

STATE OF MICHIGAN  
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS  
[Cameron, P.J., and Cavanagh and Gadola, J.J.]

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 164520, 164521  
Court of Appeals No. 359012, 359218  
Circuit Court No. 19-003955

v.

SETH VINCENT HORTON,

Defendant-Appellant

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**PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF  
PLAINTIFF-APPELLEE**

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## STATEMENT OF INTEREST OF AMICUS CURIAE<sup>1</sup>

The Michigan Coalition to End Domestic and Sexual Violence (“MCEDSV”) is a nonprofit membership organization comprised of more than 70 nonprofit organizations that are dedicated to the empowerment of all victims of domestic and sexual violence, and human trafficking. MCEDSV seeks to build a legacy in which sexual and domestic violence no longer exist. MCEDSV and its member organizations regularly witness the reality in Michigan - that the voices of survivors of domestic and sexual violence go unheard - whether it is because of stigmatization, because their case does not result in charges being filed, or because the perpetrator silenced their voice before they could find justice.

MCEDSV also regularly participates as amicus curiae in select state and federal cases that present issues of broad importance to victims of domestic and sexual violence such as this one. The case at bar implicates issues that are fundamental to the rights and interests of all victims of domestic and sexual violence in Michigan: the ability to appear in court, confront their perpetrator, and have their voice heard.

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<sup>1</sup> Pursuant to Michigan Court Rule 7.212(H)(3), amicus curiae and their counsel certify that no counsel for a party authored this brief in whole or in part, and no party, counsel for a party, or any other person made a monetary contribution to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

Amicus supports the position of Plaintiff-Appellee (hereinafter “Plaintiff”) that admission of the preliminary examination video neither violated Defendant-Appellant’s (hereinafter “Defendant”) right to Due Process nor was it unfairly prejudicial. Amicus also supports Plaintiff’s position that the admission of evidence of the victim’s unrelated death was proper under MRE 603, and necessary to avoid any prejudicial conclusions the jury may have drawn from the victim’s absence at trial.

Criminal Defendants have Constitutional and evidentiary protections to ensure they are afforded a fair trial. However, Michigan crime victims also have protections that are enshrined in our state’s Constitution and codified in statute. Among other things, Michigan laws guarantees crime victims, including survivors of sexual assault, the ability to participate and be present for the trial of their alleged attacker. Excluding the prior video testimony of a now-deceased victim from the Defendant’s trial would obviate a victim’s ability to be seen and heard at trial if they are otherwise unavailable. Such a sweeping restriction would significantly infringe the rights granted to victims under the William Van Regenmorter Crime Victim’s Rights Act and the Michigan Constitution.

Victims of sexual assault already face terrible odds in bringing their perpetrators to justice. Prohibiting the prosecution from playing the video testimony of a deceased complaining witness at trial, and providing no explanation of the

victim's absence to the jury, would be a further setback for sexual assault survivors in Michigan.

Finally, the Defendant should not be allowed to unfairly benefit from the tragic and untimely death of the victim. Allowing a defendant to benefit from such a tragedy would undermine faith in our criminal justice system and add insult to injury to the victim's family.

## ARGUMENT

### I. Prohibiting the victim's video testimony at trial would undermine Michigan's long-held commitment to crime victim rights as set forth in the Michigan Constitution and the William Van Regenmorter Crime Victim's Rights Act.

The State of Michigan has long been on the forefront of the crime victims' rights movement. Crime victims' rights were first codified in the William Van Regenmorter Crime Victim's Rights Act (hereinafter "CVRA") in 1985.<sup>2</sup> Three years later, Michigan added the victim's rights amendment to the state constitution, to provide a means for enforcing those rights.<sup>3</sup> Crime victims' rights evolved in Michigan from a common complaint that the criminal justice system ignored crime victims.<sup>4</sup>

Both the Michigan Constitution and CVRA recognize the importance of victims' participation in the prosecution by guaranteeing, among other things, the right of crime victims to be present at the criminal trial.<sup>5</sup> Defendant's arguments on

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<sup>2</sup> MCL 780.751 *et. seq.*

<sup>3</sup> Michigan Const. 1963, art 1, § 24.

<sup>4</sup> William Van Regenmorter, Article, *Crime Victims' Rights – A Legislative Perspective*, 17 PEPP. L. REV. 59, 59 (1990) (explaining the motivation behind the Crime Victim's Rights Act written by the statute's drafter).

<sup>5</sup> Michigan Const. 1963, art 1, § 24(1); MCL 780.761.

appeal focus entirely on *his* Constitutional right to Due Process, failing to recognize that the victim also has rights, which the court must balance with those of the Defendant.<sup>6</sup> The victim has the right to participate in, and be present during, the prosecution. This right is included in Michigan law even though, arguably, a victim's presence at trial could be prejudicial to the Defendant.<sup>7</sup> And when a crime victim is deceased, as in the instant case, her rights are not extinguished; instead, they continue through specific, related individuals who are included in the definition of "victim" under the CVRA.<sup>8</sup>

The victim in this case cannot attend the trial, although her previous participation in the preliminary examination is evidence of her desire to have her voice heard in the proceedings, and her bravery in doing so. Presentation of her video testimony during the preliminary examination is the closest she will get to being present at trial. Suppression of that video would exclude her presence and obviate

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<sup>6</sup> It is well-established that a judge has a duty to balance competing rights when due process analysis is triggered. "The fundamental requisite of due process of law is the opportunity to be heard." *Dow v Michigan*, 396 Mich. 192, 205–206, 240 N.W.2d 450 (1976), quoting *Grannis v Ordean*, 234 U.S. 385, 394 (1914) (clarifying the most basic requirements of procedural due process). "Due process requires fundamental fairness, which is determined in a particular situation first by 'considering any relevant precedents and then by **assessing the several interests that are at stake.**'" *In re Brock*, 442 Mich. 101, 111; 499 N.W.2d 752 (1993), quoting *Lassiter v Durham Co. Dep't of Social Services*, 452 U.S. 18, 25; 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (*emphasis added*).

<sup>7</sup> See, e.g., *People v Maybin*, unpublished per curiam opinion of the Court of Appeals, issued Apr. 19, 2018 (Docket No. 335180). In this unpublished Michigan Court of Appeals decision, the defendant argued that he had been denied a fair trial because the victim was permitted to remain in the courtroom even though she had been crying. The defendant also claimed that the crying was a ploy to earn the sympathy of the jury. At the time, the court did stop the proceedings and excuse the jury until the victim could contain her tears, and the victim was allowed to remain after the jury had been brought back in. *Id.* at \*6. Upon review, the Court of Appeals stated that, **regardless of her emotions and how they may impact the jury**, the victim had a **constitutional right** to be present for the trial. The court could not find how the defendant had been prejudiced, given that there was no evidence of this conduct being done purposefully or that the prosecutor asked the jury to sympathize with the victim. *Id.* at \*5.

<sup>8</sup> MCL 780.752(1)(m)(ii)(A-F).



Michigan courts' long-standing recognition that victims' rights in Michigan are remedial in character and should be liberally construed.<sup>9</sup>

The admission of the victim's video testimony at trial would fulfill her right to participate in the proceedings as much as is possible, under the circumstances. Ruling that video testimony cannot be allowed in these circumstances, on the other hand, would limit the right of victims of sexual assault to be present - *to be seen and heard* – at the trial of their alleged perpetrator. Such a ruling would mean that a sexual assault survivor who cannot be physically present at the trial, for any reason, would lose their right to participate and be heard in the proceedings altogether. This is contrary to what is intended and guaranteed under Michigan law. Amicus urges this Court to reject Defendant's argument and allow the victim to be heard – in her own voice.

**II. A reversal on either of the grounds sought by Defendant would further stack the odds against victims of sexual assault, who rarely see their perpetrators brought to justice.**

Sexual assault cases are notoriously difficult to prosecute. Because of the difficult and traumatizing nature of these proceedings for victims, and the tremendous risk they face of retaliation, most victims never report their assault in the first place.<sup>10</sup> According to the Rape, Abuse & Incest National Network (RAINN),

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<sup>9</sup> *People v Fawaz*, 299 Mich App 55, 65; 829 NW2d 259 (2012) (finding that in enacting the CVRA, “the Legislature plainly intended to shift the burden of losses arising from criminal conduct—as much as practicable—from crime victims to the perpetrators of the crimes; thus, it is remedial in character and should be liberally construed to effectuate its intent.”).

<sup>10</sup> *The Criminal Justice System: Statistics*, Rape, Abuse & Incest Nat'l Network, <https://www.rainn.org/statistics/criminal-justice-system>.

two out of three sexual assaults are never reported to law enforcement.<sup>11</sup> Approximately 5% to 7% of those reports lead to arrest.<sup>12</sup> Only .7% of these assaults lead to a felony conviction, and only .6% result in the perpetrator's incarceration.<sup>13</sup>

The outcomes proposed by Defendant would have a significant negative impact on an already-embattled criminal process, through which justice already eludes most sexual assault survivors. Disallowing an unavailable victim's prior video testimony would further limit the ability of all survivors to participate in the criminal process – *to be seen and heard by the court and jury*. Whenever a cooperating witness is unavailable for trial, for any reason, use of their previously recorded testimony would be dependent on whether the defendant was dressed in street clothes or jail garb, a situation over which a victim has absolutely no control, and which could significantly undermine their fair and full participation in the case. Even if a transcript or audio file of the same testimony is available, these mediums do not allow the jury to witness non-language credibility cues, such as the victim's demeanor, facial expressions, and body language. Prosecutors and defense attorneys both understand that, in sexual assault cases where testimony of the victim and the defendant is often the only evidence, the credibility of the witnesses is paramount to the outcome of the case.<sup>14</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> Andrew Van Dam, *Less than 1% of rapes lead to felony convictions. At least 89% of victims face emotional and physical consequences*, The Washington Post, Oct. 6, 2018, <https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences/>.

<sup>13</sup> *Id.*

<sup>14</sup> Counsel for Defendant's own website highlights how important a jury's assessment of victim credibility is: "Many (if not most) sexual assault cases are he-said-she-said cases without hard evidence on either side. This is often because accusers don't immediately report alleged assaults, and evidence—whether it's DNA or witnesses' memories—tends to degrade over time. The goal, then, in

The Defendant also seeks a ruling that would prohibit the jury from being told why the deceased victim is not there to testify at the trial, another factor likely to negatively impact the jury's assessment of the deceased victim's credibility. There is an inherent prejudice against a crime victim if they are absent from the trial, as jurors are left to wonder whether the victim recanted the allegations or lost interest in the prosecution. Together, the rulings that the Defendant proposes would compound the prejudice to the unavailable victim. The jury would be unable to see the victim's face, hear her voice, and witness her reactions to the Defendant, all while not even knowing *why* the victim is not there.

Any ruling that affects the jury's assessment of that credibility is serious and likely to impact not only the verdict, but also the prosecutor's decision to bring a case in the first place. When deciding whether to pursue charges, prosecutors must consider the odds of those charges leading to a conviction and whether the resources required to secure that conviction are proportionate to those odds. The rulings proposed by the Defendant would only add to the list of reasons prosecuting attorneys may decline to bring charges in sexual assault cases and would cause an existing injustice to become even more unjust. This Court must reject such a rule.

**III. Withholding the video testimony and the reason for the victim's absence from trial would allow the Defendant to benefit from the victim's tragic and untimely death.**

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a he-said-she-said sexual assault case is simple—undermine the credibility of the accuser. You need to go on the offensive and give the prosecutor, the judge, or the jury reason to believe the accuser should not be believed.” *Sex Crimes Attorneys in Michigan*, Grabel & Associates website, <https://www.grabellaw.com/sex-charges-overview.html> (accessed Aug. 22, 2023).

In his briefing, the Defendant flags every possible way in which he could be adversely impacted by admitting the video of the victim's testimony at the preliminary hearing, and by informing the jury of the reason for the victim's absence from trial. However, the Defendant fails to acknowledge the ways in which keeping this information from the jury may unjustly benefit his defense. The Defendant's arguments suggest that the rights of the deceased victim are insignificant, or even non-existent.<sup>15</sup>

In most sexual assault prosecutions, the victim would be present at the trial and would testify before the jury. The jury would know that the victim was cooperating in the prosecution of the defendant. Jurors would have the opportunity to watch the victim's behavior and body language in the courtroom throughout the trial, including the ways in which she reacted to the defendant's presence. They would hear the inflections in her voice and see her facial expressions while she answered questions during direct and cross-examination. These things would assist the jury in weighing the victim's credibility and would be important to the jury's ability to determine the truth of the situation.

The jury in this case will not have another opportunity to hear from the victim due to her untimely death. All that is left of her account of the night she was assaulted is in the video recording of the preliminary hearing. While the video cannot replace

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<sup>15</sup> In fact, the Defendant indicates in his briefing his incredulousness that he is being prosecuted for the assault of a now-deceased victim. "Tragically, Robinson was killed in a car accident in 2021. Even so, the prosecuting is proceeding to trial..." Defendant-Appellant's Brief on Appeal, p.1 (*emphasis added*). "In June 2021, Robinson was killed when another driver in a high-speed chase with police hit her car. The prosecution still intends to take Horton to trial." *Id.*, p. 4. (*emphasis added*).

her testifying at the trial, it comes closer to the mark than only playing the audio or reading the transcript. These mediums cannot “reflect all of the subtleties of a witness, such as an inflection of voice or a particular gesture that may completely change the meaning of the testimony. Often the sincerity of the witness may be observed only from the way the witness sounds or looks.”<sup>16</sup>

Without the video, the jury will not have an opportunity to evaluate her demeanor but will be left to draw inferences from the words she said, regardless of whether those words accurately reflect her intent and experiences. They will be left with her disembodied voice, a step removed from her as a human being. This, in turn, makes it easier for the jury to think of the victim as a statistic or hypothetical, rather than the victim of a heinous crime. In this situation the Defendant would *benefit* from the victim’s tragic death, as the juror’s ability to assess the truth of what happened during the alleged attack would be extremely hampered. Such a result would be a dishonor the victim and her family, and an insult to the criminal justice process.

Defendant would likewise unfairly benefit if the reason for the victim’s absence from trial was withheld from the jury. Defendant not only argues that the jury should not be told about the victim’s death, but also proposes that witnesses speak of the deceased victim in a specific verb tense so as not to indicate that she has died nor to imply that she is still alive. This adjustment will only serve to confuse witnesses’ testimony – and add insult to injury for the victim’s loved ones who may take the stand and be forced to speak of her as though she is still alive. The use of an unusual

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<sup>16</sup> James P. Timony, Article, *Demeanor Credibility*, 49 CATH. U. L. REV. 903 (2000).

verb tense will likely add to the jurors' speculation about the absence of a victim who the Defendant claims has falsely accused him of rape. In a he-said, she-said trial in which anything could tip the balance one way or another, the lack of clarity surrounding the victim's participation in the case could be sufficient to cause the jury to inappropriately acquit the Defendant. This Court must not allow the Defendant to unfairly benefit from the victim's death.

### **CONCLUSION AND RELIEF REQUESTED**

Michigan law provides constitutional and statutory rights that are unique to crime victims. These rights are remedial and should be liberally construed to prevent further harm. Where a crime victim is deceased, as in the instant case, those rights are held by family members of the victim, in the order specified in the CVRA. Arguably one of the most important of these rights is the right for the victim to be present at the trial, which allows for her meaningful participation in the criminal prosecution. Where a deceased or otherwise unavailable victim has previously testified against the defendant, allowing the video testimony to be played for the jury is the only way to meaningfully secure this right.

Furthermore, sexual assault victims already face an uphill battle in holding their perpetrator accountable. A ruling for the Defendant on either issue he raises with this appeal would tip the scales of justice further away from victims and would allow individuals charged with a violent crime to unfairly benefit from a victim's unavailability at trial, including the victim's tragic and untimely death.

Therefore, this Court should affirm the Court of Appeals' April 21, 2022, decision on Defendant's consolidated appeals.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 3,545 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

/s/ Johanna L. Kononen

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