

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

ROBIN SCOTT DUENAZ,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 311441

Circuit Court No. 12-000721FC

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APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Robin Scott Duenaz applies for leave to appeal the July 10, 2014 published decision of the Court of Appeals affirming his convictions for three counts of criminal sexual conduct in the first degree and one count of criminal sexual conduct in the second degree, and asks this Court to reverse his convictions. (Opinion attached as Appendix A; Order denying timely-filed Motion for Reconsideration attached as Appendix B).

This case presents five issues that warrant review by this Court, and it is particularly important to do so because they are found in a published opinion that is of binding precedent. The first is the proper interpretation, scope, and application of the Rape Shield Statute. The Court of Appeals held it was proper to exclude evidence that the complainant in this case had been sexually abused by her own father about a year before she accused Mr. Duenaz of almost

identical misconduct. That abuse resulted in the father's convictions. As a threshold matter, Mr. Duenaz contends that a child's non-volitional victimization by another is not "sexual conduct" that is covered by the plain language of the Rape Shield Statute, MCL 750.520j. This Court has wrestled with the issue in recent cases and it is thus appropriate to settle the question and clarify the law in this case. Even if the Rape Shield Statute does apply, it is important to address and correct the Court of Appeals' mistaken assumption (made without specifically addressing Mr. Duenaz's arguing in this regard) that the offered evidence was not admissible to show alternate source of the complainant's disease as MCL 750.520j(1)(b) specifically provides. The prosecutor explicitly argued that behavior and physical symptoms exhibited by the complainant that were indicative of some psychological trauma were directly attributable to Mr. Duenaz's abuse. The prosecutor further implied that the complainant's condition of "urine leakage" was physical evidence that she was sexually penetrated. What the jury did not know because of the judge's ruling was that an almost identical symptom was observed in the wake of the abuse the complainant suffered at the hands of her father. Both these types of evidence fit the ordinary definition of the term "disease". Without the evidence, the jury was left to conclude the only source of these symptoms was Mr. Duenaz's abuse. The trial court's ruling thus created an uneven playing field in which the defense was deprived of a powerful tool for blunting and countering the prosecution's theory. Finally, even if the rape shield exception did not apply, the prior abuse evidence was otherwise relevant, admissible and necessary to show an alternate source of the complainant's knowledge of sexual matters and to argue that she was a confused child who transferred her memory of her father's abuse onto Mr. Duenaz. Excluding this evidence violated Mr. Duenaz's constitutional right to present a defense and argue his theory of the case.

The Court of Appeals also stretched the meaning and reach of the “medical diagnosis” exception to the hearsay rule beyond its proper limits by admitting the complainant’s accusatory statement to a doctor who examined her in a primarily-forensic setting for the stated purpose of looking for physical evidence of a crime. MRE 803(4). It is well established in this state that statements placing blame, attributing fault, and identifying the person responsible for injuries are not reasonably necessary for diagnosis or treatment. While this Court has modified this prohibition to some extent when children are involved, the general presumption against use of such statements of this type remains intact. Any reason to suspend that general prohibition was not present in this case where: (1) the complainant had already been examined by an emergency room physician, who found no injury; (2) the examination occurred at a forensic center, (3) by a doctor who conceded he was primarily for evidence of a crime. Admitting this statement improperly bolstered the complainant’s credibility and was outcome determinative.

The Court of Appeals further erred in admitting two sets of “other bad acts evidence” under MCL 768.27a. One consisted solely of Mr. Duenaz’s Arizona conviction for a sex-related crime. MCL 768.27a applies only to acts and not convictions, and no evidence about the conduct leading to the conviction was presented to show that it was relevant in any way. The other set was allegations of sexual abuse by another individual that shared none of the aspects outlined by this Court in *People v Watkins*, 491 Mich 450 (2012), that result in any minimal probative value of the evidence outweighing its danger of unfair prejudice under MRE 403.

Additionally, the Court of Appeals erred in finding harmless the egregious violation of Mr. Duenaz’s constitutional rights to compulsory process and to present a defense that occurred when the trial court failed to ensure the presence at trial of the physician who examined the complainant almost immediately after she accused Mr. Duenaz of a crime. Exacerbating the

error and harm to defense was the trial court's refusal to allow the doctor to testify telephonically. Notably, the prosecutor had previously agreed to allow the telephonic testimony but then changed its position and objected after it became apparent that the doctor would be helpful to the defense. Because the trial court committed errors of constitutional dimension, the inquiry is not whether the error "more likely than not" was outcome determinative as the Court of Appeals reasoned, but whether the prosecution could meet its burden of proving beyond a reasonable doubt that there was no likelihood that the error had an impact on the verdict. The Court of Appeals failed to engage in the later, proper inquiry and the prosecution failed to meet its burden in this regard. Accordingly, the error must be found harmless and reversal is required.

Finally, Mr. Duenaz's sentence was increased by the use of facts that a jury did not find and that were never proved beyond a reasonable doubt. This violated Mr. Duenaz's constitutional rights to a jury trial and to proof beyond a reasonable doubt. While this state's current jurisprudence provides otherwise with regard to the Michigan Sentencing Guidelines, the United States Supreme Court's decision in *Alleyne v United States*, ___ US ___; 133 S Ct 2151 (2013), demands that the rule be changed. This Court is currently considering this issue and Mr. Duenaz contends that *Alleyne* compels it to hold that facts necessary to score offense variables must, in cases like this, be proved beyond a reasonable doubt to a jury.

This case presents a substantial question as to the validity and scope of the Rape Shield State, as well as issues that involve legal principles of major importance to this State's jurisprudence and to the public in general. MCR 7.302(B)(1)-(3). Furthermore, the decision is clearly erroneous in many respects and is inconsistent with decisions of this Court. MCR 7.302(B)(5). This Court should thus grant leave to appeal to consider these issues, or peremptorily reverse Mr. Duenaz's convictions and sentences.

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2 Wigmore (Chadbourn rev), Evidence, § 304, p 24927

5 Wigmore, Evidence (Chadbourn rev), § 1420, p. 25120

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the St. Clair County Circuit Court by jury trial, and a Judgment of Sentence was entered on July 2, 2012. A Claim of Appeal was filed on July 17, 2012 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated July 2, 2012, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, § 20, pursuant to MCL 600.308(1); MSA 27A.308, MCL 770.3; MSA 28.1100, MCR 7.203(A), MCR 7.204(A)(2). This Court has jurisdiction to consider this application for leave to appeal pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR IN HOLDING THAT RELEVANT EVIDENCE OF THE COMPLAINANT'S PRIOR SEXUAL VICTIMIZATION BY HER FATHER WAS PROPERLY EXCLUDED FROM TRIAL UNDER THE RAPE SHIELD STATUTE?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE COMPLAINANT'S STATEMENT ATTRIBUTING FAULT AND IDENTIFYING THE ALLEGED ASSAILANT, MADE TO A PROFESSIONAL CONDUCTING A FORENSIC EXAMINATION IN SEARCH OF EVIDENCE OF A CRIME WAS PROPERLY ADMITTED UNDER MRE 803(4), THE SO-CALLED "MEDICAL DIAGNOSIS" EXCEPTION TO THE HEARSAY RULE.

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- III. DID THE COURT OF APPEALS ERR IN HOLDING THAT OTHER BAD ACTS HAD BEEN PROPERLY ADMITTED A TRIAL?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

- IV. DID THE TRIAL COURT VIOLATE MR. DUENAZ'S FIFTH AND SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE AND TO COMPULSORY PROCESS BY DENYING THE DEFENSE REQUEST TO ASSIST IN PRODUCING DR. PENSCHORN FOR TRIAL PURSUANT TO MCL 767.40A, NOT REQUIRING THE PROSECUTOR TO DEMONSTRATE DUE DILLIGENCE IN PROCURING THE WITNESS AND, REFUSING TO ALLOW DR. PENSCHORN TO TESTIFY BY TELEPHONE? IS REVERSAL REQUIRED UNDER THE CONSTITUTIONAL HARMLESS ERROR TEST?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

V. IS RESENTENCING REQUIRED WHERE MR. DUENAZ'S SENTENCE RANGE WAS INCREASED BASED ON FACTS THAT WERE NOT FOUND BY A JURY OR PROVED BEYOND A REASONABLE DOUBT, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Robin Scott Duenaz seeks leave to appeal from the Court of Appeals' July 10, 2014 published decision and its August 26, 2014 order denying reconsideration which affirmed his jury-based convictions and sentences for three counts of criminal sexual conduct in the first degree (person under 13, defendant 17 years or older) and one count of criminal sexual conduct in the second degree (person under 13, defendant 17 years or older) in Saint Claire County Circuit Court, Judge James Adair presiding.

The prosecution argued that Mr. Duenaz sexually assaulted Desiree Martin sometime between December 25, 2007 and January 1, 2008 while she was visiting her aunt, -- a friend of Mr. Duenaz. Trial did not occur until 2012 because Mr. Duenaz had moved to Arizona.

Desiree Martin was seven years old in 2007 and lived in Marlette with her mother Elizabeth Cumper. *TR 541, 543.*¹ Ms. Cumper sent Desiree to visit her sister and Desiree's aunt, Dawn Martin, in Port Huron during the 2007 - 2008 holiday break. *TR 544.* Dawn Martin had been acquainted with Mr. Duenaz for about three years and during the visit she allowed him to pick up Desiree and her own four year old daughter, Shaunna, to make cookies at the Red Pepper restaurant located beneath Mr. Duenaz' apartment. *TR 7, 546.* Dawn Martin recalled the girls returning with Mr. Duenaz several hours later with cookies and extra dough. *TR 418-421.* At the girls' request, she allowed another sleepover with Mr. Duenaz that week. And, on another day she allowed him to pick the girls up and take them to K-Mart. She recalled both Desiree and Shaunna going shopping with Mr. Duenaz and returning with bubble bath and toys. *TR 418-421.*

¹ There are four volumes of transcripts from the jury trial that are sequentially paged and will be cited herein collectively as "TR". Transcripts of the various pretrial hearings will be cited by their date, while the sentencing hearing will be cited as "ST".

None of the adults in contact with Desiree noticed any change in her behavior or emotional state during her visit or in the 13 days that followed. Dawn Martin noticed absolutely no change in Desiree's emotional or physical state during the time period when Desiree was staying with her and recalled that she seemed perfectly normal. *TR 429, 432-433*. Nor did she notice any change in Mr. Duenaz' behavior whom she had known for several years, when he visited her home often during this Christmas break. *TR 418, 423*. Tara Groh, Desiree's adult cousin also lived with Dawn Martin during this time and had known Mr. Duenaz for several years. *TR 377, 401*. She noticed no change in Desiree during the time the abuse would have taken place and noticed no change in Mr. Duenaz's behavior during his frequent visits to Dawn's home over the Christmas break. *TR 382*. Elizabeth Cumper spoke with Desiree by telephone every day during the break and did not notice anything wrong. *TR 358, 375, 378-382*.

It was not until January 13, 2008; 13 days after Desiree returned to her mother, that there was any accusation against Mr. Duenaz. *TR 381*. Dawn Martin testified that on that day her daughter Shaunna told her something about Mr. Duenaz that led her to call the police and family members (presumably Elizabeth Cumper and Tara Groh). *TR 424, 426*. Ms. testified that she called Ms. Cumper and Desiree to talk with them about what she had been told. *TR 381*. Ms. Cumper contacted police and took Desiree to the doctor at their direction. *TR 364, 381*.

Desiree was examined by two doctors regarding the allegations of sexual abuse; neither corroborated the allegations. Doctor Duane Penshorn, who examined Desiree about two weeks after the alleged incidents on January 13, found no physical evidence of sexual abuse. Doctor Harry Frederick examined Desiree Martin on January 22nd and did not find any evidence that could be exclusively linked to sexual abuse other than Desiree's verbal report. *TR 460, 488, 478*.

Before trial the defense filed a request pursuant to MCL 767.40a for assistance in procuring the appearance of Dr. Penshorn and Dr. Frederick for trial. *Motions 6/4/12 21, 30.* Rather than objecting as specified by the statute, the prosecutor denied Dr. Penshorn was a vital *defense* witness because he was listed on the prosecutor's witness list. *People's Answer to Motion to Compel Testimony of Duane Penshorn MD.* And, rather than conducting a hearing as required by MCL 767.40a(5), the court simply reiterated that Dr. Penshorn was a prosecution witness and did not order the prosecutor to provide assistance in procuring him. *Motions 6/4/12.*

But on the eve of trial, the prosecution informed the court that Dr. Penshorn had relocated to Texas and as a result could not be present for trial. *Motions 6/4/12 32.* Defense counsel reminded the court of his previously motion for assistance in procuring this witness for trial. *Id.* at 30. The court's response was simply to advise the prosecutor to make "appropriate and sincere efforts" to produce Dr. Penshorn, with the possibility that if such efforts could not bring him to trial, his medical report could be admitted at trial instead. *Id.* at 33.

The defense also learned that Desiree's step-father, Richard Bloomfield, pled guilty to two counts of criminal sexual conduct 3rd degree and one count of criminal sexual conduct 2nd degree for sexually assaulting Desiree just a year before the allegations against Mr. Duenaz. Defense counsel moved to present this evidence at trial. The judge stated that he would conduct an in camera review comparing the police reports from both cases in order to determine whether the allegations and language used were similar. Following the in camera review, the motion was denied. A motion to receive a copy of the medical record from the doctor's examination of Desiree Martin in that case was also denied flatly and without reason. *Motions 4/18/12.* Then on the first day of trial during voir dire, the court ruled that evidence of Bloomfield's prior sexual assaults on Desiree were inadmissible under the Rape Shield Statute. *TR 156-161.*

At trial, Desiree testified that she and her cousin Shaunna never baked cookies with Mr. Duenaz when they went to his apartment during Christmas break. *TR 570*. Instead, when they got to Mr. Duenaz' apartment, he had them take a bath and took their clothing to wash it. *TR 547*. He gave t-shirts to the girls to put on once they were out of the bath and the three of them lay down on a bed in his room to watch television. *TR 548, 550*. At some point Shaunna, fell asleep and Mr. Duenaz' moved next to Desiree in the bed and "his penis went into [her] butt." *TR 550, 551*. He then moved Desiree to another bed, where he "put his penis in [her] vagina." *TR 552*. Mr. Duenaz then gave her some money and took her back to her aunt's. *TR 555*.

On another day during the break, Mr. Duenaz picked Desiree up from her Aunt Dawn's, took her back to his apartment where he put his penis in her vagina again, gave her some money, took her to the store alone to get "two bags of chips and a lot of gum", and then took her back to her Aunt Dawn's house. *TR 556, 557, 560*.

Ms. Cumper testified that she heard nothing about any abuse until Desiree had been back home for 13 days, at which point she received a call from Tara Groh. And, while Desiree had previously been a "quiet and compelling child she began to have frequent angry outbursts, broke out in pimples, and became withdrawn, following the allegations. *TR 368, 371-372*.

Despite a defense motion to prevent the prosecutor from presenting bad acts testimony from witness Aaron Cartwright, Duenaz' former step-daughter, she was allowed to testify during trial. *Motions 4/18/12 36-38*. Ms. Cartwright testified that she had never liked Mr. Duenaz and wished that her mother had never married him. *TR 616*. She also testified that Mr. Duenaz had forcibly sexually penetrated her in July of 2007 when she was 13 years old. *TR 588, 590, 594, 597*. At the time of trial in this case, charges were pending against Mr. Duenaz for his alleged victimization of Ms. Cartwright. Over defense objection, the court also admitted Mr. Duenaz's

2007 conviction for attempted child molestation from Arizona. No details underlying that conviction were provided either in the offer of proof or as evidence at trial. *Trial 6/7/12, 670.*

Dr. Frederick was present for trial and testified that when he examined Desiree on January 22nd he noted some redness on her external genitalia and some urine leakage from her urethra. *TR 465-466.* The prosecutor specifically asked whether such leakage could be indicative of sexual abuse, to which the doctor referenced one study showing a higher rate of leakage in children who had been sexually abused. *TR 469.* Doctor Frederick also testified that damage to the genital tissues is less commonly seen 7-14 days from the date of sexual contact due to genital tissues healing quickly and that 10-14 days from the date of the trauma could be considered remote in time. He admitted under cross, however that while the hymen could sometimes heal there were generally signs that injury had occurred. *TR 467, 469, 475.*

By the time Dr. Frederick concluded his testimony on the second day of trial, the prosecutor informed the court that she was still unable to secure the presence of Dr. Penshorn (who had also examined Desiree and found no signs of sexual abuse). The record reflects she suggested that Dr. Penshorn's testimony be taken by telephone. *TR 501-512.* Defense counsel argued that the physical presence of Dr. Penshorn was preferable but that in lieu of that telephone testimony was agreeable because the testimony was so important to the defense because Dr. Penshorn had examined Desiree within 14 days of the alleged incident, the prosecutor changed her position. In response, the prosecutor objected to the telephonic testimony, arguing that only two-way video testimony was allowed by MCR 6.006, and only then if both parties consent. Ultimately, the court agreed with the prosecutor and ruled that because the court was not properly equipped for such a presentation Dr. Penshorn could not

testify. Defense counsel stipulated that, given the court's ruling in the matter, a copy of Dr. Peshorn's report be admitted. *TR 501-512. People's Exhibit 3.*

The jury convicted Mr. Duenaz of three counts of criminal sexual conduct in the first degree (person under 13, defendant 17 years or older) and one count of criminal sexual conduct in the second degree (person under 13, defendant 17 years or older).

At sentencing the trial court assessed fifty points for offense variable 11 and sentenced Mr. Duenaz to a prison term of 50-75 years. *Judgment of Sentence; ST.*

Mr. Duenaz appealed of right arguing, *inter alia*, that the trial court erred in admitting Desiree Martin's hearsay statements to Dr. Frederik, in excluding evidence of the prior sexual abuse of Desiree by her stepfather, in admitting evidence of prior allegations of and convictions for, sexual assault crimes, in refusing to permit Dr. Peshorn to testify telephonically, and in increasing his sentence range based on judge found facts in violation of *Alleyne v United States*, 133 S Ct 2151 (2013). *People v Duenaz*, Court of Appeals No. 311441.

In a published opinion on July 10, 2014, the Court of Appeals rejected these challenges and affirmed Mr. Duenez's convictions, but remanded for resentencing based on an error in Scoring 50 points for OV 11. *People v Duenaz*, __ Mich App __ (2014 WL 3375171), No. 311441 (July 10, 2014) (Opinion Attached as Appendix A). Mr. Duenaz's timely motion for reconsideration was denied on August 26, 2014. (Order attached as Appendix B). Mr. Duenaz now seeks leave to appeal in this Court.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT RELEVANT EVIDENCE OF THE COMPLAINANT'S PRIOR SEXUAL VICTIMIZATION BY HER FATHER WAS PROPERLY EXCLUDED FROM TRIAL UNDER THE RAPE SHIELD STATUTE.

Issue Preservation / Standard of Review:

Approximately one year before the allegations of sexual misconduct against Mr. Duenaz, Desiree Martin disclosed that she was sexually assaulted by Richard Bloomfield, her former stepfather. Mr. Bloomfield pled guilty to two counts of criminal sexual conduct 3rd degree and one count of criminal sexual conduct 2nd degree (“*People v Richard Bloomfield*” St. Clair County No. 07000881-FC-K). The prosecution stipulated that the redacted police report attached hereto as Appendix C is the same one reviewed by the judge in non-redacted form. Mr. Duenaz sought to present evidence from the Bloomfield case to show that Desiree may have been re-using language from the Bloomfield case or confusing the incidents, confusing the prior abuse with her interactions with Mr. Duenaz, as well as compare the source of any injuries. *Motion 4/6/12*. Both motions were denied. *Order 5/21/12* and *Order 6/6/12*.

Defense counsel argued that the prior allegations were allowed under MRE 404(a) and not prevented by the Rape Shield statute. *Motions 4/18/12, 22*. Following arguments, all parties agreed that the court would conduct an in camera review of the police reports associated with both the Bloomfield and Duenaz cases in order to evaluate the similarity between the allegations. *Motions 4/18/12, 26-30*. On June 5, 2012 during jury selection, the court heard further arguments on the motion. Afterward, without making a finding on whether or not the facts of the Bloomfield case were similar or dissimilar with the allegations against Mr. Duenaz, the court

summarily ruled that the Rape Shield Act required exclusion of evidence from the Bloomfield case. *TR 157-161; Order 4/6/12.*

While the judge did not make a finding whether there was sufficient similarity between the two cases, it is evident from the police report that the similar descriptions, terms, and phrases, private) were used by the complainant to describe sexual abuse in both cases. *Appendix C, 3-4; TR 458.* And, both cases involved alleged penetration of at least the vaginal opening. *Compare, Appendix C, with Testimony of Desiree Martin.* Finally, the medical portion of the police report clearly states that Desiree had complained of pain while urinating, suffered from another related “non-specific” condition, and that her history and physical exam were suggestive of abuse. *Appendix C.*

Generally, the decision to admit evidence is reviewed for abuse of discretion. *People v Jehnsen*, 162 Mich App 171 (1987); *People v Hackett*, 421 Mich 338 (1984). It is an abuse of discretion for a court to commit legal error. *People v Watson*, 245 Mich App 572, 575 (2001). The application and interpretation of evidentiary rules are reviewed de novo. *People v Snyder*, 462 Mich 38, 44 (2000). Where the trial judge’s decision deprived Mr. Duenaz of his constitutional right to confrontation and to present a defense, the Court should use a *de novo* standard of review. *Sitz v Department of State Police*, 443 Mich 744 (1993). Preserved constitutional error requires this Court to reverse unless the prosecution can prove beyond a reasonable doubt that the error did not contribute to the verdict. *People v Carines*, 460 Mich 750, 774 (1999).

Argument:

The Sixth Amendment of the United States Constitution, as does the Michigan Constitution, guarantee the right of confrontation and cross-examination as a fundamental

requirement of a fair criminal trial. US Const, Amend VI; *Crawford v Washington* 541 US 36 (2004); *Sheppard v Maxwell*, 384 US 333, 351 (1966); Mich Const 1963, Art 1, § 20; *People v Fackelman*, 489 Mich 515 (2011). In addition, MCL 763.1 states that “the party accused shall be allowed to . . . meet the witnesses who are produced against him face to face.” *Id.* A criminal defendant also has the right to present a defense. US Const, Ams V, VII, XIV; Const 1963, art 1, § 17; *Chambers v Mississippi*, 410 US 284, 294 (1973); *People v Carpenter*, 464 Mich 223, 241-242 (2001). “[T]he right to present the defendant’s version of the facts as well as the prosecutor’s to the jury so it may decide where the truth lies” is in fact at the very heart of the due process right. *Washington v Texas*, 388 US 14, 19 (1967). If evidentiary rules like the rape shield statute interfere with a defendant's constitutional right to present a defense or confront accusers, they must yield. *Michigan v Lucas*, 500 US 145 (1991). Excluding the Bloomfield evidence violated Mr. Duenaz’s right to present a defense and to confront his accusers with evidence relevant to her credibility and reliability. This is because the evidence was allowed by the text of the rape shield statute and as an exception to the statute.

Michigan’s rape shield statute, MCL 750.520j, and the corresponding MRE 404(a)(3), prohibit the introduction of evidence regarding a complainant’s past sexual conduct. The Rape Shield law represents a legislative policy determination that the prejudicial effect of such evidence generally outweighs its potential probative value, justifying its exclusion. *Hackett*, 421 Mich at 346-348. MCL 750.520j states:

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

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

MRE 404(a)(3), likewise provides that a “evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease” is admissible.

Contrary to the conclusions of the trial court and the Court of Appeals, the Bloomfield evidence was not covered by the Rape Shield statute because it was sexual “conduct”. Appendix A, Slip Op. at p.3. Although Michigan courts have assumed the statute applies to evidence of a complainant’s prior non-volitional sexual victimization, *see e.g., People v Arenda*, 416 Mich 1, 6 (1982), the issue is currently the subject of some disagreement. *See e.g., People v Parks*, 483 Mich 1040, 1043 (2009) (Markman, J., dissenting from order denying leave to appeal); *People v Piscopo*, 480 Mich 966, 970 (2007) (Markman, J., dissenting from order denying leave to appeal); *see also People v Shaver*, 495 Mich 859 (2013) (order granting leave to appeal to consider whether evidence of a child’s prior sexual abuse is barred by MCL 750.520j), *order vacated and leave to appeal denied after oral argument*, 495 Mich 920 (2014). Mr. Duenaz contends an accurate interpretation of MCL 750.520j under well-established rules of statutory construction is that a child’s non-volitional role in being sexually abused is not “sexual conduct.”

In interpreting a statute, the plain language must first and foremost control, with undefined terms given their ordinary meaning. *McElhaney ex rel McElhaney v Harper-Hutzel Hosp*, 269 Mich App 488, 493 (2006); *Atchison v Atchison*, 256 Mich App 531, 535 (2003). The legislature did not specifically define the term “sexual conduct” in MCL 750.520j, thus, it is appropriate to consider relevant dictionary definitions to glean the term’s meaning. *Woodard v*

Custer, 476 Mich 545, 561 (2006). The Merriam-Webster dictionary defines “conduct” as “the way that a person behaves in a particular place or situation...the act, manner, or process of carrying on... or alternatively, conduct is a mode or standard of personal behavior especially as based on moral principles”. www.merriam-webster.com/dictionary/conduct. Non-volitional activity is not directly encompassed within that definition; rather the language indicates that a level of volition on behalf of the actor performing the “conduct” is necessary.

The term “behavior” appears within the dictionary definition of “conduct”. “Behavior” is defined as “the way a person or animal acts or behaves”. www.merriam-webster.com/dictionary/behavior. Turning to other dictionary definitions of “conduct” we are given “personal behavior; way of acting...and the term ‘behavior’ means the manner of conducting oneself.” Random House Webster’s College Dictionary (1997); *Piscopo*, 480 Mich at 970 (Markman dissenting). As victimization like that at issue here (being slapped or grabbed on the buttocks) is non voluntary, non-volitional, and it does not constitute “behavior”, it does not fall within the rape shield’s definition of “past sexual conduct.” *Parks*, 483 Mich at 1043 (Markman J. dissenting).

This reading of the rape-shield statute finds support by analysis of other sections of the same chapter of the Michigan penal code that address sexual conduct. *Parks*, 483 Mich at 1061 (Markman, J. dissenting). Statutes that relate to the same or related matter are considered to be *in pari material* and must be read together and as a whole. *People v Perryman*, 432 Mich 235, 240 (1989); *People v Harper*, 479 Mich 599, 621 (2007). The general rule of *in pari materia* requires courts to examine a statute in context and read similar statutory terms so that they are given harmonious meaning between related statutes. *Id.*; *Jennings v Southwood*, 446 Mich 125, 136 (1994). Here, under MCL 750.520b through 750.520e a person is guilty of “criminal sexual

conduct” of varying degrees if that person engages in sexual penetration or sexual contact with another person when certain aggravating factors are present. As Michigan Supreme Court Justice Markman has explained if “conduct” under this Section 520b, *et. seq*, included passive or non-volitional activity, a 13-year old girl who was raped by a 14-year-old boy, or a person who was forcibly raped, would herself be guilty of a form of criminal “sexual conduct.” *Piscopo*, 480 Mich at 970 (J. Markman, dissenting). Because this would be an absurd result, the Legislature’s use of “conduct” throughout the relevant statute is strong evidence they intended sexual conduct to refer to volitional behavior and not to include sexual abuse.

Furthermore, the rape shield statute uses both “sexual conduct” and “sexual activity”. MCL 750.520(j). MCL 750.520(j) excludes specific instances of sexual “conduct” but allows evidence of the complainant’s sexual “activity” to show the source or origin of semen, pregnancy, or disease. *Id.* The plain meaning interpretation of “activity” includes “the quality or state of being active...vigorous or energetic action”. <http://www.merriam-webster.com/dictionary/activity>. This connotes a broader scope of events than “conduct” because “conduct” requires the actor’s volition, while “activity” only seems to require some degree of action regardless of whether it is voluntary. Because the rape-shield’s definition of “conduct” requires some volitional element, Mr. Duenaz’s proposed evidence of Desiree Martin’s victimization by her father was not excludable under MCL 750.520j.

Even if the Rape Shield statute does apply, the Bloomfield evidence was admissible under Subsection (1)(b) to show a source of “disease” or “diseases” afflicting Desiree. Neither MCL 750.520a(1)(b) nor MRE 404(a)(3) define the term “disease.” An authoritative dictionary defines “disease” as “...3. “any deranged or depraved condition, as of the mind, society, etc: Excessive melancholy is a disease.” The Random House Dictionary of the English Language:

The Unabridged Edition, 1971. More recently, The American Heritage Dictionary of the English Language, 4th Edition, 2000 defines “disease” as “. . . A condition or tendency, as of society, regarded as abnormal and harmful.”

Desiree’s condition fits these definitions in two ways. First, her mother testified that she had gone from being a well-behaved child to one who suffered from frequent outbursts, had to see the school counselor, and was breaking out in pimples everywhere following the disclosure. *TR 371-372, 368.* The prosecution sought to link that behavior and the physical symptoms to Mr. Duenaz, thus implying it corroborated Desiree’s claim that it was Mr. Duenaz who abused her. *TR 465, 468-69.* These conditions clearly could be characterized as “abnormal and harmful,” or “deranged or depraved”, or excessive melancholy. Random House Dictionary, *supra*; The American Heritage Dictionary, *supra*. Indeed, the trial court felt so, as indicated after trial when it found for sentencing purposes that Mr. Duenaz had caused “serious psychological injury requiring professional treatment” to Desiree. *SIR; MCL 777.34.*

Furthermore, Dr. Frederick testified that he saw a condition of urine leakage upon examining Desiree. *TR 465, 468-69.* And while he saw it as less than significant, the prosecutor elicited testimony that one report linked such physical condition with sexual abuse. *Id.* The prosecutor clearly implied a link between that physical injury and Mr. Duenaz’s alleged sexual abuse. *Id.* The police reports from the Bloomfield case reveal similar observations of the complainant’s physical and emotional state. *Appendix C.* Without the Bloomfield evidence, the jury likely inferred that at the very least, Desiree’s emotional problems were caused by Mr. Duenaz, if not her urine leakage as well, given the prosecutor’s implication. Thus, the Bloomfield evidence was admissible to provide alternate explanations for why she exhibited these symptoms.

The Court Appeals neglected to specifically address this evidence in relation to the two exceptions to the Rape Shield statute and summarily found they did not apply, with no analysis. Appendix A at 2-3. Likewise, the court refused Mr. Duenaz's request to reconsider its conclusion in light of this evidence, permitting its published opinion on this important issue to stand as written despite these two very crucial evidentiary considerations that undermine its reasoning. Appendix B. This Court should not permit such a flawed conclusion to stand, particularly where it will have binding, precedential value so as to perpetuate and exacerbate such misapplication of the Rape Shield statute.

Furthermore, contrary to the Court of Appeals conclusion, Appendix A, p. 3, the Bloomfield evidence was relevant and admissible to show an alternate source of Desiree's age-inappropriate knowledge of sexual activity. Evidence of prior abuse providing an explanation for age-inappropriate sexual knowledge by a minor complainant can be admissible despite the rape shield statute. *People v Morse*, 231 Mich App 424, 433-436 (1998); *Hackett*, 421 Mich at 348. To evaluate admissibility of this evidence, *People v Morse* requires an in-camera hearing to determine (1) whether the evidence is relevant; (2) whether another person was convicted of prior sexual conduct; and whether (3) the facts underlying the previous conviction are sufficiently similar to the instant case. *Morse, supra*.

Here the Bloomfield assault evidence was relevant. The jury was called upon to make determinations about not only Desiree's reliability but about where she would have learned of sex acts involving vaginal and anal penetration and acquired language to describe those acts at eight years old, and then repeated them four years later. Desiree used vernacular that described sexual acts that a child of her age could not reasonably have been expected to know unless exposed to it directly. For example, Dr. Frederick testified that when she was eight years old,

Desiree Martin told him, “Scott put his pee-pee in her ...butt and private part...” *TR 458*. And at trial Desiree testified regarding Duenaz that “his penis went into [her] butt.” *TR 550, 551*. And, that he “put his penis in [her] vagina.” *TR 552*. Where prior sexual assaults could explain the source of such knowledge, it is far “less probable” that the sexual knowledge came from interactions with Mr. Duenaz and the evidence is relevant. *MRE 401; Morse, supra*.

Additionally, it is undisputed that the prior sexual assaults by Richard Bloomfield resulted in convictions of two counts of criminal sexual conduct third-degree and one count of criminal sexual conduct second-degree. *Appendix C*.

Without making a specific finding or providing any analysis of the third factor, whether there was sufficient similarity between the cases, the court summarily ruled that the evidence was barred by the Rape Shield Statute. *TR 157-161* and *Order 4/6/12*. In doing so, the court disregarded or cavalierly treated the requirements of the law, the agreement by all parties, and its own order that such analysis be required.

Had there been any meaningful analysis, the judge would be compelled to find the third requirement was met. Evidence from the Bloomfield case depicts similar charges and an alternative explanation for complainant’s emotional outbursts, urine leakage, and advanced sexual knowledge. Especially, where Bloomfield was publicly accused and pled guilty in open court, these accusations do not further detract from complainant’s rights. Here, Desiree testified that Mr. Duenaz’ penis “went into her butt” and that he “put his penis in [her] vagina”. *TR 550-552*. According to the police report in that case, Bloomfield penetrated Desiree Martin’s vagina and anus multiple times from the time she was five years old until she was six years old. As this Court has ruled, “in certain limited situation, such evidence may not only be relevant, but its admission may be required to preserve a defendant’s constitutional right to confrontation.”

Hackett, 421 Mich at 348. Desiree’s credibility – or more accurately her reliability – was central and critical to this case and the improperly excluded prior abuse evidence went to the core of that reliability. Further, it was relevant to rebut evidence that supposedly corroborated her testimony.

Nor was evidence of Mr. Bloomfield’s sexual abuse unduly inflammable or prejudicial under MCL 750.520j(1) or MRE 403. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398 (1998). The probative value of the evidence at issue certainly outweighs any danger of prejudice or confusion where it is the only method for the defense to effectively counter the prosecution. By showing an alternate source of complainant’s sexual knowledge and language, inappropriate emotional outbursts, skin condition, and urine leakage the prior abuse supports the inference that Mr. Duenaz did not cause them. Given the overall lack of any direct physical evidence to corroborate the complainant’s allegations, it is hard to exaggerate the probative value of an alternate explanation.

In contrast, Desiree’s prior victimization posed little danger of unfair prejudice, if any prejudice at all. If the defense had been allowed to reference the prior abuse the jury would have heard that the defendant in that case pled guilty to the crimes of which he was accused by Desiree Martin, thus lessening privacy concerns. *Appendix C*. Further, the jury had already heard from Desiree that she had been penetrated both vaginally and anally – in descriptive and graphic testimony. Surely, no reasonable juror would be inclined to view Desiree negatively because of the prior abuse, but merely as a confused child with a different grasp of reality.

The purpose behind Michigan’s rape shield statute was explained in *People v Adair*, 452 Mich 473, 480-481 (1996):

The rape-shield statute was aimed at thwarting the then-existing practice of impeaching the complainant's testimony with evidence of the complainant's prior consensual sexual activity, which discouraged victims from testifying "because they knew their private lives [would] be cross-examined." House Legislative Analysis, SB 1207, July 18, 1974.

Mr. Duenaz sought only to advise the jury of evidence that was in the public domain. The evidence was not being used to "wage a general attack on [Desiree's] credibility" or make some patently-absurd insinuation that she consented or somehow deserved the abuse, but for the limited purpose of providing a reasonable explanation for why she could be confused or mistaken about Mr. Duenaz, where she learned to talk that way, and to rebut evidence that was otherwise used to "corroborate" the prosecution's theory. *See Parks*, 483 Mich at 1050-1052 (Young, J., concurring in order denying leave to appeal.) There was no attempt to color Desiree as someone unworthy of the protection based on her past, or to put her past sexual victimization on display. Information that the complainant had made a prior accusation and that the person whom she had accused had in fact pled guilty would not have been prejudicial to her. The trial court erred in excluding the evidence and the Court of Appeals erred in endorsing that error.

The error is preserved constitutional error requiring reversal because the prosecutor who benefited from the error cannot prove beyond a reasonable doubt that it was harmless. *Carines*, 460 Mich at 774. The prosecutor used Desiree's post-disclosure emotional problems and urine linkage to corroborate and thereby bolster her accusation against Mr. Duenaz. *TR 469, 368, 371-372*. Furthermore, Desiree used vernacular that described sexual acts that a child of her age could not reasonably have been expected to know unless exposed to it directly. Under these circumstances, the jurors were left with questions – what made the previously quiet child turn into an emotionally troubled one? *TR 368, 371-372*. What else might have caused the condition of emotional outbursts, skin break outs, and urine leakage that Desiree suffered from? *TR 371-*

372, 468-469. And how did a seven year old acquire knowledge of acts of sexual penetration and language to describe those acts? Under the trial court's ruling, the evidenced provided the jury with only one answer to these questions – Mr. Duenaz's sexual abuse.

The court's ruling prevented the defense from arguing a perfectly plausible alternative – that Desiree was not traumatized because she was sexually abused by Mr. Duenaz but instead was traumatized by the mere thought of having to endure medical examinations, interviews, and the legal processes again. This would explain why according to the all of the adults around her, her emotional and physical state were perfectly fine during and immediately following the period when the alleged abuse would have taken place, but changed once she was confronted with the questions from family members. Once an alternate source is offered for complainant's behavior and knowledge, the playing field would be leveled and the jury could accurately evaluate Desiree's reliability with relevant evidence. Under these circumstances, Mr. Duenaz was highly likely to prevail in this contest. The error is not harmless and reversal is required.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE COMPLAINANT'S OUT OF COURT STATEMENT TO A PROFESSIONAL WHO EXAMINED HER AT THE "CHILDREN'S ASSESSMENT CENTER" FOR THE PRIMARY IF NOT SOLE FORENSIC PURPOSE OF FINDING EVIDENCE "INDICATIVE OF SEXUAL ABUSE." THE STATEMENT, MADE AFTER THE COMPLAINANT HAD ALREADY BEEN EXAMINED BY AN EMERGENCY ROOM DOCTOR, AND WHICH ATTRIBUTED FAULT AND IDENTIFIED THE ALLEGED ASSAILANT, DID NOT FALL WITHIN THE SO-CALLED "MEDICAL DIAGNOSIS" EXCEPTION TO THE HEARSAY RULE OF MRE 804(4).

Issue Preservation/Standard of Review

Evidentiary rulings are generally reviewed for abuse of discretion, but where a decision whether to admit evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes the evidence, the issue is reviewed de novo. *People v Washington*, 468 Mich 667, 670-71 (2003). There is an "abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law." *People v Katt*, 468 Mich 272, 278 (2003).

The defense preserved this issue through an objection to Dr. Frederick's testimony relating Desiree's statement as hearsay. *TR 454, 455*. The judge disagreed, stating, "I'm satisfied that the, the examination by this physician was in connection with the assignment that he was embarked on, and it's a proper question. I overrule the objection." *TR 457-458*. The Court of Appeals affirmed this ruling and further found that any error would have been harmless because the hearsay was "cumulative". Appendix A at 3-5.

Argument

All defendants are entitled to a due process right to a fair trial untainted by inadmissible and unfairly prejudicial evidence. US Const, Amends VI, XIV; Const 1963, art 1, § 20. *See*

Bruton v United States, 391 US 123, 131 (1968) (noting that an important element of a fair trial is that only relevant and competent evidence is introduced against the accused). This right requires a fair trial of the issues involved in the particular case and a determination of disputed questions of fact on the basis of only properly admitted evidence. *Napuche v Liquor Control Comm*, 336 Mich 398, 403 (1953). Mr. Duenaz' right to a fair trial was violated by the erroneous admission of hearsay.

Hearsay is as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is inadmissible because the declarant's credibility cannot be tested through cross examination and it is inherently unreliable. See *People v Tanner*, 222 Mich App 626, 629 (1997); MRE 802. Exceptions to the hearsay rule are justified by the belief that certain statements are both necessary and inherently trustworthy because of the conditions under which they were made. See *Solomon v Shuell*, 435 Mich 104, 119 (1990); 5 Wigmore, Evidence (Chadbourn rev), § 1420, p. 251. A party seeking to admit an out of court statement must prove it falls within one of the few narrowly drawn exceptions to the hearsay rule. *Sanborn v Income Guaranty Co.*, 244 Mich 99, 107 (1928); see also *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 781 (2004) ("It is well established that the proponent of evidence 'bears the burden of establishing [its] admissibility.'") quoting *Crawford*, 458 Mich at 388 n.6.

MRE 803(4) permits admission of statements made for the purposes of medical treatment or medical diagnosis in connection with treatment. For this exception to apply, the party offering a statement must show that it: (1) was made for purposes of medical treatment or diagnosis in connection with treatment, and (2) describes medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury

insofar as reasonably necessary to diagnosis and treatment. MRE 803(4); *People v Meeboer* (After Remand), 439 Mich 310, 322 (1992). The circumstances surrounding the statement must suggest “the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.” *Meeboer*, 439 Mich at 322.

Here, Dr. Frederick was allowed to testify that Desiree Martin told him, “Scott put his pee-pee in her ...butt and private part...” *TR 458*. Preliminarily, the statement “Scott put his pee pee in my butt and private part” was not necessary to the diagnosis or treatment of the complainant. The statement went far beyond describing the “general character of the cause or external source of the injury” as it attributed cause and fault to a particular person. *Meeboer*, 439 Mich at 322. “It has long been the rule that the declarant's naming of the person responsible for his condition may not be admitted pursuant to the hearsay exception described in MRE 803(4).” *People v LaLone*, 432 Mich 103, 110 (1989). Likewise, statements allocating fault are considered impertinent to medical diagnoses and treatment, as they exceed the general background information that normally is necessary for that process. *Jones on Evidence* § 30:10 (7th ed.); *United States v Narciso*, 446 F Supp 252, 289 (ED MI 1977) (“[This hearsay exception] has never been held to apply to accusations of personal fault, either in a civil or criminal context.”). For instance, “a patient's statement that he was struck by an automobile would qualify [under Rule 803(4)] but not his statement that the car was driven through a red light.” Advisory Committee Note to FRE 803(4).

Desiree’s statements are further inadmissible even under judicially-created guidelines tailored to control, and sometimes ease restrictions on the use of such statements when children

are involved. *Meeboer*, 439 Mich at 324-325. In *Meeboer* this Court outlined factors for determining whether MRE 803(4) applies when the declarant is a child:

While the inquiry into the trustworthiness of the declarant's statement is just one prong of the analysis under MRE 803(4), it is very important that the understanding to tell the truth to the physician be established. Factors related to trustworthiness guarantees surrounding the actual making of the statement include: (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age,(5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate.

Id. at 324-25. Here, no effort was made to establish the reliability of the statement or establish its trustworthiness according to the factors outlined in *Meeboer*. While the judge's ruling might address the medical treatment purpose of the statement it does not address trustworthiness in any way as *Meeboer* requires.

A brief examination of those factors fails to overcome the presumption of inadmissibility for Desiree's statements. Desiree was only eight years old at the time of the examination and there was nothing to show she possessed the maturity or cognitive ability to appreciate the need to tell the truth. Second, as Dr. Frederick as much as conceded, the statement was elicited for the purpose of investigating a crime, not necessarily to identify, diagnose, or treat any physical or psychological injury. In fact, Dr. Frederick testified that the purpose of his examination was to "do a physical assessment and document any findings that might be or were indicative of sexual abuse." *TR* 456. Third, while childlike language was used Desiree already had a prior

experience with sexual assault and reporting and therefore could re-use the same language. Fourth, the examination was initiated by the police who directed Desiree's mother to take her to the hospital for examination for sexual assault. Fifth, Desiree was not seen in the hospital until twenty-two days after the alleged assault and the complainant was not suffering any pain or distress. And sixth, the purpose of the exam was to substantiate a crime that had already been reported; it was not for medical treatment and no medical treatment was rendered.

This case follows the fact pattern of one of the companion cases to *Meeboer*, where this Court held MRE 803(4) did not apply. In *People v Craft*, the claimant was only four years old at the time of her treatment, "making it more difficult to establish that she understood the need to be truthful to her physician." *Craft*, 439 Mich at 336. Furthermore, the disclosure and evaluation occurred a number of days (three weeks in the instant case) after the initial disclosure. *Meeboer*, 439 Mich at 338. The presumption against admitting this hearsay was thus far from overcome. The Court of Appeals thus erred in ruling the statement was admissible.

Reversal is required because the error more likely than not was outcome determinative. See *People v Lukity*, 460 Mich 484 (1999). Contrary to the Court of Appeals' assertion, Appendix A at 5, it is more likely than not that admitting the hearsay was outcome determinative.

The Court of Appeals turned what is actually a factor that favors reversal into one that favors its harmless conclusion by labelling the hearsay statements merely "cumulative" of Desiree's trial testimony. Appendix A at 5. Such circular reasoning misses the point. While erroneous admission of hearsay evidence can be rendered harmless error where corroborated by other competent testimony, see *People v Hill*, 257 Mich App 126 (2003), in this case the other testimony was that of a single witness – the complainant – and was otherwise uncorroborated.

Thus, rather than cumulative, the hearsay statement was corroboration -- because of this statement the jury heard from the doctor's mouth that the defendant had sexually penetrated Desiree Martin. The hearsay amounted to a prior consistent statement that served to unfairly bolster Desiree's trial testimony. *See People v Harris*, 86 Mich App 301, 305 (1978) (prior consistent statement of a testifying witness inadmissible and irrelevant to bolster witness's credibility); *People v Rosales*, 160 Mich App 304, 308 (1987) (same). Errors that bolster or undercut credibility in a credibility contest are particularly harmful and warrant reversal. *See People v Anderson*, 446 Mich 392, 407, n37 (1994); *People v Yost*, 278 Mich App 341, 387 (2008). Given the dearth of other evidence and the fact that Desiree's testimony was otherwise, the ole evidence of guilt, it is more likely than not that the jury would have acquitted had it not heard this improper bolstering evidence.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT OTHER BAD ACTS HAD BEEN PROPERLY ADMITTED A TRIAL.

Issue Preservation/Standard of review

The defense preserved review of the prior conviction ruling by filing a motion to suppress before trial. *Motions 6/4/12*, 37, 45. Evidentiary rulings are reviewed for abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60 (2000). This Court reviews de novo whether a rule or statute precludes or requires admission of evidence. *Yost*, 278 Mich App at 353.

Argument

Due process requires fundamental fairness in the use of evidence against a criminal defendant. *Lisenba v California*, 314 US 219, 236 (1941); US Const, Ams V, XIV; Const 1963, art 1, § 17. A defendant's due process right to a fair trial is violated when there is a reasonable

possibility that inadmissible evidence may have contributed to the conviction. *Fahy v Connecticut*, 375 US 85, 87-88 (1963).

Under MRE 404(b) “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” *People v Crawford*, 458 Mich at 383. Rather, such evidence may only be offered for non-propensity purposes, “such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident”. MRE 404(b).

MRE 404(b)(1) codified the prohibition against character evidence deeply rooted in Michigan jurisprudence. The rule reflects and gives meaning to the fundamental precept of the criminal justice system -- the presumption of innocence. *Crawford*, 458 Mich at 384. “Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged.” *Id.* at 384. Evidence of extrinsic bad acts thus carries the risk of prejudice, for it negates the concept that “a defendant starts his life afresh when he stands before a jury” *Id.*

The primary danger of prior misconduct evidence is that it tends to be overvalued by the jury, denying the accused a fair opportunity to defend against the charged crime. *People v Allen*, 429 Mich 558 (1988). Jurors can misuse evidence of a defendant’s criminal past in three ways:

First, . . . jurors may determine that although defendant’s guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no ‘innocent’ man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged. *Id.* at 569.

Notwithstanding this strong tradition against the use of propensity evidence, the Michigan Legislature enacted MCL 768.27b, which provides in pertinent part:

Notwithstanding [MCL 768.27] in a criminal case in which the defendant is accused of committing a listed offense against a minor (as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722), evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.

MCL 768.27a provides a limited exception to the general bar against admission of prior bad acts evidence for propensity uses in prosecutions for certain sex offenses against involving minors under 13 years of age. *People v Watkins*, 491 Mich 450 (2012); *People v Mann*, 288 Mich App 114, 118 (2010). However, this Court admonished that the even evidence otherwise admissible under MCL 768.27a should be excluded if it is unfairly prejudicial under MRE 403. *Watkins*, 491 Mich at 486-487.

“Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In the context of prior bad acts, that danger is prevalent. When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe.” *Crawford*, 458 Mich at 398. For these and various additional reasons arising out of the general preference against admitting prior misconduct evidence, the task of weight prejudice versus relevance should not be taken lightly: “we caution trial courts to take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence.” *People v Pattison*, 276 Mich App 613, 621 (2007). To determine admissibility under MCL 768.27a, “courts must weigh the propensity relevance of prior bad acts evidence against its danger for unfair prejudice.” *Watkins*, 491 Mich 487. Several considerations are relevant including:

(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. *Id.*, citing

United States v LeMay, 260 F3d 1018, 1032 (CA 9, 2001); *United States v Guardia*, 135 F3d 1326, 1331 (CA 10, 1998).

A. Mr. Duenaz's Arizona conviction was inadmissible.

The trial court admitted evidence of Mr. Duenaz' 2009 Arizona *conviction* of attempted molestation of a child in order to demonstrate a "common scheme or plan" to sexually abuse minor girls. Motions 6/4/12. Contrary to the Court of Appeals' assertion, this ruling is erroneous. Appendix A at 27. The evidence was not relevant for this or any other purpose and the fact of a conviction is not admissible under statute or court rule.

To begin with, a conviction by itself is not admissible under MCL 768.27a or MRE 404(b). Neither rule says anything about court proceedings or convictions, and the admissibility of prior convictions is covered by MRE 609. That rule states that the credibility of a witness shall not be impeached with a prior conviction unless that conviction is for a crime containing an element of dishonesty or false statement. Further, MRE 609 requires that for a prior conviction to be used for purposes of impeachment the evidence must be elicited from the witness or established by public record during cross examination and Mr. Duenaz did not testify.

Further, it was never shown that Mr. Duenaz's 2009 Arizona conviction was relevant in any way to show a common scheme or plan, as the prosecutor argued below. Prior misconduct evidence can be relevant to show a common scheme or plan where the charged and uncharged acts are similar enough to permit the inference that the defendant "'devise[d] a plan and use[d] it repeatedly to perpetrate separate but very similar crimes.'" *Sabin*, 463 Mich at 63 (quoting *State v Lough*, 125 Wash 2d 847, 855 (1995)). Where evidence is offered for this purpose, the proponent must show the prior and current charged acts share "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which

they are the individual manifestations.” *Sabin*, 463 Mich at 64 (quoting 2 Wigmore (Chadbourne rev), Evidence, § 304, p 249 (emphasis in original). It is not enough that the prosecution show a “[g]eneral similarity” between the acts. *Id.* Instead, the similarity must be strong enough to show “a definite prior design or system which included the doing of the act charged as part of its consummation.” *Id.*

The evidence here does not approach the level of similarity required to support a common scheme or plan theory; in fact no evidence was even presented that could have served as the basis for such a determination. The 2009 conviction out of Arizona was for a crime that occurred two years after those in the present case. The court and jury heard only that there was a conviction of attempted sexual molestation of a child. *TR 691*. No details were given regarding the circumstances or design of accomplishing the crime and therefore it could not have been found to be sufficiently similar to the one for which defendant was on trial. *TR 691*. Indeed, the only commonality was that the conviction was for generic sexual contact between adult and child. But the alleged commission of mere “similar spontaneous acts,” is insufficient to support a common scheme or plan theory. *People v VanderVliet*, 442 Mich 52, 64-66 (1993). Such coincidence does not establish a common scheme or plan. *Id.*

B. Prior bad acts involving Aaron Cartright was improperly admitted.

In addition to evidence of Mr. Duenaz’s Arizona conviction, the trial court also admitted the testimony of Mr. Duenaz’s stepdaughter, Aaron Cartright. Ms. Cartright testified that in 2007 she was twelve years old and living with her mother and sister in Arizona. Ms. Cartright’s mother and Mr. Duenaz were married at the time but Mr. Duenaz was living in Michigan. One Ms. Cartright flew to Michigan to visit her uncle and other family members. When her uncle could not be located to retrieve her from the airport, her mother contacted Mr. Duenaz and at her

request he picked Ms. Cartright up from the airport. Ms. Cartright testified that instead of taking her to her Uncle's house, Mr. Duenaz first took her to his apartment where he beat her, drugged her, raped her, and held her against her will prior to taking her to her uncle's house. She did not disclose this to anyone and willingly went to the zoo with Mr. Duenaz the following day and to a family wedding the day after that. Ms. Cartright claimed that she disclosed the abuse to family members at a party that same week while Mr. Duenaz was present but no police report was made. In fact, no police report was filed until two years later. Ms. Cartright testified that she had never liked Mr. Duenaz and wished that her mother had never married him. Mr. Duenaz resided in the family home with Ms. Cartright, her mother, and other siblings in Arizona for several years. *TR 585-635.*

Applying the *Watkins* factors here reveals the Court of Appeals' error in asserting that this evidence was properly admitted. Appendix A at 6-7. The assault alleged in the current case and the assault alleged by Aaron Cartright were distinguishable in several respects, including:

- Age – Desiree Martin was a 7 year old child at the time of the alleged assault whereas Aaron Cartright was a 12 year old girl who likely would have entered puberty.
- Relationship – Desiree Martin was a stranger to Mr. Duenaz who would have met him for the first time immediately preceding this incident while at her aunt's house. On the other hand, Ms. Cartright was Mr. Duenaz' stepdaughter, had known him for a number of years, and had resided in the family home with him.
- Physical Violence – Ms. Cartright alleged that she was beaten by Mr. Duenaz to the point of having noticeable scratches and bruises. Ms. Martin did not allege that physical violence was used.
- Monetary compensation – Ms. Martin stated that Duenaz gave her money twice after the alleged assaults; Ms. Cartright made no such allegation.
- Victim held against her will following sex act – Ms. Cartright claimed that she was held against her will and locked up alone in the apartment. Ms. Martin never stated that she was left alone in the apartment or held there against her will.

- Use of drugs to obtain compliance – Ms. Cartright claimed that Mr. Duenaz drugged her by slipping something into a drink. Ms. Martin never alleged that she was drugged.

This factor weighs against admitting the prior bad acts evidence due to the lack of similarity between the two alleged incidents.

The other acts evidence was related to an infrequent occurrence

Mr. Duenaz was married to Ms. Cartright's mother and they resided in the same household with other siblings for some period of time. For at least part of this time Ms. Cartright was between the ages of six and eight years old. Despite what would have been unfettered access to Ms. Cartright for several years at the time she would have been the same age as the complainant in the current case, she claimed only a single set of incidents occurring over a period of two days. Ms. Cartright made no allegations of other incidents of sexual abuse by Mr. Duenaz and there were no other allegations involving siblings in the household.

There was a lack of intervening acts

The lack of any intervening acts of a sexual nature also weighs against admitting the evidence. There was approximately six months of time between the alleged incidents involving Ms. Cartright and those involving Ms. Martin. During that period there were no allegations of sexual abuse involving Mr. Duenaz.

There was no need for additional evidence

The testimony offered by Ms. Cartright did nothing to help the jury understand the current case. The cases were not similar. The complainant was able to testify and did so. And, one doctor who examined the complainant testified and the report of another doctor was admitted. This was sufficient evidence to submit to the jury. Allowing the prosecution to bolster

the case allowed them to fill in holes in their case that they otherwise could not fill. This was improper and highly prejudicial.

In summary, the balance of the *Watkins* factors weigh heavily on the side of excluding Ms. Cartright's claims as only marginally relevant and posing a high danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403; *Watkins*, 491 Mich at 487-489. Accordingly, it was error for the trial court to admit Ms. Cartright's testimony.

C. Reversal is required.

Admitting the marginally relevant and highly prejudicial prior conviction and bad acts evidence requires reversal, as it is more likely than not that the evidence was outcome determinative. *Lukity*, 460 Mich at 495-496. In determining whether error in this context is harmless, the court must focus on the nature of the error and assess its effect in light of the weight and sufficiency of the untainted evidence. *Crawford*, 458 Mich at 399-400.

Here, the jury heard highly prejudicial propensity evidence in a case where the evidence was thin. This was a close case that hinged on a credibility contest between Mr. Duenaz and the complainant, with several reasons to doubt the latter's veracity. None of the adults around Desiree Martin noticed any change in her during the time the abuse was said to have occurred, the complainant never reported the incident to anyone until questioned about it two weeks later, and there was no physical evidence of sexual assault despite examinations by two different doctors. *TR 358, 375, 378-382, 418, 423, 492, 432-43, 460, 488, 478.*

Admitting the prejudicial prior bad acts evidence no doubt convinced the jury that Mr. Duenaz was a bad person who needed to be locked up regardless of whether he assaulted Desiree.. The error was thus not harmless and Mr. Duenaz should be given a new trial untainted by the admission of the 2009 conviction and Ms. Cartright's prejudicial testimony.

IV. THE TRIAL COURT VIOLATED MR. DUENAZ'S FIFTH AND SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE AND TO COMPULSORY PROCESS BY DENYING THE DEFENSE REQUEST TO ASSIST IN PRODUCING DR. PENSHORN FOR TRIAL PURSUANT TO MCL 767.40A, NOT REQUIRING THE PROSECUTOR TO DEMONSTRATE DUE DILLIGENCE IN PROCURING THE WITNESS AND, REFUSING TO ALLOW DR. PENSHORN TO TESTIFY BY TELEPHONE.

Issue Preservation/Standard of Review

The defense preserved the issue by first filing a notice seeking the trial court's assistance in obtaining Dr. Peshorn's presence for trial and then moving to present Dr. Peshorn's testimony by telephone. *Motions 6/4/12; TR 501-512*. While decisions on the admission of evidence and testimony are generally reviewed for abuse of discretion, *see Jehnsen*, 162 Mich App 171, this Court reviews the constitutional question de novo. *People v Kurr*, 253 Mich App 317, 327 (2002).

Argument

The defense wanted Dr. Peshorn to testify and filed a timely notice with the court pursuant to MCL 767.40a to obtain assistance in procuring his presence, indicating that the defense would be denied the opportunity to present a defense if Dr. Peshorn was not produced to testify at trial. *See Defendant's Request for Assistance-Demand Pursuant to MCL 767.40a(5); Motion to Compel; Motions 6/4/12 21, 30*. In response, the prosecutor opposed the request, essentially arguing that prosecutorial assistance was unnecessary because Dr. Peshorn was a listed prosecution witness. *People's Answer to Motion to Compel Testimony of Duane Peshorn MD*, ¶ 5 ("Deny that the Defendant will be denied his opportunity to present a defense, considering Dr. Peshorn is listed as a prosecution witness.")

However, the day before trial the prosecution informed the court and the defense that the witness had moved to Texas and she had not secured his presence. *Motions 6/4/12 31-32*. The trial court instructed the prosecutor to take “appropriate and sincere efforts” to bring Dr. Peshorn to trial. *Id.* Then on the second day of trial, it was confirmed that Dr. Peshorn was not brought to trial, and the prosecutor and the record reflects the prosecutor suggested that Dr. Peshorn testify by telephone. *TR 501-512*. Defense counsel argued vigorously that Dr. Peshorn should be physically present but that if that was not possible then telephone testimony was agreeable. *Motions 6/4/12; TR 501-512*. Defense counsel argued that the prosecution had focused Dr. Frederick’s testimony on his opinion that genital tissue heals very quickly and that this would explain the lack of injury observed when he examined Desiree on January 22nd. Dr. Peshorn’s testimony was relevant to show Mr. Duenaz could not have penetrated Desiree because he examined her on January 13th prior to the time period specified by Dr. Peshorn in which genital tissues would heal, and found no physical indications of sexual abuse. *Motions 6/4/12; TR 501-512*.

Despite her earlier suggestion, the prosecutor objected to Dr. Peshorn testifying by telephone, arguing that it is not addressed by MCR 6.006, relating to video testimony. *TR 501-512*. She argued the defense could simply submit Dr. Peshorn’s report to the jury making particular note of the date of the examination and that it was no longer necessary for the jury to hear directly from Dr. Peshorn. The court agreed and barred Dr. Peshorn’s telephonic or video testimony. In light of this the attorneys stipulated that the jury would be provided a copy of Dr. Peshorn’s report in light of the court’s ruling on the matter. *TR 501-512*.

A. The trial court committed reversible error when it failed to call an endorsed res gestae witness and denied defendant the compulsory process outlined in MCL 767.40a.

Well before trial, the defense wanted Dr. Penshorn to testify and filed a notice pursuant to MCL 767.40a(5). That statute requires the prosecutor and/or law enforcement to provide “reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon” witnesses the defense requests for trial. “Under MCL 767.40a[5], the prosecution has a duty to provide law enforcement assistance to investigate and produce witnesses the defense requests.” *People v Long*, 246 Mich App 582, 585-86 (2001); citing, *People v Burwick*, 450 Mich 281, 289 (1995).

In *Long*, the trial court ruled that the prosecution had made reasonable efforts to provide diligence in providing assistance to the defense in producing a witness who refused to appear for trial and the court affirmed. There, the prosecutor provided law enforcement assistance to produce the witness requested by defendant by providing to the defense a statement made by the witness to the police and informing the witness that her presence was required in court when defense counsel requested her presence. When the witness informed a detective that she would not appear for trial, in addition to leaving numerous unreturned messages another detective went to her last known address and last known place of employment but, was unable to locate her. The court found no error with respect to the trial court's ruling that due diligence had been exercised by the prosecution.

Here, the defense filed a notice pursuant to MCL 767.40a for assistance in procuring Dr. Penshorn for trial. *Defendant's Request for Assistance-Demand Pursuant to MCL 767.40a(5); Motions 6/4/12, 30*. In response, the prosecution argued that assistance was unnecessary and induced reliance on her own efforts to produce him. *Motions 6/4/12 21, 30*. But, her efforts were minimal and when she learned that the witness was out of state in Texas, she waited until

the eve of trial to inform the court and the defense that she was unable to get him there. *Motions 6/4/12 31-33*. She was unable to tell the court whether he had been subpoenaed or provide any explanation as to the lack of effort to produce him. Thus, it is reasonable to assume that had Dr. Penshorn been subpoenaed, he would have appeared for trial.

Additionally, Dr. Penshorn was listed on the prosecution's witness list in accordance with MCL 767.40a(1) which, requires the prosecutor to include the names of all known *res gestae* witnesses on the witness list attached to the information and all known witnesses who might be called at trial. MCL 767.40a(4) provides that a prosecutor may only remove a witness from the witness list upon the approval of the court and a showing of good cause or stipulation of the parties. Once a witness is on the prosecution's witness list, the prosecution is required to exercise due diligence to produce him. *People v Eccles*, 260 Mich App 379 (2004).

Dr. Penshorn was a *res gestae* witness. He was the first doctor to examine Desiree, examined her specifically for indications of sexual abuse, and did so closer in time to the incident than anyone else. He therefore witnessed some event in the continuum of the criminal transaction and his testimony would not have aided in developing a full disclosure of the facts at trial. *Long*, 246 Mich App at 585.

In *People v Rode*, 196 Mich App 58, *reversed on other grounds*, 447 Mich 325 (1992), the trial court allowed the prosecution to amend its witness list the day before trial without any explanation of good cause for the delay. The prosecution argued that the additional witness was of no consequence because he was a codefendant and therefore the defendant was already aware of what the testimony would be. The court held that the trial court erred in permitting the prosecution to amend its witness list on the first day of trial to endorse additional witnesses where the prosecution did not show good cause to justify its motion.

In *Eccles*, a witness endorsed by the prosecution could not be located and failed to appear for trial after promising to do so. The Court of Appeals affirmed the trial court's ruling that the evidence presented in a due diligence hearing demonstrated that the prosecution made sufficient efforts to produce the witness for trial. The efforts of the officer in charge of the case included: numerous attempts by the officer in charge to serve the witness with a subpoena, traveling to the address on the witness' arrest card and interviewing a number of subjects there, checking the witness' jail records for an alternate address, checking the county jails, hospitals, and morgues in the surrounding area and city where the witness was last known to be present, speaking with the mother of the witness' child, conducting three days of surveillance on the home of the witness' mother and a party store he was known to frequent, and running the witness' name in the law enforcement information network. *Id.* at 389-391.

Like the prosecutor in *Rode*, the prosecutor in this case waited until the eve of trial to advise the trial court and defendant that she was unable to produce Dr. Penshorn. Further, like the prosecutor in *Rode*, she offered no explanation or good cause as to why she could not produce the witness other than he was out of town – indeed she did make an attempt to explain other than to say the witness lived in Texas.

Here, unlike in *Eccles*, the prosecution had the benefit of knowing exactly where Dr. Penshorn was. The day before trial, the prosecutor informed the court that Dr. Penshorn had moved to Texas and she had not secured his presence, and that she had searched for and found him. No due diligence hearing was held and the trial court failed to make the required due diligence finding. There was not even an inquiry as to whether Dr. Penshorn was subpoenaed and there was no explanation as to why he would not be present despite the prosecution having almost six months to prepare for trial and although his whereabouts were known. Further, the

prosecutor informed the court that she was unable to say whether Dr. Peshorn had even been served because she had waited until a week before the commencement of trial to inquire as to whether he had been subpoenaed. *Motions 6/4/12 31, 32*. There was absolutely no showing that anything approaching due diligence was used here and the prosecution's efforts to produce Dr. Peshorn were insufficient. As a result, they were not excused from producing Dr. Peshorn.

B. Mr. Duenaz was denied his constitutional right to present a defense and to compulsory process by the failure to produce Dr. Peshorn and refusal to permit him to testify telephonically.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation Clause of the Sixth Amendment . . ., the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v Kentucky*, 476 US 683, 690 (1986); citing *California v Trombetta*, 467 US 479, 485 (1984). The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Washington*, 388 US at 19. In this regard, courts have consistently held that evidentiary rules cannot be arbitrarily used to exclude evidence that is vital to a proffered defense. *Crane*, 476 US at 690-691, citing *United States v Cronin*, 466 US 648, 656 (1984); *Chambers v Mississippi*, 410 US 284, 294, 302 (1973) ("where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice"); *Washington v Texas*, *supra*,

Davis v Alaska, 415 US 308 (1974). Procedural and evidentiary rules “may not be applied mechanistically to defeat the ends of justice,” but must meet fundamental due process standards. *Rock v Arkansas*, 483 US 44, 56 (1987); *People v Stanaway*, 446 Mich 643, 663-664 (1994).

Here, no rule specifically permits or prohibits a party from presenting important witness testimony via telephone. Absent such a directive either way, a trial court has the discretion in controlling the proceedings and the manner in which evidence and testimony is presented, in order to advance the truth seeking function of the proceedings. See *People v Taylor*, 252 Mich App 519, 522 (2002). More specifically, the trial court may exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence, so as to “make the interrogation and presentation effective for the ascertainment of the truth” and “avoid needless consumption of time.” MRE 611(1), (2).²

Those special circumstances existed here to allow Dr. Peshorn to testify via telephone in order to afford Mr. Duenaz his constitutional right to present a defense. Dr. Peshorn’s absence from trial was due primarily to the prosecutor’s recalcitrance. As discussed above, the prosecutor assured the defense and the court well before trial that any assistance to the defense in bringing Dr. Peshorn was not necessary because he was a listed, prosecution witness. *People’s*

² While there appears to be a split of authority, courts from many states have interpreted Evidence Rule 611 to allow the use of telephonic testimony where the special circumstances of the particular case require it. See Michael J. Weber, Annotation, Permissibility of Testimony by Telephone in State Trial, 85 ALR.4th 476 (1991); *In re Estate of Broderick*, 286 Kan 1071, 1079 (Kan 2008) (discussing split of authority); *Town of Geneva v Tills*, 129 Wis 2d 167 (1986) (noting that a trial court may permit telephonic testimony if the right to a fair trial is preserved); but see e.g., *State v McCabe*, 2011 WL 1797192 (Wash App 2011) (finding no abuse of discretion and no violation of defendant’s compulsory process rights in trial court’s refusal to allow defense witness to testify telephonically) See e.g., *In re D.S.*, 333 SW 2d 379, 387-88 (Texas App. 2011) (interpreting Texas version of MRE 611 to allow the presentation of telephonic testimony at parental termination trial); *Barry v Lindner* 119 Nev 661, 668 (Nev, 2003) (allowing the use of telephonic testimony in special circumstances); *In re MH 2004-001987*, 211 Ariz 255.

Answer to Defendant's Motion to Compel ¶ 5. The prosecutor was ordered by the court to make efforts to bring Dr. Peshorn to trial and the prosecutor so agreed. *Motions 6/4/12 30-32.* Both the court and the defendant had “no reason not to accept the representations of [this] officer of the court [who was] bound by a duty of candor to a tribunal.” *People v Garland*, 286 Mich App 1, 8 (2009). And despite these assurances, and absent any record evidence as to what was actually done to produce Dr. Peshorn, the prosecutor changed strategy mid-trial and objected to the very procedure she had suggested by opposing telephonic testimony. *TR 501-512.* Such tactics smack of the very type of gamesmanship that is antithetical to MCL 767.40a, the prosecutor’s duty “to seek justice and not merely convict”, as well as the trial’s “principal mission, the search for the truth.” *People v Callon*, 256 Mich App 312, 327 (2003) (MCL 767.40a was not designed as a tool for gamesmanship at trial); *People v Dobek*, 274 Mich App 58, 63 (2007) (noting that “a prosecutor's role and responsibility is to seek justice and not just wins); *People v Kowalski*, 492 Mich 106, 143 (2012) (central purpose of criminal trial is the search for truth). And the trial court exacerbated both the unfairness and prejudice by neglecting to consider adjourning in order to secure the witness’ appearance, and did not issue a certificate pursuant to MCL 767.93 to obtain an out of state witness. *Motions 6/4/12; TR 501-512.*

Given the testimony of Dr. Frederick including the prosecution’s focus on time required for genital tissues to heal the anticipated testimony of Dr. Peshorn that Desiree had no physical injuries prior to the time of expected healing was vitally important. The trial court offered no basis for denying the defense request other than the silence of MCR 6.006 on the issue. *TR 510-*

512.³ There was no claim or evidence of prejudice to the prosecution – who ostensibly had wanted Dr. Penshorn to testify as well until it became clear that he would help the defense.

Unlike the defense, the prosecution had no Sixth Amendment right to face-to-face confrontation of witnesses. US Const, Ams VI, XIV, Const 1963, art 1, § 20. Moreover, the preference for live witness testimony has been regularly set aside where the interest of justice requires it, and when guarantees of trustworthiness, including the ability to cross-examine the declarant, are available. For instance, nearly all exceptions to the hearsay rule allow for the substantive use of out of court statements at trial where the declarant is not present in the courtroom and available for the jury to observe his or her demeanor. See MRE 803; MRE 804. Most specific and analogous to this case is MRE 804(b)(1), which allows transcripts of an unavailable witness’s prior examination testimony to be admitted against a party into evidence so long as the other party has had the opportunity and similar motive to cross examine the witness. Indeed, courts have routinely admitted *transcripts* of witnesses’ prior testimony against *criminal defendants*, who have a paramount Sixth Amendment right of face-to-face confrontation, in lieu of live testimony. See *People v Meredith*, 459 Mich 62, 63, 65-66 (1998).

Like those criminal defendants who were afforded the opportunity to cross examine witnesses at prior proceedings, the prosecution here would have a similar if not superior ability to do so with Dr. Penshorn, who would be cross examined at trial. Indeed, unlike the “dry record” review of the testimony deemed acceptable when transcripts are admitted under MRE 804(b)(1), the prosecution here would have been able to directly cross examine the defense

³ Somewhat inconsistently, the trial court was perfectly satisfied admitting Dr. Penshorn’s written report without any foundation for its admissibility, something that the rules don’t specifically permit either. MRE 901(a)-(b).

witness in “real time” before a jury that would hear the witness’s answers. The opportunity for cross-examination, and this important guarantee of trustworthiness, would thus be preserved.

In light of this and under the circumstances of this case, the prosecutor’s non-existent “right” to live defense witnesses should yield to the Defendant’s constitutional right to present a defense. Indeed, the trial judge acknowledged the importance of the defense witness’s anticipated testimony at trial because it provided a copy of Dr. Penshorn’s medical report to the jury. And as discussed above, the witness was key to rebutting the prosecution’s theory that Desiree’s genital tissues could have healed by the time Dr. Frederick examined her, weeks after Dr. Penshorn had. It was thus an abuse of discretion to deny the defense request, particularly when the necessity for such a procedure was created not by the defense but by governmental delays and induced reliance on the government’s responsibility to produce the witness.

C. The constitutional error requires reversal.

Contrary to the Court of Appeals’ assertion, the error was not harmless. Appendix A at 9. Initially, the court failed to recognize that Mr. Duenaz’ constitutional compulsory process and due process rights were violated. In that circumstance, the inquiry is not whether the error “more likely than not” was outcome determinative. Rather, this constitutional error requires the prosecution to prove, and the reviewing court to determine, beyond a reasonable doubt that there is no reasonable possibility that the error complained of might have contributed to the conviction. *People v Anderson*, 446 Mich 392, 406 (1994); *Chapman v California*, 386 US 18, 23-24 (1967).

Because it mistakenly applied the wrong harmless error test, the Court of Appeals did not endeavor to make such a determination. And the prosecution cannot sustain its burden of proving the error harmless beyond a reasonable doubt. Dr. Frederick’s testimony on his opinion

that genital tissue heals very quickly and that this would explain the lack of injury observed when he examined Desiree on January 22nd. Dr. Peshorn's testimony would counter the claims of sexual penetration by showing the lack of physical evidence within the time period specified by Dr. Peshorn in which genital tissues would heal. *TR 501-512*. While Dr. Peshorn's report did support the defense, not having the very first health care professional explain to the jury the reduced likelihood that Desiree would have been sexually penetrated with such physical symptoms was highly valuable. Indeed, Dr. Peshorn could easily have disputed Dr. Peshorn's assertion that the lack of physical injury is of little consequence to whether sexual abuse occurred. Moreover, since the Dr. Peshorn's examination occurred at a point at which injury from a sexual assault would have healed, he could have elaborated on the significance of that in a sexual assault investigation, particularly where the prosecution had strained to imply that Desiree's urine leakage was a symptom of abuse. Clearly, Dr. Peshorn's testimony would have assisted Mr. Duenaz. Had Dr. Peshorn's testimony been presented to the jury, there is more than a reasonable likelihood of an acquittal. The Court of Appeals thus erred in holding that the error was harmless.

V. RESENTENCING IS REQUIRED WHERE MR. DUENAZ'S SENTENCE RANGE WAS INCREASED BASED ON FACTS THAT WERE NOT FOUND BY A JURY OR PROVED BEYOND A REASONABLE DOUBT, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Issue Preservation/Standard of Review

Mr. Duenaz preserved this issue through a timely motion to remand, which was denied on October 4, 2014. MCR 7.211(C)(1)(a); MCL 769.34(10); MCR 6.429(C). This Court reviews de novo the constitutional challenge to the sentences in this case. *Harper*, 479 Mich at 610.

Argument

At sentencing, the trial court scored several Offense Variables based on facts that were in addition to those necessary to convict Mr. Duenaz of the charged offenses. SIR; MCL750.82. In so doing, the judge applied the rules in effect in Michigan that require only a preponderance of the evidence to support the variables, and that permit judges rather than juries to find the facts necessary to score those variables. *People v Osantowski*, 481 Mich 103, 111 (2008). By increasing the range of potential punishment to which Mr. Duenaz was exposed using this procedure, the trial court violated the 5th and 6th Amendments to the United States Constitution.

Under the Sixth and Fourteenth Amendments to the United States Constitution, “any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.” *Cunningham v California*, 549 US 270, 281 (2007); *Blakely v Washington*, 542 US 296, 303 (2004); *Apprendi v New Jersey*, 530 US 466, 490 (1999). For purposes of this rule, the maximum sentence range is the maximum “a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely*, 542 US at 302. It is not the

“maximum sentence a judge may impose *after* finding additional facts, but the maximum he may impose *without any additional findings.*” (Emphasis added) *Id.* at 303-304; *United States v Booker*, 543 US 220 (2005). Under *Apprendi*, *Blakely* and its progeny, where further fact-finding is required to increase a sentence that which by law flows from the guilty verdict – by increasing a guidelines range, departing from the guidelines, or otherwise – the Sixth Amendment demands that those facts be found by a jury and proved beyond a reasonable doubt.

The *Apprendi* rule formerly was limited to prohibit judicial fact-finding that increased only the ceiling of permissible sentences, including a sentencing guidelines range, and not to facts used to increase defendants’ minimum. *Harris v United States*, 536 US 545 (2002); *Alleyne v United States*, 133 S Ct 2151 (2013). For this reason this Court has held the *Apprendi* rule does not apply to Michigan’s Sentencing Guidelines since those guidelines determine only the minimum sentence range, while the maximum, or ceiling, is set by statute. *People v Drohan*, 475 Mich 140, 161-62 (2006).

But while *Drohan* has not been specifically overruled, its logical and precedential underpinnings were recently eviscerated by the United States Supreme Court in *Alleyne v United States*. In *Alleyne*, the Court overruled *Harris* and held that the *Apprendi* rule applies to facts that raise both the presumptive ceiling as well as the presumptive floor of a defendant’s sentence. The *Alleyne* Court reasoned, “[j]ust as the maximum of life marks the outer boundary of the range, so [the minimum sentence at issue in that case] marks its floor. And because the legally prescribed range is the penalty affixed to the crime. . . , it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.” *Id.* at 2160 (emphasis in original, internal citation omitted). In light of this, “there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the

minimum” and the Sixth Amendment forbids judicial fact-finding on facts that increase minimum sentences. *Id.* at 2163.

As this Court is aware, review is current pending to decide the impact of *Alleyne* on Michigan’s sentencing guidelines. See *People v Lockridge*, ___ Mich ___; 846 NW2d 925 (June 11, 2014) (order granting leave to appeal to consider, *inter alia*, whether *Alleyne* applies to offense variable scoring). This Court is compelled to hold that *Alleyne* applies to the Michigan sentencing guidelines, which produces a sentence range that is the equivalent of a mandatory minimum term. The trial court must consider and apply the sentencing guidelines range and must sentence within that range absent substantial and compelling reasons. MCL 777.21; MCL 769.34(2); *People v Gary Smith*, 482 Mich 292, 316 (2008) (explaining that “The federal sentencing guidelines [after *United States v Booker*] are not mandatory. By contrast, a sentence in Michigan must be within the guidelines recommendation unless the court states on the record one or more substantial and compelling reasons to depart from it.”) (citations omitted). Facts beyond those necessary to convict of the underlying offense must be found to score the offense variables, which raise the minimum sentence range calculation, or to depart from the calculated range. MCL 769.34(2)-(3); *Gary Smith, supra*. Since those facts expose a defendant to a greater potential sentence, they “must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.” *Cunningham*, 549 US at 281.

The Court of Appeals is incorrect in deciding otherwise. Appendix A at 13-15; *People v Lockridge*, ___ Mich App ___; 2014 WL 563648 (February 13, 2014), *leave to appeal granted*, 846 NW2d 925 (June 11, 2014). The rejection of *Alleyne* is based on the *Alleyne* Court’s caveat that “[o]ur ruling today does not mean that any fact that influences judicial discretion must be

found by a jury. We have long recognized that broad sentencing discretion, informed by judicial fact-finding, does not violate the Sixth Amendment.”). *Alleyne*, 133 S Ct at 2163.

Contrary to what the Court of Appels claims, this caveat does not apply to Michigan’s guidelines. Judges do *not* have “broad” discretion to impose sentences within a range of available punishments. Instead, the limits of their discretion are set by the existence and finding of facts (the Offense Variables), which under the current practice, are not jury-found. And, the Michigan Legislature has made the finding of those facts mandatory—the OV’s *must* be scored (although the sentencing guidelines do not specify by whom or by what standard of proof). MCL 777.21. Furthermore, the court “must” sentence the defendant within the calculated range unless even more facts supporting a departure are found. *People v McCuller*, 479 Mich 672, 684-685 (2007), citing MCL 769.34(2). The only “broad” discretion a judge has is in choosing a sentencing *within* the calculated guidelines range. While the *Apprendi* rule undeniably does not touch that discretion, it applies on all fours to the fact-finding necessary to set the guideline range and to depart.

A court’s departure authority changes nothing. MCL 769.34(3). As the United States Supreme Court explained the availability of a departure in specified circumstances does not avoid the constitutional issue, because such departures themselves are dependent upon the finding of additional fact, *particularly* where the presumption is the range of available punishment triggered by the facts found by juries. *Booker*, 543 US at 234-235; *see also Cunningham*, 549 US at 6*3+280-283. In other words, if the facts are essential prerequisites to the judge’s authority to impose a particular sentence or sentence range, be it a departure or scoring that moves the range up or down, *Apprendi/Blakely* applies.

Here, the jury's verdict on the CSC I charges would place Mr. Duenaz into the into the F-III cell of the sentencing guidelines for a range of 135-450 months at the minimum. MCL 777.62; MCL 777.21(3)(c).⁴ But the guideline range was raised to 270-900 months or life, based on findings that "[b]odily injury not requiring medical treatment occurred to a victim" (5 points for OV 3, MCL 777.33(1)(e)); that the victim suffered serious psychological injury requiring treatment (10 points for OV 4, MCL 777.34(1)(a)); that a victim was asported to another place of greater danger or to a situation of greater danger (15 points for OV 8, MCL 777.38(1)(a)); and that that predatory conduct was involved (15 points for OV 10, MCL 777.40(1)(a)), for an additional 70 OV points. SIR. Since those facts "exposed [Mr. Duenaz] to a greater potential sentence" and were found by a judge, not a jury, and established by a preponderance of the evidence, not beyond a reasonable doubt, the sentence elevation violated the Sixth Amendment under *Apprendi* and its progeny. *Cunningham*, 549 US at 281.

Remand for resentencing based on facts that were found by a jury and proved beyond a reasonable doubt is thus required.

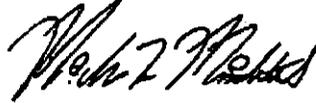
⁴ Admittedly, the jury's verdict on that count would encompass the scoring of 25 points for OV 11 (for one sexual penetration arising out of the sentencing offense) and of 25 points for OV 13, applicable where the sentencing offense was part of a pattern of three or more crimes against a person within a five year period. This would result in a Total OV score of 50-Level III.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant the relief requested.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE



BY: _____

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Dated: October 20, 2014

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
-v-
ROBIN SCOTT DUENAZ,
Defendant-Appellant.

Supreme Court No.
Court of Appeals No. 311441
Circuit Court No. 12-000721FC

NOTICE OF HEARING

TO: ST. CLAIR COUNTY PROSECUTOR

PLEASE TAKE NOTICE that on November 11, 2014, the undersigned will move this Honorable Court to grant the within Application for Leave to Appeal.

STATE APPELLATE DEFENDER OFFICE



BY: _____
MICHAEL L. MITTLESTAT (P68478)

Date: October 20, 2014

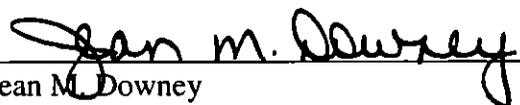
CERTIFICATE OF SERVICE

Jean M. Downey says that on October 20, 2014, she mailed one copy of the following: NOTICE OF HEARING/CERTIFICATE OF SERVICE and APPLICATION FOR LEAVE TO APPEAL to:

St. Clair County Prosecutor
3300 County Building
201 McMorran Blvd
Port Huron, MI 48060

Clerk, Michigan Court of Appeals
P O Box 30022
925 West Ottawa Street
Lansing, MI 48909

Clerk, St. Clair County Circuit Court
County Building
201 McMorran Blvd
Port Huron, MI 48060



Jean M. Downey

IDEN NO. 26259T-J / Michael L. Mittlestat

STATE APPELLATE DEFENDER OFFICE

DAWN VAN HOEK
DIRECTOR

JONATHAN SACKS
DEPUTY DIRECTOR

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PENOBSCOT BLDG., STE 3300
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LANSING AREA:
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October 20, 2014

Clerk
Michigan Supreme Court
925 West Ottawa, 4th Floor
P. O. Box 30052
Lansing, MI 48913

Re: People v Robin Scott Duenaz
Supreme Court No.
Court of Appeals No. 311441
Circuit Court No. 12-000721FC

Dear Clerk:

Enclosed please find the original and seven (7) copies of Notice of Hearing/Certificate of Service and Application for Leave to Appeal for filing in your Court.

Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink that reads "Michael L. Middlestat".

Michael L. Middlestat
Assistant Defender

MLM.jd

Enclosures

cc: St. Clair County Prosecutor
Court of Appeals Clerk (Lansing)
St. Clair County Circuit Court Clerk
Robin Scott Duenaz

