STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals,
Joel P. Hoekstra, P.J., and Kirsten F. Kelly and Jane M. Beckering, J.J.
Affirming the Circuit Court for the County of Kent, Dennis B. Leiber, J.

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

-v-

JASON SHAVER,

Defendant-Appellant.

_____/

Supreme Court
No. 146521

Court of Appeals
No. 300959

Kent County Circuit Court
No. 09-11041-FC

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

Timothy K. McMorrow (P 25386)
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STATEMENT OF APPELLATE JURISDICTION

The People accept that this matter is properly before the Court, pursuant to this Court's September 20, 2013 order granting Defendant-Appellant's timely application for leave to appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

-I-

DID THE TRIAL COURT PROPERLY EXCLUDE EVIDENCE THAT ONE OF THE TWO MINOR VICTIMS OF THE DEFENDANT'S SEXUAL ASSAULTS HAD BEEN SEXUALLY ABUSED BY HER FATHER WHEN (1) THE DEFENSE PRESENTED NO PRIOR NOTICE OF INTENT TO INTRODUCE THE EVIDENCE, (2) NO EVIDENCE WAS PRESENTED THAT THE PRIOR SEXUAL ABUSE OF THE DAUGHTER WAS SIMILAR TO THE SEXUAL ABUSE PERPETRATED BY THE DEFENDANT, AND (3) NO EVIDENCE WAS PRESENTED THAT THE SON WAS EVER SEXUALLY ABUSED BY HIS FATHER?

The Trial Court answered Yes.

The Court of Appeals answered Yes.

Defendant-Appellant answers No.

Plaintiff-Appellee answers Yes.

-II-

WERE THE DECISIONS OF TRIAL COUNSEL TO ESCHEW PRESENTING THE DEFENDANT'S CLAIM THAT HE WAS IMPOTENT, WHICH WOULD HAVE LED TO EXTENSIVE REBUTTAL EVIDENCE CONCERNING THE DEFENDANT'S SEXUAL ACTS WITH OTHERS, AND TO FOREGO PRESENTING EVIDENCE OF THE SLIGHT DIFFERENCE BETWEEN THE DEFENDANT'S PUBIC HAIR AND THE DESCRIPTION GIVEN BY ONE OF THE CHILD VICTIMS, SENSIBLE TACTICAL DECISIONS THAT CANNOT FORM THE BASIS OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?

The Trial Court answered Yes.

The Court of Appeals answered Yes.

Defendant-Appellant answers No.

Plaintiff-Appellee answers Yes.

-III-

DID THE TESTIMONY OF TWO CHILDREN THAT THE DEFENDANT ENGAGED IN SPECIFIC ACTS OF SEXUAL ABUSE AGAINST THEM SUPPORT THE JURY'S VERDICT, A VERDICT THAT CANNOT BE HELD AS AGAINST THE GREAT WEIGHT OF THE EVIDENCE?

The Trial Court answered Yes.

The Court of Appeals answered Yes.

Defendant-Appellant answers No.

Plaintiff-Appellee answers Yes.

COUNTER-STATEMENT OF FACTS

This case arises from the defendant's conviction of two counts of criminal sexual conduct first degree, MCL 750.520b. The victims in the case were Jacob Riley and Brittney Riley, the two minor children of Jody Riley and James Riley. The defendant is James Riley's cousin (51a).

After the jury was selected but prior to the taking of testimony, the prosecutor said that she had not received any notice of any intent on the part of the defense to introduce evidence of prior acts of sexual abuse perpetrated on the victims by someone other than the defendant. The prosecutor said she was inquiring "to make sure we are not going to go into that or, if we are, the Court rules on it according to statute, but I believe that requires a motion and an in-camera review, which I don't think we have time to do at this juncture" (25a). Defense counsel[1] said the evidence in question was the prior sexual abuse of the children by their father, James Riley, and argued that the rape shield statute, MCL 750.520j, did not apply "because it says the victim's sexual conduct" and that sexual abuse is not sexual conduct (26a). The trial court ruled that "sexual conduct does not mean volitional acts" (27a). The trial court ruled that no reference to the children's prior sexual acts with their father would be permitted (27a).

In opening statement, defense counsel referred to the father of the victims "who is serving a substantially long criminal sentence for the same conduct that is alleged here" (28a). The prosecutor objected. The jury was excused. Defense counsel said she thought the trial court's ruling was that there would be no evidence of prior sexual acts with the defendant as the actor

[1] The defendant was represented at trial by Louise E. Johnson. Ms. Johnson is often referred to by her middle name, Ellie, and there are occasional references in the record to her maiden name, Herrick. Hence, references that appear in the record to "Ellie" or "Ellie Herrick" or "Ms. Herrick" are to Louise E. Johnson. We refer in this brief to Ms. Johnson either as "defense counsel" or "Ms. Johnson."

(29a). The trial court reiterated that evidence of the sexual abuse of the children by their father could not come in, could not be mentioned in opening statement, and could not be presented in final argument, because no timely motion was made and because the rape shield law would not permit the evidence (29a). Defense counsel said that James Riley pled guilty to sexually abusing his daughter, and that the defendant was charged with the same conduct approximately 30 days after James Riley entered his plea. Defense counsel said that a child protective services worker who had investigated the acts of James Riley asked the children whether anyone else had touched them, and they said no (29a). The prosecutor said she had no objection to evidence that the children made a prior inconsistent statement. The trial court ruled that if the children were asked if the defendant had assaulted them and denied it, and then later said he did, that would be proper evidence, but the fact that they were sexually abused by their father would not be admissible (30a).

Jacob Riley was born December 8, 2000 (38a). Jacob testified that the defendant was living with his family. He testified that the defendant "put his thing in my butt" and that "then he put it in my mouth" (39a). The defendant told him "don't tell anybody or else I'll kill your mom" (39a). Jacob knew that the defendant had a knife in a cabinet in the house (39a). The sexual abuse started when they lived in Florida, and continued in Michigan. It happened seventeen times (39a). Jacob said he counted the number of times. He said the defendant once stuck his finger in Jacob's butt and told him to put his "thing" (meaning the defendant's "private part") in Jacob's butt (40a). One time "white stuff came out" of the defendant's "thing" and it went "down my chin" (40a).

In cross-examination, defense counsel asked Jacob where his father was, and Jacob said "in jail" (41a).

Brittney Riley was nine years old at the time of her testimony (47a). Brittney testified that the defendant "put his thing in my butt" and "put his thing up my butt" (48a). She said he did this 20 times, that "I counted them" (49a). In cross-examination, defense counsel asked when the last time was that Brittney talked with her dad (50a). Brittney said she didn't remember, but agreed that it was a long time ago (50a).

Jody Riley is the mother of Jacob and Brittney (42a). The defendant stayed with her and her husband off and on for the years she was married to James Riley (43a). She also testified that when they lived in Florida, she, James, and the defendant were involved in a sexual act together (43a). In cross-examination, defense counsel asked Ms. Riley where her husband was when Jacob told her what had happened. Objection to this question was sustained (44a). Defense counsel also asked how many times the children were seen at the Children's Assessment Center (45a).[2]

On the third day of trial (and the second day of testimony), defense counsel asked for reconsideration of the trial court's ruling precluding evidence of the sexual abuse of Brittney by James Riley (31a). Defense counsel presented to the Court the case of *People v Morse*, 231 Mich App 424; 586 NW2d 555 (1998), concerning the standard for admitting evidence that children were abused by someone other than the defendant on trial. Defense counsel noted that before trial she had asked for and received from the prosecution information concerning James Riley's conviction. The trial court said that defense counsel alleged that the acts perpetrated by James Riley were similar, but that "I don't know that they're similar because I don't know what it is the father did to these children," that "I don't know anything about anything the father did as it

[2] The Children's Assessment Center is a center that assesses children after a report of suspected child abuse. See *People v Musser*, 494 Mich 337, 342; 835 NW2d 319 (2013).

related to these children to determine whether it's similar to their testimony as in court yesterday about what the defendant did to them" (32a). The trial prosecutor responded that she would never "hold an attorney to ten days past arraignment" (the time constraint in MCL 750.520j) but that raising the issue after jury selection was too late.

The trial court denied the motion for reconsideration (35a). The trial court said that the prosecutor's information to defense counsel concerning James Riley's sex abuse conviction "begs the question as to what exactly happened. Is it similar and is it relevant?" (34a). The trial court said that "this evidence of sex acts between father and children might be intended to explain and answer inappropriate knowledge of the children. However, there exists independently an admission basically in this case, evidence that the children walked in on their mother engaged in sex acts with multiple partners, independent or whatever happened between the children and their father" (34a).

Royce Brooks was in the Kent County Jail with the defendant. Mr. Brooks testified that the defendant told him that one time, he, Jody Riley and Jody's ex-husband were in a ménage a trois, and the children came into the room and saw homosexual acts occurring between the defendant and James Riley. Mr. Brooks also testified that the defendant said he had allowed the male child to perform fellatio on him. When the defendant started to say what happened with the girl child, Mr. Brooks told him to shut up (54a). Mr. Brooks sent a message from the jail about this conversation. Mr. Brooks said he asked for no consideration for this testimony, and relayed the information because, as someone with grandchildren, he was upset about it (55a).

Becky Yunker from the Children's Assessment Center was called as a witness by defense counsel. Ms. Yunker testified that she interviewed Brittney, but not Jacob, on June 6, 2009, and

that the defendant's name did not come up in that interview (59a). The defendant's name did come up in a second interview with Brittney, on September 1, 2009 (59a).

In final argument, defense counsel said that the case presents a picture "of two little kids that obviously obtained their specific adult, inappropriate sexual knowledge from someone other than Mr. Shaver. Why do I make that? You know there's something else going on here. For a lots [sic] of reasons in the law, you didn't get to know the specifics" (65a). Objection was sustained (66a). In rebuttal argument, the prosecutor said that "there's a reason why the Judge is going to instruct you than you have to decide this case based on the evidence in this case" (66a). The prosecutor later said that "[i]f dad's the problem here, then bring it. That's not what the kids said. Don't take my word for it. My argument doesn't matter and neither does hers" (67a).

After conviction, the defendant brought a motion for new trial. At the motion, the defendant presented evidence that Brittney had reported that her father had ejaculated in her mouth when he sexually abused her (137a). Appellate counsel conceded that there was no evidence James Riley had sexually abused Jacob (152a), but argued that if James Riley had done this to Brittney he may have done the same thing to Jacob (150a). The trial court denied the motion for new trial. The trial court said that there was no evidence concerning any abuse by James Riley against Jacob, and that the conviction of James Riley for the acts against Brittney concerned oral sex, not the other acts Brittney described that the defendant committed (172a).

Following two remands from the Court of Appeals, the trial court conducted an evidentiary hearing on the defendant's claim of ineffective assistance of counsel. The first witness, Robert Farrington, said he knew the defendant in Michigan. He testified that years later he met James and Jody Riley in Florida, when the defendant was living with them (185a). He said he slept on the floor of the Riley home. One day Jody told him to grab his things and leave.

He did not know why she did this. Appellate counsel, in an offer of proof, said that Jody threatened to say that Farrington had molested her daughter if he did not leave immediately (189a). Mr. Farrington said he told Ms. Johnson about this conversation (192a-193a). He said that she responded that "they'll piss on it" and that the defendant would be released in a year or two anyway (193a). Mr. Farrington said he had talked with the trial prosecutor after trial (195a), and said that he had had a homosexual relationship with the defendant "to a degree" (197a).

Louise Johnson testified that she was retained by the defendant, and was not his first lawyer on the case (208a). She said she learned early on that the statements of the children concerning the defendant's sexual abuse of them came within a few weeks after their father entered a plea to molesting them (211a). She said the defendant had made some statements regarding his impotence, but her research showed that reported impotence was not "100%" and that the defendant and Robert Farrington "were involved in a relationship he had told me" (211a). She denied making the "piss on it" statement (212a). She spoke with Farrington regarding the statement the defendant told her that Jody had threatened Farrington a few years before (215a). She decided not to call Farrington because of her knowledge that the defendant and Farrington were involved in a sexual relationship, and that she didn't think Farrington would provide any useful information (216a). She denied ever telling any witnesses that they would not be allowed to testify (217a).

Ms. Johnson's strategy had been to show the children's molestation by their father accounted for their sexual knowledge (218a). She believed that when the trial court ruled she could not introduce that evidence, it destroyed her trial strategy (218a).

The defendant told Ms. Johnson before trial that he was impotent. She knew that he had undergone chemotherapy for cancer (221a). From her research, she knew that impotence was not

guaranteed (222a). She said she did not look at the defendant's medical records, but did exchange e-mails with the attorney representing the defendant in a disability claim (224a). The defendant had admitted that he was sexually involved both with Robert Farrington and James Riley (226a). "I didn't want to open that can of worms" by introducing evidence suggesting the defendant was impotent (227a). She anticipated that if she got into the impotence defense, it would open the door to evidence that would show the defendant's alternative lifestyle (233a).

Ms. Johnson received the children's medical records and the reports from the Children's Assessment Center (235a). She anticipated that, in the face of an impotence argument, the prosecution would argue that the defendant might not be able to perform sexually with women, but could with children or adult men (235a). She had information that James Riley had sexually abused Brittney, but had no information that James Riley had ever sexually abused Jacob (236a). The defendant had confided to her that he and James Riley had been involved in a sexual relationship. "And I recall asking if the children's mother would likely know of his bisexuality, and he said yes. And I chose not to get into it because the mother would expose that information, and thereby muddy already pretty muddy waters" (237a).

Ms. Johnson testified that Ronda Olds, the defendant's mother, had told Ms. Johnson that the defendant's wife had attempted to kill Ms. Olds (237a). Ms. Johnson said that she thought of putting the defendant's wife on the stand to testify to his impotence. She was not comfortable doing so, and the defendant's mother's allegation was "the straw that put it over the camel's back" (266a).

Ms. Johnson confirmed that, during a recess, the defendant had reached into his pants and pulled out some of his pubic hair, saying it wasn't the color that Jacob had described (266a). Ms.

Johnson said that it was close to the color Jacob had described, and would have passed for a young boy's description of the pubic hair (267a).

The medical records introduced at the hearing showed the defendant's testosterone level within the high normal range, 771ng/dL with a normal range of 241 to 827 ng/dL (262a).

Amy Vanover was the defendant's girlfriend from 2006 to 2008. She said that they did not have much sexual intimacy "because he had trouble getting up" (268a). She said he could ejaculate, but could not get a full erection (268a). She said she told this to Ms. Johnson, who said it wouldn't help their case (268a). She said she found out a little later about the defendant's bisexuality (268a). "I was aware that he had a situation with the mother, but I didn't know about the father until we were here the last time" (268a).

Ronda Olds, the defendant's mother, remembered the incident where the defendant pulled out his pubic hair to show it wasn't the color Jacob had described, that it was blackish brown. She said that Ms. Johnson responded that the defendant's act was uncalled for, and said nothing else about it (271a). She said the statement concerning the defendant's wife attempting to kill her was a misunderstanding, and came the day of sentencing and not at trial (271a).

Jane Shaver married the defendant on September 1, 2010. She said the marriage was not consummated, because the defendant could not obtain an erection (273a). She said she told Ms. Johnson that the defendant could not ejaculate, and that Ms. Johnson told her that witnesses for Jason were not allowed, and that the judge had tied her hands (273a). Ms. Shaver testified that she first found out about a week before the hearing that the defendant in 2008 had had an affair with a man (274a).

The trial court denied the motion for new trial. The trial court found that the defendant's head hair was shown by the records to be reddish blonde (277a), and that exploring the difference

between the colors brown and strawberry blonde would not have changed the outcome of the trial (278a). The trial court also found that introduction of evidence of impotency "could have led to the introduction of even more damaging evidence of Defendant's sexual proclivities," and the decision to not introduce that evidence was a matter of trial strategy (278a).

The defendant appealed of right to the Court of Appeals, which affirmed his convictions in an unpublished *per curiam* opinion (280a-287a). The Court of Appeals noted that there was no evidence presented that James Riley had engaged in sexual conduct with Jacob, that the acts that James Riley pled to concerning Brittney differed from the acts that Brittney had testified the defendant committed, and that the trial court therefore did not err in excluding evidence of the conduct of James Riley as an explanation for age inappropriate sexual knowledge (285a). The Court of Appeals also held that, in light of the defendant's admitted homosexual acts with James Riley and Robert Farrington, trial counsel's decision to not present evidence of the defendant's alleged impotence was not professionally unreasonable (286a). With respect to counsel's alleged deficiency for not presenting evidence of defendant's pubic hair color, the Court of Appeals found that the defendant did not establish the factual predicate of his claim. In light of the testimony of Ms. Johnson that the defendant's pubic hair did not look black or brown, but could have passed for reddish blonde or light brown, the Court of Appeals held that the decision to not pursue this line of inquiry was valid trial strategy (286a).

SUMMARY OF ARGUMENT I

The Rape Shield statute precludes evidence of any prior sexual conduct of a victim with a person other than the actor charged in a specific case. This prohibition applies whether the prior sexual contact of the victim was with consent or without consent. The prohibition specifically applies to evidence that a child sexual abuse victim was, on another occasion, abused by someone other than the defendant.

The defendant requested to present evidence that Brittney, one of the two victims in this case, was on an earlier occasion sexually abused by her father. The request to present this evidence, not made prior to the onset of trial, was untimely. Such evidence in any event should be permitted only in a limited circumstance, to explain a child's age inappropriate sexual knowledge. The admissibility of such evidence should be determined by the trial court in an *in camera* hearing, and should be admissible only where relevant to the specific facts of the case.

Where, as here, the defendant presents no basis upon which it could be concluded that the sexual abuse perpetrated by the father of Brittney was at all relevant to explain the testimony of that victim concerning the defendant's sexual abuse Brittney, and totally irrelevant to explaining the testimony of Jacob where there was no evidence that Jacob had ever been sexually abused by his father, the decision of the trial court to preclude this evidence was a proper exercise of judicial discretion. In addition, any error was harmless, where the testimony of Jacob was clear and unequivocal, and where defense counsel was able to present some evidence that could be argued as showing Brittney and Jacob were exposed to sexual acts prior to the abuse perpetrated by the defendant.

SUMMARY OF ARGUMENT II

Trial counsel's decision to not present the defendant's asserted claim that he was impotent, and to not explore the defendant's claim that his pubic hair was a different color than that described by a child sex abuse victim, was a proper tactical decision. Exploring the claim of impotence would have opened the door to extensive evidence of the defendant's homosexual conduct, which would have shown that even if the defendant was unable to engage in sexual acts with adult women, he was not impotent. Since no evidence was presented to support the defendant's claim that Jacob's description of the defendant's pubic hair was inaccurate, the factual predicate for the defendant's claim of ineffective assistance of counsel fails. In any case, the defendant has not demonstrated the requisite prejudice required for the grant of a new trial based on a claim of ineffective assistance of counsel.

SUMMARY OF ARGUMENT III

The clear testimony of the two child victims that the defendant engaged in sexual penetration with them on numerous occasions belies any claim that the verdict was against the great weight of the evidence.

ARGUMENT I

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE THAT ONE OF THE TWO MINOR VICTIMS OF THE DEFENDANT'S SEXUAL ASSAULTS HAD BEEN SEXUALLY ABUSED BY HER FATHER WHEN (1) THE DEFENSE PRESENTED NO PRIOR NOTICE OF INTENT TO INTRODUCE THE EVIDENCE, (2) NO EVIDENCE WAS PRESENTED THAT THE PRIOR SEXUAL ABUSE OF THE DAUGHTER WAS SIMILAR TO THE SEXUAL ABUSE PERPETRATED BY THE DEFENDANT, AND (3) NO EVIDENCE WAS PRESENTED THAT THE SON WAS EVER SEXUALLY ABUSED BY HIS FATHER.

Standard of Review. As a generic proposition, questions concerning the admission of evidence are entrusted to the discretion of the trial court, and review of a trial court's decision on the admission or exclusion of evidence is reviewed for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). Whether a statute or court rule permits or forbids evidence, however, is a question of statutory interpretation. Whether the defendant has a constitutional right to present certain evidence is an issue of law. De novo review is applied to questions of statutory interpretation, *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), and constitutional law, *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Discussion. The defendant maintains that he was deprived of his right to present a defense since the trial court precluded the admission into evidence of the prior sexual abuse of Brittney by her father. The issue of the propriety of this testimony was raised for the first time at trial, after the jury was selected and just before the jury was sworn. The trial court ruled that evidence that Brittney was sexually abused by someone other than the defendant would be precluded by the rape shield law. On reconsideration, the following day, the trial court again precluded the evidence, but also observed that nothing had been presented to the court to show that the acts perpetrated on Brittney by her father were similar to the acts alleged to have been

perpetrated by the defendant. The trial court was thus presented with (1) an issue that should have been raised prior to trial, and (2) a request to permit evidence when the defense had presented nothing to show how the evidence would truly be relevant. Having been shown no basis on which to conclude that the proffered evidence would be relevant, indeed having not even been presented with what the proffered evidence would be other than Brittney was abused by her father, the trial court was left with no basis on which to make any other ruling.

The starting point for analysis is the rape shield statute itself, MCL 750.520j. That statute provides

> (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.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

MRE 404 provides that evidence of a person's character is generally not admissible, but MRE 404(a)(3) provides for an exception:

> In a prosecution for criminal sexual conduct, 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.

This Court, in its order granting leave to appeal (288a), asked the parties to address three issues: (1) whether evidence of a child's prior sexual abuse is barred by the rape-shield statute, (2) if so, whether evidence of prior sexual abuse is nevertheless admissible in this case to preserve the defendant's right of confrontation and to present a defense, and (3) whether any error in excluding evidence of prior sexual abuse in this case was harmless. We shall address these questions seriatim.

A.

> The Rape Shield Statute Bars Evidence Of Any Sexual Conduct Of A Victim, Not Simply Conduct That Is Volitional, And Excludes Evidence That A Child Was Abused By Someone Other Than The Defendant.

MCL 750.529j is specific and unequivocal. It provides that evidence of a victim's conduct – not just evidence of voluntary conduct of a victim – is inadmissible, with a very few specific exceptions. Abuse perpetrated by a third party on a victim is not one of those exceptions.

When construing a statute, this Court considers the statute's plain language and will enforce clear and unambiguous language as written. *In re Bradley Estate*, 494 Mich 367, 377; 835 NW2d 545 (2013). "If the language is clear and unambiguous, the statute must be enforced as written without judicial construction." *Petipren v Jaskowski*, 494 Mich 190, 201-202; 833 NW2d 545 (2013). Where a term in a statute is defined by statute, that definition controls. *People v Williams*, 288 Mich App 67, 74; 792 NW2d 394 (2010). Where a term is not defined

by statute, a reviewing court may look to dictionary definitions for guidance. *People v Laidler*, 491 Mich 339, 347; 817 NW2d 517 (2012).

MCL 750.520j talks of "conduct," not "voluntary conduct." "Conduct" as a noun has several meanings, including "the way that one acts; behavior; deportment." *Webster's New World Dictionary* (2nd College Ed). Whether the acts and behavior are those done with consent does not change the fact that they are acts. Brittney engaged in sexual acts and sexual behavior with her father. That those were not consensual, indeed that the sexual acts of a child could not as a matter of law be deemed consensual, is beside the point.

This Court has never specifically ruled on the question whether the conduct referred to in the rape shield act encompasses prior sexual abuse of a child. In *People v Parks*, 483 Mich 1040; 766 NW2d 650 (2009), this Court denied leave to appeal in a case that involved this issue. In separate statements, Justice Young and Justice Markman presented diametrically opposed positions. Justice Young, in concurring, opined that "conduct" referred to "personal behavior," and did not distinguish between voluntary and involuntary personal behavior. *Id.*, pp 1043-1049. Justice Markman, in dissent, wrote that "conduct" in the rape shield statute referred only to volitional conduct and did not encompass prior involuntary acts that stemmed from being subjected to sexual abuse. *Id.*, pp 1059-1063.

We submit that Justice Young's approach was the correct one. As Justice Young noted, a prior draft of the rape shield statute would have precluded only consensual sexual activity of a victim with another person. *Id*, p 1045. The adopted rape shield law was not so restrictive. The definition of "actor" in the criminal sexual conduct statutes is someone "accused of criminal sexual conduct," MCL 750.520a(a), while a "victim" is someone "subjected to criminal sexual

conduct," MCL 750.520a(p), expressing an understanding that "sexual conduct" is something that both perpetrators and victims take part in, even though the victim takes part involuntarily.

Nearly every state that has interpreted its rape shield protection has concluded that it covers both voluntary and involuntary sexual conduct. *Id*, p 1047, fn 23. In addition, every Michigan case which has addressed the propriety of permitting evidence that a child sexual abuse victim was abused by another person as well (see Argument I-B, *post*) has operated on the assumption that such evidence was covered by the rape shield statute. While that assumption is not binding on this Court, it does illustrate that the understanding of Michigan courts has always been in accord with the language of the statute, that it covers both volitional and non-volitional acts.

Any other interpretation would defeat a significant purpose of the rape shield statute. If the rape shield statute is interpreted to apply only to a victim's voluntary conduct, then a child who was kidnapped and sexually abused by a stranger would face the prospect of having introduced into evidence that the child was sexually abused by a parent, with the resultant invasion of privacy and humiliation that would entail. And it would not only be children. Suppose an adult was subjected to forcible non-consensual sexual penetration. Suppose that three years later, the victim was again similarly victimized. Under the theory that involuntary acts would not be covered by the rape shield statute, the fact that the victim had earlier been victimized would not be precluded under the rape shield act, which means the victim would face the prospect not only of having to relive the present crime in his or her testimony, but having to again relive the earlier crime.

It is of course possible in those situations that a trial court would preclude the evidence of prior nonconsensual sexual activity as irrelevant. But if those acts are not covered by the rape

shield statute, there would be no need for the defense to give prior notice of its intent to introduce such evidence. It could be sprung on the victim by surprise, through cross-examination, or raised so late that it would be difficult for the trial court to sensibly weigh whether the evidence in question should be admitted or excluded as irrelevant or because its probative value would be substantially outweighed by the danger of unfair prejudice, MRE 403. It would lead to the ironic result that a victim who had engaged in consensual sexual acts with a third party would be given more protection and greater privacy than a victim who had been subjected to involuntary sexual acts.

We therefore submit that the proper interpretation of MCL 750.520j is that it precludes evidence of any prior sexual conduct of a victim, even when those acts are involuntary acts perpetrated upon a victim.

B.

The Defendant's Request To Present Evidence That Brittney Had Been Sexually Abused By Her Father Was Untimely. Even Where Timely Requested, Evidence That A Child Sex Abuse Victim Was Abused By Another Person Should Be Limited To Explaining A Child's Age Inappropriate Sexual Knowledge, And Only Where Relevant To The Specific Facts Of The Case.

On its face, MCL 750.520j would present no basis for presenting evidence that a child had been abused by someone other than the person charged at trial, unless to explain source or origin of semen, pregnancy, or disease. As an absolute matter, though, that goes too far. One can imagine any number of scenarios where such evidence might be relevant – to show bias, for example. The theory most often advanced for justifying such evidence, as will be discussed *post*, is that it would explain how a child obtained age inappropriate sexual knowledge.

There is no question that a statute which on its face precludes the admission of evidence would in some circumstances have to yield to a defendant's constitutional right to confront witnesses and to present evidence. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994) (holding that a statutory privilege must upon a proper showing give way to a defendant's right to present evidence). But that does not forbid a state from requiring a defendant to give proper notice of the intention to present otherwise excluded evidence. "States are free to adopt procedural rules" governing such evidence, and can compel a defendant "to exercise his Confrontation Clause rights before trial." *Melendez-Diaz v Massachusetts*, 557 US 305, 327; 129 S Ct 2527, 2541; 174 L Ed 2d 314 (2009).

The rape shield statute contains a provision that mandates that a defendant who intends to present evidence otherwise precluded by the rape shield act must do so within 10 days after arraignment. To hold a defendant – or for that matter any litigant – to such a stringent time limit would be unreasonable. It is possible, indeed likely, that the evidence itself, or the import of the evidence, might not even be known to defense counsel until a later time. We would not advocate that a trial judge would be justified in precluding such evidence based on a notice that was filed well past the 10 days limit of the statute but still well in advance of trial. But the notice provision does justify a trial court's consideration of the timing of the defendant's motion, particularly where the defense never even raises a motion for the introduction of such evidence, and the motion is not even presented to the trial court until the prosecution brings a motion in limine after jury selection.

In *People v Arenda*, 416 Mich 1; 330 NW2d 814 (1982), the defendant sought to admit evidence of an eight year old victim's sexual conduct with others to explain the victim's ability to describe the sexual acts that occurred and to dispel any inference that this ability resulted from

experiences with the defendant. This Court held that the rape shield law precluded such evidence, and did not infringe on the defendant's right of confrontation. The Court noted that the defendant had other means available by which the defendant could cross-examine the victim as to his ability to describe what occurred. The Court left open whether under other facts the rape shield statute would be unconstitutional as applied. *Id*, p 13.

In *People v Hackett*, 421 Mich 338; 365 NW2d 120 (1985), this Court revisited the issue, though not in the context of child sexual abuse. *Hackett* involved two consolidated cases. In one, the defendant made an offer of proof to admit evidence of the victim's reputation for homosexuality, to impeach his credibility and to bear on the issue of consent, and specific acts of prior homosexual conduct with prisoners of the same race as defendant to circumvent the inference that the victim would not have consented to engaging in homosexual acts with the defendant. *Id.*, p 351-352. In the other case, the defendant sought to introduce evidence of the victim's reputation for unchastity, a specific instance where the victim allegedly met a man in a bar and left with him for consensual sexual relations, and evidence of a statement the victim made that she was not getting enough sexual satisfaction from her husband. *Id.*, pp 353-354.

In both cases, this Court found that the proffered evidence was properly excluded under the rape shield law. The Court stressed the need for a pretrial hearing on the issue:

> Whether we construe [the rape shield statute] to permit the extension of *in camera* hearings to include consideration of evidence outside the scope of subsection (1) where a defendant's confrontation right has been implicated, or whether we ground the broadened scope of such hearings on this Court's constitutional authority to establish rules of practice and procedure, we conclude that the hearing procedure will best accomplish the required balancing. A hearing held outside the presence of the jury to determine admissibility promotes the state's interests in protecting the privacy rights of the alleged rape victim while at the same time safeguards the defendant's right to a fair trial. Furthermore, this

> procedure establishes a record of the evidence for appellate review of the trial court's ruling. [*Id.*, pp 349-350]

The Court also stressed that the decision whether to permit such evidence would be entrusted to the discretion of the trial court, acting under the parameters the Court had outlined, and that such evidence should not be routinely admitted:

> The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation. [*Id.*, p 349]

In the case at bar, the defendant's argument was that the prior sexual abuse of Brittney by her father was relevant to show Brittney's knowledge of sexual activity. In *People v Morse*, 231 Mich App 424; 586 NW2d 555 (1998), the Court of Appeals addressed a similar issue. The defendant in *Morse* was charged with criminal sexual conduct against his former wife's two daughters. The defendant intended to introduce evidence that a man who had lived with the victims' mother three years before the alleged offenses had sexually abused the girls. The defendant alleged that the complainants' allegations against him were highly similar in nature to the prior sexual abuse by that man. The defendant maintained that he did not commit the charged acts, and that the details provided by the girls were false and instead were the product of the earlier sexual abuse. The Court of Appeals held that an *in camera* hearing would be appropriate to determine whether (1) the defendant's proffered evidence was relevant, (2) the defendant could show that another person was convicted of criminal sexual conduct involving the victims, and (3) the facts underlying the previous conviction were significantly similar to be relevant to the case against the defendant. *Id.*, p 437.

The *Morse* Court looked for guidance from out of state cases that had confronted the same issue. For example, in *People v Hill*, 289 Ill App 3d 859; 224 Ill Dec 244; 683 NE2d 188 (1977), the defendant was charged with having engaged in fellatio with a six year old girl. He sought to admit evidence that the girl had learned about fellatio from a male playmate. The *Hill* court said that "under proper circumstances, evidence of a child witness's prior sexual conduct is admissible to rebut the inferences that flow from a display of unique sexual knowledge." The *Hill* court also said, however, that "this particular exception must be narrowly drawn. When prior sexual abuse is tendered to explain age-inappropriate knowledge, the proof must be carefully examined before admission. Contrary to previously noted common perception, child victims are often taken advantage of by more than a single abuser. The rebuttal of inferences created by age-inappropriate knowledge is not an open invitation to indiscriminately present prior episodes of sexual abuse. *The prior sexual conduct must be sufficiently similar to defendant's alleged conduct to provide a relevant basis for its admission.* It must engage the same sexual acts embodied in the child's testimony. Further, if the prior sexual conduct cannot fully rebut the knowledge displayed, if it failed to account for certain sexual details unique to the charged conduct, its admission should be precluded. Simply put, the prior sexual conduct must account for how the child could provide the testimony's sexual detail without having suffered defendant's alleged conduct." *Id.* at 865, as quoted with emphasis added in *People v Morse*, *supra*, p 434.

People v Morse also looked to the test of the Supreme Court of Wisconsin in *State v Pulizzano*, 155 Wis 2d 633, 651-652; 456 NW2d 325 (1990): that a defendant must make an offer of proof that (1) the prior act clearly occurred, (2) the act closely resembled those at issue, (3) the act is relevant to a material issue, (4) the evidence is necessary to the defendant's case, and (5) the probative value of the evidence outweighed its prejudicial effect. The *Morse* Court

further noted the observation of the Supreme Court of New Jersey, *State v Budis*, 125 NJ 519, 533; 593 A2d 784 (1991), that a court "should consider the likely trauma to the child and the degree to which admission of the evidence will invade the child's privacy. Such evidence can be adduced from sources other than the child. . . . If the victim is questioned about the prior abuse, the court should guard against excessive cross-examination."

The general thrust of these cases is that certain evidence of prior sexual abuse against children may be admissible for a limited purpose: to explain how a child might have achieved age-inappropriate sexual knowledge through some source other than the defendant, in order to rebut the inference that, if the child has such knowledge, perforce the child's allegations against the defendant must be true. Which of course leads to the question: just what is age-inappropriate sexual knowledge? Children from an early age become cognizant of sexual organs, and know the physical difference between little boys and little girls. While certain acts, such as fellatio and cunnilingus or ejaculation, would be foreign to most very young children, the concept of sexual touching would not be, even if the significance of the touching were beyond their knowledge.

In *Pierson v People,* 279 P2d 1217 (Colo 2012), the Colorado Supreme Court rejected an argument that the defendant should have been permitted to introduce evidence of a victim's prior sexual contacts to show her understanding of the sexual acts the defendant was charged with perpetrating. The Court observed:

> While it might be possible, with regard to children of a sufficiently tender age, to infer, without more, a complete lack of knowledge about sexual matters or even knowledge of the anatomy of members of the opposite sex, this could hardly be the case of a child old enough to interact with other children and come in contact with television or other forms of media entertainment. And while certain unusual sexual practices or perversions might seem beyond the imagination of even an older child, in the absence of direct exposure to them, that could hardly be the case with regard

> to basic anatomical information or sensations a child could experience regarding her own genitalia. While it may well be that a child's ability to describe pain of a particular nature might naturally lead to an inference that she must have experienced sexual abuse, nothing in the child-victim's general description of pain or discomfort resulting from hard touching of her external genitalia in this case suggests such a unique source of knowledge. In fact, no argument of this nature was ever made to the trial judge, and the only suggestion remotely related to such a theory was defense counsel's fleeting reference in his proffer to the source of physical, as well as psychological, injury.

That children were sexually abused by another perpetrator does not, in other words, give carte blanche to the defendant to introduce this evidence, unless the defendant can demonstrate its relevance.

These authorities present what we submit should be the proper approach to this issue. Evidence that a child sexual abuse victim was abused by someone else should not be generally admissible. It may be admitted in certain limited circumstances, to illustrate how the child came to obtain certain sexual knowledge that would be inappropriate for the child's age. It should be admissible only after an *in camera* hearing where a trial court can weigh the necessity of the evidence to determine whether the prohibition of such evidence is outweighed by the right of the defendant to present a defense.

C.

Since The Defendant Presented No Basis To The Trial Court To Permit The Evidence Of James Riley Having Sexually Abused Brittney, The Court's Order Precluding Such Evidence Was Proper.

The assumption underlying defense counsel's argument at trial was that since there was evidence that James Riley had abused Brittney, then of course evidence he had committed such abuse would be relevant to explain how Brittney was able to describe the defendant's sexual

abuse. But the defendant never made an offer of proof concerning just what James Riley had done to Brittney. The defendant asserted, but did not support with specific allegations, that the evidence was relevant. The trial court had no option but to decline to permit the defendant to present evidence that James Riley had abused Brittney.

The defendant attacks the trial court's post-trial determination and the Court of Appeals finding that, since James Riley was convicted of a single act of oral penetration, which was not what Brittney described the defendant did, such evidence would not have been relevant. The defendant challenges this reasoning, saying that James Riley's plea to only one count "is a fact based on the realities of plea bargaining, not to the provenance of the child's sexual knowledge" (Defendant's brief, p 22). That James Riley was convicted of a specific form of sexual penetration of his daughter was a public declaration of something that occurred, and introduction into evidence of something which is a matter of public record – that someone else actually committed a specific act against a child – is less invasive of a child's privacy than introduction into evidence of something not of public record. Still, the defendant's argument makes some sense in isolation. If a child's age inappropriate knowledge of sexual matters comes from another source, it would seem logical that it would be the commission of the other act, and not the conviction of the person for committing the other act, that would be relevant. But there are still two overwhelming problems with the defendant's argument.

First, the defendant did not make either a pre-trial or mid-trial presentation to the trial court of any information concerning precisely what acts James Riley committed.[3] The defendant

[3] The defendant's post-trial motion included reports where Brittney said that her father had engaged in vaginal, anal, and oral penetration with her (129a). But Brittney never said that the defendant engaged in oral penetration with her. The defendant was not charged with criminal sexual conduct based on penile/oral penetration (22a, felony complaint, counts 5 and 6). The

notes that the trial court disregarded what James Riley had been charged with committing, but there was no information timely presented to the trial court that would have allowed the trial court to weigh James Riley's acts and determine whether they were indeed relevant.

Second, there is nothing in the record to show that what Brittney described the defendant did constituted age inappropriate sexual knowledge. Brittney testified that the defendant "put his thing in my butt" (48a). Her testimony against the defendant did not describe ejaculation. Her testimony did not describe an act of fellatio or cunnilingus. She used no age-inappropriate sexual terms. There is nothing about a child testifying that a man put his "thing" in the child's "butt" that needs explanation.

Could some sexual knowledge be such that it would be considered age inappropriate? Certainly. For example, Jacob described how the defendant put his "thing" in Jacob's mouth, that "white stuff" came out of the defendant's "thing" and "went down my chin" (40a). That is a description of fellatio leading to ejaculation that presumably would be beyond a young child's knowledge. Had there been evidence that James Riley once forced Jacob to perform fellatio on him and had ejaculated, such evidence might have been admissible to explain Jacob's ability to describe that act, and to counter the inference that Jacob's description of such acts must mean that the defendant had committed those acts.

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defendant's conduct against Brittney was not the same as that of James Riley. If the argument is that Brittney confused what her father did and projected that conduct on the defendant, it leaves open why Brittney would not also have accused the defendant of the same penile/oral penetration her father subjected her to.

But of course that raises a separate question. There was no evidence that James Riley ever sexually abused Jacob.[4] Defense counsel's argument at trial was unclear, but on appeal defense counsel agreed that there was no evidence James Riley had ever sexually abused Jacob (152a). James Riley's sexual abuse of Brittney would not have been relevant evidence for the charge that the defendant sexually abused Jacob. Whatever standard one wishes to adopt for the presentation of such evidence, it cannot be held that the sexual abuse by a third party against one child is somehow relevant on bearing on the sexual knowledge of another child.

D.

Given The Clear Testimony Of Jacob Concerning The Sexual Abuse The Defendant Perpetrated On Him, Any Error In Excluding Evidence That A Third Party Had Sexually Abused Brittney Was Harmless.

The standard of review of this sub-issue depends on whether defense counsel at trial properly preserved this issue. Defense counsel asserted that the trial court's ruling deprived the defendant of his right to confrontation, but did not detail how, did not state what abuse James Riley had perpetrated on Brittney, did not show how it would be relevant. The issue should be considered forfeited for appellate review, and reversal justified only where it can be shown that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[4] The defendant notes that the trial court wrongly found that Jacob Riley said James Riley had never sexually abused him. While it is true that Jacob never said that James Riley had *not* sexually abused him, there has never been any indication of any sort that James Riley actually had abused Jacob. The defendant's claim regarding sexual abuse of Jacob by James Riley is speculation with no evidentiary support.

If the alleged error is considered preserved for appellate review, and if it is held that the trial court erred in excluding the evidence, reversal would be required unless appellee can show that the error was harmless beyond a reasonable doubt. *Id.*

For Jacob, the answer is obvious. There was absolutely no evidence that James Riley had ever sexually abused Jacob. There was no alternative explanation ever shown for how Jacob could have described an act of fellatio ultimately resulting in ejaculation, other than the cryptic reference to his possibly having seen his parents and the defendant in a three-way sexual encounter. Even assuming that evidence of James Riley's sexual abuse of Brittney had been admitted, it would not have provided any evidence countering Jacob's testimony.

For Brittney, it is a closer call – at least on whether any error, if it be error, would be harmless. But it must be reiterated again that never has there been any showing of what acts James Riley perpetrated on Brittney. There has never been any showing that the acts James Riley committed, even if under the same statutory subjection as the acts charged against the defendant, were sufficiently similar that their exclusion was error.[5]

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[5] The defendant notes the Court of Appeals comment that "the prosecutor's argument at trial regarding defendant's failure to present evidence illustrating an alternate source of the victims' age-inappropriate sexual knowledge was highly inappropriate" (284a). What the prosecutor actually said was that defense counsel "keeps throwing dad out there. Dad didn't do this. Dad was already gone when some of these acts happened . . . If dad's the problem here, then bring it" (67a). This was not an argument concerning the failure of the defendant "to present evidence illustrating an alternate source" of age-inappropriate knowledge. It was instead a statement that James Riley ("dad") was not present when the defendant abused Jacob and Brittney. Even if taken as a reference to the children being able to describe sexual acts, it was accurate as regards Jacob, since there is no evidence that James Riley ever abused Jacob. It is a comment made in rebuttal, and what it really showed was exasperation at defense counsel's efforts to present evidence that the trial court had specifically excluded. The record is replete with defense counsel ignoring the trial court's ruling, including defense counsel's utterly inappropriate comment that "you know there's something else going on here," that "for a lots [sic] of reasons in the law, you don't get to know all of these specifics" (65a). It is axiomatic that attorneys have to follow the rulings of a court, and are not free to disregard those rulings simply because they disagree with

Assuming that error occurred, it would be in the trial court not conducting an *in camera* hearing on the propriety of the evidence of James Riley having abused his daughter. But the defendant still has the burden of showing just what evidence was excluded, and how that exclusion prejudiced him. The defendant's argument in essence is that the mere fact that James Riley had sexually abused Brittney was relevant, but he has never shown, even at the post-trial evidentiary hearing, just what acts James Riley perpetrated on Brittney, how those acts were similar to the acts perpetrated by the defendant, or how such allegedly similar acts would have been relevant.

The jury in any event heard, because of the improper actions of defense counsel (see fn. 4) that the children's father was in prison. Defense counsel managed to sneak into the record a claim, not entirely true, that James Riley was in prison for the same conduct the defendant was accused of committing. The jury heard evidence that James Riley, Jody Riley, and the defendant had engaged in a three way sexual encounter. While Jody Riley said the children were in their rooms when this occurred, Royce Brooks testified that the defendant told him the children had observed homosexual acts occurring, which provided evidence of another source of the children's sexual knowledge. In short, the exclusion of evidence of James Riley's sexual abuse of his daughter was of minimal consequence to this action. On these facts, while there should be no finding of any error at all, we submit that any error was harmless and does not call for reversal.

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them. Defense counsel's conduct at trial could have been subject to a finding of contempt. Granted, that is not relevant to the legal issue raised in this case, but neither is the propriety of the prosecutor's final argument which (1) has never been raised as an issue, and (2) was a response to defense counsel's utter disregard for the trial court's ruling.

ARGUMENT II

TRIAL COUNSEL'S DECISIONS TO ESCHEW PRESENTING THE DEFENDANT'S CLAIM THAT HE WAS IMPOTENT, WHICH WOULD HAVE LED TO EXTENSIVE REBUTTAL EVIDENCE CONCERNING THE DEFENDANT'S SEXUAL ACTS WITH OTHERS, AND TO FOREGO PRESENTING EVIDENCE OF THE SLIGHT DIFFERENCE BETWEEN THE DEFENDANT'S PUBIC HAIR AND THE DESCRIPTION GIVEN BY ONE OF THE CHILD VICTIMS, WERE SENSIBLE TACTICAL DECISIONS THAT CANNOT FORM THE BASIS OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review. Whether a person has been denied the effective assistance of counsel is a mixed question of law and fact. Where the issue is raised in the trial court, the factual findings of the court are reviewed for clear error, while the ultimate application of the law is reviewed de novo. *People v LeBlanc, supra.*[6]

In *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court set forth the following test for determining whether a defendant was deprived of the effective assistance of counsel under the Sixth Amendment:

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered

[6] This Court's order granting leave to appeal (288a) stated the three questions the Court wished the parties to address. Issue II, ineffective assistance of counsel, and Issue III, whether the verdict was against the great weight of the evidence, were not included. On the other hand, the Court's order granting leave did not say that it was limited to those issues. We are unsure if the Court is interested in reviewing those issues, but since they were briefed by the defense on appeal, we shall address them in responsive arguments.

> adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

The Court further held that an error by counsel, "even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.*, p 691. Thus, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.*, p 692. The Court said that "every effort [must] be made to eliminate the distorting effects of hindsight," and that "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*, p 689. Ultimately, the defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, p 694.

In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), this Court held that the test for ineffective assistance of counsel under the Michigan Constitution is the same as that under the United States Constitution. To show that defense counsel's representation was constitutionally deficient, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. The Court adopted the *Strickland* test of prejudice, requiring the defendant to show a reasonable probability that, but for counsel's unprofessional errors, the result may have been different.

This standard was well described by the Sixth Circuit in *Storey v Vasbinder*, 657 F2d 372, 374 (CA 6, 2011):

> It is common ground in this case that Storey's trial lawyer did a poor job. But the Supreme Court has gone out of its way to make clear that, in order to obtain a new trial on ineffective-assistance grounds, the petitioner must do more than show that he had a bad

> lawyer – even a really bad one. Instead, the petitioner must also show prejudice, which means he must show a reasonable likelihood that his lawyer's bad performance made a difference in the outcome of his trial. The Court's precedents make clear that the former showing by no means leads inevitably to the latter.

In any claim of ineffective assistance of counsel, the defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Carbin*, 463 Mich 590, 601; 623 NW2d 884 (2001).

Discussion. The defendant's ineffective assistance claim centers around two claims: that defense counsel should have presented evidence that the defendant was impotent, and should have followed up on the defendant's extraordinary action of pulling out some of his pubic hair to illustrate how it differed in color from the description given by Jacob.

In the post-trial hearing, the defendant presented medical records to support his claimed impotence -- but of course those records were all of the defendant's self-reported impotence. The records showed medical conditions that, the defendant argues, could have led to impotence, but no proof positive, such as nerve damage following a radical prostatectomy.[7] The records show that the defendant had a normal range of testosterone (262a), which would not preclude impotence but certainly would be evidence that at least the defendant did not suffer from a low testosterone level that could have explained his claimed impotence.

The defendant argues that it is impossible for the defendant to have ejaculated on Jacob's face if he in fact was impotent. That is an assumption, and it is not accurate. Impotence is the

[7] https://www.cornellurology.com/clinical-conditions/erectile-dysfunction/prostatectomy-and-erection-problems/

inability of a man to maintain an erection sufficient to engage in sexual intercourse.[8] It is not the same as inability to ejaculate. Amy Vanover, the defendant's erstwhile girlfriend, testified that the defendant was able to ejaculate but not obtain an erection (268a). Even a casual investigation would support that it is possible for a man to be able to ejaculate without obtaining a full erection.[9] Had evidence of the defendant's claimed impotence been presented, it would not have eliminated the possibility of his being able to ejaculate.

Suppose, however, that defense counsel chose to present an impotence claim. Defense counsel could have presented testimony from Jane Shaver, the defendant's wife, concerning their inability to consummate their marriage – in 2010, after the commission of crimes charged in this case. Defense counsel could also have presented evidence from Amy Vanover concerning the defendant's impotence. But Jody Riley had testified that she, her husband James, and the defendant had once engaged in a three way sexual encounter. The details of that encounter were not presented, and it appears that the primary relevance of that portion of her testimony was to support the testimony of Royce Brooks, that the defendant had admitted to engaging in sexual acts with James Riley and told Mr. Brooks that the children had observed those acts. With the claim of impotency, however, it would have been entirely relevant, albeit eminently uncomfortable, to have Jody Riley testify to what specific sexual acts the defendant engaged in, and whether he was able to maintain an erection and ejaculate during those acts.

The claim of impotency would have opened the door to more extensive testimony of the defendant's homosexual relations. The issue is not whether homosexual men are more likely to

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[8] http://medical-dictionary.thefreedictionary.com/impotence

[9] http://www.drugs.com/health-guide/impotence-erectile-dysfunction.html

abuse children than are heterosexual men, a proposition that has no support in evidence. But the inevitable argument to counter a claim of impotency would be that the defendant had difficulty becoming sexually aroused with adult women, but had no problem with sexual arousal in general, and could easily have committed the acts described by Brittney and Jacob. Little wonder that defense counsel thought it wise to avoid that line of inquiry. Minimally it cannot be said that the decision to not present such evidence, which was not dispositive and would have opened the door to intensive inquiry of the defendant's physical ability to perform sexually, undermines confidence in the verdict.

The "pubic hair" imbroglio is even more tenuous. Defense counsel confirmed the extraordinary claim that the defendant, during a break in the proceedings, reached into his genital area, yanked out several strands of his pubic hair, and said that it was not the color as described by Jacob. She thought this was debatable, and that the hair looked sort of reddish blonde, which would have accorded with "a little boy's description" of the pubic hair (267a). The defendant on appeal asserts that this question should have been explored more thoroughly, but no evidence was presented in the post-trial hearing that contradicted Ms. Johnson's description. Nothing was presented to show that presentation of this so-called evidence would have weakened Jacob's clear testimony that the defendant forced Jacob to perform an act of fellatio that resulted in ejaculation.

The defendant's claims are essentially that *maybe* presentation of the defendant's alleged impotence and *maybe* inquiry into the pubic hair color would have weakened the prosecution's case. It is just as likely that those inquiries would have strengthened the case. Defense counsel's decision to decline those lines of inquiry was sensible, well within the range of professional

competence, and not the sort of decisions that should lead to a finding of ineffective assistance of counsel, or a finding of prejudice that would justify the grant of a new trial.

ARGUMENT III

THE TESTIMONY OF TWO CHILDREN THAT THE DEFENDANT ENGAGED IN SPECIFIC ACTS OF SEXUAL ABUSE AGAINST THEM SUPPORTED THE JURY'S VERDICT, A VERDICT THAT CANNOT BE HELD AS AGAINST THE GREAT WEIGHT OF THE EVIDENCE.

Standard of Review. A trial court's decision on whether a verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

When considering a motion to set aside a jury verdict as against the great weight of the evidence, "the hurdle a judge must clear to overrule a jury is unquestionably among the highest in our law. It is to be approached by the court with great trepidation and reserve, with all presumptions running against its invocation." *People v Bart (on remand)*, 220 Mich 1, 13; 558 NW2d 449 (1996). A trial judge does not sit as a "thirteenth juror" charged with reweighing the credibility of witnesses. *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998).

A verdict may be vacated as against the great weight of the evidence only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1994), quoting *Nagi v Detroit United Railway*, 231 Mich 452, 457; 204 NW 126 (1925). A new trial may be ordered where the verdict has resulted in a miscarriage of justice. MCR 6.431(B). Review of a denial of a motion for a new trial based on a great weight of the evidence argument is for an abuse of discretion, which will be found only where denial of the motion was manifestly against the clear weight of the evidence. *People v Gonzalez*, 178 Mich App 526, 532; 444 NW2d 228 (1989).

Discussion. The defendant argues that, since the defendant was impotent, he therefore could not have sexually abused Brittney and Jacob as they described, and the verdict therefore was against the great weight of the evidence. The jury was never presented with the so-called impotence evidence. The issue concerning the defendant's impotence may be procedurally presented in the claim of ineffective assistance of counsel. We maintain that that argument should fail for the reasons stated *supra*, but that is where the issue belongs.

The testimony of Brittney and Jacob was clear and unequivocal. There was nothing inherently incredible in their descriptions of what occurred. There was no legally cognizable basis on which the trial court could have concluded that the verdict in this case was against the great weight of the evidence, and no reason for the Court of Appeals or for this Court to question that determination.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that the decision of the court of appeals, affirming the convictions and sentences entered in this cause by the Circuit Court for the County of Kent be AFFIRMED.

Respectfully submitted,

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

Dated: 12/18/13

By: _____
Timothy K. McMorrow (P 25386)
Chief Appellate Attorney