

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee

vs

DEXTER BURRELL TAYLOR,

Defendant/Appellant

SC: 159612

COA: 340028

Wayne County Case No.
16-007780-01-FC

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DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL

****ORAL ARGUMENT REQUESTED****

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STATEMENT OF BASIS OF JURISDICTION

This Defendant-Appellant's Brief on Appeal is filed in compliance with MCR 7.309.

The Judgment of Sentence, filed June 27, 2017, is the order appealed from.

Request for Appointment of Attorney was filed August 1, 2017.

Claim of Appeal and Order Regarding Appointment of Appellate Counsel was filed August 31, 2017.

Transcripts were filed April 18, 2018.

On March 27, 2018, the Court of Appeals issued an order extending the time to file Appellant's Brief on Appeal to June 11, 2018.

Defendant/Appellant's Brief on Appeal was filed on April 28, 2018.

Plaintiff/Appellee/s Brief on Appeal was filed March 7, 2019.

Oral Arguments in the Court of Appeals were held on March 13, 2019.

An Opinion – Per Curiam – Unpublished was issued by the Court of Appeals on March 26, 2019.

Defendant/Appellant filed an Application for Leave to the Supreme Court on May 17, 2019.

On January 24, 2020, the Supreme Court issued an order directing the Clerk to schedule oral arguments on the application, directing the Wayne Circuit Court to appoint William Branch as Attorney for Defendant/Appellant, requiring the filing of

Defendant/Appellant's Supplement Brief and Appendix within 42 days from the date of the order appointing counsel and directing appellee's brief, if any, within 14 days of being served with appellee's brief.

Order Appointing Appellate Counsel was issued by the Wayne County Circuitry Court on January 31, 2020.

Defendant/Appellant filed a Motion to Extend Time to File Supplemental Brief on March 20, 2020. No ruling has been received.

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STATEMENT OF QUESTIONS PRESENTED

- I. Was Mr. Taylor denied due process by the admission of prior bad acts evidence?**

Defendant/Appellant answers, "Yes."

The trial court answered, "No."

- II. Was Mr. Taylor denied due process where his conviction is not supported by sufficient evidence of guilt?**

Defendant/Appellant answers, "Yes."

The trial court answers, "No."

- III. While the minimum sentence is within the sentence guidelines, is it disproportional to the defendant?**

Appellant/Defendant answers, "Yes."

The trial court answers, "No."

- IV. Is the statutory ban on appellate review of sentences within the sentencing guidelines a violation of constitutionally mandated separation of powers?**

Defendant/Appellant answers, "Yes."

The trial court gave no answer.

STATEMENT OF FACTS

Dexter Taylor had a history of drug abuse and retail fraud, but no record of violence or sex offenses. (L 759 a, L 763 a – L 771 a) Nevertheless, he was tried and convicted for a criminal sexual conduct 1st-degree offense that occurred 19 years earlier. To gain the conviction, the prosecutor used evidence of another event that was even older. The evidence against Mr. Taylor was often confused and contradictory. Now fifty years old and suffering from pancreatic cancer, Mr. Taylor is serving a sentence that will far exceed his lifetime.

The case was first tried in 2016, resulting in a mistrial. The complaining witness was Rachel Davis. After that trial the prosecutor filed a Notice of Intent to Use 404(b) evidence, namely, allegations from a lady named Erica Doak. The first trial did not include direct evidence regarding Ms. Doak. The court overruled a defense objection to the proposed evidence. (F 58 a)

The case involved three locations. One was the sight of an abandoned K-Mart on Outer Drive between I-75 and Dix Toledo Road in Melvindale. (H 409 a) The second was near Outer Drive and Fort in Detroit, less than half a mile away. The final location was the area of Fort and Schafer in Detroit, about a mile and a half from the K-Mart. (H 416 a-417 a)

ERICA DOAK AND THE PRIOR BAD ACT

On February 17, 1994, then 20-year old Erica Doak was six months pregnant. (H 308 a, 313 a) The prosecutor reminded the jury of her pregnancy in the closing statement. (J 666 a) Ms. Doak lived in the Cass Corridor, an area then known for high rates of prostitution and illegal drugs. (H 324 a) At about 2:00 that afternoon she was

walking alone around Outer Drive and Fort Street. (H 308 a, 326 a) She had her purse with her. She was approached from behind by a man who put a pocket-knife to her side. (H 310 a- 311 a) At the trial she could not remember what the man looked like. (H 311 a) They walked to a house that had an open basement. There was a mattress in the basement. The house was about three blocks from Schafer. (H 312 a) The man laid the knife on the floor. He removed her pants and they had intercourse. She did not resist or struggle because she was pregnant and he had a knife. (H 315 a; JT 4-27 p 59) Afterwards he got up and left. (H 312 a; JT 4-27 p 60) He took her jacket, silver bracelet and ten or fifteen dollars from her purse. (H 318 a)

Ms. Doak did not attempt to call the police. (H 327 a) A friend's father took her to Oakwood Hospital. The staff performed an exam and she gave a report to police. They kept her underwear. (H 319 a)

Ms. Doak took the police to the basement where the incident occurred. The knife was still on the floor. (H 321 a)

At the trial, Ms. Doak did not recognize anybody in the courtroom, including Dexter Taylor. (H 322 a)

STORIES OF RACHEL DAVIS

Rachel Davis was 42 years old at the time of the trial. (G 221 a) She testified that on July 25, 1996, she walked by herself to an area in Ecorse where she knew she could hang out and get high on crack cocaine. (G 222 a, G 233 a) She had smoked crack within an hour and a half earlier. (G 73 a; JT 4-26 p 10) When she arrived, she saw a man in a burgundy car. She had seen him before, getting high and smoking crack, but had not spoken to him. He pulled over and asked if she wanted to get a buzz. She voluntarily got in his car. (G 232 a, 233 a; H 261 a, 262 a) She expected to get high. She

recalled there was baby seat in the car but could not remember if she got in the front or back seat. She testified she got in the front seat. She admitted she may have been mistaken when she later told the police she got in the back seat. (H 270 a) The man drove to a deserted K-Mart store and pulled around the back. He stopped and said, "bitch get out the car." (G 235 a) He also got out, pushed her down, ripped her shirt, pulled her pants down and penetrated her. (G 236 a) She was afraid he might kill her. (G 239 a)

Ms. Davis testified she was wearing a white shirt with blue stars and navy-blue shorts. (G 237 a) She testified she was not wearing jeans, then said she was wearing jean shorts. (H 283 a, H 241 a)

The prosecutor asked if she was fighting back. She answered, "I just wanted it to end." (G 240 a) After that he hit her with a bat couple of times on her shoulder and drove away. (G 239 a, G 241 a) She had not seen the bat in the car. (H 239 a) She got her clothes back together and crawled or hopped to the front of the store looking for help. (G 238 a, G 241 a, G 243 a, G 244 a) She did not recall previously testifying that she crawled all the way to the street. (H 283 a; H 289 a) She took the bat, holding it by the top and later gave it to police officers. (H 281 a)

John Difatta, an off-duty Melvindale Police Inspector, saw Ms. Davis in the K-Mart parking lot area, coming towards Outer Drive. She was walking, not crawling. Contrary to her testimony, he did not see a bat. (H 335 a) She was crying and screaming for help. Difatta called the Melvindale Police Department and two squad cars and paramedics responded. (G 92 a, H 330 a, H 322 a).

Melvindale Police Officer Chad Hayse was among those who responded to the call. (H 409 a) He saw a distraught female standing near the sidewalk in front of the K-

Mart building. She was screaming and crying, and he was not able to have any conversation with her. (H 410 a) He went to the loading dock area behind the K-Mart with Det. Gary Morabito. He observed a broken bottle, a piece of jewelry and a piece of paper that appeared to have excrement on it. (H 412-413 a) These items were photographed. Officer Hayse was not trained as a technician and did not collect any evidence. (H 423 a) He did not see a bat. (H 428 a)

Contrary to Ms. Davis's testimony that she had voluntarily gotten the car, Officer Hayse testified that according to police reports, Ms. Davis said a man grabbed her arm and told her if she did not get into the vehicle, he would hit with a baseball bat he was holding in his other hand. He ordered her to pull her pants down and he put his dick in her. (H 423 a)

Officer David Taft also responded to the scene. He described Ms. Davis as hysterical and crying. (H 432 a) He called for an ambulance and followed it to the hospital. (H 434 a) He spoke to the nurse and Ms. Davis and learned of the allegation of sexual assault. (H 434-435 a) Ms. Davis told him the man used the bat to force her into the vehicle against her will. (H 442 a) Officer Taft received the clothing evidence in a bag or box from the hospital and transported it to the station. (H 436 a) He returned to the crime scene to assist Detective Morabito. Ms. Davis had told him at the hospital that she had defecated on herself during the intercourse and used paper on the ground to wipe herself. He located that paper. (H 439 a) Officer Taft testified he also collected a full-sized baseball bat as evidence. (H 440-441 a)

Ms. Davis did not remember telling police that she had a bowel movement and stained her clothes. (G 92 a) She was taken to Dearborn Oakwood Hospital in an ambulance. (G 245 a) A rape kit was performed and she testified she was told she had

trichomonas. (G 246 a) She believed she had abrasions on her shoulders and legs and a knot on her forehead. (G 252 a)

Ms. Davis talked to a nurse at Oakwood Hospital and various police officers. (H 71 a, H 72 a) She did not remember what she told the nurse. (G 99-100 a)

Valerie Taylor was a registered nurse on duty at Oakwood Hospital in Dearborn. (H 338 a). She performed a sexual assault forensic exam on Rachel Davis. (H 344 a, H 347 a) She collected Ms. Davis's clothing, consisting of one shirt, black white print, that was dirty with dirt and leaf pieces, one pair of dark blue jeans, dirty with grass and leaves and one pair of underpants, the crotch area dirty and a small amount of brown drainage on that area. (H 352 a)

Ms. Taylor did not note any feces on the clothing. (H 361 a) The records indicate an abrasion and an evulsion on her right knee, abrasion on the back, both posterior shoulders and left shoulder pain, and an abrasion on her left or right upper buttock. (H 350-351 a) A doctor who took two swabs from Ms. Davis's vagina. (H 354-355a;) The evidence was placed in a kit which was picked up by police officers. (H 358 a)

Nurse Taylor interviewed Ms. Davis and recorded her responses. Davis told her that she sat in the back seat of the man's vehicle, because there was a baby seat in the front. Either Ms. Davis or the man were trying to be friendly. (H 363 a) There was nothing in the records to indicate a head injury or knot on the forehead. (H 364-365 a) There was a recent treatment for gonorrhea, syphilis and HIV. (H 367 a) The most recent prior intercourse was the day before the incident. (H 368 a)

The clothing included blue jean pants, not shorts as Ms. Davis had testified. There were no tears on the knees of the pants. (H 369-370 a) The examination did not indicate any sexually transmitted diseases resulted from this incident. (H 372 a)

In describing the incident, Ms. Davis told the nurse that she laid down on her back and pulled her pants down. She did not say the man ripped off her pants or tore them. There was no indication the man was waiving the bat around at any point. (H 374 a)

Guy Morabito was the initial detective in charge of the case. He arrived at the scene around 9:30 p.m. Other officers were already present. (H 468 a) Morabito later received evidence, including a bag of Ms. Davis's clothing, a hair pin, a bat and the rape kit. (H 470 a)

Morabito turned the items, including the bat, over to the Michigan State Crime Lab the day after the incident. He received the bat back. There were no identifiable prints on it. (H 472 a) The bat was described as 24 1/2 inches long, not a full-sized a baseball bat. However, the current whereabouts of the bat were unknown. (H 474 a, H 482 a)

The paper with feces was not collected. (H 485-486 a) The blouse taken into evidence was not torn. (H 492 a)

In 2016 Ms. Davis was contacted by a Detective Tuski who told her DNA testing had led to the arrest of Dexter Taylor. (G 248-249 a) She was shown a photo line-up and testified she identified Mr. Taylor.

At the trial, Ms. Davis did not remember testifying at the Allen Park District Court in September of 2015. (H 267 a) However, she agreed that on that day she did not recognize anybody in the courtroom, including Mr. Taylor. She then again stated she did not remember being at another courthouse. (H 268) After a break, she did remember testifying at Allen Park and agreed she had not recognized Mr. Taylor in the courtroom. (H 296 a, H 298 a) She testified she recognized the texture of Mr. Taylor's

hair, but was fuzzy about “the complex of his skin.” (H 269 a) She did identify him at the trial. (G 251 a)

THE DNA TRAILS

Benedict Arrey was a forensic toxicologist at the Fairfax Identify Laboratory in Fairfax, Virginia. In 2004 he received the rape kit of Rachel Davis. (H 377-378 a) It contained male and female DNA. (H 348 a) The female DNA was from Ms. Davis. (H 393 a) Mr. Arrey prepared a written report detailing his findings and returned the kit to the Michigan State Police. (H 395 a)

Heather Vitta was an expert in the field of forensic biology and DNA analysis employed by the Michigan State Police Crime Lab. (I 505 a) She testified that in January of 2005 the DNA samples taken from Rachael Davis produced a match to Dexter Taylor. (I 505 515 a, 517 a) Ms. Vitta notified the Melvindale Police Department in March of 2005, and requested they obtain a confirmation sample from Mr. Taylor. (I 518 a) She received the confirmation in 2016 and concluded Mr. Taylor was the sample donor. (I 519-522 a)

In 2005 Chad Hayse, the Melvindale Officer who originally responded to the scene, was working at the Detective Bureau and received information regarding the case. He attempted to locate Ms. Davis but was unsuccessful. He did contact her in 2012, but she did not want to pursue the case. (H 418-419 a)

Kirk Deleeuw was a forensic scientist with the Michigan State Police. (I 536 a) In October of 2014 he reviewed the samples taken from Erica Doak. (I 548 a) The DNA profile from the vagina swab sperm fraction taken from Erica Doak matched the DNA profile from Dexter Taylor. (I 557 a, 560 a)

Lindsay Dashe was a forensic scientist employed by the Michigan State Police in their CODIS section. Her duties included monitoring the CODIS database for matches. (I 530 a) On January 13, 2015, she sent a report to the Detroit Police Department indicating the samples taken from Erica Doak had generated an association with Dexter Taylor. (I 533 a)

THE FINAL INVESTIGATION

Ronald Tuski was an investigator for the Wayne County Prosecutor's Office with the Sexual Assault Kit Task Force. (I 571 a) He was assigned to investigate the case of Erica Doak. (I 575 a) Dexter Taylor was identified as a suspect, and in the Melvindale case of Rachael Davis. (I 576-577 a) Tuski was able to contact both victims. He presented photo line-ups to each that included a picture of Mr. Taylor. In contrast to Ms. Davis's claim that she pointed out Dexter Taylor, neither were able to identify him. (I 584 a, 586 a)

Mr. Tuski received medical records and evidence on the Rachel Davis case. He did not obtain a baseball bat. (I 586-587 a) He obtained a DNA sample from Mr. Taylor. (I 587 a, 589 a)

The statute of limitations had expired on the Erica Doak case. Therefore, Tuski did not proceed with that investigation. (I 590)

Ms. Davis told Tuski that she got in the car willingly, believing she was going to smoke crack with this guy. (I 609 a, 615 a) Earlier, she told the police "I was forced into the car." (I 612 a) She told Tuski she had smoked crack earlier in the day. (I 612 a) She said she had smoked crack with Mr. Taylor on prior occasions. (I 626 a) There were no tears in Ms. Davis's clothing, contrary to her claim that her blouse and pants were ripped off. (I 614 a)

Ms. Davis told Tuski the assailant was about 5 feet 1 inches tall. (I 607 a)
According to the MDOP records, Mr. Taylor is 5 feet 11 inches. (K 1 a)

There were no medical records to indicate Ms. Davis was hit in the head or anywhere else with a bat. There was no blood evidence other than what was drawn in the sex kit. (I 627 a)

VERDICT AND SENTENCE

Mr. Taylor was convicted of criminal sexual conduct 1st degree.

The sentence guidelines were 240 to 480 months or life. (M 789 a) While Mr. Taylor had six prior felonies and 24 misdemeanors, there were no other allegations regarding sex or violence. (I 762-772 a) The judge noted she had received a letter from Mr. Taylor accepting full responsibility for his acts. (M 792 a). While in custody, Mr. Taylor had been diagnosed with pancreatic cancer. (M 784 a, M 794 a)

Dexter Taylor was sentenced to 37 years, or 444 months, to 80 years in prison.

THE SUPREME COURT ORDER

The Michigan Supreme Court issued an Order, Appendix O herein, instructing the appellant to file a supplemental brief addressing (1) whether the other-acts evidence offered to show a common plan, scheme, or system contained a “striking similarity” to the charged act, *People v Denson*, 500 Mich 385, 403 (2017), (2) whether the other-acts evidence was admissible under the “doctrine of chances,” *People v Mardlin*, 487 Mich 609, 616-617 (2010), and (3) if the evidence was not offered for a proper purpose, whether its admission was harmless. Those questions are incorporated into the other arguments Mr. Taylor has presented for review.

LEGAL ARGUMENTS

I

Mr. Taylor was denied due process by the admission of prior bad acts evidence

STANDARD OF REVIEW

Generally, the standard of review of a trial court's decision whether to admit evidence is abuse of discretion. But, when the decision regarding the admission of evidence involves preliminary questions of law, for example, whether a rule of evidence or statute precludes admissibility of the evidence, the trial court's decision is reviewed *de novo*. *People v Lukity*, 460 Mich 484, 598 NW 2d 607 (1999).

This issue was preserved by the prosecutor's notice, the defendant's response and the judge's ruling. (HT 2-27-17 & 4-13-17 p 12)

A. The evidence of other acts was not relevant

MRE 401 reads:

Definition of "Relevant Evidence"

"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 probably than it would be without the evidence.

MRE 402 reads:

Relevant Evidence Generally Admissible, Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, These rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

MRE 403 reads:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, Or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of unduly delay, waste of time, or needless presentation of cumulative evidence.

In *People v Fisher*, 449 Mich 441, 537 NW 2d 577 (1995), the Michigan Supreme

Court made the point that:

“Obviously, evidence offered against a party, by its very nature is prejudicial; otherwise there would be no point in presenting it. The pivotal consideration is whether the probative value of the testimony is substantially outweighed by unfair prejudice. To the contrary, it is marginally relevant evidence, when coupled with a danger of leading the jury to reach a decision on irrelevant or improper grounds such as passion, prejudice, or sympathy, that is most likely to be excluded under Rule 403. *People v Mills*, 450 Mich 61, 537 NW 2d 909 (1995).

In determining whether evidence should be allowed under MRE 403, a trial court should use a sliding scale. The less probative the evidence is, the more likely the trial court should be to sustain an objection to its admissibility of Rule 403 grounds. In *People v Beckley*, 434 Mich 691, 456 NW 2d 391 (1990), in concluding that child sexual abuse syndrome evidence was unreliable as an indicator of sexual abuse, Justice Brickley wrote:

“As reliability diminishes the prejudicial effect of the evidence increases. Evidence, although relevant, is excluded when its probative value is Substantially outweighed by any unfair prejudice.”

The Supreme Court stated in *People v Vasher*, 449 Mich 494, 537 NW 2d 168 (1995):

“Evidence presents the danger of unfair prejudice when it threatens the

fundamental goals of MRE 403: *accuracy and fairness*...The perceived danger here is that the jury would decide that this evidence is more probative of a fact than it actually is.” (*Emphasis added*)

The major function of MRE 403 is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. *Waknin v Chamberlain*, 467 Mich 329, 653 NW 2d 176 (2002).

Under MRE 403, the evidence of uncharged prior bad acts must be substantial. *People v Nieves*, 92 Mich App 613; 285 NW 2d 389 (1989). The prior bad acts evidence against Mr. Taylor failed in this requirement.

Evidence that Mr. Taylor had non-consensual sex with Ms. Doak more than 20 years ago fell on the wrong side of the sliding scale. Two characteristics which should have removed it from the trial. First, it was not substantial. It consisted of a single instance of misconduct that occurred so long ago the statute of limitations had expired. Second, it was introduced to paint Mr. Taylor as a bad person, because the victim was pregnant. What other purpose did it serve, and why else did the prosecutor elicit and emphasize that detail? The only result was to create substantial prejudice against Mr. Taylor, contrary to MRE 403, while doing little to establish guilt of the current case.

Even if Ms. Doak’s story was relevant, its probative value was substantially outweighed by unfair prejudice. *People v Beckley*, supra. Its admission produced the real danger that the jury would view Mr. Taylor as a bad person because the victim was pregnant and reach a decision on irrelevant or improper grounds such as passion, prejudice or sympathy, rather the facts of the allegation. *People v Fisher*, supra. It needlessly produced the danger that the jury would decide this evidence was more probative of fact than it actually was. *People v Vasher*, supra. This testimony, of scant

probative force, was “dragged in by the heels for the sake of its prejudicial effect.”

Waknin v Chamberlain, supra.

**B. The evidence of other acts was not
admissible under MRE 404(b)**

Apart from impeaching a witness with prior convictions, Michigan law limits the admission of evidence of a defendant’s other crimes. MCL 768.27 provides:

In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

Similarly, MRE 404(b) reads:

Other crimes, wrongs or acts

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *United States v Bailey*, 957 F2d 439 (CA 7, 1992), the defendant objected to admission, in his trial for robbing a Chicago bank, of his prior statement to the FBI about a similar bank robbery in California. Applying the substantially similar provisions of the Federal Rules of Evidence, the Seventh Circuit observed:

[FRE] 404(b) prohibits evidence of other crimes, wrongs, or acts in order to show a propensity towards crime, but allows admission “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” [FRE] 404(b) is usually paired with [FRE] 403, which says, “Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.”

In *United States v Beasley*, 809 F2d 1273, 1279 (CA 7, 1987), this court explained the procedure for using Rules 404(b) and 403:

The district judge must both identify the exception [under Rule 404(b)] that applies to the evidence in question and evaluate [under Rule 403] whether the evidence, although relevant and within the exception, is sufficiently probative to make tolerable the risk that jurors will act on the basis of emotion or an inference via the blackening of the defendant’s character.

In Bailey’s case, the district judge did not comply with *Beasley*. He agreed that the evidence concerning the previous robbery could not come in to show propensity, but he did not address in any way a comparison of its probative value and danger of unfair prejudice.

There is an exception to this rule when the evidence is transparently admissible, *Beasley*, 809 F2d at 1280, but that is not true of the evidence in this case. Although it satisfies the criteria for Rule 404(b) because it tends to prove Bailey’s identity, in that the two robberies are remarkably similar, and is evidence that the California robbery actually occurred, it does not clearly satisfy Rule 403 [*Bailey*, supra, p 442].

The Seventh Circuit went on to find the error harmless, because, among other things, “the portion of Bailey’s statement which is evidence of another crime is part of a statement in which he confesses the offense for which he was on trial. The record suggests no reason why the jury could have believed Bailey’s confession of the California robbery without also believing his confession of the Chicago robbery.” *Id.*

In the current case, the trial judge cited *People v Timothy Jackson*, 498 Mich 246 (2015) and *People v VanderVliet*, 444 Mich 52, (1993), considered similarities and differences between the stories of Ms. Doak and Ms. Davis and provided the cautionary instruction SJI 20.28, before ruling the evidence would be allowed. (F 54-59 a)) But she did not “address any comparison of its probative value and danger of unfair prejudice.” *Bailey*, supra. There is nothing accomplished by introduction of the Doak evidence that overcomes the resulting prejudice that results from an allegation of sexually assaulting a pregnant woman.

MRE 404 prescribes that, under normal circumstances, evidence of a person’s character is not admissible to prove that the person acted in conformity with his or her character on a particular occasion. *People v Minney*, 155 Mich 534, 119 NW 918 (1909). The rationale of the rule – which, like its similar but not identical counterpart, FRE 404, supra, has occasioned considerable critical comment-was set forth in *People v Allen*, 429 Mich 558, 420 NW 2d 499 (1988):

“(I)n our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendant’s prior acts in reaching its verdict.”

In *People v VanderVliet*, 444 Mich 52, 508 NW 2d 115 (1993), the Michigan Supreme Court set forth a four-part standard for determining the admissibility of other acts evidence. First, the “evidence must be offered for a proper purpose under Rule 404(b). The “proper purpose” need not be specifically enumerated in Rule 404(b) (1). The court emphasized the Rule’s list of purposes is not exhaustive, and the rule “permits the judge to admit other acts evidence whenever it is relevant on a non-character theory.” This issue will be explored below.

Second, the other acts evidence must “be relevant under Rule 402 as enforced through Rule 104(b) (Relevancy Conditioned on Fact).” As detailed above, the testimony did not even meet the basic definition of “relevant evidence.” A single case of wrongdoing more than 20 years ago is not substantial.

Third, the court must determine “that the probative value of the evidence is not substantially outweighed by unfair prejudice.” This refers to the normal balancing test under Rule 403, as applicable to all evidence, not some “superannuated weighing requirement.” Again, the testimony did nothing but prejudice the jury against Mr. Taylor, and was meaningless in proving the charged crime.

Fourth, the trial court “may”, upon request, provide a limiting instruction to the jury. In the current case, the jury was given a limiting instruction.

The *Vandeervliet* standards were tightened in *People v Crawford*, 459 Mich 376 (1998), in which a conviction for possession of cocaine with intent to deliver was reversed on the grounds that evidence of the defendant’s prior conviction for delivery of cocaine was improperly admitted under Rule 404(b). While *VanderVliet* requires the other acts evidence be “offered for a proper purpose,” the Court noted in *Crawford* that the mere recital of a proper purpose without closer scrutiny is insufficient:

“(A) common pitfall in MRE 404(b) cases is the trial court’s tendency to admit prior misconduct evidence merely because it has been “offered” for one of the rule’s enumerated proper purposes. Mechanical recitation of “knowledge, intent, absence of mistake, etc.” without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE (4). If it were, the prosecutor could routinely admit character evidence by simply calling it something else...In order to ensure the defendant’s right to a fair trial, courts must vigilantly weed out character evidence that is disguised as something else. The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized.

The Court approved the approach that “the prosecutor must make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person.”

While *VanderVliet* applied the normal balancing test under Rule 403, as opposed to some “superannuated weighing requirement,” *Crawford* held:

“Because prior acts evidence carries with it a high risk of confusion and misuse, there is a heightened need for the careful application of the principals set forth in MRE 403.”

In *People v Sabin*, 463 Mich 43, 614 NW 2d 888 (2000), in affirming a conviction for first degree criminal sexual conduct involving the defendant’s minor daughter, the Michigan Supreme Court approved the admission of evidence of prior acts of sexual conduct involving the defendant’s stepdaughter, to show the charged act occurred by showing a common plan, scheme or system. But more than general similarity is necessary for this purpose. The Court noted that “general similarity between the charged and uncharged acts does not by itself, establish a plan, scheme, or system used to commit the acts.” Rather, “To establish that the existence of a common design or plan, the common features must indicate the existence of a plan rather than series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.”

The *Sabin* decision gave force to the requirements of Rule 404(b) by rejecting several common arguments, namely that the prior acts were admissible to show motive, intent, absence of a mistake by the victim, or the victim’s credibility. As to motive, the court said the use of the defendant’s motive to have sex with young girls to show the charged conduct occurred “would allow use of the evidence for the prohibited purpose of

proving defendant's character to show that he acted in conformity therewith during the events underlying the charged offense." 643 Mich at 68. As to intent, since the defendant was charged with a general intent crime, and accident was not an issue, "the evidence was not relevant to prove defendant's general intent." 463 Mich at 68. As to the absence of mistake, the victim's "perception of the incident was not within the range of litigated matters in controversy." 463 Mich at 69. Finally, as to bolstering the victim's credibility, the Court reaffirmed its holding in *People v Jones*, 417 Mich 285 (1983), that "evidence of sexual acts between the defendant and persons other than the complainant is not relevant to bolster the complainant's credibility because the acts are not part of the principal transaction." 463 Mich at 69. It is clear from *Sabin* that the Court will require genuine relevance for other acts evidence to pass muster under Rule 404(b).

These warnings were violated in the current case. Exactly what motive, opportunity, intent, preparation, scheme, plan or system in doing an act, did the testimony prove? As to intent, there was no question that Mr. Taylor intended to have sex with Ms. Davis. The Doak evidence did nothing to show opportunity to have sex with Ms. Davis. There was no indication that either crime involved any preparation or planning. Contact with the victims appears to have been merely by chance. At most, these are a series of similar spontaneous acts, and the prior acts evidence was not admissible under MRE 404(b).

As a result of the admission of this irrelevant and unduly prejudicial evidence, Mr. Taylor was deprived of due process and the right to a fair trial. US Const, Ams V, XIV, Mich Const 1963, art I, sec 17: Lisenba v California, 314 US 219; 62 S Ct 280; 86 L Ed 166 (1941); *Walker v Engle*, 703 F 2d 959 (CA 6, 1983). Due process is violated when

the prosecution introduces evidence of other bad acts that is not rationally connected to the crimes charged. *Manning v Rose*, 507 F 2d 889 (CA 6, 1977). The inclusion of the improper evidence rendered the trial fundamentally unfair. *Chambers v Mississippi*, 410 US 284 (1973); *Holmes v South Carolina*, 547 US 319 (2006); *Clemmons v Sowders*, 34 Fd 3d 352 (6th Cir 1994).

C. The similarity between the two incidents was not striking

The Michigan Supreme Court's Order, Appendix O, directed the Appellant to address whether the other-acts evidence offered to show a common plan, scheme, or system contained a "striking similarity" to the charged act as required by *People v Denson*, 500 Mich 385, 403 (2017)

In *Denson*, as in the current case, the prosecution built a theory of relevance centered upon the supposed similarity between a prior incident and the charged offense. To prove sufficient similarity, the prosecution must show "striking similarity" between the other act and the charged offense. *Vander Vliet*, 444 Mich at 67.

The acts or events need not bear striking similarity to the offense charged if the theory of relevance does not itself center on similarity.

In *Denson*, the earlier facts involved a completely different situation and a victim who was completely unrelated to the charged offense. A 2002 incident consisted of a seemingly calculated attack to recover a drug debt, whereas the instant offense, which occurred in 2012, involved an allegedly spontaneous reaction by the defendant after he witnessed his daughter and the victim in a state of partial undress. The 2002 incident did not involve a claim of self-defense or defense of others, while the 2012 event did.

The court found the only similarity between these two incidents is that both were assaults allegedly committed by defendant. Rather than being sufficiently similar and

providing a proper noncharacter purpose for admission into evidence, the 2002 incident served solely to demonstrate defendant's propensity for violence. Thus, the evidence of the prior offense was rejected.

In the current case, Ms. Doak was approached by an unknown man on foot with a knife. She did not describe any conversation between herself and the man. (H 310-311 a) She was taken to a house that had an open basement equipped with a mattress. (H 312 a) The man not only sexually assaulted her, but robbed her of money, a jacket and bracelet. (H 318 a) After the incident he got up and left. She did not tell of any other violence against her. (H 319 a)

Ms. Davis was approached by a man in a car. She was familiar with him, having previously smoked crack and gotten high in his presence. He engaged her in conversation, asking if she wanted to get a buzz. She went with him voluntarily. (G 232-233 a) She did not claim any property was taken from her. She did testify he pushed her down, ripped her shirt and hit her with the bat. (G 236 a, G 239 a, G 241 a)

While the Court of Appeals noted some similarity of location, in fact the important factor is that both occurred in a high crime area, known for drug use and prostitution. It is no surprise that multiple sex crimes occurred in this environment.

The testimony of Ms. Doak was not *strikingly similar* to that of Ms. Davis. Their stories showed sex crimes occurring about a year and a half apart in a high crime area of Detroit and Melvindale. While the Court of Appeals notes similarities, there are too many differences for the similarities to be striking. Just as the bad acts evidence in *Denson* only served to demonstrate Denson's propensity for violence, this evidence could only suggest Mr. Taylor had a propensity for sex crimes. It was used to show he was the "kind of person" who would commit that crime. The prosecution failed to

establish “some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issue in this case.” It was character evidence masking as something else. As in *Denson*, the evidence in the current case should have been inadmissible.

D. Evidence of a single prior act of misconduct should not have been admissible under the “doctrine of chances.”

The Supreme Court next directed Defendant/Appellant to address whether the other acts evidence was admissible under the “doctrine of chances,” *People v Mardlin*, 487 Mich 609, 616-617 (2010)

The doctrine of chances was explained in the Court of Appeals decision in *Mardlin*, *ibid*.

The doctrine of chances – also known as the “doctrine of objective improbability” – is a “theory of logical relevance (that) does not depend on a character inference.” Under this theory, as the number of incidences of an out-of-the-ordinary event increases in relation to a particular defendant, the objective probability increases that the charged act and/or the prior occurrences were not the result of natural causes. The doctrine is commonly discussed in cases addressing MRE 404(b) because the doctrine describes a logical link, based on objective probabilities, between evidence of past acts or incidents that may be connected with a defendant and proper, noncharacter inferences that may be drawn from these events on the basis of their frequency. If a type of event linked to the defendant occurs with unusual frequency, evidence of the occurrences may be probative, for example, of his criminal intent or of the absence of mistake or accident because it is objectively improbable that such events occur so often in relation to the same person due to mere happenstance. To illustrate, *United States v York*, 933 F 2d 1343 (CA 7, 1991,) provides a classic description of the doctrine when used to negate innocent intent:

The man who wins the lottery once is envied, the one who wins it twice is investigated. It is not every day that one’s wife is murdered’

it is more uncommon still that the murder occurs after the wife says she wants a divorce; and more unusual still that the jilted husband collects on a life insurance policy with a double-indemnity provision. That the same individual should later collect on exactly the same sort of policy after the grisly death of a business partner who owed him money raises eyebrows; the odds of the same individual reaping the benefits, within the space of three years, of two grisly murders of people he had reason to be hostile toward seems incredibly low, certainly low enough to support an inference that the windfalls were the product of design rather than the vagaries of chance...This inference is purely objective, and has nothing to do with a subjective assessment of (the defendant's) character.

The seminal English case employing the doctrine, *Rex v Smith*, 11 Cr App R 229 (1915), acknowledged that evidence of past alleged accidents may be admitted to show "whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defense which would otherwise be open to the accused." *Rex v Smith* infamously involved a defendant accused of drowning his wife in the bath. The Court of Criminal Appeal concluded that the trial court properly admitted evidence that two other wives of the defendant were each similarly found dead in their baths from apparent accidental drowning.

Hence, "the doctrine of chances" is often similarly employed in cases alleging arson to argue that the fire at issue was not an accident, but was intentionally caused by the defendant. Indeed, arguably the doctrine is epitomized in arson cases in which apparently accidental fires befall property linked to the defendant with uncommon frequency. As explained by Professor Edward Imwinkelried:

Based on ordinary common sense and mundane human experience it is unlikely that a large number of similar accidents will befall the same victim in a short period of time...

Application of the doctrine depends on the reason the evidence is offered. If the prosecutor proposes to allow it due to similarity to the charged offense, then there must still be a "striking similarity" between the proposed and charged events. *Mardlin*, *ibid.* In our current case, the prosecutor stressed similarities, and as we have seen in the previous arguments, the similarity in the two events was not striking.

While the doctrine does not depend on establishing specific odds of an event repeating, it is still a numbers game. In *Mardlin*, the defendant was charged with arson and the prosecution entered evidence he was connected with four previous fires. In *Rex v Smith*, the defendant apparently drowned three wives in their baths. Professor Imwinkelreid describes “a large number of similar accidents.” These examples are not reflected in the current case. The evidence introduced only showed that Mr. Taylor had sex, either voluntary or not, two times in a year and a half, in an area known for high drug and prostitution rates. Unlike the drowning of multiple wives or collecting insurance many from fires, Mr. Taylor’s acts were not unusual in themselves and they were not of a frequency to justify enacting the doctrine of chances.

E. Inclusion of the other acts evidence was not harmless error

The inclusion of the evidence of the prior assault upon Ms. Doak cannot be considered harmless error. The prosecution was not able to convict Mr. Taylor at the first trial, where there was no direct reference to Erica Doak. Because the evidence violated Mr. Taylor’s rights to a fair trial and due process, it was a preserved constitutional error. A defendant is entitled to relief from a preserved constitutional error unless that error is harmless beyond a reasonable doubt. The burden of proof lies with prosecution. *Chapman v California*, 386 US 18, 87 S Ct 824, 17 L Ed 2d 705 (1967); *People v Anderson* (After Remand) 446 Mich 392 (1994).

If the improper evidence were eliminated, the jury would never have heard the memorable testimony that Mr. Taylor, armed with a knife, committed the sexual assault upon the six-month pregnant Ms. Doak. It cannot be found, beyond a reasonable doubt, that the inclusion of the evidence was harmless error. Even if the error is considered non-constitutional, it certainly was outcome determinative, as it undermined the

reliability of the verdict. *People v Lukity*, 460 Mich 484 (1999); *People v Snyder*, 462 Mich 38 (2000).

II

Mr. Taylor was denied his due process rights where his conviction is not supported by sufficient evidence of guilt

STANDARD OF REVIEW

In reviewing a sufficiency of the evidence claim, the appellate courts apply a de novo standard. *People v Hawkins*, 245 Mich App 439, (2001). Due process prohibits a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, (1999). A defendant may raise a claim that the evidence supporting his convictions is insufficient for the first time on appeal. *People v Hawkins*, supra.

Circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction, provided the prosecution meets its burden of proof. *People v Nowack*, 462 Mich 392 (2000). The prosecution is not required to disprove all innocent theories when a case is based on circumstantial evidence. *Id.* In reviewing a claim that the evidence was legally insufficient to justify a conviction, a reviewing court evaluates the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *Hawkins*, 245 Mich App at 457. All conflicts in the evidence must be resolved in the favor of the prosecution. *People v Terry*, 224 Mich App 447 (1997).

In all criminal cases the guilt of the defendant must be proven, not merely by a preponderance of the evidence, but beyond a reasonable doubt. *People v Mayrand*, 300

Mich 225 (1942). The prosecution is required to introduce some *competent* direct or circumstantial evidence as to each element of the crime charged so as to support a finding of guilty beyond a reasonable doubt. *People v Clark*, 88 Mich App 88 (1979). (*emphasis added*) The evidence is insufficient if it could not support a finding of guilty beyond a reasonable doubt. *People v Williams*, 368 Mich 498 (1962).

Mr. Taylor does not dispute he had sexual contact with Rachel Davis. But the conviction required proof beyond a reasonable doubt that force or coercion was used to accomplish that contact. MCL 750.520b(ii) The only evidence that force or coercion was the testimony of the Rachel Davis. Her multiple versions of the facts were so confused and contradictory that her testimony lacked the required credibility to overcome the presumption of innocence.

Ms. Davis's problems in accurately recounting the facts are understandable. She was a long-time crack cocaine user and smoked it shortly before the incident. (G 222 a, 232 a)

She initially told the police that a man grabbed her arm and told her if she did not get into the vehicle he would hit her with a bat he was holding in his other hand. (H 423 a, H 434 a) But she testified she had not seen the bat in the car. (H 234 a) There was no indication in the hospital record that the man was waving a bat around at any point. (H 374 a) She told Valerie Taylor, the nurse, that she and the man were friendly. (H 363 a) Later, she told Ronald Tuski she got in the car willingly believing she was going to smoke crack with the driver. (H 365 A, H 371 a) At trial, she testified she voluntarily got in Mr. Taylor's car, because she expected to get high. (H 261-262 a) She admitted to Tuski that she had smoked crack with him on a number of prior occasions. (I 626 a)

Ms. Davis could not remember where the baby seat was, or if she got in the front

or back seat. (H 270 a) Valerie Taylor, the hospital nurse, testified Ms. Davis told her she had to sit in the back seat, because the baby seat was in the front. (H 363 a)

She testified that she crawled or hopped to the front of the store looking for help. (H 431-434 a) She could not recall that she previously testified she crawled all the way to the street. (H 396 a, H 399 a) Officer Difatta saw her walking, not crawling. (H 335 a) She did not remember telling the police she had a bowel movement and stained her clothes. (G 92 a) Officer Taft testified she told him she had defecated on herself and used paper on the ground to wipe herself. (H 439 a)

Ms. Davis testified she had a knot on her forehead. (G 252 a) There was nothing in the record to indicate a head injury, or knot on the forehead. As to Ms. Davis's claim that she was told she contracted a sexual transmitted disease from Mr. Taylor, the hospital record indicated she already had gonorrhea, syphilis and HIV. She had intercourse the day before the incident. (H 367-368 a) The record does not reflect she had any sexually transmitted diseases as a result of this incident. (H 372)

Ms. Davis testified the man ripped her shirt and pulled her pants down. (G 236 a;) But she told Officer Hayes the man ordered her pull her pants down. (H 423 a) She told the nurse she laid down and pulled her pants down. She did not say the man ripped off her pants or tore them. (H 374 a) The blouse taken into evidence was not torn. (H 492 a)

Ms. Davis claimed she identified Mr. Taylor in a photo line-up. (G 251 a) This was contradicted by Ronald Tuski, who testified neither witness was able to identify Mr. Taylor in the photo line-ups. (I 584a, 586 a) Ms. Davis was finally able to identify Mr. Taylor at the second trial, after viewing him in the preliminary examination and the first trial. (G 251 a)

Ms. Davis did not remember testifying at the preliminary examination. (H 267 a) In fact, she was not able to identify Mr. Taylor at that exam. (H 268 a) However, she agreed that on that day she did not recognize anybody in the courtroom, including Mr. Taylor. She then again stated she did not remember being at another courthouse. (H 268 a) After a break, she did remember testifying at Allen Park and agreed she had not recognized Mr. Taylor in the courtroom. (H 296a, H 298 a) She testified she recognized the texture of Mr. Taylor's hair, but was fuzzy about "the complex of his skin." (H 268 a;) She told Tuski the assailant was about 5 feet 1 inches tall. (I 607 a) According to the MDOP records, Mr. Taylor is 5 feet eleven inches. (App. K 1 a)

Mr. Taylor does not argue there was some evidence of his guilt. However, the fact that some evidence is introduced does not necessarily mean that the evidence is sufficient to raise a jury issue. In quantitative terms, the fact that a piece of evidence has some tendency to make the existence of a fact more probable, or less probable, does not necessarily mean that the evidence would justify a reasonable juror in reasonably concluding the existence of that fact beyond a reasonable doubt. *People v Hampton*, 407 Mich 354; 285 NW 2d 284 (1979). Whether Ms. Davis was confused, forgetful or dishonest, no reasonable juror could not find her testimony sufficient to overcome the presumption of innocence and prove guilt beyond a reasonable doubt.

The finding of guilt also violates Mr. Taylor's constitutional rights. As an essential element of the due process guaranteed by the Fourteenth Amendment, no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof, which is defined as the evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Jackson v Virginia*, 443 US 307; 61 L Ed 2d 560; 99 S Ct 2781, (1979). Due Process is violated if a defendant

is convicted on the basis of less than legally sufficient evidence. US Constitution, Am V and XIV; Const 1963, art I, sec 17; In re Winship, 397 US 358; 90 SCt 1068; 25 Led 2d 368 (1970).

III

While the minimum sentence is within the sentence guidelines, it is not proportional to the defendant

STANDARD OF REVIEW: When reviewing a sentence imposed by a trial court, the standard of review is abuse of discretion. *People v Milbourn, 435 Mich 630 (1990).*

A sentencing court may exercise its discretion to depart from the applicable guidelines range without articulating substantial and compelling reasons for doing so. A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness. A sentencing court must still justify the sentence imposed in order to facilitate appellate review. *People v Lockridge, 498 Mich 358 (2015).* The test for reasonableness will be the proportionality test from *People v Milbourn, 435 Mich 630 (1990); People v Steanhouse, 313 Mich App 1 (2015).*

In *People v Schrauben, 314 Mich App 181, 196; 886 NW 2d 173 (2016),* the Court of Appeals ruled that sentences falling within the guidelines range must be affirmed absent a mis-scoring of the guidelines or consideration of inaccurate information. However, there remains an exception for appellate review of constitutional challenges to a within guidelines sentence. *People v Conley, 170 Mich App 301; 715 NW 2d 177 (2006)* Dexter Taylor's constitutional rights to due process were violated by the sentence.

Although Michigan judges have broad discretion in imposing punishment, their discretion is limited by due process considerations. US Const Ams V, XIV; Mich Const 1963 art 1 sec 17; *Townsend v Burke*, 334 US 736, 68 S Ct 1252, 92 L Ed 2d 1690 (1948).

Defendant's claim is based on long-established principles, that a fair and proportionate sentence is based upon a trial court's consideration of the nature of the offense and the culpability and criminal history of the offender. Defendant recognizes that his sentence is within the guidelines, *People v Babcock*, 469 Mich 247; 666 NW 2d 231 (2003) but argues that the court chose a point in the wide range of acceptable alternatives that resulted in a disproportionate minimum term.

Proportionality is the threshold requirement for a valid sentence. It derives from both the federal and state constitutions, which are sources of due process protections separate and distinct from the legislative statutory guidelines. A disproportionate sentence may violate the US Constitution Amendment VIII's ban on cruel and unusual punishment regardless of whether it is based on accurate Michigan guidelines scoring. *Solem v Helm*, 463 US 277, 103 S Ct 3001, 77 L: Ed 2d 637 (1983); *Harmelin v Michigan*, 501 US 957, 111 S Ct 2780, 115 L Ed 2d 836 (1991); US Const Ams V, XIV; Mich Const 1963 art 1 secs 17, 15; As the Michigan Supreme Court observed in *People v Sinclair*, 387 Mich 91, 194 NW 2d 878 (1972):

It is ludicrous to suppose that the people who prohibited excessive fines and bail and cruel or unusual punishment intended thereby to vest unbridled power in judges to require bail, impose fines and inflict punishments.

It is equally unrealistic to conclude that the people intended to permit the legislature to give such unbridled power to the trial courts in the name of indeterminate sentencing.

See also *People v Lorentzen*, 387 Mich 167, 194 NW 2d 827 (1972). (:...the

Constitution has not left the liberty of the citizen of any state entirely to the indiscretion or caprice of its judiciary, but enjoins upon all that unusual punishments shall not be inflicted.”

In *People v Milbourn*, supra, the court stated:

“Where a given case does not present a combination of circumstances placing the offender in either the most or least threatening class with respect to the particular crime, then the Trial Court is not justified in imposing the maximum or minimum penalty respectively. Accordingly, if the maximum or minimum penalty is unjustifiably imposed in this regard, contrary to the legislative scheme, the reviewing Court must vacate the sentence and remand the case to the Trial Court for resentencing. The discretion conferred by the Legislature does not extend to exercises thereof which violate legislative intent; such exercises are, therefore, an abuse of discretion...

Conceivably, even a Sentence within the Sentencing Guidelines could be an abuse of discretion in unusual circumstances. As noted above, in the interest of allowing the Guidelines to continue to evolve, Trial Judges shall remain entitled to depart from the Guidelines if the recommended ranges are considered an inadequate reflection of the proportional seriousness of the matter at hand. Just as Guidelines may not be a perfect embodiment of the principle of proportionality, so too may a sentence within the Guidelines be disproportionately severe or lenient...

The guidelines represent the actual sentencing practices of the judiciary, and we believe that the second edition of the Sentence Guidelines is the best “barometer” of where on the continuum from the least to the most threatening circumstances a given case falls.” (*emphasis added*)

A given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender... *Milbourn*, at 636

The legislature, in setting a range of allowable punishment for a single felony, intended persons whose conduct is more harmful and who have more serious prior criminal records to receive greater punishment than those whose criminal behavior and prior record is less threatening to society.” *Milbourn*, *ibid*, at 651

Factors that have previously been considered in reviewing the proportionality of a sentence include: (1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expression of remorse, and the defendant's potential for rehabilitation. *Milbourn*, 435 Mich at 659-660.

In addition to these factors, the Michigan Supreme Court has noted that "except for extremely serious crimes or unusually disturbed persons, the goal of rehabilitating offenders with maximum effectiveness can best be reached by short sentences of less than five years imprisonment." *People v Lorentzen*, 387 Mich 167 (1972).

In the current case, a minimum sentence of 37 years is not proportional. Glaring factors not considered in the guidelines are Mr. Taylor's age and medical condition and the lack of any related offenses for nearly 20 years.

At sentencing, Mr. Taylor was fifty years old with pancreatic cancer. He will not live to complete a 37-year minimum sentence. The alleged assaults occurred in 1994 and 1996. He has never been accused of any other offenses involving violence or sexual misconduct. This is a clear indication that his rehabilitation occurred long ago, and society is not in need of further protection from him.

Other factors to be considered are raised in the letter Mr. Taylor wrote to the judge, attached to the Presentence Information Report. He accepts full responsibility for his acts and apologizes to his victims. He notes his decision to smoke crack cocaine led to his life of crime. He has five-year old twin daughters and would like to someday

be a part of their lives.

Dexter Taylor will spend the rest of his life in prison, although he is in poor health, the criminal sexual conduct he was convicted occurred in 1996, he had never again been charged with a similar offense and he showed remorse for his actions. Where then, would an unrepentant offender who committed recent comparable offenses fall on the same guidelines continuum? The imposition of the maximum possible sentence must be reserved only for the most severe combination of offense and offender. *People v Rosales*, 202 Mich App 33 (1993) Mr. Taylor does not merit that treatment.

IV

The statutory ban on appellate review of sentences within the sentencing guidelines is a violation of constitutionally mandated separation of powers

STANDARD OF REVIEW

As a constitutional question, this issue is reviewed de novo. *People v Pipes*, 475 Mich 267 (2006).

Mr. Taylor's right to appeal the terms of his sentence should not be precluded by Michigan law. He acknowledges MCL 769.34(10) reads:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing, absent an error in scoring the sentence guidelines or inaccurate information relied upon in determining the defendant's sentence. *People v Schrauben*, 314 Mich App 181, n. 1 (2016)

This statutory directive would appear to preclude appellate review of a sentence within the statutory sentencing guidelines range if properly scored on accurate

information. Defendant-Appellant submits the statutory provision is unconstitutional as a violation of separation of powers and due process of law and in derogation of the state constitutional right to appeal as a matter of right or by leave to appeal.

Article I, section 20 of the Michigan Constitution provides for:

An appeal as a matter of right, except as provided by law and appeal by an accused who pleads guilty or nolo contendere shall by leave of the court...

Mr. Taylor has, as a matter of right, a right to present arguments to the Court of Appeals seeking appellate review of his sentence. The attempted statutory mandate that this court cannot engage in appellate review is in derogation of that constitutional right. The legislature simply does not have the power to alter a constitutional provision by purporting to require that the Court of Appeals rule against a particular claim.

The powers of government are divided into three branches, legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. Const. 1963, art 3,2.

Article 6, section 1 of the Michigan Constitution provides:

The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court...

These constitutional provisions are clear that there is to be a separation of powers between the three branches of government and that the judicial powers rests “exclusively” in one court of justice. In *In Re 1976 PA 267*, 400 Mich 660; 225 NW2d

635 (1977) the Supreme Court described the judiciary's power:

The judicial powers derived from the Constitution include rulemaking, supervisory and other administrative powers as well as traditional adjudicative ones. They have been exclusively entrusted to the judiciary by the Constitution and may not be diminished, exercised by, nor interfered with by other branches of government without constitutional authorization.

MCL 769.34(10) directly interferes with an adjudicative function of the judiciary, and in particular with the adjudicative power of appellate review of sentencing recognized in *People v Coles*, 417 Mich 523 (1983). It is an unconstitutional effort by the legislature to both strip the judiciary of its constitutional power and to exercise in themselves by directing a court how to decide a particular case in controversy.

MCL 769.34(10) represents an unconstitutional denial of both procedural and substantive due process of law. U.S. Const., Am XIV; Const. 1963, art I, sec. 17. In *Dodge v Detroit Trust Co.*, 300 Mich 575; 2 NW2d 509 (1942), the Supreme Court described a denial of due process in a criminal trial as “the failure to observe that fundamental fairness essential to the very concept of justice.” In the context of an appeal, it offends due process to constitutionally provide for appellate review while prohibiting such appellate review at the whim of the legislature. Or, in a more specific example, it offends due process to be constitutionally protected against cruel and/or unusual punishment, but to allow the legislature to prohibit the judiciary from reaching such a conclusion if the sentence is within the legislature sentencing guidelines.

Finally, in *Lockridge* and *Steanhouse*, supra, the Michigan Supreme Court approved the *Milbourn* standards of proportionality in sentencing. As seen above, *Milbourn* specifically allowed for review of sentences within the guidelines. *Conley*,

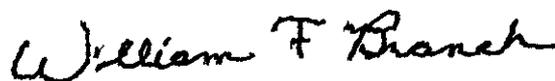
supra, allows for review of guidelines sentences based on constitutional claims

Defendant also requests that upon any remand, this matter be assigned to a different judge. Remand to a different judge is appropriate where the original judge would have difficulty putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication. A case should be remanded to a different judge on remand if it would be unreasonable to expect the trial judge to be able to put previously expressed findings out of mind without substantial difficulty. *People v Pillar*, 233 Mich App 267 (1998). There are multiple judges in the Criminal Division of the Wayne County Circuit Court. Thus, reassignment would not entail excessive waste or duplication. A reassignment should be ordered to preserve the appearance the justice.

STATEMENT OF RELIEF REQUESTED

Defendant/Appellant moves the conviction be set aside and the remanded for a new trial, excluding the 404(B) evidence of Erica Doak, in the alternative, for re-sentencing to a proportionately reduced term.

Respectfully submitted,



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