**STATE OF MICHIGAN**

**IN THE MICHIGAN SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellee,

v

**ANDRE F. BOND,**

Defendant-Appellant.

______________________________/

**Court of Appeals No. 267679**

**Lower Court No. 05-93 FH**

**WASHTENAW COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellee

______________________________

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**SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL**

**PROOF OF SERVICE**

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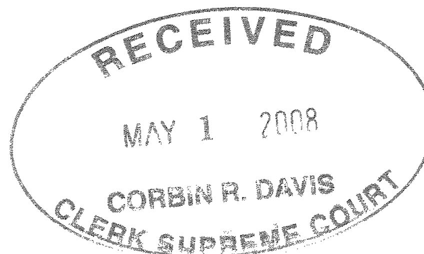

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## STATEMENT OF QUESTION PRESENTED

I. **SHOULD THIS COURT ADOPT A TOTALITY OF THE CIRCUMSTANCES TEST TO DETERMINE WHETHER SOMEONE WAS IN A POSITION OF AUTHORITY AND USED THAT AUTHORITY TO COERCE ANOTHER TO SUBMIT TO UNWANTED SEXUAL CONTACT, AND BASED ON THAT TEST, WAS THE EVIDENCE PRESENTED AT MR. BOND'S TRIAL SUFFICIENT TO SUSTAIN HIS CONVICTION FOR SECOND DEGREE CRIMINAL SEXUAL CONDUCT?**

Trial court did not answer.

Defendant-Appellant answers, "Yes."

## I. THIS COURT SHOULD ADOPT A TOTALITY OF THE CIRCUMSTANCES TEST TO DETERMINE WHETHER SOMEONE WAS IN A POSITION OF AUTHORITY AND USED THAT AUTHORITY TO COERCE ANOTHER TO SUBMIT TO UNWANTED SEXUAL CONTACT, AND BASED ON THAT TEST THE EVIDENCE PRESENTED AT MR. BOND'S TRIAL WAS NOT SUFFICIENT TO SUSTAIN HIS CONVICTION FOR SECOND DEGREE CRIMINAL SEXUAL CONDUCT.

In its March 21, 2008 order, this Court expressed an interest in determining how the "use of authority" language in MCL 750.520c(1)(b)(iii) should be interpreted and applied. Because the term "position of authority" can be applied to many different types of relationship, with widely varying interactions and dynamics, a "one size fits all" approach is not appropriate. Instead, a totality of the circumstances test should be adopted because it would have sufficient flexibility to enable judges and juries to consider, and give appropriate weight to the relevant factors in order to determine both the nature of the relationship and whether "authority" was used to coerce another to submit to unwanted sexual contact.

MCL 750.520c, which defines the offense of second degree criminal sexual conduct, provides:

> (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
> (a) That other person is under 13 years of age.
> (b) That other person is at least 13 but less than 16 years of age and any of the following:
> (i) The actor is a member of the same household as the victim.
> (ii) The actor is related by blood or affinity to the fourth degree to the victim.
> (iii) The actor is in a position of authority over the victim and the actor used this authority to coerce the

victim to submit.

(iv) The actor is a teacher, substitute teacher, or administrator of the public or nonpublic school in which that other person is enrolled.

(c) Sexual contact occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section 520b(1)(f).

(e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section 520b(1)(f).

(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

(i) The actor is related to the victim by blood or affinity to the fourth degree.

(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(i) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, the department of corrections who knows that the other person is under the jurisdiction of the department of corrections.

(j) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, a private vendor that operates a youth correctional facility under section 20g of 1953 PA 232, MCL 791.220g, who knows that the other person is under the

> jurisdiction of the department of corrections.
>
> (k) That other person is a prisoner or probationer under the jurisdiction of a county for purposes of imprisonment or a work program or other probationary program and the actor is an employee or a contractual employee of or a volunteer with the county or the department of corrections who knows that the other person is under the county's jurisdiction.
>
> (l) The actor knows or has reason to know that a court has detained the victim in a facility while the victim is awaiting a trial or hearing, or committed the victim to a facility as a result of the victim having been found responsible for committing an act that would be a crime if committed by an adult, and the actor is an employee or contractual employee of, or a volunteer with, the facility in which the victim is detained or to which the victim was committed.

MCL 750.520c is part of MCL 750.520a, *et seq*, commonly known as the Criminal Sexual Conduct Statute, which was the result of a legislative effort to modernize and refine laws dealing with sexual assault/misconduct. The Criminal Sexual Conduct Statute establishes four separate offenses, each of which can be committed in multiple ways. MCL 750.520c(1)(b)(iii), the statutory section at issue in the instant case, represents one of approximately 17 ways in which the offense of Second Degree Criminal Sexual Conduct can be committed.

In some circumstances, such as those involving individuals under the age of 13 and/or armed with a weapon, a single factor is used to determine whether the sexual contact is unlawful. See MCL 750.520c(1)(a) and (e). In other circumstances, like those involving individuals under the jurisdiction of the department of corrections, two related factors (the actor's relationship to the department of corrections and his/her knowledge of the other individual's status) are used to determine whether the sexual contact is unlawful. See MCL 750.520c(1)(j). In still other circumstances, such as when the defendant uses force and coercion to accomplish the sexual contact, a single factor (personal injury) serves to aggravate conduct which would otherwise

constitute the less serious offense of Fourth Degree Criminal Sexual Conduct, See MCL 750.520c.

MCL 750.520c(1)(b) provides four circumstances under which sexual contact with someone 13, 14, or 15 years old constitutes the offense of Second Degree Criminal Sexual Conduct. Three are based exclusively on the relationship of the parties: being members of the same household, having a certain degree of affinity, and having a student-teacher/administrator relationship. MCL 750.520c(1)(b)(i), (ii), and (iv). The fourth, the one at issue here and the only one which aggravates conduct which would otherwise be Fourth Degree Criminal Sexual Conduct and turns it into Second Degree Criminal Sexual Conduct, requires that the actor be in a position of authority over the alleged victim and by virtue of that position coerced the victim to, in fact, submit.

In light of the examples discussed above, it is clear that when the legislature wants to use a single factor or relationship to establish that sexual contact is unlawful or to enhance otherwise unlawful sexual contact, it knows how to do so. Consequently, the fact that the legislature did not make sexual contact between a 13, 14, or 15 year old and an individual in a position of authority, without more, a crime, clearly establishes that more than just the age of the alleged victim and whether or not the alleged perpetrator was in a "position of authority" over the alleged victim is necessary to establish the offense of Second Degree Criminal Sexual Conduct. The additional factors which must be established are that the defendant used his/her position of authority to coerce the alleged victim to submit and that the "victim" submitted because of that exercise of authority. This Court expressly recognized that requirement in its order in People v Usman, 428 Mich 902 (1987). The Court of Appeals also recognized it, implicitly if not

explicitly, in People v Knapp, 244 Mich App 361 (2001) and People v Reid, 233 Mich App 457 (1999).

Because the phrase "position of authority over the victim" can encompass a wide variety of relationships, using a single factor to determine whether the defendant was in a position of authority over the alleged victim and/or that he/she used that position of authority to coerce the alleged victim to submit is not practical. Instead, in order to permit all of the relevant factors to be taken into consideration, a " totality of the circumstances" test should be adopted. See Illinois v Gates, 462 US 213 (1983).

With respect to the question of whether the defendant was in a position of authority over the alleged victim, the factors which should be considered include the following: the relative ages of the parties, the formal nature of the relationship between the defendant and the alleged victim, whether the defendant was in a position of moral authority over the alleged victim (clergy, counselor, scout leader), whether the defendant was ostensibly put in charge of the alleged victim (babysitter engaged by parent/guardian), whether the defendant asserted authority over the alleged victim (neighbor asserting authority when parents/guardians absent), and whether the alleged victim recognized the defendant's authority ("You're not my mother/father").

With respect to the question of whether the defendant used his/her position of authority to coerce the alleged victim to submit, all of the following factors should be considered: the age and social maturity of the alleged victim, how long the defendant and the alleged victim had known each other, the nature and extent of the authority the defendant had over the alleged victim, the nature and extent of their prior interactions, whether, and/or to what extent, the defendant had the power to reward/punish the alleged victim, the specific conduct in which the defendant allegedly

engaged in order to coerce submission, how the alleged victim responded to the claimed coercive conduct, the specific evidence offered to show that the alleged victim submitted, and whether the alleged victim subjectively believed that he/she had submitted to the defendant.

Based on the proposed "totality of the circumstances" test, the evidence presented at trial in the instant case was clearly insufficient to establish that Mr. Bond had used his position of authority to coerce the alleged victim to submit.

Although Mr. Bond was older than the complainant, and an employee of the school the complainant attended, those facts alone do not establish that at the time of the charged offense he was in a position of authority over the complainant. The incident, as testified to by the complainant, occurred when Mr. Bond, as instructed, accompanied the complainant from the administrative offices when she went to clean out her locker after being suspended from school. At that time, because he did not have either disciplinary authority or supervisory responsibilities *vis-a-vis* the complainant, he was not in a position of authority over the complainant.

Regardless of whether Mr. Bond was in a position of authority over the complainant, the evidence clearly fails to support a finding that he successfully used a position of authority to coerce the complainant to submit to unwanted sexual contact. As a hall monitor, Mr. Bond's official duties *vis-a-vis* the complainant were extremely limited. He could direct her to go to a classroom or other school location, and request administrative review of any behavior he deemed inappropriate, but did not have any power to directly punish or reward her. (T II 49-50). According to the evidence introduced at trial, he had never written her up for a disciplinary infraction. (T II 70). At the tine the incident occurred, the complainant was in the process of cleaning out her locker in order to begin serving an out-of-school suspension. (T II 88). Under

those circumstances, the complainant would have no reason to feel intimidated by the authority of a hall monitor.

The complainant was socially mature and not deferential to authority figures. According to the officer in charge of the case, the complainant, who was 15 years old at the time of the alleged assault, was "defiant ... very vocal ... stubborn ... rebellious." He said that she would "buck authority," "tell you to go to hell," and was "just the kind of person that's going to do what she wants to do." (T II 126-7).

The prior interactions between the complainant and Mr. Bond, which continued over some months' duration, were clearly more peer-to-peer than hierarchical. Jessica Winters, one of the complainant's teachers, testified that the complainant was often late for her class and that Mr. Bond would escort her to the classroom and make excuses for her. (T II 55-7). The complainant herself testified that she and Mr. Bond used to be "cool" (T II 68), that he would do her small favors (T II 68-9), and that other students believed that they were romantically involved (T II 89-90, 93-4).

Other than pointing out that there was a momentary delay before the complainant pushed Mr. Bond away, the prosecution has failed to articulate the specific facts upon which it is relying to support its contention that the complainant submitted to unwanted sexual contact because of Mr. Bond's position of authority. A review of the record establishes that there are no facts which support that contention. A momentary delay in reacting to a startling event does not constitute submission.

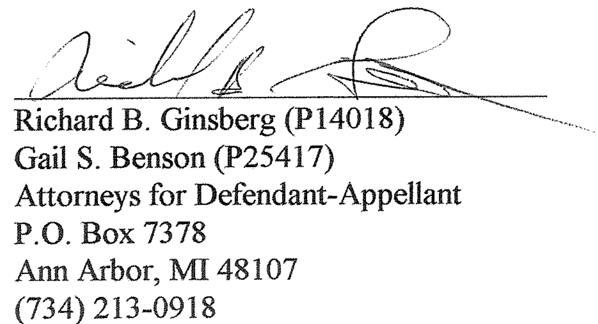
Finally, and most importantly, the complainant never claimed to have submitted to Mr. Bond's advances, let alone that she submitted because of his position of authority. In the absence

of a subjective intent to submit, no submission can occur (unless the complainant was asleep, unconscious, or otherwise unable to respond).

Based on the evidence presented at trial, and taking into account the "totality of the circumstances," the prosecution has failed to establish that Mr. Bond used a position of authority to successfully coerce the complainant to submit to unwanted sexual contact. The record does not establish either that Mr. Bond used a position of authority to coerce the complainant to submit unwanted sexual contact or that the complainant in fact submitted to unwanted sexual contact.

Wherefore, for all of the above reasons, Mr. Bond asks this Court to grant his application for leave to appeal and reverse the decision of the Court of Appeals reversing the trial judge's decision to reduce Mr. Bond's second degree criminal sexual conduct conviction to fourth degree criminal sexual conduct.

Respectfully submitted,



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Dated: April 28, 2008

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_______________________________________/

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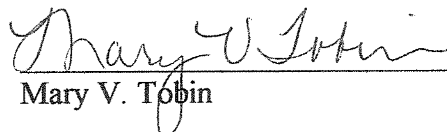
_______________________________________

**PROOF OF SERVICE**

On April 29, 2008, I filed a copy of Defendant-Appellant's Supplemental Brief in Support of Application for Leave to Appeal and Proof of Service and mailed a copy of same to:

Washtenaw County Prosecutor
P.O. Box 8645
Ann Arbor, MI 48107-8645

by placing same in a sealed envelope with first-class postage fully prepaid and depositing it in the U.S. mail.



Mary V. Tobin