STATE OF MICHIGAN

IN THE SUPREME COURT

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

No. 146521

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v.

JASON SHAVER,

Defendant/Appellant.

COA No. 300959

Case # 09-11041FC
Kent County Circuit Court

Hon. Dennis B. Leiber

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APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Submitted by:

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ORDER APPEALED FROM

Appellant was granted leave to appeal the December 4, 2012 Opinion and Order of the Court of Appeals. Record 280a-287a. Leave was granted on September 20, 2013. Record, 288a.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER DEFENDANT'S RIGHTS OF CONFRONTATION, COMPULSORY PROCESS AND TO PRESENT A DEFENSE WERE VIOLATED WHEN THE LOWER COURTS RULED THAT THE RAPE SHIELD LAW PRECLUDED EVIDENCE THAT THE MINOR CHILDREN HAD BEEN ABUSED BY THEIR FATHER ONLY A FEW WEEKS BEFORE THE CHARGES WERE MADE AGAINST DEFENDANT. US CONST. AMS VI, XIV.

Plaintiff-Appellee states "No."
Defendant-Appellant states "Yes."
The Trial Court states "No."
The Court of Appeals said, "No."

II. WHETHER DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS DENIED A FAIR TRIAL, CONTRARY TO THE SIXTH AND FOURTEENTH AMENDMENTS WHEN TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EXCULPATORY WITNESSES.

Plaintiff-Appellee states "No."
Defendant-Appellant states "Yes."
The Trial Court states "No."
The Court of Appeals said, "No."

III. WHETHER THE VERDICT IS AGAINST THE GREAT WEIGHT OF THE EVIDENCE.

Plaintiff-Appellee states, "No."
Defendant-Appellant states, "Yes."
The Trial Court states, "No."
The Court of Appeals states, "No."

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STATEMENT OF FACTS AND PROCEEDINGS

Defendant was convicted after a 4-day jury trial of two counts criminal sexual conduct 1st degree, MCL 750.520B2B. He was sentenced on October 7, 2010 to a term of 28-56 years in prison on each count. This case arises from charges that Defendant committed oral-penile penetration with 8-year old Jacob Riley, and anal-penile penetration with 7-year old Brittney Riley, brother and sister.

Facts

Jacob Riley, aged 8-9 years old at the time of the alleged incidents, testified that in January 2009 he lived with his father, mother and sister. For one month, Mr. Shaver lived with them. (Record, 38a; Tr II, 146-148). His father "stopped staying" at his house, and then Jason stopped staying there. (Record, 38a Tr II, 149). Jacob stated that Mr. Shaver "put his thing in my butt" and "...then he put it in my mouth." (Record, 39a; Tr II, 151). "First he pulled down his clothes and then he put his thing up my butt, and then he put his thing in my mouth, and then he said don't tell anybody or else I'll kill your mom." (Record, 39a; Tr II, 152). Jacob also said it happened "17" times "because it started in Florida" when he was four years old, living in Florida with "Jason, me, my dad and my sister and my mom." (Record, 39a; Tr II, 153).

Jacob then related that in Florida Mr. Shaver "stuck his finger in my butt and the second time he told me to put my thing in his mouth and then his butt." The same things happened in Cedar Springs. (Record, 40a; Tr II, 154-155). He specifically testified that "white stuff came out" of Jason's penis, went down Jacob's chin and Jason told him to "wipe it off." (Record, 40a; Tr II, 155-156). He described Jason's penis as "medium sized with yellow and whitish hair." (Record, 40a; Tr II, 157).

Jody Riley testified that she, Brittney and Jacob, lived with her husband James and Mr. Shaver in Cedar Springs. Jason slept on the couch and sometimes in Jacob's room in his own bunk bed (Jacob had the other bunk bed). (Record, 42a; Tr II, 164-165). She stated that Jason stayed with the Rileys off and on for most of her 11-year marriage. For about a year they all lived in Florida. (Record, 43-44a; Tr II, 166-167, 173). On one occasion when they lived in Florida, the three adults engaged in a "threesome" when the children were in their bedroom. (Record, 43a; Tr II, 167-168).

After they had returned to Cedar Springs, Jacob told her "something about" Jason . She had Brittney go get her sister Sabrina, and, while she stayed in the living room, Sabrina talked to Jacob. The next day, Jody called the authorities. (Record, 43-44a; Tr II, 168-170).

Brittney Riley, nine years old at the time of trial, testified that she lived with her mother, brother, and Jason. (Record, 48a; Tr II, 186). She said that Jason "put his thing in my butt" when her mother and brother were cooking dinner. She asked him to stop but he wouldn't. (Record, 48a; Tr II, 187). She told her mother. Jason did it "20 times" on different days. She said that if she told anybody, Jason would "call the cops on my mom." (Record, 49a; Tr II, 190-193).

Sabrina Smith, Jody's sister, was at her house in the late summer when Brittney came and asked her to come to Jody's house because Jacob needed to talk to her. (Record, 50a; Tr II, 195-196). She went to Jody's house and went into Jacob's bedroom to talk. After talking to Jacob for about 10-15 minutes, she told Jody she needed to call Child Protective Services. (Record, 50a; Tr II, 197).

Royce Brooks was in the jail with Defendant for a time. (Record, 53a; Tr II, 226). Brooks testified that one time, Mr. Shaver was crying -- as he did frequently -- and "he just blurted

out, I did it." (Record, 54a; Tr II, 227). He then related that he had had a menage a trois one time with a man and woman, and the two children had witnessed it. Then, Mr. Shaver purportedly said that he was standing in front of the sink and allowed the boy to perform fellatio on him. (Record, 54a; Tr II, 227-228). Mr. Shaver supposedly began to tell what he had done to the girl, but Brooks told him to shut up and don't ever speak to him again. (Record, 54a; Tr II, 229). The next day, Brooks wrote a kite asking to be moved to a different cell. Brooks then asked to be put in contact with the prosecutor and police because he wanted "the story to be told." (Record, 54a; Tr II, 230).

Proceedings

At various points during the trial, the defense sought to introduce evidence that the children's father, James Riley, had abused them. In fact, Riley had pleaded guilty to oral penetration with Brittney and is currently serving a plea-based prison sentence. Record, 119a. This information would be relevant because it tends to explain why young children would have any knowledge of sexual activity. The trial court denied the requests to introduce this evidence, ruling that the Rape Shield Act, MCL 750.520j, prohibited evidence that the children had been victimized by their father. See Record, 25a-35a .

After Defendant had been convicted, a motion for a new trial was timely filed, on the basis that he had received ineffective assistance of trial counsel and that the verdict was against the great weight of the evidence. The motion was denied by order dated April 25, 2011. Record, 109a-110a.

On December 16, 2011 the Court of Appeals issued its first Order remanding the case to the circuit court with instructions to do two things: 1) determine whether the facts underlying the father's conviction were highly similar to the conduct the victims testified to in the instant proceeding

and 2) conduct a *Ginther* evidentiary hearing as to the effectiveness of trial counsel for failing to present exculpatory witnesses and evidence. Record, 111a-112a.

Soon after the first order of remand the parties met in chambers with the trial court to discuss how to proceed. It was decided that undersigned counsel should file a motion to put the case back on the lower court's active docket. Counsel proceeded to obtain records of James Clement Riley's conviction, police reports, and interviews with Brittany and Jacob which led to the arrest and conviction by plea of James Clement Riley. Record, 113a-139a - Motion for Findings of Fact.

A motion hearing was held. At that time, we argued that there was no reasonable doubt that the acts which James Clement Riley perpetrated on his daughter, Brittany Riley, were "highly similar" to those with which Defendant was charged and convicted. Brittney claimed at trial that Defendant had penetrated her anally. However, although James Riley had been ***charged*** with three counts of CSC1, encompassing oral, vaginal ***and*** anal penetration, he pleaded no contest to only one count of oral penetration; the two additional counts were "nolle prossed." See Judgment of Conviction and Sentence and other materials pertaining to James Riley's actions, Record, 113a-135a.

With respect to Jacob Riley, we conceded at the hearing that he had no similar documentary proof showing that James Riley had performed (or was alleged to have performed) "highly similar" acts on Jacob. (Record, 143a-170a).

In its March 3, 2012 Opinion, an opinion that can only be described as sophistry, the trial court first decided that the acts perpetrated on Brittany Riley by her father were not "highly similar" to those for which Defendant was convicted, because James Riley had pleaded no contest to a charge of oral sex, whereas Brittany accused Defendant of anal penetration. The trial court made

no findings with respect to Jacob. The trial court also decided -- without holding the evidentiary hearing that the Court of Appeals had ordered -- that trial counsel had not been ineffective. Record, 171a-172a. The Court of Appeals's Order of Remand had required the trial court to determine whether the **facts** underlying James Riley's conviction were "highly similar" to the acts charged against Defendant. The ultimate plea deal made between the prosecution and James Riley of "plead to one, nolle prosse the others" does not mean that Brittany had not disclosed additional **facts** underlying James Riley's conviction that were highly similar to the charges in this case.

Because the second portion of the trial court's Opinion completely disregarded the appellate court's order to hold an evidentiary hearing, undersigned counsel filed a Second Motion to Remand, asking the Court of Appeals to order the trial court to obey the December 16, 2011 Order of Remand. The Court of Appeals swiftly ordered the trial court to do just that on April 16, 2012 in its second Order of Remand, instructing the trial court to obey the first Order of Remand and to conduct an evidentiary hearing on the issue of ineffective assistance of trial counsel. Record, 173a. Finally, an evidentiary hearing was held over portions of two days. Record, 175a-275a.

Five witnesses were called: Defendant's trial counsel, Louise Herrick Johnson; Robert Farrington; Amy Vanover, Defendant's former girlfriend; Jane Shaver, Defendant's wife; and Ronda Olds, Defendant's mother. Additionally, the parties stipulated to the admission of Defendant's medical records from the Ferguson Family Health Clinic. (Record, 181a-182).

The trial court issued its Opinion on June 28, 2012, concluding that trial counsel had not performed deficiently, and that Defendant had not suffered prejudice. Record, 181a-182a.

Facts Developed at the *Ginther* Hearing

Robert Farrington was the first witness. He testified that he had known Defendant and his family for about 11 years. (Record, 185a). In fact, he moved to Florida seven years earlier with Defendant, with whom he was at that time having a homosexual relationship. (Record, 196a-197a). He had stayed one night, when Jody Riley demanded that he pack up his things and leave, or else she would accuse him of molesting her daughter. (Record, 186a-187a).

The next witness was trial counsel, Louise E. Herrick Johnson. She agreed that cases involving child criminal sexual conduct frequently turn on credibility, as there may be no corroborating evidence. (Record, 204a). She testified that when defending a child CSC case, she would examine police reports, forensic reports, prior statements and that she did so in this case. (Record, 205a-206a).

Trial counsel agreed that it would be critical to show that a child's account of a sexual assault was not accurate, or that their account was inconsistent with other facts. (Record, 206a-207a, 219a). In a hypothetical "thought experiment" counsel was asked whether evidence that an accused could not physically have performed the act he was charged with would be material evidence to present:

Q. You're defending an armed robber and the testimony is that the witness saw the armed robber run away?...

Q. You've got evidence that your client, who is the accused armed robber, on that day was -- had a broken leg and was in a cast and could either could not have run or could only have run with difficulty. Would you consider that to be material evidence to present in his defense?
A. Absolutely.
Q. So, evidence that a defendant was either physically incapable or would have physical difficulty in performing the alleged crime would be significant to you?
A. Yes.

(Record, 207a).

She testified that her strategy was to show that the children's precocious sexual

knowledge derived from their father, James Clement Riley's, sexual abuse of them. (Record, 211a, 218a). She had no other strategy besides focusing on the father's abuse of the children. (Record, 218a). But, once the trial court had ruled that the Rape Shield Act precluded any evidence concerning James Riley, her trial strategy had been "destroyed." Her strategy then became to "poke some holes in the subtle little victims in this case." (Record, 219a). She agreed that if she had evidence that Defendant had not penetrated the two children "20 times" or "17 times" as they had testified at trial, she would want to present it. (Record, 220a).

Trial counsel was then questioned extensively about when she became aware that Defendant was impotent, and what she did to investigate it. She first testified that she became aware of Defendant's impotence "later on," during the trial [1], but later conceded that she was aware of his impotence before trial and had even spoken to Amy Vanover and Jane Shaver concerning his impotence. (Record, 216a, 220a-221a, 226a-229a). [2] She conceded that she knew of his impotence at least 5-6 months before trial and had the time to investigate it. (Record, 223a-224a).

She stated that she did not want to "open that can of worms" concerning Defendant's impotence, because she believed he was homosexually involved with Robert Farrington, and even the Riley father. (Record, 226a-227a). She stated that she learned from the Internet that impotence can

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[1] "There was some statement he was impotent, that came to light kind of later on in the testimony, but, you know, my research of that, given his chemotherapy, and that that's not a hundred percent, and then Mr. Farrington and he were involved in a relationship he had told me." (Record, 211a).

[2] Q. When was it you found out that Mr. Shaver claimed that he was impotent?
A. It was not immediate, I can tell you that. I believe it was -- I mean it might have been -- I would be speculating. It might be a month or two after I became his attorney and all,... (Record, 222a).

have social "triggers," such that one might be impotent with one gender or age group, but be able to perform with another. (Record, 222a, 232-3a). But trial counsel knew before trial that Defendant had been undergoing chemotherapy and was not a healthy man. (Record, 211a, 221a).

> "I understand that he was medically compromised, having gone through cancer treatment and chemo, and that some of the drugs made him impotent." (Record, 221a).

Notwithstanding this knowledge before trial, she did not obtain Defendant's medical records, never contacted his doctors and merely exchanged some e-mails with Defendant's Social Security disability attorney and apparently discussed with the disability attorney "the condition of his impotency and that there was some evidence of that". (Record, 214a, 222a). Counsel said that she wanted to avoid any discussion of his impotence because this might raise the possibility that his impotence was selective, i.e. that he could perform with men or children, but not adult women.

The Court of Appeals affirmed Defendant's conviction on December 4, 2012. Record, 280a-287a. Defendant applied for leave to appeal and this Court granted leave on September 20, 2013. Record 288a Further facts will be stated as needed in the Argument section.

ARGUMENT

I.

DEFENDANT'S RIGHTS OF CONFRONTATION, COMPULSORY PROCESS AND TO PRESENT A DEFENSE WERE VIOLATED, AND WHETHER THE TRIAL COURT ABUSED ITS DISCRETION, WHEN THE TRIAL COURT RULED THAT THE RAPE SHIELD LAW PRECLUDED EVIDENCE THAT THE MINOR CHILDREN HAD BEEN ABUSED BY THEIR FATHER ONLY A FEW WEEKS BEFORE THE CHARGES WERE MADE AGAINST DEFENDANT. US CONST. AMS VI, XIV.

Standard of Review and Issue Preservation

On the second day of trial, the prosecutor requested that the trial court disallow any reference to James Clement Riley's abuse of his children on the basis that the notice requirements of the Rape Shield Act, MCL 750.520j, had not been complied with. The defense objected. The trial court ruled that because the statutory notice requirements had not been met, the defense was absolutely barred from introducing any evidence of the children's sexual contact with their father. (Record, 27a). A trial court's ruling that the Rape Shield Act precludes evidence is reviewed for an abuse of discretion. *People v Adair*, 452 Mich 473, 485, 550 NW2d 505 (1996).

The issue arose again on the third day of trial, when the defense requested that the trial court revisit its earlier ruling. (Record, 31a-35a). At that time, the defense contended that the court's ruling violated the right of confrontation. (Record, 31a). Thus, the constitutional issues have been preserved. Constitutional issues pertaining to the right to a fair trial, the right of confrontation, compulsory process or the right to present a defense are reviewed de novo. *People v Beasley*, 239 Mich App 548, 609 NW2d 581 (2000). Because this issue involves preserved constitutional error,

review is made to see whether the error is harmless beyond a reasonable doubt, and it is the prosecution's burden to prove harmlessness beyond a reasonable doubt. *Chapman v California*, 386 US 18, 87 SCt 824 (1967).

The procedural aspects of the Rape Shield Act (written notice) are not at issue in this appeal because the Court of Appeals agreed with the defense that the notice requirements of the Rape Shield Act were complied with. (Record, 283a).

Argument

On the second day of trial, the prosecution requested that the trial court prohibit evidence that the children had been sexually molested by their biological father several weeks before allegations were made against Mr. Shaver. The prosecution contended that the Rape Shield Act, MCL 750.520j, prohibited evidence of the molestation because it precluded evidence of the "victim's" prior "sexual conduct." (Record, 25a-26a). The defense said that the information concerning James Riley's past molestation was relevant, since it occurred within 3-4 weeks of Defendant's arrest, and showed the basis for the children's age-inappropriate knowledge. (Record, 26a). The defense then claimed that the statute did not prohibit evidence of the father's molestation, because the children's victimization did not constitute sexual "conduct". (Record, 26a). The issue arose again during opening statements. Defense counsel referred to James Riley, the prosecution objected, and the court re-stated its ruling, in a lengthy interchange. (Record, 28a-36a).

The issue was revisited for the third time on day three of trial, during the defense motion for reconsideration. The court said it had no information that the father, James Riley, had perpetrated "similar acts" on the children. (Record, 31a-35a). The trial court denied reconsideration of its earlier ruling, claiming (1) no notice had been filed (2) there was no indication that the "acts"

were similar and (3) the defense had other information concerning the children's age-inappropriate sexual knowledge with which to present a defense, namely, that the children had walked in on James, Jody and Defendant during a "threesome" in Florida. (Record, 34a-35a).

1. The Statute.

Michigan's Rape Shield Act is contained at MCL 750.520j, which provides:

> Sec. 520j. (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).

2. This Court has not decided whether prior child sexual abuse is sexual "conduct" which is barred by the Rape Shield Act, or the extent to which sexual abuse of a child is precluded by the Act.

In its Order granting leave to appeal, this Court directed the parties to address whether evidence of a child's prior sexual abuse is barred by the rape-shield statute. The Michigan statute

precludes evidence of a victim's sexual "conduct" except that the evidence noted in subsections (a) and (b) may be admitted if relevant to a fact at issue. Thus, under a literal reading of the statute, the only "conduct" evidence which could ever be admitted is (a) evidence of the victim's past sexual conduct with the actor and (b) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease, and then such evidence would only be admissible if relevant to an fact at issue in the case. The statute does not address whether prior child sexual abuse is "conduct" or whether it is admissible in any circumstances; the statute is, simply, silent on these points. Neither of the circumstances in subsections (a) or (b) was relevant to this case. Both the trial court and the Court of Appeals took the position that evidence of Jacob and Brittney's prior sexual abuse by their father was excluded as sexual "conduct" precluded by the statute.

The question thus arises – dramatically, in this case – if a victim's "sexual conduct" includes prior sexual abuse, but is inadmissible because of the Rape Shield Act, how does an accused show that a young child has been previously subject to abuse by a third party, and that this previous sexual abuse accounts for age-inappropriate knowledge?

This Court has never definitively addressed the issue of what constitutes sexual "conduct" under the Rape Shield Act. Justice Young, in his concurring opinion in *People v Parks*, 481 Mich 860, 748 NW2d 241 (2008) would hold that sexual "conduct" should be broadly construed to include both voluntary and involuntary actions. Thus, under Justice Young's view, the Rape Shield Act's proscription of "conduct" evidence would proscribe evidence that a child victim had previously suffered sexual abuse by a third party, because a child's sexual "actions" are involuntary – he/she is a victim. Justice Markman, on the other hand, would hold that sexual abuse of a child is an

involuntary act of victimization and these acts of victimization would not be proscribed by the Act, because involuntary actions are not "conduct." See *People v Piscopo*, 480 Mich 966, 741 NW 2d 826 (2007) Order Vacating Leave, Justice Markman dissenting. Both Justices Young and Markman rely heavily on the dictionary definitions of "conduct," supported by analyses of legislative history. The majority view among the states appears to be that involuntary sexual acts, including prior sexual abuse of a child, is "sexual conduct" that is protected from disclosure by rape shield statutes. See, discussion in *Grant v Demskie*, 75 F Supp 2d 201 (SDNY 1999).

3. Evidence of sexual abuse of a child may be admissible on a case by case basis in order to protect a defendant's rights of confrontation and to present a defense.

Appellant suggests that it is unhelpful and indeed non-determinative to focus on whether prior sexual abuse of a child turns on whether the sexual acts perpetrated on the child victim are "voluntary" or "involuntary" on the part of the child. Rather, Appellant suggests, one must balance the purposes of the Rape Shield Act and an accused's rights of confrontation and to present relevant and material evidence in his defense.

The purposes of the Rape Shield Act are to protect a complainant from harassment and embarrassment, to guard a victim's sexual privacy, to avoid misleading and prejudicing the jury, and to exclude minimally relevant evidence. See *People v Arenda,* 416 Mich 1, 9-11, 330 N.W. 2d 814 (1982). To the extent that the Act seeks to prevent harassment or embarrassment, whether or not the child has engaged in voluntary or involuntary "sexual conduct" is beside the point, because both voluntary and involuntary sexual acts have the capacity to embarrass. For example, consider an individual who is photographed and fondled while in a state of intoxicated unconsciousness. Clearly,

this person will be embarrassed even though his/her "actions" ("conduct," in Justice Young's view) are involuntary. Thus, prior child sexual abuse may be highly embarassing to the child victim, yet relevant to show how the child has acquired sexual knowledge. To claim that the child's prior victimization is "sexual conduct" which is therefore inadmissible by virtue of the rape shield act because it is embarassing would exclude much relevant and material evidence.

However, to the extent that the Act seeks to avoid misleading or confusing the jury, or to preclude irrelevant, immaterial evidence, then whether child sexual abuse constitutes a voluntary or involuntary action on the part of the child also makes no difference. Irrelevant and immaterial evidence is not admissible, period. MRE 402. The result is that prior child sexual abuse is admissible if it is relevant and material to a fact at issue, a rule that is the foundation of the law of evidence, and a rule that cannot be disregarded depending on how "conduct" is defined. Focusing the analysis on what constitutes "conduct" is beside the point and obscures the purposes of the Act.

As will be discussed below, all courts have ruled that a generic rape shield act must at times yield to a defendant's constitutional rights. What this means is that – regardless of whether a child has engaged in voluntary or involuntary sexual "conduct" – such evidence must be admissible in certain circumstances. Thus, the Act cannot be construed to absolutely preclude evidence of child sexual abuse without encountering potentially fatal and unconstitutional repercussions.

A rule based on an absolute refusal to allow in evidence of child sexual abuse on the theory that the Rape Shield Act precludes evidence of any action perpetrated on a child that can remotely be described as "sexual" (whether it is voluntary or involuntary "conduct") leads to the Alice in Wonderland absurdities of this trial. The trial court ruled that evidence of James Riley's sexual

victimization of Brittney was "not to be allowed" – thus leaving Defendant completely without the means of showing Brittney's precocious knowledge. The trial court actually and absurdly told the jury that Riley's abuse "doesn't exist." (Record, 65a). And, under such an absolutist rule, the prosecutor was allowed to argue to the jury that Defendant should "bring it on" – show an alternative source for the children's knowledge – fully knowing that the trial court had completely precluded any such evidence. (Record, 67a, Closing Arguments, pp 282-283). Even the Court of Appeals acknowledged the complete impropriety and unfairness of this argument. (Record 284a – referring to prosecutor misconduct).

In any event, as discussed below, the constitutional issue cannot be avoided in this case, because trial counsel raised the confrontation issue "front and center" on Day II of trial and one day later at the motion for reconsideration. Record, 28a-30a, 31a. Thus, whether or not acts of child sexual abuse are voluntary or involuntary "conduct," the constitutional issues cannot be avoided.

Both the majority and minority views of sexual "conduct" acknowledge the primacy of an accused's constitutional rights, and that a generic rape shield act must yield in the event of conflict. As noted, the majority view is that "sexual abuse" is within the proscriptions of various state rape shield statutes; this was exhaustively recited by Justice Young in *Parks*.

However, even under the majority view, evidence of prior sexual abuse may be admitted to preserve an accused's right of confrontation and to present a defense. See, e.g. *Tague v. Richards,* 3 F3d 1133, 1139 (CA7 1993) (defendant should have been allowed to present evidence that the eleven year old victim was previously raped by her father, to advance an alternate theory of why the child's hymen was enlarged and how she got a sexually transmitted disease); *United States v. Bear Stops*, 997 F2d 451, 457 (CA8 1993) (en banc) (district court improperly limited the defense's proffer

that three boys raped the child complainant before the defendant allegedly attacked the child, which could have provided an alternative explanation for the child's exhibition of sexual abuse symptoms); *United States v. Begay*, 937 F2d 515, 519–23 (CA10 1991)(error to exclude evidence of child's prior rape as alternative theory of how child's hymen came to be injured); *Latzer v. Abrams*, 602 F Supp 1314, 1319–21 (EDNY1985) (habeas petitioner was denied his Sixth Amendment right to cross-examine the child complainant and his brother with respect to their sexual relations with other men to establish that the brothers misidentified the accused, where the trial court did not hold a hearing to inquire into the relevance of the brothers' prior sexual conduct).

The tension between the right of confrontation and the Rape Shield Act was first addressed in *People v Arenda*, 416 Mich 1, 330 NW2d 814 (1982). *Arenda* upheld the constitutionality of the Rape Shield Act against a challenge that it violated the defendant's right of confrontation. There, the defense wanted to reserve the right to bring in evidence that the 8-year old child victim had learned of sexual activity from participation with other individuals. The problem was – and what distinguishes *Arenda* from this case – that there was no such evidence, thus the defense simply wished to reserve the right to cross-examine the child upon a purely hypothetical set of facts.[3]

The Court acknowledged that the Act, like many similar such statutes recently enacted in various states, furthered two legislative purposes: guarding the victim's sexual privacy, and "further[ing] the truth-determining function of trials" by excluding evidence – the victim's prior sexual conduct and sexual history – of little relevance and no probative value. *Arenda*, 416 Mich, at 9,

[3] "(It is notable that defendant offered no proofs while arguing on this theoretical level.)" 416 Mich, at 11.

quoting from *People v Khan*, 80 Mich App 605, 613-614, 264 NW2d 360 (1978). *Arenda*'s rationale is founded in ***relevancy*** because in the vast majority of cases, a victim's sexual history is simply not relevant to current charges. *Arenda* acknowledged that in cases involving young victims, evidence of sexual conduct with others would have more than *de minimus* probative value, but that children in particular needed to be protected by the Rape Shield Act. 416 Mich, at 13.

The next case to address the Act is *People v Hackett*, 421 Mich 338, 365 NW2d 120 (1984), where, again this Court faced a confrontation challenge. There, the defendants sought to use evidence of the alleged victim's sexual proclivities to mount general challenges to the victim's credibility. *Hackett* specifically recognized that the Act contained implicit exceptions, for example, to show the complaining witness' bias, to show an ulterior motive, or to show that a complainant had made false accusations in the past. In such circumstances, evidence of prior sexual conduct would be ***required*** to satisfy the demands of confrontation. 421 Mich, at 348-349. In those circumstances, the complainant's prior sexual conduct would be (1) relevant (2) material (3) probative, and (4) not unfairly prejudicial. Of course, the trial court would be required to limit cross-examination "to prevent questions which would harass, annoy or humiliate sexual assault victims and to guard against mere fishing expeditions" or to avoid confusing or misleading the jury. 421 Mich, at 351.

Hackett himself sought to admit the complainant's prior homosexual acts as bearing on (1) general credibility and (2) to show consent to homosexual sodomy with black male prisoners. Because the complainant had admitted being a homosexual, this Court held that sex evidence was properly excluded as not relevant to the issues of credibility or consent. *Hackett* said, at 348-349:

"We recognize that in certain limited situations, such evidence may

> not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted... Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge... Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past....
>
> "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."

Next, in *People v Adair*, 452 Mich 473, 483-84; 550 NW2d 505, 510-11 (1996), the Court held that evidence of the alleged victim's sexual conduct with the defendant before and after the alleged assault was admissible. Again, this Court focused on the relevance and materiality of the sexual conduct to the charges.

> "It is axiomatic that relevance flows from the circumstances and the issues in the case. It is primarily for this reason that we reject the argument that otherwise relevant evidence becomes legally irrelevant and inadmissible merely because it occurred after an alleged sexual assault and not before. The Legislature did not intend an arbitrary limit on relevant evidence, and we find that imposing such a time limit would not faithfully further the legislative purposes of the rape-shield statute."

452 Mich, at 483. The circumstances and issues in this case are on point to the Riley evidence, because the charges directly "flow" from this evidence.

Thus, all of this Court's prior jurisprudence acknowledges that there ***must be***

exceptions to the Rape Shield Act to preserve the right of confrontation and the right to present a defense based on relevant, material evidence. These exceptions are to be evaluated on a case by case basis to ascertain the relevance of the sexual conduct sought to be admitted, whether such evidence is probative of the specific charges, and whether it will confuse or mislead the jury.

All of these cases recognize that in certain circumstances, rape shield statutes must yeild to the right to present a defense and confrontation. *Faretta v. California*, 422 US 806, 818, 95 S.Ct. 2525, 2533, 45 .Ed2d 562 (1975): "In short, the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it." The Constitution requires that a criminal defendant be given the opportunity to present evidence that is relevant, material and favorable to his defense. See *Washington v. Texas,* 388 US 14, 16, 87 SCt 1920, 1921-22, 18 L Ed2d 1019 (1967) (6th Amendment violation occurs when defendant is arbitrarily deprived of 'testimony ... relevant and material, ... and vital to the defense.'). Thus, in *Bear Stops*, supra, the Court held that admission of prior sexual abuse was "constitutionally ***required*** to be admitted." 997 F2d, at 455. (Emphasis added).

We submit that the Rape Shield Act must be construed to allow evidence of child sexual abuse in certain circumstances, in order to preserve an accused's right of Confrontation, Compulsory Process and the right to present a defense. Whether or not child sexual abuse is described as "voluntary" or "involuntary" conduct, it must be allowed allowed to show that young children could have knowledge of specific sexual acts because they had been exposed and subjected to it by someone other than the accused.

4. Evidence of prior sexual abuse was admissible here in order to protect Defendant's rights

of confrontation and to present a defense.

How do these principles apply here? The defense sought to show that James Riley's criminal sexual conduct accounted for the children's knowledge. (Record, 28a-29a; Tr II 135-144). Under both the majority and minority views this is an exception to rape shield acts. The right of confrontation and to present a defense permits a defendant to offer evidence of third party guilt even if procedural rules might not allow it. *Rock v Arkansas,* 483 US 44, 107 S.Ct. 2704, 97 L.Ed. 37 (1987). This is part of the fundamental right to present evidence which is relevant, material, and vital to the defense. *Chambers v Mississippi,* 410 US 284, 93 SCt 1038, 35 L Ed 2d 297 (1973); *Davis v Alaska,* 415 US 308, 94 SCt 1105, 39 L Ed 2d 347 (1974); *California v Trombetta,* 467 US 479, 485 (1984); *Washington v Texas,* 388 US 14, 87 SCt 1920, 18 Led 2d 1029 (1967); *Crane v Kentucky,* 476 US 683, 106 S.Ct. 2142, 90 L Ed 2d 636 (1986).

Holmes v South Carolina, 547 US 319, 126 SCt 1727, 1731, 164 L Ed 2d 503 (2006), noted that this issue may be analyzed as a Due Process issue or as a Confrontation / Compulsory Process issue. Regardless, the Supreme Court held that the exclusion of defense evidence of third party guilt denied the defendant a fair trial and violated the Sixth and Fourteenth Amendments.

> "...Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *Crane, supra,* at 690, 106 S.Ct. 2142... This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are " 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'... " (Internal citations omitted).

The James Riley evidence was material, relevant and had a direct, logical bearing on

the issues of the case. It could not have been excluded under the Rape Shield Act. *Holmes, supra* at 1374. It is relevant and material because it provides an exculpatory explanation for the question how it is that Brittney knows about anal penetration, i.e. because James Riley perpetrated it. Similarly, the evidence provides an exculpatory explanation for how it is that Jacob knows about ejaculation, because James Riley perpetrated it. Yet, to exclude evidence of Riley's actions left Defendant defenseless by making it impossible for him to show an alternative source / explanation for the children's knowledge. The result is clearly unconstitutional.

The trial court prohibited Defendant from introducing evidence that the children's precocious knowledge arose from being molested by their father, not by him. In fact, Judge Leiber said that the defense was ***not to be allowed*** to show that a third party was responsible for the children' sexual knowledge:

> "The rape shield law protects the children from saying that they were in some way responsible for this conduct because they were victimized on other occasions by other people or -- no -- you cannot tell this jury -- and you can't in opening statement, and you cannot argue at the conclusion of the trial that these children were victimized by somebody else and got confused, and you can't in this case present evidence about the children and their father's sexual behaviors which results in the father's conviction. That's excluded."

(Record, 29a, Tr II, 138-139). This is directly contrary to the Sixth Amendment and to the right to a fair trial. What makes the ruling so absurd and wrong-headed is that James Riley had been arrested only several weeks before the accusations against Defendant arose. The issue was clearly "fresh" and non-peripheral, unlike the speculative and hypothetical situation in *Arenda*.

When the trial court disallowed evidence of James Riley's conviction for molesting his daughter, he completely precluded any explanation of how Jacob and Brittney could have

attained sexual knowledge, unless the charges against Jason Shaver were true. This exact issue was addressed by the Court of Appeals. In *People v Morse*, 231 Mich App 424, 586 NW 2d 555 (1998), the Court addressed a case in which an accused sought to introduce evidence of sexual abuse by another man of the child victims. Like the trial court here, the trial court in *Morse* held that it was required to exclude the evidence under the Rape Shield Act. The Court of Appeals reversed, holding that the proposed evidence could be relevant and material to show the provenance of the children's sexual knowledge:

> "We hold 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...."

231 Mich App at 434.

In this case, however, both the trial court and the Court of Appeals held that James Riley's oral penetration of Brittney was "not highly similar" to the acts with which Defendant was charged. Both courts disregarded the fact that James ***had been charged*** with oral, vaginal and anal penetration of Brittney – based on her disclosures to the police and various investigators. The fact that James ultimately pleaded only to one count is a fact based on the realities of plea bargaining, not to the provenance of the child's sexual knowledge.

With regard to Jacob, it is true that we could not find any records showing that James Riley had molested Jacob, or that Jacob had made any disclosures with regard to James Riley. But in another example of the trial court's unsupported findings, it court stated, "In fact Jacob testified that Mr. Riley never touched him." No, Jacob did not "testify" to this at all. Jacob did not make any disclosures with regard to his father that we could discover. But Brittany did, and in a trial involving both small children in the same household, disclosures made by one child are certainly relevant to

disclosures made by the other. And, at the hearing on our Motion for Findings of Fact, we requested that the children be brought in for examination, but this was foreclosed by the trial court's ruling that the acts were not similar. (Record, 162a). ***And in fact, the prosecutor agreed that James Riley was in prison for abusing both of them.*** Record, 25a-26a, Tr II, 109. Thus, merely because we could not find specific documentary evidence of "similar acts" perpetrated by James Riley on Jacob should not have precluded the defense from demonstrating the provenance of Jacob's sexual knowledge, given the prosecution's concession of abuse perpetrated on Jacob as well as Brittney.

This case is one of those unusual cases where evidence of sexual conduct was required to be admitted to preserve the right of confrontation and the right to present a defense. First, the abuse ***actually was*** perpetrated by James Riley. The sexual abuse by James Riley on both children is a fact that was stipulated by the prosecution on Day II of trial. (Record, 25a-26a). We are not, therefore, dealing with purely speculative issues.

Second, the James Riley abuse was ***relevant***. Riley was accused of oral, vaginal and anal penetration of Brittney. Jason Shaver was charged with penile-vaginal and penile-anal penetration of Brittney. Record, 22a. As this Court noted in *Adair*, relevance " flows from the circumstances and the issues in the case." The fact that James Riley had committed various types of sexual penetration against Brittney is ***relevant*** to her knowledge of these acts and ***relevant*** to the charges at issue here. 452 Mich, at 511.

Third, the Riley evidence is probative of children's knowledge of penile penetration.

Fourth, the evidence would not have violated the Act's legislative purpose of preventing embarassment to victims of sexual abuse. The Riley evidence is a matter of public record

– undersigned counsel merely had to walk into the Clerk's office and get copies to attach to the Motion for Findings of Fact – it was all in the court file. Record, 119a-138a.

We acknowledge that the rights of cross-examination and to present a defense may be limited by competing interests. We recognized this at the hearing on the Motion for Findings of Fact, where we said that the defense did want to cross-examine Jacob, but that there was no need to be vicious about it. Record, 160a-162a. The Court of Appeals in its first Order of Remand also acknowledged that there could be ways of cross- examining the children, yet protecting them. Record, 111a-112a. In fact, the Riley evidence could even have come in by stipulation, thus preserving Defendant's right to present a defense, and yet protecting the children's privacy, without actual cross-examination.

5. The error was not harmless.

Confrontation errors are subject to harmless error analysis. *Delaware v Van Arsdall*, 475 US 673, 106 SCt 1431; 89 L Ed 2d 674 (1986). In this case, the error was not harmless. All of the cases agree that any evidence to be admitted notwithstanding a rape shield act must be relevant, material, probative, and not unfairly prejudicial. All of those conditions were met by the Riley evidence.

Trial counsel made a two-fold (or even three-fold) profer for the James Riley evidence: (1) it was not "conduct" precluded under the Rape Shield Act (2) it was relevant i.e. how would these children know about sexual acts (3) it tended to show bias and motive, i.e. did the children so miss their father that they would accuse Defendant. (Record, 26a).

Everyone at this trial acknowledged the ***relevance*** of James Riley's abuse of Jacob and

Brittney to the provenance of the children's sexual knowledge. But, the prosecutor and the judge energetically prevented the jury from hearing any of this highly relevant evidence. Both the prosecutor and judge went out of their way to prevent trial counsel even from alluding to James Riley. Judge Leiber even said that evidence of an alternate source for the children's knowledge "doesn't exist"!

(BY MS. JOHNSON)

> "She speaks of this picture, this puzzle of the Alps. We got a picture all right, but it's not of the Alps. Its 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 of reasons in the law, you don't get to know all of those specifics.

MS. BRINKMAN: I object.
MS. JOHNSON: What do you know?
THE COURT: Ladies and gentlemen, that's not proper because it doesn't exist. You're to base your decision only on the evidence in this case.

(Record, 65a).

Then, in closing argument, trial counsel attempted to advert to the possibility that "somebody else" had abused the children:

> "When his little sister on June 26, 2009, a mere three weeks after Mr. Shaver is alleged to have committed these acts, why isn't his name mentioned in front of this professional? I can't tell you. I wonder maybe if it's because Mr. Shaver didn't do those acts. Somebody else did."

(Tr 4, 279).

In response, the prosecutor challenged her to bring on the evidence that showed an alternative source of precocious sexual knowledge. The prosecutor engaged in flagrant misconduct

in challenging the defense to "bring it on" with regard to claims that James Riley had abused the children. Of course, the prosecutor knew that any such evidence had been completely precluded by the trial court's rulings.

> "She wants you to believe that there's a motive. She keeps throwing dad out there. Dad didn't do this. Dad was already gone when some of these acts happened.
>
> "Okay, sorry. If dad's the problem here, then bring it. That's not what the kids said.
>
> *****
>
> "The next thing she said was that they got their inappropriate knowledge from somewhere else. Where? Where? Tell us what? Ms. Johnson, give it to me. Where? That's all she got. She's got to explain away why Jacob can tell you about this. She doesn't, so she's going to say somebody else. You can't do it like that."

(Tr 4, 282-283).

This case presents not simply an instance of the right of cross-examination having been diluted by the Rape Shield Act, lamented by Justice Markman in *People v Piscopo*, 480 Mich 966, 741 NW2d 826 (2007), but a right which was completely "eliminated" and perverted by wrong-headed trial court rulings. On multiple occasions, the trial court cut off any attempt by trial counsel even to allude to James Riley as the source of the children's knowledge. We are not faced with a case where the trial court ***limited*** cross-examination or ***circumscribed*** a line of defense; rather, he completely cut it off, completely forbade it. The James Riley evidence was vital to the defense, but was completely dis-allowed by the trial court's ruling. The trial court said that evidence came in pertaining to the children's witnessing a "three-some," which is arguably true, through the very brief testimony on this point by Royce Brooks. But Brooks' testimony was limited in scope and provided no descriptions or

detail whatever as to what exactly the children may have seen. Recall, the children's testimony was quite detailed: they said that Defendant committed sexual penetration "17" times or "20 times," that Defendant's penis was "medium sized" with "yellow-white" pubic hair, and that Defendant ejaculated in Jacob's face, so that he had to wipe it off with a towel. The brief reference by Royce Brooks that the children had walked in on a three-some in no way explains the amount of detail that their testimony otherwise revealed. Only by allowing the James Riley evidence could the defense have accounted for the children's specific knowledge. But the trial court completely disallowed it.

We acknowledge that the constitution permits reasonable limits, and the right of Confrontation does not entitle an accused to completely unrestricted cross-examination. *Michigan v Lucas*, 500 US 145, 111 SCt 1743, 114 LEd2d 205 (1991). In this case, Defendant never got as far as discussing reasonable limits and boundaries, because of the trial court's ruling that completely foreclosed any cross-examination whatever as to James Riley.

Ironically, the Court of Appeals, in its first Motion to Remand, attempted to set reasonable limits on cross-examination of the children. Recall, in the first Motion to Remand, the Court instructed the trial court to make certain findings of fact. Relying on *People v Morse*, the Court of Appeals directed the trial court to ascertain whether the acts for which Defendant was convicted were substantially similar to those for which Riley had pleaded no contest, and further cautioned the trial court to limit examination of the children themselves. This course of action would have furthered the purposes of the Rape Shield Act, by limiting any embarassment to the child victims.

The effects of the trial court's ruling in this case were ***pervasive*** in restricting Defendant's ability to present his defense. For example, the trial court essentially prevented defense counsel from asking much of anything about James Riley – trial counsel asked Jacob if he knew where

his dad was at the time of trial. When Jacob replied, "in jail," the prosecution immediately objected and the trial court supported the objection. (Record 41a, Tr II, 158-159). Then, when trial counsel attempted to ask Jody Riley where her husband was when Jacob made his disclosure, the prosecutor again objected, and the trial court sustained the objection. (Record 44a, Tr II, 173). When trial counsel asked Jody Riley "how many times" she had taken the children to the Child Assessment Center, the prosecutor -- by now, on the razor's edge of readiness -- objected immediately, and the court dismissed the jury. (Record, 45a, Tr II, 174-ff). Then, when trial counsel attempted to ask Becky Yunker, the Assessment Center worker, about the interview she had with Brittney on June 26, 2009 (when she was interviewed about her father's abuse of her), the trial court limited the permissible questions to whether Jason Shaver's name came up. (Record 57a, Tr III, 241-248). The end result of the restrictions imposed by the trial court's ruling was to sharply limit the defense's ability to even allude to the possibility that the children's sexual knowledge derived from a source other than Defendant.

Defendant submits that the trial court, in ruling that the specific legal facts underlying James Riley's conviction were not "highly similar" to the charges made against Defendant, made clear errors of law and fact. Defendant further submits that the lower courts' rulings violate his right to confrontation, compulsory process, to present a defense and to a fair trial.

II.

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS DENIED A FAIR TRIAL, CONTRARY TO THE SIXTH AND FOURTEENTH AMENDMENTS BY FAILING TO INVESTIGATE AND PRESENT EXCULPATORY WITNESSES.

Standard of Review and Issue Preservation

The issue was preserved by the filing of a motion for a new trial which was heard on March 25, 2011 and denied by Order dated April 25, 2011.

A defendant is guaranteed the constitutional right to effective assistance of counsel as part of the Due Process right to a fair trial. US Const Ams VI, XIV; Const 1963, art 1, § 20. In order to establish that a defendant "was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. With respect to prejudice, the defendant must prove "a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994).

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law reviewed de novo. *Strickland v Washington*, 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Findings of fact for clear error and questions of constitutional law are reviewed de novo. *People v. Grant*, 470 Mich 477, 484-485, 684 NW2d 686,691 (2004).

Argument

The two children said that Defendant engaged in oral and anal penetration with them,

and according to Jacob, Defendant ejaculated in Jacob's face, so that he had to wipe it off with a towel. How is this possible if he is impotent? How is it possible to accomplish anal intercourse with a young child with a flaccid penis? Common sense tells one that, had the information of Defendant's impotence been presented, a reasonable juror would say to him- or herself, "If the defendant is impotent, he probably cannot have anal penetration with a young child" and "If the defendant is impotent, he probably cannot ejaculate."

1. The lower courts' rulings that trial counsel's strategy was reasonable, and that Defendant had not been prejudiced, are clearly erroneous, both legally and factually.

Both Amy Vanover and Jane Shaver testified that Defendant had varying degrees of impotence. Amy testified that as of 1998 and between 2006-2008, Defendant was able to attain a partial erection but "he had trouble getting it up" (Record, 32a). so that they had intercourse only once a month. By 2010, when he married Jane Shaver, he was completely impotent and had never ejaculated. The children's allegations arose in 2009, in the middle of this apparent transition from partial-to-complete impotence. Counsel knew of this evidence, but did not present it. She said she didn't want to open "that can of worms" because Defendant was apparently bi-sexual or homosexual, and she believed that evidence of his impotence would raise issues of his sexual arousal triggers. Both lower courts said counsel's omission was "strategic" and therefore she did not perform deficiently. This strategy may theoretically reasonable, since it would be reasonable to assume that a homosexual man would not be capable of arousal with an adult woman, or that a confirmed pedophile could not become aroused by adults of the same or opposite sex. However, it is not reasonable in this case, because counsel had made no investigation of the medical basis for

Defendant's impotence.

The Court of Appeals said, that Defendant "had failed to overcome the strong presumption that counsel rendered adequate assistance" (Record, 285a). The Court of Appeals said that trial counsel "was aware before trial" of Defendant's impotence but that "there was not conclusive evidence" that he was impotent. However, trial counsel made no investigation of his medical records, which actually supported his claim of impotence beginning at least two years before the allegations at issue. And, the Court of Appeals' reliance on Amy Vanover's testimony that Defendant could maintain a partial erection and could ejaculate ignores the fact – undisputed – that Vanover's relationship with Defendant occurred during 1997 and 2006-2008 – well before the allegations at issue. By the time of the allegations, Defendant was completely impotent, and a reasonable investigation would have shown this.

The Court of Appeals also said that "counsel's strategic decision not to present evidence of impotence was not professionally unreasonable" and that Defendant "has not established the factual predicate of his claim on the basis of impotence" such that other hypotheses consistent with adequate trial representation were excluded. (Record, 286a). Thus, the Court of Appeals did not address the issue of "prejudice", i.e. whether there is a reasonable probability that jurors would have voted differently had they known Defendant was impotent, could not get an erection, and could not ejaculate.

But what neither the trial court nor the Court of Appeals acknowledged is that Defendant had a valid ***medical*** defense that would have gone a long way to obviating any concerns about the potential social "triggers" for his impotence, but which trial counsel had never even invesitgated. In order for her decision to have been "strategic" trial counsel was required to

investigate the case before making a "strategy" decision, and even then, so-called "strategic" decisions are not completely insulated from review for reasonableness. *Strickland, People v Grant.* Here, counsel did nothing to investigate Defendant's medical condition aside from a couple of hours of "Googling" on the issue of impotence. This failure is especially egregious since she **knew** that Defendant's girlfriend and wife claimed he was impotent, and apparently, the impotence was getting worse over time. So that, by the time of the allegations of the Riley children -- January to June 2009 – there would be reason to believe Defendant's abilities had diminished even further.

She did nothing to investigate his medical status, even though she knew he was a medically compromised individual, suffering diabetes and having undergone chemotherapy. Defendant's medical status is particularly significant in light of trial counsel's desire to avoid the "messy" issues of Defendant's apparent bi-sexuality. She believed that his impotence was caused by social triggers, but she did nothing to investigate whether Defendant's impotence was medically caused. Moreover, trial counsel had significant reason to believe that Defendant's impotence was not "social / selective" but "medical"; she admitted that Defendant was medically compromised by chemotherapy and diabetes, and that she knew that his drugs could cause impotence. Still, she did nothing to investigate this claim.

"Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable", *Strickland*, supra at 690, 104 S Ct at 2066. However, "counsel has a duty to [actually] make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691, 104 S Ct at 2066. Where "counsel fails to investigate and interview promising witnesses, and therefore ha[s] no reason to believe they would not be valuable in securing [defendant's] release," counsel's action constitutes

negligence, not trial strategy. *Workman v Tate*, 957 F2d 1339, 1345 (CA6 1992); *Von Moltke v Gillies*, 332 US 708, 721, 68 SCt 316, 92 L Ed 309 (1948). Counsel's investigation must include pursuing "all leads relevant to the merits of the case." *Blackburn v Foltz*, 828 F2d 1177, 1183 (CA 6, 1987).

The cases are literally legion holding that failure to call and present available witnesses or to develop evidence that refutes or impeaches the state's evidence is, quite simply, deficient performance. To cite one of the most prominent cases addressed by this Court in recent years, in *People v. Grant*, 470 Mich. 477, 484-485, 684 NW2d 686,691 (2004), also a child sex assault case, the Court held that defense counsel's failure to investigate and substantiate defendant's primary defense amounted to ineffective assistance. Also see, *Baylor v Estelle*, 94 F3d 1321 (CA9 1996) (failure to follow up on criminalist's report tending to exclude defendant on the basis that criminalist was on vacation and not available to testify held to be deficient performance. "We have difficulty understanding how reasonably competent counsel would not recognize "the obvious exculpatory potential of semen evidence in a sexual assault case.").

"The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538, 462 N.W.2d 793 (1990); *People v Dixon*, 263 Mich App 393, 688 NW2d 308 (2004); *People v Payne*, 285 Mich App 181; 774 NW2d 714 (2009). A defense is substantial if it might have made a difference in the outcome. of the trial. *People v Hyland*, 212 Mich App 701, 538 NW2d 465 (1995). With respect to the failure to raise possible defenses, the Court in *Beasley v United States*, 491 F2d 687, 696 (CA6, 1974), stated: "Defense counsel must investigate

all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner."

Both *People v Grant* and *Strickland* require trial counsel to have made a reasonable investigation of available evidence and leads before evaluating the reasonable-ness of counsel's "strategy." Without investigating Defendant's medical history, which showed impotence at least 2 years before the allegations arose, counsel could not legitimately decide whether the issue of impotence was dangerous to broach before the jury, or if there was any way to defuse the "can of worms" that she anticipated. However, this much is certain -- had the jury believed that Defendant was impotent, and could not ejaculate, he almost certainly would have been acquitted. This is deprivation of a substantial defense, and constitutes prejudice. Also see, *People v Jerry DeMorest*, Court of Appeals No. 296118, May 3, 2011, where the Court of Appeals found it to be deficient performance by trial counsel not to have investigated and presented evidence of the defendant's medical history, including his ***serious medical conditions, heart attack and other indications that sexual activity was "difficult or impossible."***

The trial court even said that "***defendant's inability to maintain an erection or ejaculate is not relevant*** because Defendant could commit the CSC 1 offenses without a full erection and without ejaculating." (Record, 278a). This is a clearly erroneous factual finding. Moreover, it

is legally wrong, because such evidence is clearly "relevant" under MRE 401.[4] [5] [6] Defendant submits that evidence of Defendant's impotence was relevant, material and non-cumulative and trial counsel was deficient in not presenting it.

In this case, had evidence of Defendant's physical incapacities been presented, the jury would have had a reasonable doubt. In the language of *Strickland* and *Pickens*, there is a reasonable probability of a different outcome. Defendant submits that trial counsel's performance was deficient, not strategic, and the lower courts' rulings to the contrary are clearly erroneous.

2. If trial counsel had a "strategy" it was not reasonable.

Trial counsel testified that once the trial court ruled that the Rape Shield Act precluded the James Riley evidence, she had no fallback strategy other than to "poke holes" in the testimony of the angelic little children. The trial court and the Court of Appeals found that trial counsel acted

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[4] MRE 401: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Defendant assumed, wrongly, it seems, that everyone knew from high school biology class that a male erection is "relevant" to the ability to accomplish a sexual penetration, particularly of the closed anal opening of a young child.

[5] The trial court had first wrongly said, "Defendant's theory is that his inability to have normal sexual relations with his wife would have made his CSC crimes physically impossible." (Opinion, p 2). No, that was not Defendant's theory. The defense theory is that Defendant's impotence makes it impossible / highly improbable / unlikely that he could 1) ejaculate onto the face or in the mouth of a young boy and 2) have anal intercourse with a young girl.

[6] Another instance of the trial court's distorting the evidence in this case: The trial court says, "Defendant could at times maintain an erection with male lovers despite not being able to perform with women." (Record, 278a). There was no such evidence whatever, aside from some testimony that Defendant was homo- or bi-sexual, and no evidence whatever regarding Defendant's sexual abilities with male lovers.

pursuant to strategy. These rulings are clearly erroneous because they take no account of the reasonableness of the evidence that was available. Defendant submits that counsel's "strategy" of "poking holes" in the children's testimony – without presenting the evidence that was already available ***and which trial counsel was apparently aware of,*** but which she had failed to investigate --- was not reasonable. *Strickland* holds that strategic decisions are virtually unimpeachable, subject to the caveats that 1) reasonable investigation must be made **before** asserting "strategy" and 2) not every incantation of "strategy" is protected if the strategy itself is not reasonable. *Strickland* makes clear that even the invocation of "strategy" does not insulate unreasonable decisions. It is hard to see how "reasonably competent counsel" would not recognize that near complete impotence is exculpatory evidence in a case involving allegations of penile insertion into the anus of a young child. *Gersten v Senkowski*, 426 F3d 588, 610 (CA2 2005) ("Failing to present exculpatory evidence is not a reasonable trial strategy.").

Trial counsel's testimony on the issue of her "strategy" was all over the board. She said she had no "strategy" once the trial court ruled that the Rape Shield Act precluded evidence of James Riley's actions, until she had the "strategy" of poking holes in the children's testimony; she had the strategy of avoiding the "messy" subject of Defendant's impotence, until she decided to put Jane Shaver on the stand (but then changed her mind); she didn't know of his impotence before it came up in testimony, until she admitted that she knew of it five months before trial; she wanted to "poke holes" in the testimony of the children, but didn't want to show the inconsistency in the color of the pubic hair of the perpetrator.

The testimony at the hearings showed that trial counsel's stated strategy was incoherent

and inconsistent, if not flatly self-contradictory. Counsel was correct in one regard: once the trial court ruled the Rape Shield statute prevented the James Riley evidence, her initial strategy had been destroyed. At that point, she was left with a credibility contest between an accused molester and the two "beautiful" children. She had to poke holes in their testimony, not necessarily by showing that they were lying, but by showing that they were mis-remembering, or were mistaken. But she failed to present just that evidence that would have not simply poked a hole in their testimony, but driven the proverbial bulldozer through it. And she knew about this evidence!

The trial court, in its haste simply to affirm the conviction and in its distaste for having even to hold the evidentiary hearing[7], said that trial counsel's actions were "strategic":

> "Ms. Herrick testified that in her belief the introduction of Defendant's impotency at trial would have opened the door for the people to explore Defendant's homosexual relationships. Ms. Herrick concluded that as a matter of trial strategy the evidence of impotency would have damaged Defendant's case by painting him as a deviant who is only able to perform sexually when women are not involved.
>
> "Because the introduction of Defendant's impotency to the jury could have led to the introduction of even more damaging evidence of Defendant's sexual proclivities, the outcome of the trial would not have resulted in an acquittal."

(Opinion, 2).

This conclusion is factually and legally erroneous for several reasons. First, as explained, trial counsel's "strategy" of poking holes was not based on a reasonable investigation; thus,

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[7] "Proliferation of evidentiary hearings...serve neither the defense bar nor the defendant" (Record, 278a) evidently reflects the trial court's revulsion at having even to conduct the hearing, regardless of the justice of this particular defendant's conviction, who, let us not forget, is serving a 28-year **minimum** sentence.

it is afforded less deference. Second, the evidence at the evidentiary hearings showed that Defendant's impotence is a medical condition, not a result of his sexual "deviance." Third, the standard of "prejudice" is not that Defendant would definitely have been acquitted, but that there is a "reasonable probability" of a different outcome, such that confidence in the verdict is undermined.

Counsel's assumption was unreasonable in this case, because counsel had not even investigated Defendant's medical records, which showed that Defendant was claiming medical impotence two years before the charges arose! The records from the Ferguson Family Health Clinic as of April 2007 showed that **"[Defendant] states he's having impotence and states he just cannot gain an erection. This has been ongoing for several months."** (Record, 247a). A medical basis for the impotence would obviate any concern that his impotence was selective, or dependent on who he was aroused by.

Trial counsel "[did not] deny. [She] was not questioning whether or not Mr. Shaver was claiming he was impotent" (Record, 233a). She agreed also that penile-anal penetration would be difficult to perform if one were impotent, but she neglected to present any of the abundant evidence on this point. Knowing of his impotence, counsel never inquired if he could ejaculate (Record, 229a) even though arguably the most dramatic instance of testimony came when Jacob testified that Defendant had ejaculated on his face or in his mouth and he had to wipe it off with a towel! (Record, 40a). [8] Counsel conceded that if she had evidence that Defendant could not ejaculate, such evidence

[8] The trial court asked Ms. Johnson if Defendant's impotence would affect his ability to place even a flaccid penis in the child Jacob's mouth. (Record 240a-241a). But even before hearing any evidence, the trial court had written, "Defendant's claimed impotence would not have changed the outcome because Defendant could have committed the same crime with a flaccid penis." (Record, 110a). It is true that even an impotent man can place his flaccid penis in a child's mouth; that is not the key point. What the trial court did not appreciate is that, not only did Jacob say that

would tend to show that the child witnesses were mistaken, or were mis-remembering. (Record, 231a-232-1a). Why didn't she present the evidence she had?

Counsel's "strategy" of "poking holes" in the children's testimony was unreasonable when she had available concrete evidence of Defendant's incapacity. It is inconceivable that she would not present evidence that would show that Jason Shaver could not have performed these acts, or only performed them with great difficulty. Even accepting her statement that she wanted to "poke holes" in the victims' testimony, it is unreasonable not to have shown that the children's testimony of penetration would have been very difficult for a medically compromised individual to do. This is true even if it turned out that the children were mistaken in claiming that Defendant had penetrated them 17-20 times, rather than one time each. How else to poke holes in their testimony if not from the most direct evidence: He couldn't have done it! He could not have had penile-anal penetration with Brittany -- he can't get an erection. [9]

Defendant placed his penis in his mouth, but also that Defendant ejaculated, and that Jacob had to wipe it off with a towel. This action clearly encompassed ejaculation, and it is highly unlikely that an impotent man with a flaccid penis will be able to ejaculate. Counsel takes it that this is a matter of common sense, which apparently the trial court did not apprehend.

In its June 28, 2012 Opinion, the trial court completely misapprehended Defendant's contention in this regard. In its Opinion, the court says, "Defendant also argues that the children lied on the stand when they testified that "white stuff" came out of the penis." (Record, 278a). Neither Defendant nor counsel made any such argument! The contention was that it would be relevant to know that a man was impotent in deciding whether the child's testimony of ejaculation was mistaken. It was always the defense contention that their age-inappropriate knowledge derived from abuse by their father. There was never any contention that the children were lying. To say otherwise is just to flagrantly mis-represent the defense position.

[9] The trial court in its Opinion denying the Motion for a New Trial and in its June 28, 2012 Opinion after the evidentiary hearings said evidence of Defendant's inability to attain an erection was not prejudicial, because "any penetration" no matter how slight, is sufficient under the law. This is a correct statement of the law. Nonetheless, non-cumulative evidence of physical inability to penetrate would certainly have been material to the jurors. Any jury faced with evidence that

Notwithstanding this prior knowledge, trial counsel's sole investigation of Defendant's medical condition was two to three hours of internet research. She did not look at or even obtain Defendant's medical records. But even this limited research should have prompted counsel to look further. As she admitted, even her limited "Googling" or "Doctor.com-ing" showed that chemotherapy drugs could cause impotence! (Record, 225a-226a). Defendant's medically compromised situation is particularly relevant given the fact that -- according to the children's trial testimony -- Defendant was able to penetrate them many, many times, 17 to 20 times each between January to July 2009. This is a feat conceded by trial counsel more easily performed by a virile specimen of manhood rather than one compromised by chemotherapy. (Record, 221a, 229a). A strategy which is not based on a reasonable investigation is not protected. *People v Grant*, 470 Mich 477; *Strickland.* It is not reasonable to forego easily obtainable medical evidence and lay witness testimony in favor of "Googling" for a couple of hours. Had trial counsel investigated Defendant's impotence and looked at his records she would have discovered that as early as 2007, he complained to his doctor that he could not get an erection. By the time of his marriage, however, he was fully impotent. Given that the Riley children's allegations occurred between January-July **2009**, a clear strategy of intensifying medical incapacity could have been formulated and presented.

In *People v Brown*, 491 Mich 914, 811 NW 2d 500 (2012), the Supreme Court reversed

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Defendant cannot attain an erection nor ejaculate is going to question whether Defendant can achieve any sort of penetration with a flaccid penis. One would think as a matter of common sense that a jury would believe it important to know whether an accused can perform sexually, and to what extent, before convicting him of sexual entry 17-20 times into the closed anal opening of a young child.

the decision of the Court of Appeals which had held that the defendant had received effective assistance of trial counsel. In so doing, the Supreme Court placed special emphasis on the fact that trial counsel had taken no steps to investigate the defendant's medical logs (drug and alcohol counseling logs) which would have contradicted the accuser's claims.

> On order of the Court, the application for leave to appeal the October 27, 2011 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals and REMAND this case to the Wayne Circuit Court for a new trial. The trial court erred in concluding that the defendant received the effective assistance of trial counsel. Counsel was ineffective for failing to specifically request the National Counsel on Alcoholism and Drug Dependence staff activity logs before trial, as those logs supported the defendant's claim that he did not have as many individual counseling sessions with the complainants as they alleged...

As to the discrepancy between Jacob's testimony of "yellow and white" pubic hair, and Defendant's brownish-black pubic hair, the trial court said that the color of Defendant's pubic hair involved a minor inconsistency that would not have made a difference in the outcome. This fact alone is probably true. But again, the court's position is somewhat disingenuous because it does not acknowledge what the point of the pubic hair testimony would have been. If, as Ms. Johnson claimed, her "strategy" was to poke holes (Record, 219a) in the testimony of the "beautiful" (Record, 212a) angelic young children, this is an important hole to poke – to show that Jacob Riley got it wrong. Trial counsel conceded this. (Record, 229a, 232-1a).

Dramatically, during a break in the trial proceedings, Defendant had even pulled out his pubic hairs to show to his trial counsel. Admittedly, this is an indelicate demonstration, but there is little about child sexual abuse that is not indelicate. Necessarily, the most private aspects of a

person's body and functionality are up for discussion and presentation to a jury, and one cannot be too squeamish when issues of guilt or innocence, and a 25 year minimum prison sentence, rest on the outcome of these very delicate private facts.

Jane Shaver and Ronda Olds confirmed this incident. Even assuming that trial counsel's strategy of "poking holes" in the children's testimony could in some circumstances be reasonable, why did she not try to poke holes in Jacob's testimony by showing that Defendant's pubic hair was not yellow and whitish? (Record 40a) Counsel readily agrees that the spectacle of Defendant pulling out his pubic hairs in a conference room and testimony by his mother, Ronda Olds, that she had seen his blackish brown pubic hair (Record 271a-272a) because he showed her his hemorrhoids in June 2006 is rather comical – even farcical – but nonetheless, his pubic hair was blackish-brown, not yellow-white. (Record 266a-267a, 273a). Why on earth would trial counsel not have tried to poke a hole in this aspect of Jacob's testimony?

3. Defendant was prejudiced.

The trial court said none of the evidence presented at the evidentiary hearings would have changed the outcome. The Court of Appeals did not address the question of prejudice.

As to the assertion of "no prejudice," counsel appeals to the common sense and common knowledge of human-kind, those who are not judges. Below, counsel posited a "thought experiment" – simply ask 12 random people (the composition of a jury) about a hypothetical CSC case involving penile-anal penetration and ejaculation onto the face or into the mouth of a young child. Virtually every single person will say that impotence and inability to have an erection is an important fact to know in deciding whether an adult man can penetrate the anus of a small child 17-20 times.

And, virtually every single person will say that this same adult man's inability to ejaculate is a significant fact that should be brought out in order to evaluate the testimony of the young boy that this man ejaculated on his face and he had to wipe it off with a towel. Counsel acknowledges that this case has lurid aspects not ordinarily discussed in polite society, but the facts are the facts, and for the lower courts to have dismissed and distorted what everyone knows borders on intellectual dishonesty.

As *Strickland* notes, in evaluating "prejudice,"

> "We say that a defendant was prejudiced by his lawyer's substandard performance if he can show that, but for counsel's errors, "there is a reasonable probability ... that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.
>
> "In making this determination, a court ... must consider the totality of the evidence before the judge or jury."

Strickland, 466 U.S. at 695, 104 S.Ct. at 2069.

We concede that there was evidence against Defendant. The children's testimony and the testimony of the jail-house snitch were damaging. Yes, there was evidence of guilt, but it was not overwhelming. The fact of Defendant's longstanding impotence is surely a fact of consequence to be placed before the jury. The evidence adduced at the evidentiary hearings makes it highly **un**likely that a jury would have found him guilty beyond a reasonable doubt. Snitch testimony is routinely discounted by juries, and the children's testimony should have been considered in light of their father's conduct with them to ascertain whether they were mistakenly ascribing to Defendant acts that had been perpetrated by their father. "Where there is relatively little evidence to support a guilty verdict to begin with the magnitude of errors necessary for a finding of prejudice will be less than where there is greater

evidence of guilt." *Brown v Smith*, 551 F3d 424 (CA 6 2008).

Here, both the trial court and the Court of Appeals focused on the evidence of guilt, i.e. the children's testimony and the snitch testimony, and concluded that Defendant's evidence of physical incapacity was therefore unimportant and inconclusive. But this is the wrong conclusion. Under the Constitution, the defense also has the right to present relevant, material, non-cumulative contrary evidence so that the fact finder can draw the appropriate conclusion. What *Holmes v South Carolina* means, at its core, is that it is not just the prosecution whose evidence counts; rather, the defense's evidence counts, too!

> " [I]n evaluating the prosecution's forensic evidence and deeming it to be "strong"—and thereby justifying exclusion of petitioner's third-party guilt evidence—the South Carolina Supreme Court made no mention of the defense challenges to the prosecution's evidence."

Id., at 329.

> "The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt..."

Holmes, at 331.

The trial court said it made no difference that evidence of Defendant's impotence was not presented, that he would have been convicted anyway, saying "Defendant's claimed impotence would not have changed the outcome because Defendant could have committed the same crime with a flaccid penis." (Record, 110a). The vast bulk of ordinary citizenry would laugh in derision at such a ruling. Is it likely that an impotent man can accomplish anal intercourse with a child with a flaccid penis? Is it likely that an impotent man can ejaculate? Would a jury want to know this fact

before making a decision? This issue should not have to reach the rarefied air of the appellate panels to be answered. Any man or woman with a passing acquaintance of the facts of life knows that if a man cannot get an erection, it is not likely that he can have anal intercourse. Yet the trial judge said it "would not have made any difference." The only proper response to this ruling is simple disbelief. We have a girlfriend's testimony concerning Defendant's incapacities before the allegations at issue, we have medical records concerning Defendant's inability to maintain an erection two years before the allegations at issue, and we have the wife's testimony of complete impotence. This is significant evidence to present to a jury. Defendant submits that the trial court and Court of Appeals decision that he did not receive ineffective assistance of trial counsel is clearly erroneous, both on the facts and the law.

III.

THE VERDICT IS AGAINST THE GREAT WEIGHT OF THE EVIDENCE.

Standard of Review and Issue Preservation

The issue was preserved by the timely filing of a post-trial motion for a new trial on the basis that the verdict was against the great weight of the evidence. The test to determine whether a verdict is against the great weight of evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v. Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998).

Argument

The Court of Appeals said that the verdict was not against the great weight of the evidence because "there was no evidence at trial to suggest that the testimony of the prosecution's witnesses contradicted indisputable physical facts...or defied physical realities"... (Record, 287a).

This is one of the most risible of the lower courts' rulings, and the one that would cause ordinary people to roar with laughter. An impotent man who cannot attain an erection nor ejaculate is convicted of having anal penetration with a young child 17-20 times and ejaculating in a child's face, and the courts of this state say his physical incapacities are not significant under the law?

A judge is authorized to grant a new trial if the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); MCR 6.431. Moreoever, a judge has wide discretion in granting a motion for new trial on this ground, far broader than in determining if there has been insufficient evidence, and he may grant it even though there was enough evidence to take the case to a jury. *Bridwell v Segel*, 362 Mich 102, 105 (1960); *People v Brown*, 239 Mich App 735, 746, n 6 (2000). See also *United States v Pierce*, 62 F3d 818, 825-826 (CA 6, 1995). If "the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result," a new trial can be granted on this basis. *People v Lemmon*, 456 Mich. 625, 627; 576 NW2d 129 (1998). A post-verdict motion for new trial focuses not on the legal sufficiency of the evidence, but instead on whether the verdict constituted a "miscarriage of justice," or whether the interests of "justice" require a new trial be ordered.

Lemmon held that jury determinations of the facts are almost unimpeachable. However, the Court left open certain situations in which a jury verdict could be set aside: if "it can be said that contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury

could not believe it,' or contradicted indisputable physical facts or defied physical realities..." the trial court has some discretion to set the verdict aside. In this case, if Mr. Shaver is almost completely impotent, if the physical description of his private parts is inaccurate, if he cannot ejaculate, the verdict is contrary to physical realities. The verdict would then be against the great weight of the evidence and would constitute a miscarriage of justice.

The Court of Appeals cites *People v Roper*, 286 Mich App 77, "89"; 777 NW2d 483 (2009) for the proposition that "only the evidence presented at trial" may be considered in evaluating a "great weight" argument (Record, 287a) but *Roper* – at the page cited – says no such thing.

In *People v Demorest*, previously cited, the Court of Appeals said that a great weight claim cannot be raised as to evidence presented only in post-trial proceedings. "Logically speaking, the verdict could not have been against the great weight of the evidence if the evidence cited by the trial court was simply not presented to the jury." Nonetheless, Defendant argues that his conviction would be a miscarriage of justice given the physical realities of sexual penetration and impotence. Defendant submits that this is one of those cases, where the trial court should have considered all of the evidence, presented during trial and in post-trial proceedings, and set the verdict aside as against the great weight of the evidence in order to prevent a miscarriage of justice.

RELIEF REQUESTED

For these reasons, Defendant requests that the Order of the Michigan Court of Appeals and the trial court be reversed, and that the case be remanded to the trial court for a new trial in front of a different judge.

Date: 11/11/2013

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