may decline to prosecute rather than put their child through the additional trauma of recounting her sexual assault and subjecting her to a vigorous cross-examination.

Here, however, the 3½-year-old child did tell. Her molester confessed. And, her parents brought her to court, where she twice testified at preliminary examination after being found competent to testify.

About a year later, however, the trial court found the now 4½-year-old child incompetent to testify. Even though the trial court found her incompetent, it declined to find her unavailable to testify, a finding that would have allowed the People to introduce the child's preliminary-examination testimony and move forward with the prosecution. In doing so, the trial court ignored this Court's precedent.

Because the victim is not only legally unavailable, but also factually unavailable, this Court should reverse.

STATEMENT OF FACTS

The Attorney General agrees with the Macomb County Prosecutor's statement of facts and supplements them as follows.

Two sets of parents hire Vita Duncan to care for their young daughters

Sixty-two year-old Defendant Vita Duncan was an unlicensed daycare provider. (10/17/11 PESD, pp 141, 151-152, 154-155; 12/2/11 PEVD, pp 9, 51.) Her sixty-five year-old husband Stanley Duncan was retired. (12/2/11 PEVD, p 22.) Vita watched KN, who was born on January 15, 2007, from the time she was 8 weeks old. (10/17/11 PESD, pp 139, 156, 180, 197.) KN's mother is Vita's niece. (10/17/11 PESD, pp 139, 152, 204.)

Vita was also hired to provide daycare for RS from the time RS was 9 or 10 months old. (21a, 37a-38a, 46a; 10/17/11 PESD, pp 14-15, 22, 51, 67, 95; 12/2/11 PEVD, pp 9-10, 21.) RS was born on March 3, 2008.¹ (52a; 10/17/11 PESD, pp 14, 50; 12/2/11 PEVD, p 7.)

Young KN has numerous urinary tract infections and vaginitis

While in Vita's care, KN had constant urinary tract infections and vaginal infections – so many that she had to see a urinary specialist. (10/17/11 PESD, pp 157, 160.) The pediatrician suggested the cause as being a wet bathing suit, but KN's father found that odd as KN's infections occurred even in the middle of winter. (10/17/11 PESD, pp 167, 186-187.) On June 17, 2011, four-year-old KN stopped

¹ There is an additional first-degree criminal sexual conduct charge against Stanley; it involves a young woman who says that he sexually assaulted her in 1994 while Vita was providing daycare for her. (12/2/11 PEVD, pp 26-27, 73.)

going to Vita's daycare and her father began watching her. (10/17/11 PESD, p 156.)

KN had no further infections. (10/17/11 PESD, p 167.)

Three-year-old RS tells her father that Stanley touches her privates with his fingers and his tongue after he takes out his teeth

On June 30, 2011, just two weeks after KN stopped going to Vita's daycare and about one week after the Duncans went on vacation, RS's father was reading books to her until she fell asleep. (10/17/11 PESD, pp 16, 30, 32, 51-52, 73, 95; 12/2/11 PEVD, pp 10, 21, 24-25.) RS was lying on her father's belly, and he was rubbing her back. (10/17/11 PESD, p 32; 12/2/11 PEVD, pp 10-11.) When he touched below the waistband of her Pull-Up,² RS jerked, told him not to do that, saying: "Stan does that." (10/17/11 PESD, pp 16-18, 31-32; 12/2/11 PEVD, p 11.) RS's father asked, "What does Stan do?" (10/17/11 PESD, pp 18, 31, 33; 12/2/11 PEVD, p 11.)

RS calmly explained that Stanley put his hand down her pants and touched her privates³ with his fingers. (10/17/11 PESD, pp 18, 33-34; 12/2/11 PEVD, p 11.) RS also said Stanley took out his teeth and put his tongue on her privates. (10/17/11 PESD, pp 18, 34; 12/2/11 PEVD, p 12.) RS asked her father why they couldn't take out their teeth. (10/17/11 PESD, pp 18, 34.)

Three-year-old RS tells her mother Stanley touches her privates

² RS wore underwear during the day, but Pull-Ups at night. (12/2/11 PEVD, pp 14, 23.)

³ RS called her vaginal area her privates, her buttocks, her butt, and her breasts, her "boobies." (10/17/11 PESD, p 33.)

RS's father took her to her mother and asked RS to tell her what she had just told him. (10/17/11 PESD, pp 18, 20, 34-35, 53-54, 77; 12/2/11 PEVD, pp 13, 25.) RS repeated that Stanley put his fingers on her private and would take his teeth out and tickle her private. (10/17/11 PESD, pp 35, 55, 77; 12/2/11 PEVD, p 26.) RS's mother asked where Stanley touched her, and RS pointed to her vagina. (10/17/11 PESD, pp 18, 35, 88-89; 12/2/11 PEVD, p 13.) RS reported that it happened in the bathroom and that Stanley would put her on his lap.⁴ (12/2/11 PEVD, p 29.) RS denied that Stanley touched her because he was wiping her butt.⁵ (10/17/11 PESD, pp 55, 88.)

RS's parents asked if Vita knew and RS said she did. (10/17/11 PESD, pp 18-21, 35; 12/2/11 PEVD, pp 13, 27, 39-42.) RS said that Vita said: "No Stan, no, bad boy" and, then, they would spank him. (12/2/11 PEVD, p 41.)

RS's mother asked if Stanley did that to anyone else, and RS said KN. (10/17/11 PESD, pp 18-20, 35, 55; 12/2/11 PEVD, pp 28-29.) RS said that it happened in the bathroom, but, at times, he would lay her on him and put his

⁴ A year earlier, RS's mother arrived before her usual pickup time and learned that Stanley and RS were in the bathroom together. (10/17/11 PESD, pp 65, 73-74; 12/2/11 PEVD, p 36.) Vita came running out of the back room, explaining that RS liked to go in the bathroom when Stanley was in there. (10/17/11 PESD, p 65; 12/2/11 PEVD, p 37.) RS's mother noted that RS did not do that at home and asked Vita not to let her do so again. (10/17/11 PESD, p 65; 12/2/11 PEVD, p 38.) Vita agreed. (12/2/11 PEVD, p 38.)

⁵ According to RS's parents, she was capable of wiping herself after urinating, but needed help when she had a bowel movement. (10/17/11 PESD, pp 56, 89-90; 12/2/11 PEVD, pp 14, 23.) Vita was aware of this as RS had been wiping herself after urinating for about a year. (10/17/11 PESD, pp 80-90.)

fingers in; RS then demonstrated by putting her fingers down her pants. (10/17/11 PESD, p 55.)

RS's mother told her that Stanley would never do that again and thanked her for telling them. (10/17/11 PESD, p 57.) After RS's parents put her to bed, they talked about what RS had told them. (10/17/11 PESD, p 21; 12/2/11 PEVD, pp 14, 29.)

The next day, RS's mother contacts KN's mother

RS's mother sent KN's mother a Facebook message, asking her to call. (10/17/11 PESD, pp 36-37, 62, 80-81, 141, 163; 12/2/11 PEVD, p 15.) When she did, RS's mother described how she had been "humping." KN's mother said that KN did the same thing.⁶ (10/17/11 PESD, pp 81, 164.) Then, RS's mother told KN's mother about the sexual assaults RS had described. (10/17/11 PESD, pp 164-166.)

Two days later, RS again tells her mother that Stanley touches her privates

As RS's mother drove to a 4th of July gathering, RS asked if she was going to see Vita. (10/17/11 PESD, 12/2/11 PEVD, p 30.) RS's mother told her that she was not as the Duncans were on vacation. RS's mother added that because the Duncans

⁶ When RS would lie on her parents, she would move back and forth in a humping motion. (10/17/11 PESD, pp 64, 75.) When asked why she did that RS said KN taught her, and that it was her exercise. (10/17/11 PESD, pp 64-65.) While this sexual behavior struck RS's mother as odd, her Internet search suggested it could be normal.

KN's parents also noticed KN "humping" a blanket she balled up and put between her legs. (10/17/11 PESD, pp 143, 157.) When KN's mother asked her pediatrician about it, he said it could be normal. (10/17/11 PESD, pp 157, 164.)

were not always around, she and RS's father were looking for more stable care for RS. (10/17/11 PESD, pp 58-59; 12/2/11 PEVD, p 30.)

RS then said: "That's not true, mommy. It's because Stanley touches me, isn't it?" (10/17/11 PESD, p 59; 12/2/11 PEVD, p 30.) RS's mother replied by asking: "Only when he wipes you, right?" (12/2/11 PEVD, p 30.) RS responded: "No mommy, he takes his fingers and touches my privates and he takes his tongue and he put[s] it down there too and tickles me." (10/17/11 PESD, p 59; 12/2/11 PEVD, p 30.) RS asked why Stanley did that, noting that neither of her parents did. (10/17/11 PESD, pp 59-60; 12/2/11 PEVD, p 30.) RS then said that Stanley said: "Don't tell mommy. Don't tell mommy." (10/17/11 PESD, p 60; 12/2/11 PEVD, p 30.)

RS's mother asked if he did that to KN. (10/17/11 PESD, p 59; 12/2/11 PEVD, p 31.) Again, RS said that he did. (10/17/11 PESD, p 59; 12/2/11 PEVD, pp 31, 38-39.) Both KN and Vita said "No, bad Stan, bad", and they would all spank him. (10/17/11 PESD, p 60; 12/2/11 PEVD, p 31.) RS's mother told her that she didn't know why Stanley did that, but he would never do it again. (10/17/11 PESD, p 60.) RS's mother then changed the subject. (10/17/11 PESD, p 60.)

The next day, the parents go to the police

RS's mother called her family lawyer on July 4th. (10/17/11 PESD, pp 62, 79-80; 12/2/11 PEVD, p 33.) He told her she needed to go to the police. (10/17/11 PESD, p 62; 12/2/11 PEVD, p 33.) RS's and KN's parents went to the police together. (10/17/11 PESD, p 80; 12/2/11 PEVD, p 40.)

Four-year-old KN tells her parents that Stanley repeatedly touched.

At Care House, KN did not make any disclosures, but the interviewer believed that something was going on and gave her parents a pamphlet/book explaining safe and unsafe touches. (10/17/11 PESD, pp 141-142, 173-174, 182.) Later, KN's mother read it with her, and, afterward, asked if anyone had done an unsafe touch to her. (10/17/11 PESD, p 142.) KN put her head down, and said "yes." (10/17/11 PESD, pp 142, 171, 173.) KN's mother asked who, and KN replied: "Stan." (10/17/11 PESD, p 171.) KN explained that Stanley put her on his lap, put his hand down her pants and touched her vagina. (10/17/11 PESD, p 171.) Asked if he had done this just one time, KN replied, "No, about a hundred." (10/17/11 PESD, pp 176-177.) KN then told her mother that "Stan does it to [RS] all the time." (10/17/11 PESD, p 172.)

KN's mother told her husband KN had something to tell him. (10/17/11 PESD, p 183.) KN's father then spoke to KN alone, saying "Mommy tells me that you wanted to tell me something." (10/17/11 PESD, p 183.) KN repeated that Stanley touched her "vagigi" with his fingers. (10/17/11 PESD, p 183.) KN's father asked if Stanley had to wipe her to ensure KN was not mistaking wiping for fondling. (10/17/11 PESD, pp 184, 194.) KN said, "No Daddy, he did it a lot of times." (10/17/11 PESD, p 184.)

Vita admits she saw Stanley rub 3-year-old RS's vagina

When interviewed by the police, Vita said that she saw RS on Stanley's lap. (12/2/11 PEVD, pp 67-68.) Stanley took his hand and slid it between RS's skin and underwear and "was starting to rub on her vagina." (12/2/11 PEVD, p 68.) Vita told "Stanley to stop it and that was sick of him to do it." (12/2/11 PEVD, p 67.)

Vita also admitted that, in the late spring or early summer, she saw Stanley holding RS upside down while belly-to-belly. (12/2/11 PEVD, pp 62, 65.) However, Vita said RS was fully dressed and Stanley did not have his mouth on RS's genitals. (12/2/11 PEVD, p 69.) Even so, what she saw gave her a sick feeling. (12/2/11 PEVD, p 66.)

Stanley confesses he sexually touched and performed cunnilingus on both RS and KN

The police interviewed Stanley for over an hour. (10/26/11 PESD, pp 221, 224, 256.) He admitted sexually touching both RS and KN. (10/26/11 PESD, p 283.) He admitted to penetrating both RS and KN. (10/26/11 PESD, p 283.) He admitted putting his tongue on the vaginas of both RS and KN. (10/26/11 PESD, p 283.)

The girls testify at preliminary examination

At Stanley's preliminary examination, the court found RS, who was over 3½ years old, competent to testify. (9a.) RS said she would give honest answers to the questions asked, and later testified that she never told a lie. (9a, 26a-27a.)

Although afraid of Stanley Duncan (24a; 10/17/11 PESD, pp 62, 98),⁷ RS testified and defense counsel cross-examined her. (10a-32a.)

⁷ Stanley Duncan's claim that "[t]here was no suggestion by the prosecution that RS was afraid of Mr. Duncan or his counsel" is refuted by the record. (Appellee's Brf, p 9.) RS asked her mother to ensure that Stanley would be handcuffed, could not

Consistent with what she had previously told her parents, RS testified that when she was three, Stanley touched her privates with his hands and mouth. (13a-18a, 23a.) He touched her three times and blew raspberries on her more than one time. (16a, 18a, 20a.) When Stanley used his hand, it "really hurted." (32a.)

RS also described Stanley as standing behind her, holding her upside down after she had used the bathroom and "blowing raspberries" on her "private." (13a-14a, 19a-20a, 22a-23a, 27a-32a.) In describing her "private", RS pointed to her vaginal area. (20a.) RS explained she uses her "private" "to pee pee" and said she was old enough to wipe herself when she urinates. (15a, 30a.) RS testified that Vita watched as Stanley did this. (23a-24a.)

The court also determined that KN, who was almost five, was competent to testify. (10/17/11 PESD, pp 196-202.) Although KN was afraid of Stanley and of coming to court, she testified that Stanley would hurt her when she was on his lap. (10/17/11 PESD, pp 150, 208, 211.) He touched her on her privates more than one time. (10/17/11 PESD, pp 209, 212.) He said "all kinds of words" when he touched her, including "yes." (10/17/11 PESD, p 215.) Stanley also kissed KN on the lips. (10/17/11 PESD, p 212.) Moreover, KN had seen Stanley touch RS's privates more than one time while RS sat on Stanley's lap in the living room. (10/17/11 PESD, p 213.)

Less than two months later, at Vita's preliminary examination, the same court again found RS competent. (36a.) Again, defense counsel cross-examined her.

stand up, and that there were police officers in the room. (24a; 10/17/11 PESD, pp 62, 98.)

(45a-47a.) And, again, RS described Stanley as twice holding her upside down and blowing raspberries on her privates. (40a-46a.) RS repeatedly asked Vita to tell RS's mother about Stanley's touchings, but she did not. (42a.)

At trial, the court determines RS is incompetent to testify

A year after Stanley's preliminary examination and ten months after Vita's preliminary examination, the trial judge found RS, who was now over 4½ years old, incompetent to testify. (58a-60a, 98a-99a.) Although RS could answer questions about herself (52a-53a), she said she did not know the difference between "a truth" and "a lie" and repeatedly answered the court's questions by saying: "I don't know." (53a-55a.) Even after the court took a break, RS continued to say that she did not know what the truth or a lie was. (57a, 102a.) The only question she answered was about the color of her nail polish. (57a.)

When asked, RS said she wanted this to be over and to go see her "momma." (58a.) During its questioning, the court described RS as engaging in "post-traumatic stress hand [w]ringing" "the whole time" and as having tears in her eyes. (59a, 103a.) By the end of the court's questioning, RS's tears were streaming down her face. (59a, 103a.)

The court determined RS could not testify. (60a, 103a.) But, it did not find her unavailable under its reading of MRE 804(a). (61a-62a, 103a.) Despite its description of RS's emotional state, the court specifically found that RS was not unable to testify because of a then-existing mental illness or infirmity. (62a.) On

reconsideration, the court continued to rule RS's incompetency was not unavailability under MRE 804(a). (80a-82a.)

The Court of Appeals affirms

The Court of Appeals eventually affirmed the trial court's decision. (111a-118a.) Describing the language of the rule as "unambiguous", the Court opined that the People failed to show "MRE 804(a) does not provide an exhaustive list of when a witness can be declared unavailable." (117a.) But, even if they had, the trial court had no duty "to fashion a ruling that is without precedent." (117a.)

ARGUMENT

I. Where a trial court determines that a witness is incompetent to testify, the witness is unavailable under MRE 804(a).

A. Standard of Review

When the decision to admit or exclude evidence involves a preliminary question of law, such as whether a rule of evidence precludes its admission, the standard of review is de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010); *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). The issue of unavailability is a preliminary question for the trial court to decide before the admission of evidence; therefore, the rules of evidence do not apply. *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009), citing MRE 104(a). The trial court's determination that a witness is unavailable is reviewed for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). A court necessarily abuses its discretion when it makes an error of law. *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012) (citation omitted.)

B. Analysis

A child who is competent may testify. When a child does so at preliminary examination, but is later disqualified from testifying at trial, the child is unavailable. The lower courts legally erred when they found otherwise, ignoring binding precedent. This Court should reverse and remand so that RS's preliminary-examination testimony may be used at trial.

1. Young children are competent to testify.

In 1998, Michigan repealed MCL 600.2163, which required the court to examine a child-witness who was under 10 to ascertain whether the child-witness had “sufficient intelligence and sense of obligation to tell the truth.” Instead, child-witnesses, like other witnesses, are presumed to be competent to testify unless the court “finds after questioning [the child-witness] ... that ... [he or she] does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably....” MRE 601.

Michigan’s trial courts have repeatedly found three- and four-year-old children competent to testify. *People v Jehnsen*, 183 Mich App 305, 307-308; 454 NW2d 250 (1990) (4-year-old girl); *People v Kasben*, 158 Mich App 252, 256-257; 404 NW2d 723 (1987) (4-year-old girl); *People v Draper*, 150 Mich App 481, 488; 389 NW2d 89 (1986), remanded 437 Mich 873; 463 NW2d 427 (1990) (3-year-old girl); *People v Foster*, 40 Mich App 406, 408; 198 NW2d 923 (1972) (4-year-old boy).

Likewise, other states have repeatedly found three- and four-year-old children competent to testify not only about crimes committed against them, but also about crimes they witness, including murder. *State v Carter*, 707 SE2d 700 (NC Ct App, 2011), rev den 365 NC 202; 710 SE2d 9 (2011) (girl who was 2½ when assaulted and 4 at trial); *Escamilla v State*, 34 SW3d 263 (Tex App, 2010) (3-year and 9 month-old girl); *State v Perez*, 137 Wash App 97, 104-105; 151 P3d 249 (2007) (4-year-old boy); *State v Guthmiller*, 2003 SD 83; 667 NW2d 295 (2003) (4-year-old girl); *Hollinger v State*, 911 SW2d 35, 37-38 (Tex App, 1995) (boy who was 3 when assaulted and 4 at

trial); *State v Ward*, 118 NC App 389, 394-397; 455 SE2d 666 (1995) (2-year-old when assaulted and 4 at trial); *State v Stewart*, 641 So2d 1086, 1088-1089 (La App 2d Cir, 1994) (4-year-old girl); *State v Kelly*, 93 Ohio App 3d 257, 262-263; 638 NE2d 153 (1994) (4-year-old girl); *Holloway v State*, 313 Ark 306, 313-315; 849 SW2d 473 (1993) (4-year-old girl); *Duvall v State*, 41 Ark App 148; 852 SW2d 144 (1993) (4-year-old at time of pre-trial hearing and 5 at time of trial); *State v Ward*, 86 Ohio App3d 4, 5-6; 619 NE2d 1119 (1992) (3 and 4-year-old girls); *Reyna v State*, 797 SW2d 189, 191-192 (Tex App, 1990) (4-year-old girl); *Hutton v State*, 192 Ga App 239, 240; 384 SE2d 446 (1989) (4-year-old boy); *State v Kivett*, 312 NC 404, 412-415; 364 SE2d 404 (1988) (4-year-old boy); *Sanders v State*, 727 SW2d 670, 673-674 (Tex App, 1987), judgment vacated on another grd 761 SW2d 6 (Tex Crim App, 1988) (3½-year-old girl); *State v Fogle*, 743 SW2d 468 (Mo App, 1987) (girl about 3½ when assaulted and 4 at trial); *Kirchner v State*, 739 SW2d 85, 88 (Tex App, 1987) (4-year-old girl); *State v RW*, 104 NJ 14, 18; 514 A2d 1287 (1986) (3-year-old girl); *State v Marois*, 509 A2d 1160 (Me, 1986) (4-year-old girl); *State v Brotherton*, 384 NW2d 375, 377-378 (Iowa, 1986) (3-year-old girl at time of assault and 4 at trial); *State v Jenkins*, 83 NC App 616; 351 SE2d 299 (1986), cert den 319 NC 675; 356 SE2d 791 (1987) (4-year-old girl); *State v Workman*, 14 Ohio App 3d 385, 386, 388-389; 471 NE2d 853 (1984) (3 year-old girl); *State v Bertrand*, 461 So2d 1159, 1160-1161 (La App 3d Cir, 1984), writ den 464 So2d 314 (La, 1985) (4-year-old girl); *State v Armstrong*, 453 So2d 1256 (La App 3d Cir, 1984), writ den 457 So2d 16 (La, 1984) (3½-year-old boy at time of mother's murder, but 4½ at trial); *Smallwood v State*,

165 Ga App 473; 301 SE2d 670 (1983) (4-year-old girl); *Clark v State*, 659 SW2d 53 (Tex App, 1983) (3-year-old girl); *State v Arnaud*, 412 So2d 1013 (La 1982) (4-year-old boy); *Miller v State*, 391 So2d 1102 (Ala App, 1980) (4-year-old girl); *Fields v State*, 500 SW2d 500, 501-503 (Tex Crim App, 1973) (5-year-old boy); *State v Jensen*, 70 Or 156, 157; 140 P 740 (1914) (4-year-old girl).

Here, the district court twice determined that RS was competent to testify. The first time was at Stanley's preliminary examination which took place just three months after the sexual assaults against RS and KN were reported. (9a; 10/17/11 PESD, pp 106-112.) Although Stanley objected to the court's finding, it overruled his objection. (10/17/11 PESD, pp 113-114.) RS, who was over 3½ when she first testified, said she would give honest answers to the questions asked. (9a.) She later testified: "I don't tell a lie" and said that she had never told a lie. (26a-27a.)

The second time the district court found RS competent was about two months later when RS testified at Vita's preliminary examination. (36a; 12/2/11 PEVD, pp 44-48.) At the end of the court's inquiry, Vita's attorney said he was satisfied RS was competent. (12/2/11 PEVD, p 48.) However, at the end of Vita's preliminary examination, Vita's attorney argued that she was not qualified to testify. (12/2/11 PEVD, pp 156-157.) The record does not show that the district court reconsidered its ruling.

A year after Stanley's preliminary examination and ten months after Vita's preliminary examination, the trial judge found RS, who was now over 4½ years old, incompetent to testify. (58a-60a, 98a-99a.) Although RS could answer questions

about herself (52a-53a), she said she did not know the difference between “a truth” and “a lie” and repeatedly answered the trial court’s questions by saying: “I don’t know.” (53a-55a.) Even after the trial court took a break, RS continued to say that she did not know what the truth or a lie was. (57a, 102a.) The only question she answered was about the color of her nail polish. (57a.)

During its questioning, the court described RS as engaging in “post-traumatic stress hand [w]ringing” “the whole time” and as having tears in her eyes. (59a, 103a.) By the end of the court’s questioning, RS’s tears were streaming down her face. (59a, 103a.)

The trial court’s determination that, under MRE 601, RS was incompetent to testify at trial is not at issue in this appeal.

2. Under the Confrontation Clause, a witness’s prior testimonial statement is admissible when the witness is unavailable and the defendant had a prior opportunity for cross-examination.

The Sixth Amendment of the United States Constitution gives an accused the right “to be confronted with the witnesses against him.” US Const, Am VI. The Sixth Amendment applies to the states through the Fourteenth Amendment. *Pointer v Texas*, 380 US 400, 406; 85 S Ct 1065; 13 L Ed 2d 923 (1965). Michigan’s Constitution also affords criminal defendants the right to confront the witnesses against him. Mich Const 1963, art 1, § 20.

Prior preliminary hearing testimony is testimonial. *Crawford v Washington*, 541 US 36, 57, 68; 124 S Ct 1354; 158 L Ed 2d (2004). And, it is admissible at trial

without violating a defendant's confrontation rights when the government establishes the witness' unavailability and that the defendant had a prior opportunity for cross-examination. *Id.*; *California v Green*, 399 US 149, 165; 90 S Ct 1930; 26 L Ed 2d 489 (1970); *Garland*, 286 Mich App at 7, citing *Crawford*. A child who is disqualified is unavailable to testify. *People v Sisavath*, 118 Cal App 4th 1396, 1401; 13 Cal Rptr 3d 753 (2004) (The trial court determined the 4-year-old child "was disqualified because she could not express herself so as to be understood ... and because she was incapable of understanding her duty to tell the truth.").

3. Under MRE 804(b)(1), a witness's prior testimony is also admissible when the witness is unavailable.

Former testimony is also admissible under MRE 804(b)(1) "as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony." *Garland*, 286 Mich App at 7, citing MRE 801(b)(1).

Here, defense counsel for both Stanley and Vita had an opportunity for cross-examination during their separate preliminary examinations. Stanley's counsel extensively cross-examined RS (10a-32a) and Vita's counsel cross-examined RS. (45a-47a.) Thus, for purposes of MRE 804(b)(1), the sole remaining issue is whether RS was unavailable.

4. Unavailability under MRE 804(a).

Under Michigan's evidence rules, MRE 804(a) defines "unavailability." It begins with the language "[u]navailability as a witness' *includes*" and goes on to

describe five “situations”: (1) exempt from testifying due to privilege; (2) refuses to testify; (3) has a lack of memory; (4) is unable to be present due to death or physical or mental illness or infirmity; or (5) is absent and unable to be procured. MRE 804(a) (emphasis added.) By using the word “includes,” “Rule 804(a) does not limit the situations in which a witness may be found unavailable. Rather it lists common instances in which unavailability may occur.” *State v Thomas*, 974 P2d 269, 274 (Utah, 1999). Stated otherwise, the rule “is illustrative rather than exhaustive[.]” *Gov’t of the Virgin Islands v Riley*, 754 F Supp 61, 64 (D VI, 1991); *State v Bounds*, 71 Or App 744; 694 P2d 566 (1985) (“[T]he opening phrase ‘includes situations’ indicates that the list is not intended to be exhaustive.”)

MRE 804(a) also separates each of the five situations described using the disjunctive word “or”, making clear that each is sufficient. E.g., *People v Kowalski*, 489 Mich 488, 499 n 11; 803 NW2d 200 (2011), quoting *Mich Pub Serv Comm v Cheboygan*, 324 Mich 309, 341; 37 NW2d 116 (1949) (“‘Or’ is ... a disjunctive [term], used to indicate a disunion, a separation, an alternative.”); *Auto Club Ins Ass’n*, 211 Mich App 55, 69; 535 NW2d 529 (1995) (“[T]he statute employs the term ‘or,’ which is generally construed as referring to an alternative or choice between two or more things.”)

5. This Court has held that unavailability may exist in situations not expressly included in MRE 804(a).

Consistent with the non-exhaustive language of MRE 804(a), this Court has held that a situation not falling under the rule’s five “situations” may still constitute

unavailability. In *People v Meredith*, 459 Mich 62, 65; 586 NW2d 538 (1998), reh den 459 Mich 1234; 590 NW2d 67 (1999), where the witness invoked his Fifth Amendment right, this Court ruled that “[w]hile invocation of the Fifth Amendment is not expressly treated in MRE 804(a), it is of the same character as other situations outlined in the subrule.” “[W]hile, ‘unavailability’ is a term of art under MRE 804(a), it also bears a close nexus to the ordinary meaning of the word.” *Id.* Thus, this Court held that a witness who invokes his Fifth Amendment right is unavailable for purposes of the rule. *Id.* at 66 (citations omitted.)

Following *Meredith’s* rationale, the Court of Appeals held that a fearful shooting victim, who appeared for trial, but then left without explanation, while not expressly addressed by MRE 804(a), “is also of the same character as other situations outlined in that rule of evidence.” *People v Adams*, 233 Mich App 652, 657-658; 592 NW2d 794 (1999). The Court of Appeals looked to the dictionary definition of “unavailable,” saying: “When someone is not available, that person is not ‘at hand,’ ‘readily obtainable; accessible’ or ‘free or ready to be seen, spoken to.’” *Id.* at 658, quoting *Random House Webster’s College Dictionary* (1992), p 94. (footnote omitted.) The Court of Appeals then concluded that the victim was unavailable under MRE 804(a)(2), and that her earlier preliminary examination testimony was properly admitted under MRE 804(b)(1) as well as the Confrontation Clause. *Id.* at 659.

6. Under MRE 804(a)(4) a witness is unavailable when she “is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.”

Outside of situations involving death, the plain language of MRE 804(a)(4) requires a “then existing physical or mental illness or infirmity.” While RS is not physically ill,⁸ she falls under the remainder of the rule.

An infirmity is defined as “*a*: the quality or state of being infirm *b*: the condition of being feeble frailty.”⁹ See also *Gov’t of the Virgin Islands*, 754 F Supp at 64, quoting *Black’s Law Dictionary* 700 (5th ed 1979) (“Although the term ‘infirmity’ often connotes a defect or illness, the basic meaning of the term is ‘weakness’ or ‘feebleness.’”) In turn, “infirm” is defined as “1: of poor or deteriorated vitality; *especially*: feeble from age 2: weak of mind, will, or character : irresolute, vacillating 3: not solid or stable : insecure.”¹⁰ A child, who at an earlier point in time testified competently but who no longer can testify because of fear and the

⁸ A then-existing physical illness or infirmity has been found in numerous cases. *Garland*, 286 Mich App at 7 (the victim had a high-risk pregnancy, lived in Virginia, and was unable to fly or travel to Michigan to testify); *People v Gross*, 123 Mich App 467, 469; 332 NW2d 576 (1983) (the victim was hospitalized three days before trial and undergoing testing for an aneurism); *People v Lytal*, 119 Mich App 562, 567-568; 326 NW2d 559 (1982) (the witness had been released from the hospital, had a bad leg, and was under a doctor’s care); *People v Murry*, 106 Mich App 257, 259; 307 NW2d 464 (1981) (the 84-year-old victim was hard of hearing, extremely upset about the possibility of retestifying and suffered from hypertension, recurrent pneumonia, and myocardial ischemia; the victim’s doctor said she could come to court, but it would be detrimental to her health). Given the witnesses’ unavailability, their earlier preliminary examination or trial testimony was properly admitted. *Id.*

⁹ <http://www.merriam-webster.com/dictionary/infirmity> (accessed March 21, 2013)

¹⁰ *Id.* infirm.

stress of repeatedly testifying has a then-existing mental infirmity. See *Gov't of the Virgin Islands*, 754 F Supp at 64 (“The child’s incompetence to testify in open court is due to the weakness of the emotional state of a child of his age as compared to an ordinary adult, and thus can be said to be the result of a ‘mental infirmity.’”) RS’s current inability to testify brings her squarely within the language of MRE 804(a)(4).

a. Michigan case law – a child witness, who is incompetent to testify, is unavailable under MRE 804(a)(4).

The Court of Appeals has held that a child’s incompetence renders her unavailable under MRE 804(a)(4). *People v Edgar*, 113 Mich App 528; 317 NW2d 675 (1982). There, a 4-year-old girl asked her aunt in graphic terms if they were going to perform fellatio on her aunt’s boyfriend. When the victim’s aunt asked how she would know about something like this, the victim began to say her father, but then stopped herself. She later explained her father had threatened to whip her if she told.

Although the victim was competent to testify at preliminary examination, the trial court found her incompetent during a pretrial hearing under MRE 601 because she did not recognize the difference between truth and falsity and did not respond to questions about the sexual assault. *Id.* at 532. Finding it “incongruous” that the victim understood those concepts six months earlier at the preliminary examination, the court dismissed the first-degree criminal sexual conduct charge. *Id.* at 532, 535. The Court of Appeals reversed, saying that the examining

magistrate had not abused his discretion in finding the child competent to testify after she said she knew what the truth was and would tell the court the truth. *Id.* at 530, 535. Noting the 4-year-old victim's "inability or reluctance to answer" the trial court's questions, the Court of Appeals questioned whether "her sudden failure of memory was due to fear of the defendant or an honest lack of recall..."¹¹ *Id.* at 536. But, whatever the cause, the Court of Appeals ruled "she was unavailable as a witness during trial." *Id.* In so doing, the Court of Appeals cited *both* MRE 804(a)(3) and MRE 804(a)(4). *Id.* at 536 n 1.

The Court of Appeals followed *Edgar* in *People v Karelse*, 143 Mich App 712; 373 NW2d 200 (1985), rev'd on another ground 437 Mich 872; 437 NW2d 255 (1987). There, the defendant's 20-year-old mentally retarded daughter testified at preliminary examination. Pretrial, the defendant filed a motion, challenging her competence. Although the trial court agreed that she had the apparent ability to tell the truth, it concluded that her "limited mental ability" and "susceptibility to influence made her incompetent" under MRE 601. *Karelse*, 143 Mich App at 714. The trial court then relied on *Edgar* to admit the victim's earlier testimony. *Id.* The Court of Appeals affirmed because the victim's mental incapacity made her unavailable under MRE 804(a)(4). *Id.* at 715. This Court reversed after it

¹¹ In *People v Hayward*, 127 Mich App 50; 338 NW2d 549 (1983), a nine-year-old sexual assault victim was unable to remember the assault. The trial court did not know why the victim could not remember, suggesting that a psychological examination might reveal that she was blocking it as the result of trauma; but it admitted her preliminary examination transcript testimony because she was unavailable under MRE 804(a)(3). *Id.* at 54. The Court of Appeals affirmed. *Id.* at 55-58.

determined the victim was competent because she “recognized and had the ability to tell the truth.” *Karelse*, 428 Mich at 872.

Later, the Court of Appeals again read *Edgar* as permitting the prior juvenile court testimony of a three-year-old witness whom the trial court found incompetent to testify. *People v Bradley*, unpublished opinion per curiam of the Court of Appeals, issued August 13, 1999 (Docket No. 204652).

There is no reason for this Court to retreat from its holding in *Meredith* or the Court of Appeals’ holding in *Edgar*. There is no distinction between unavailability due to lack of presence and unavailability due to incompetence; in both cases, the lips of the child are equally sealed.

b. Other jurisdictions treat a child’s incompetence as unavailability under like evidentiary rules

Other states have similarly held incompetent child witnesses unavailable under their versions of MRE 804(a) or MRE 804(a)(4). E.g., *State v Townsend*, 635 So2d 949, 955 (Fla, 1994) (“[A]n incompetent witness is an unavailable witness within the meaning of section 90.804(1)(d)’s existing mental infirmity requirement”, meeting the unavailability requirement set forth in the hearsay exception for a child’s statement of sexual abuse); *State v Andrews*, 447 NW2d 118 (Iowa, 1989) (although the court agreed with other courts that an incompetent witness is unavailable for purposes of rule 804, admission of the 4-year-old victim’s prior testimony was barred under *Coy v Iowa*, 487 US 1012; 108 S Ct 2798; 101 L Ed 2d 857 (1988), as the court failed to comply with its requirements); *In the Matter of*

ADB, 778 P2d 945, 946-948 (Okla Civ App, 1989) (incompetency of 4-year-old girl “is an ‘infirmity’ which would render her unavailable as a witness” and, therefore, her statement was admissible under a statutory hearsay exception for minor children in sexual abuse cases); *State v Bounds*, 71 Or App 744, 750 n 1; 694 P2d 566 (1985) (for purposes of the residual hearsay exception, incompetency due to age while not expressly mentioned in OEC 804(1), which defines unavailability, “includes the situation in which a declarant is incompetent to testify because of age.”); *Haggins v Warden, Fort Pillow State Farm*, 715 F2d 1050, 1056 (CA 6, 1983), citing FRE 104(a) and 804(a) (since the 4-year-old victim “was ruled incompetent to testify, she was clearly unavailable.”)

Numerous courts have also held that young children are unavailable under a rule like 804(a) or 804(a)(4) when their emotional condition or age prevents them from testifying. E.g., *State v Thomas*, 974 P2d 269, 271-274 (Utah, 1999) (although recognizing “that neither ‘age’ nor ‘ability to testify’ is *specifically* delineated as a basis for unavailability under rule 804”, the trial court properly determined the 6-year-old victim was unavailable when despite numerous questions and sitting on her mother’s lap, she did not answer the court’s questions or responded with one- or two-word answers or nodded her head); *State v Chandler*, 324 NC 172, 178-181; 376 SE2d 728 (1989) (without medical testimony, the court determined a 4-year-old girl was unavailable under 804(a)(4) when she was “frozen” in fear, her throat was quivering and her legs were shaking so that she was simply unable to testify, even after sitting in her mother’s lap); *State v Robinson*, 153 Ariz 191, 195, 201 n 12; 735

P2d 801 (1987) (court heard testimony from expert that 5-year-old girl “would be uncommunicative if asked about the assault and could be further traumatized by courtroom proceeding; after watching prior unsuccessful attempt at live and videotaped testimony, the “court concluded that because of her age and the trauma” “she was *incapable* of testifying about the event” and held she “was ‘unavailable’ to testify under Rule 804(a)(4) because of an existing mental infirmity.”); *State v Drusch*, 139 Wis 2d 312, 315-320; 407 NW2d 328 (1987) (8-year-old witness, who had previously testified at a preliminary hearing, was unavailable when she answered only a few questions before beginning to cry; the appellate court affirmed the trial court’s findings that she was so frightened and emotionally upset as the equivalent of a finding that the witness’ inability was the result of “then existing ... mental illness or infirmity.”)

7. The trial court abused its discretion because it misapplied the law.

After the trial court determined that RS was incompetent under MRE 601, it said that it could not say that she was not unavailable under MRE 804(a). But under this Court’s decision in *Meredith* and the Court of Appeals’ decision in *Edgar*, RS *was* unavailable to testify under MRE 804(a). In addition, the trial court erred when it second-guessed and overruled the magistrate’s decision that RS was competent when she testified at the earlier preliminary examinations.

The Court of Appeals continued the trial court’s errors. It too failed to correctly read the Court of Appeals’ opinion in *Edgar*. And it determined that this

Court's opinion in *Meredith*, finding MRE 804(a)'s language to be nonexhaustive, was *wrong*. The Court of Appeals may not ignore this Court's precedent, but must follow it. *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987).

CONCLUSION AND RELIEF REQUESTED

A child who is incompetent to testify is unavailable under MRE 804(a). But the child's prior testimony—given at a time that the child was competent and the defendant had the opportunity for cross-examination—is admissible. By failing to follow this Court's and the Court of Appeals' precedent, the trial court legally erred when it found RS unavailable. It thereby abused its discretion. Rather than correcting the trial court's error, the Court of Appeals compounded it.

This Court should reverse the legally-erroneous decisions of the Court of Appeals and the trial court, and order defendant's trial to continue with the admission of RS's preliminary examination testimony.

Respectfully submitted,

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