IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Kathleen Jansen, Presiding Judge
Cynthia Diane Stephens and Michael J. Riordan, Judges

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant

Supreme Court
No. 146295

-vs-

STANLEY GREIG DUNCAN,
Defendant-Appellee,
_____/

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

Supreme Court
No. 146296

-vs-

VITA DUNCAN,
Defendant-Appellee,
_____/

BRIEF ON APPEAL – APPELLANT
ORAL ARGUMENT REQUESTED

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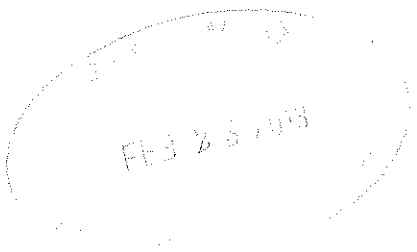

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STATEMENT OF JURISDICTION

On January 24, 2013 this court issued an Order (119a) granting Plaintiff-Appellant's motion for immediate consideration and granting Plaintiff-Appellant's application for leave to appeal the November 29, 2012 judgment of the Court of Appeals, limited to the issue whether the witness was "unavailable" for the purposes of MRD 804(a). This Court has jurisdiction pursuant to MCR 7.301(A)(2) and MCR 7.302(H)(3). Pursuant to that Order, the Plaintiff-Appellant's brief is being filed no later than February 26, 2013.

ISSUE PRESENTED

ISSUE

DID THE TRIAL COURT REVERSIBLY ERR IN CONCLUDING THAT THE COMPLAINANT WAS UNAVAILABLE WITHIN THE MEANING OF MRE 804(A)?

Plaintiff-Appellant's Answer: "Yes."
Defendant-Appellee's Answer: "No."

STATEMENT OF FACTS

The jury trial in these consolidated cases began on September 26, 2012. The prosecution charged co-defendant, Stanley Greig Duncan, with First-Degree Criminal Sexual Conduct (Person Under 13, Defendant Over 17) [complainant—S.P.] (MCL § 750.520b(2)(b)) in Macomb CC No. 11-4304-FC and four counts of First-Degree Criminal Sexual Conduct (Person Under 13, Defendant Over 17) [complainants—R.S. (two counts) and K.N. (two counts)] and four counts of Second-Degree Criminal Sexual Conduct (Person Under 13, Defendant Over 17) [complainants—R.S. (two counts) and K.N. (two counts)] (MCL § 750.520c(2)(b)) in Macomb CC No. 11-3839-FC. The prosecution charged co-defendant, Vita Duncan, on an aiding and abetting theory with two counts of First-Degree Criminal Sexual Conduct (Person Under 13, Defendant Over 17) [complainant—R.S], two counts of Second-Degree Criminal Sexual Conduct (Person Under 13, Defendant Over 17) [complainant—R.S.], and one count of Child Care Organizations- Violations (MCL § 722.125(1)(b)) in Macomb CC No. 11-4401-FC.

On Friday, September 28, 2012, the assistant prosecuting attorney called one of the complainants, R.S., a four-year-old girl, as a witness. (52a). Judge Switalski, after questioning the complainant, found that she was not competent to testify under MRE 601. (52a-60a). At this point, the assistant prosecuting attorney requested that the trial court find the complainant unavailable under MRE 804(a)(4) and admit her preliminary

examination testimony under MRE 804(b)(1). (60a-62a). The trial court refused this request. (60a-62a).

On the next scheduled day of trial, October 2, 2012, the assistant prosecuting attorney asked Judge Switalski to reconsider his ruling. (69a-79a). Judge Switalski refused this request. (79a-83a). He did, however, grant the assistant prosecuting attorney's motion for a stay of proceedings so that she could seek emergency relief in the appellate courts. (83a-96a, 98a-99a).

Later that day, the prosecution filed applications for leave to appeal and motions for immediate consideration with the Court of Appeals. On October 4, 2012, the Court of Appeals granted the motions for immediate consideration and held the applications for leave to appeal in abeyance. (100a-101a). Further, being without the benefit of transcripts, the Court of Appeals remanded the matters to the trial court "for preparation of an opinion, explaining its decision related to the October 2, 2012 order regarding the complainant's testimony." (100a-101a). Pursuant to these orders, Judge Switalski prepared an opinion regarding his evidentiary ruling. (102a-105a).

On October 8, 2012, the Court of Appeals denied the prosecution's applications for leave to appeal. (106a-107a).

The following day, the prosecution filed applications for leave to appeal and motions for immediate consideration with this Court. On October 10, 2012, the prosecution filed a motion for stay of proceedings

with this Court. On that day, this Court granted the motions for immediate consideration. (108a). In lieu of granting leave to appeal, this Court remanded these cases back to the Court of Appeals for consideration as on leave granted on an expedited basis. (108a) In addition, this Court granted the prosecution's motion for stay of proceedings pending the completion of this appeal. (108a).

In that regard, the Court of Appeals ordered that this appeal be expedited and directed the parties to file briefs on appeal by the end of October. (109a-110a). The Court of Appeals held oral argument on November 9, 2012. On November 29, 2012, the Court of Appeals affirmed Judge Switalski's ruling in an unpublished per curiam opinion. (111a-118a).

The prosecution filed an application for interlocutory leave to appeal. On January 24, 2013, this Court granted the application for interlocutory leave to appeal on the limited issue of "whether the witness was 'unavailable' for the purposes of MRE 804(a)." (119a). This Court vacated "as *dicta* those portions of the Court of Appeals' judgment and the Macomb Circuit Court's October 5, 2012 opinion discussing whether the admission of the complainant's preliminary examination testimony would violate the defendants' Confrontation Clause rights pursuant to *Crawford v. Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004)". (119a).

ISSUE

THE TRIAL COURT REVERSIBLY ERRED IN CONCLUDING THAT THE COMPLAINANT WAS UNAVAILABLE WITHIN THE MEANING OF MRE 804(A).

STANDARD OF REVIEW

An appellate court reviews a trial court's decision whether to admit evidence for an abuse of discretion. *People v. Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, decisions regarding the admission of evidence often involve preliminary questions of law, *e.g.*, whether a rule of evidence or a statute precludes admissibility of evidence. *Lukity, supra* at 488; 596 NW2d 607. Questions of law are reviewed *de novo.* Id.

ARGUMENT

The jury trial in these consolidated cases commenced on September 26, 2012. On September 28, 2012, the assistant prosecuting attorney called one of the complainants, R.S., a four-year-old girl, as a witness. (52a). The trial court, after questioning the complainant, concluded that she was not competent to testify under MRE 601. (52a-60a). At this point, the assistant prosecuting attorney asked the trial court to declare the complainant unavailable as set forth in MRE 804(a) and admit her testimony from the preliminary examinations as contemplated by MRE 804(b)(1). (60a-62a). The trial court denied this request. (60a-62a).

This Court has granted leave to appeal on the narrow issue of whether R.S. was "unavailable" for the purposes of MRE 804(a). (Tr. 119a). The relevant rule of evidence, MRE 804, provides:

> **(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;
>
> (3) has a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or testify 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.

In determining unavailability, the focus is not on the unavailability of the witness *per se*, but on the availability of his or her testimony. *Thomas v. Cardwell*, 626 F2d 1375, 1385 (9th Cir. 1980); *State v. Barela*, 779 P2d 1140, 1143 (Ore. 1989). The other pertinent rule of evidence for these

purposes, MRE 601, states that "[u]nless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules."

People v. Edgar/People v. Karelse/People v. Bradley

The trial court's ruling is contrary to published Michigan case law and constitutes reversible error. In the Court of Appeals' decision in *People v. Edgar,* 113 Mich App 528, 530; 317 NW2d 675 (1982), the complainant in a First-Degree Criminal Sexual Conduct case, Caprice Johnson, testified at preliminary examination. The examining magistrate found Caprice to be competent, heard her testimony, and bound the defendant over to circuit court to stand trial. *Id.* at 530-531. At a pretrial hearing, however, the circuit court judge found Caprice incompetent under MRE 601 and "held that Caprice's testimony at the preliminary examination could not be read at trial under MRE 804(b)(1)." *Id.* at 532,

The Court of Appeals reversed the circuit court's ruling. *Id.* at 535-536. In a *per curiam* opinion, the *Edgar* Court wrote:

> The prosecution also claims that the trial court erred in ruling that the preliminary examination testimony of Caprice was not admissible at trial. The court ruled that Caprice did not understand the difference between truth and falsehood at the time of trial. It was further held that it would be incongruous to hold Caprice did understand the concept six months earlier during the preliminary examination. Consequently, Caprice was not allowed to testify at

> trial and her previous testimony was excluded as being unreliable.
>
> The examining magistrate's decision that Caprice was competent to testify is reviewable only to determine whether there was an abuse of discretion. *People v. Minchella*, 268 Mich.App. 123, 255 N.W. 735 (1934). We cannot say that the examining magistrate abused his discretion in finding her competent at the time of the pretrial evidentiary hearing. Although the change in the child's competency may seem incongruous on its face, her subsequent inability to testify does not alter the magistrate's initial finding. We find that the trial court erred in reversing the magistrate's determination that Caprice was competent to testify. MRE 601. A subsequent showing of the witness's inability to testify truthfully affects credibility, not admissibility. *People v. Cobb*, 108 Mich.App. 573, 576, 310 N.W.2d 798 (1981).
>
> When the trial court examined Caprice she exhibited an inability or reluctance to answer the questions. Whether her sudden failure of memory was due to fear of the defendant or an honest lack of recall does not affect the fact that she was unavailable as witness during trial. Under MRE 804(b)(1), her prior preliminary examination testimony was admissible due to her inability to testify at trial. See *People v. Terry*, 80 Mich.App. 299, 263 N.W.2d 352 (1977). *Id.* at 535-536. (emphasis added)

As a result, the Court of Appeals reinstated the charges. *Id.* at 536.

The Court of Appeals has reaffirmed *Edgar* on numerous occasions since its publication. In *People v. Karelse*, 143 Mich App 712, 714; 373 NW2d 200 (1985), rev'd on other grounds in *People v. Karelse*, 428 Mich 872 (1987), the defendant, charged with sexual molestation of his daughter, filed a pretrial motion alleging that the complainant was not competent to testify at trial. After examining the complainant, the trial

court declared her incompetent as a witness under MRE 601. *Id.* Citing *Edgar*, however, the trial court ruled that "the transcript of the victim's preliminary examination testimony could be read to the jury." *Id.*

The Court of Appeals affirmed. *Id.* at 715. The *Karelse* Court observed that MRE 804(b)(1) "provides that the prior testimony of a witness is admissible in a subsequent proceeding if the witness is unavailable to testify and if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony of the witness at the prior hearing." *Id.* Under the circumstances, the Court of Appeals found that "the trial court correctly ruled under MRE 804(a)(4) that the victim, due to her mental incapacity, was unable to testify and was therefore unavailable as a witness." *Id.* The Court of Appeals noted that the preliminary examination transcript revealed that the defendant employed his opportunity to develop the complainant's testimony regarding his guilt by cross-examination. *Id.* Relying upon the *Edgar* decision, the Court of Appeals found that, "despite contrary findings by the examining magistrate and the trial court on the issue of the victim's competency, the preliminary examination was properly allowed into evidence." *Id.*

More than a decade later, in *People v. Bradley*, unpublished opinion per curiam of the Court of Appeals, issued August 13, 1999 (Docket No. 204652)(120a-122a), a defendant endeavored to admit videotaped testimony from his daughter's deposition in a juvenile court

proceeding during which his daughter denied that he sexually abused her. (122a-123a). Citing *Edgar*, the Court of Appeals determined that the trial court's decision to preclude this evidence was reversible error:

> We agree with defendant that the trial court should have admitted the daughter's previous testimony. The trial court determined that she was incompetent to testify under MRE 601. This Court has held that when a child witness is prohibited from testifying under MRE 601 she should be considered unavailable for purposes of MRE 804(a)(4), which defines an unavailable witness as one who "is unable . . . to testify at the hearing because of . . . then existing physical or mental illness or infirmity." See *People v. Edgar*, 113 Mich.App. 528, 535-536, 317 N.W.2d 675 (1982), where we held that a child's "inability or reluctance to answer the questions" made that child unavailable to testify at trial and allowed the prosecutor to present the child's prior preliminary examination testimony under MRE 804(b)(1). See also *People v. Karelse*, 143 Mich.App. 712, 714-715, 373 N.W.2d 200 (1985), rev'd on other grounds in *People v. Karelse*, 428 Mich. 872 (1987). Though the trial court found that defendant's daughter was not competent to testify at the trial, the juvenile court found her competent to testify in the earlier proceeding. Once the juvenile court was satisfied that defendant's daughter was competent to testify, the trial court's later showing of her inability to testify truthfully or to communicate reflected on her credibility, not her competency. *People v. Coddington*, 188 Mich.App. 584, 597; 470 NW2d 478 (1991). (121a-122a). (emphasis added)

The *Bradley* Court reversed and remanded for trial. (122a).

The case at bar is factually identical to these cases from the Court of Appeals. Like the trial courts in *Edgar*, *Karelse*, and *Bradley*, Judge Switalski declared the complainant incompetent to testify under MRE 601 after that complainant had been adjudged competent to testify at a

prior hearing by another judge or magistrate. As in these published Michigan appellate cases, the complainant is unavailable for purposes of MRE 804(a)(4) and the assistant prosecuting attorney should be permitted to present the complainant's testimony from the preliminary examinations under MRE 804(b)(1).

MRE 804(a)

Judge Switalski made much of the fact that the complainant's "failure to be able to take the equivalent of the oath did not trigger any of the scenarios in [MRE] 804(a), where unavailability is defined." (103a). As noted, *Edgar* and its progeny have held that a trial court's ruling that a witness is incompetent under MRE 601 also makes the complainant unavailable under MRE 804(a)(4) as "unable to be present or testify at the hearing because of death or then existing physical or mental illness or infirmity." Notably, the language contained in MRE 601 ("does not have sufficient physical or mental capacity . . . to testify truthfully") even tracks the language contained in MRE 804(a) ("is unable . . . to testify . . . because of . . . then existing physical or mental illness or infirmity").

Even so, the relevant rule of evidence, MRE 804(a), is not as precise as Judge Switalski interpreted it and does not specifically limit "unavailability" to the exact situations set forth in paragraphs (1) through (5). In that regard, the Michigan Supreme Court has endorsed a broad view of the term "unavailable" as it is used in MRE 804(a). In *People v. Meredith*, 459 Mich 62, 63-66; 586 NW2d 538 (1998), a drug

courier asserted her Fifth Amendment as a reason for refusing to testify and the prosecution sought to use her preliminary examination testimony at trial. The *Meredith* Court held:

> While invocation of the Fifth Amendment is not expressly treated in MRE 804(a), it is of the same character as the other situations outlined in the subrule. Further, while "unavailability" is a term of art under MRE 804(a), it also bears a close nexus to the ordinary meaning of the word. Thus, we often have recognized that a witness, in fact, is unavailable who cites the Fifth Amendment as a justification for not testifying (citations omitted). *Id.* at 65-66.

Here, the complainant's adjudged incompetency under MRE 601, coming after her testimony at the preliminary examinations, "is of the same character" as the scenarios set forth in MRE 804(a). *Id.* at 65.

In that same regard, in *People v. Adams*, 233 Mich App 652, 655; 592 NW2d 794 (1999), the Court of Appeals dealt with a scenario in which the complainant "appeared at court on the day of trial to testify against defendant, but she abruptly left without warning or notice before proceedings began." The *Adams* Court, relying on *Meredith*, concluded that "while a complainant's eleventh-hour decision to leave the courthouse is not expressly addressed under MRE 804(a), it is also of the same character as other situations outlined in that rule of evidence." *Id.* at 658. Here, the complainant's adjudged incompetency under MRE 601, coming after her testimony at the preliminary examinations, "is of the same character" as the scenarios set forth in MRE 804(a). Employing the ordinary meaning of the term as in *Meredith* and *Adams*, Judge

Switalski's ruling rendered the complainant unavailable under MRE 804(a).

Other Jurisdictions

Other jurisdictions have overwhelmingly held that a child witness deemed incompetent to testify at trial is unavailable for purposes of that jurisdiction's hearsay rules and other rules of evidence. By way of example, the Sixth Circuit Court of Appeals, in *Haggins v. Warden*, 715 F2d 1050, 1055 (6th Cir.1983), citing FRE 804(a) in the context of an analysis under the Sixth Amendment right to confrontation, determined that "[s]ince the declarant in this case was ruled incompetent to testify, she was clearly unavailable." Moreover, in *Government of the Virgin Islands v. Riley*, 754 FSupp 61, 64 (D.V.I. 1991), a federal district court judge dealing with a scenario similar to the case at bar, stated:

> In any event, the admission of the deposition does not depend on the categorization of the child's incompetence as a "mental infirmity." Evidently, the purpose of the deposition exception to the hearsay rule, together with its unavailability requirement is to permit deposition testimony when and only live testimony cannot be procured through reasonable means. The literal language of Rule 804(a) suggest that the definition of unavailability is illustrative rather than exhaustive, and the purpose of the deposition exception to the hearsay rule would be defeated by adopting a reading that would exclude reliable deposition testimony even though the witness's live testimony could not be obtained at trial. The inability of a child to communicate with a jury, no matter how it is described, is similar in is essential nature to the types of unavailability specifically enumerated in Rule 804(a). It makes no difference whether the absence of the witness's live testimony is due, on the one hand, to a young child's fear of the courtroom setting, or on the

> other hand, to a refusal to testify, a mental illness or disability, or a lack of memory. (emphasis added)

Thus, the federal district court judge held that the "Federal Rules of Evidence and Criminal Procedure do not bar the introduction of the deposition in evidence." *Id.*

In *State v. Bounds*, 694 P2d 566, 568 (Ore.1985), the defendant argued on appeal that "the trial court erred when it permitted the victim's mother to testify as to statements made by the child" under Oregon hearsay rules. The parties "stipulated that the declarant was incompetent to testify because of her age; for this reason she was unavailable as a witness." *Id.* at 568. In that regard, the Oregon Court of Appeals, interpreting the identical Oregon rule of evidence, OEC 804(1)(d), stated:

> Although incompetency due to age is not expressly listed as a situation of unavailability, we think that it qualifies. We note that the opening phrase "includes situations" indicates that the list is not intended to be exhaustive. It is possible to read the language of subsection (d) concerning "mental infirmity" as including incompetence due to youth, but we think that would do violence to the literal meaning. In accord with the following state and federal case authorities, we hold that "unavailability of a witness" includes the situation in which a declarant is incompetent to testify because of age: *State ex rel. Gladden v. Lonergan*, 201 Or. 163, 182, 269 P.2d (1954); *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1055 (6th Cir.1983), *cert. denied*, 464 U.S. 1071, 104 S.Ct. 980, 79 L.Ed.2d 217 (1984); *Ellison v. Sachs*, 583 F.Supp. 1241 (D.Md.1984); *People v. Orduno*, 80 Cal.App.3d 738, 145 Cal.Rptr. 806 (1978), *cert. denied*, 439 U.S. 1074, 99 S.Ct. 849, 59 L.Ed.2d 41 (1979). *Id.*

Thus, the *Bounds* Court held that these statements were admissible pursuant to Oregon hearsay rules. *Id.* at 569.

Further, in *State v. Doe*, 105 Wash2d 889, 895; 719 P2d 554 (1986), the Washington Supreme Court, in interpreting several state statutes and rules of evidence, including the identical Washington rule of evidence, ER 804(a)(4), wrote:

> Although other jurisdictions uniformly conclude an incompetent witness is unavailable, *State v. Bounds*, 71 Or.App, 744, 694 P.2d 566 (1985); *Lancaster v. People*, 200 Colo. 448, 615 P.2d 720 (1980); *People v. Orduno*, 80 Cal.App.3d 738, 145 Cal.Rptr 806 (1978), this court has not yet addressed the issue . . . While the concepts of availability and competency do not overlap entirely, it is quite clear that an incompetent child is not available. The term "available" denotes a witness who can be confronted and cross-examined. ER 804(a)(4). A child unable to take the stand obviously cannot respond to opposing counsel's questions.

In *State v. Andrews*, 447 NW2d 118, 119 (Iowa, 1989), the prosecution charged the defendant with two counts of "lascivious acts" with a minor child. The first trial, at which the minor child testified, resulted in a hung jury and a mistrial. *Id.* Subsequently, another trial court judge "declared the child victim incompetent to testify." *Id.* Further, the trial court judge denied the prosecution's motion to introduce the minor child's testimony from the first trial under Iowa Rule of Evidence ("IRE") 804(b). *Id.* at 120.

The Iowa Supreme Court, although affirming the lower court on Sixth Amendment grounds, preliminarily grappled with the issue of the

admissibility of the minor child's trial testimony under IRE 804(a)(4) and concluded that it agreed with the Washington Supreme Court's above analysis in *Doe*. *Id.* at 122-123. Like the *Doe* Court, the *Andrews* Court noted that "[o]ther jurisdictions have uniformly held that an incompetent child witness is 'unavailable' for the purposes of rule 804." *Id.* at 122.

The Florida Supreme Court, in *State v. Townsend*, 635 So2d 949, 955-956 (1994), found that "an incompetent witness is an unavailable witness within the meaning of section 90.804(1)(d)'s existing mental infirmity requirement." In doing so, the Florida Supreme Court, citing dozens of cases from both state and federal jurisdictions[1], acknowledged that the substantial majority of courts agree with this interpretation. *Id.*

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[1] See *Gregory v. North Carolina*, 900 F.2d 705, 707 n. 6 (4th Cir.) (incompetency equals unavailability under rule 804 of the Federal Evidence Code), *cert. denied*, 498 U.S. 879, 111 S.Ct. 211, 112 L.Ed.2d 171 (1990); *United States v. Dorian*, 803 F.2d 1439 (8th Cir.1986) (witness who testified but was too young and frightened to be subject to meaningful direct examination was unavailable for all practical purposes); *Ellison v. Sachs*, 769 F.2d 955, 957 n. 4 (4th Cir.1985) (victim, although present, was unavailable because she was declared incompetent given her young age); *Haggins v. Warden*, 715 F.2d 1050 (6th Cir.1983) (because the declarant was ruled incompetent to testify, she was clearly unavailable under the Federal Evidence Code), *cert. denied*, 464 U.S. 1071, 104 S.Ct. 980, 79 L.Ed.2d 217 (1984); *Government of Virgin Islands v. Riley*, 754 F.Supp 61, 64 (D.V.I.1991) (even though incompetency is not an enumerated basis for unavailability under Rule 804, an incompetent witness is unavailable for purposes of that provision; "[t]he literal language of rule 804(a) suggests that the definition of unavailability is illustrative rather than exhaustive"); *People v. Bowers*, 801 P.2d 511 (Colo.1990) (a finding that a child is incompetent to testify does not necessarily impair any particularized guarantees of reliability that otherwise inhere in the child's hearsay statement); *People v. Hart*, 214 Ill.App.3d 512, 158 Ill.Dec. 103, 573 N.E.2d 1288 (child who was deemed incompetent to testify due to age was unavailable to testify within meaning of statute), *abrogated on other grounds, People v. Schott*, 145 Ill.2d 188, 164 Ill.Dec. 127, 582 N.E.2d 690 (1991); *State v. Lanam*, 459 N.W.2d 656 (Minn.1990) (text of federal and state provisions are almost identical and, under the statute, incompetency equals unavailability), *cert. denied*, 498 U.S. 1033, 111 S.Ct. 693, 112 L.Ed.2d 684 (1991); *State v. Deanes*, 323 N.C. 508, 374 S.E.2d 249 (1988) (the unavailability of a child witness in a sexual abuse trial due to incompetency adequately

The Court of Appeals' Opinion

In its opinion, the Court of Appeals endeavors to distinguish *Edgar* on the basis that *Edgar*'s holding is grounded in MRE 804(a)(3) and the complainant's failure of memory during her testimony. The *Edgar* opinion itself, however, belies that interpretation. The *Edgar* Court initially noted that the trial court "ruled that [the complainant] was incompetent to testify 'because she cannot appreciate the obligation to testify truthfully and understandably as required by MRE 601." *Edgar*, *supra* at 532.

Later, the *Edgar* Court observed that the complainant "did not understand the difference between truth and falsehood at the time of trial." *Id.* at 535. In other words, just like the case at bar, the trial court declared the complainant incompetent under MRE 601 which requires that a witness "ha[s] sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably." Thus, the thrust of the *Edgar* opinion is that when a child witness is precluded from testifying under MRE 601 he or she should be viewed as an unavailable witness who "is unable . . . to testify at the hearing because of . . . then existing physical or mental illness or infirmity." *Id.* at 535-536. Indeed, the Court of Appeals previously interpreted *Edgar* in this very way in *Bradley*.

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demonstrates the necessity for using the child's hearsay declaration), *cert. denied*, 490 U.S. 1101, 109 S.Ct. 2455, 104 L.Ed.2d 1009 (1989).

Moreover, during its analysis of *Edgar* and *Karelse*, the Court of Appeals asserted that "[t]hat those complainants were also declared incompetent was of no consequence to the unavailability analysis." (116a). Even putting aside Michigan cases, however, countless other jurisdictions have held exactly that—that an incompetent witness is unavailable to testify under 804(a). The Court of Appeals' opinion mentions that "the prosecution does provide a variety of holdings from foreign jurisdictions in support of its position," but makes no effort to explain why Michigan should move away from the overwhelming majority position on this evidentiary issue. The Court of Appeals' opinion further observes that "the prosecution has failed to demonstrate that MRE 804(a) does not provide an exhaustive list of when a witness can be declared unavailable." (117a). Again, the prosecution posits that *Meredith* and *Adams*, as well as many other cases from other jurisdictions and the plain language of MRE 804(a) itself, stand for this exact proposition: the five categories of unavailability set forth in MRE 804(a) is not exhaustive but illustrative. The trial court did, in fact, reversibly err in refusing to admit the complainant's testimony from the preliminary examinations.

RELIEF REQUESTED

The prosecution respectfully requests that this Honorable Court **REVERSE** the rulings of the lower courts and **REMAND** back to the trial court with instructions to admit the complainant's preliminary examination testimony under MRE 804(b)(1).

Respectfully submitted,

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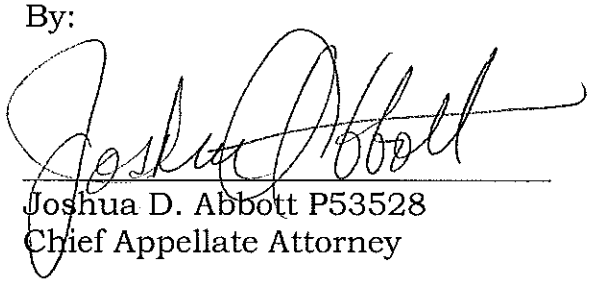
By:



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