Skills Training for

Criminal Defense Lawyers

Sample Motions

Robyn Frankel

Attorney at Law

Huntington Woods, Michigan

September 30, 2016

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE
STATE OF MICHIGAN,

CASE NO: xxxxxxxx

Plaintiff,

Hon xxxxxx

v

X,

Defendant.
_____/

MOTION TO SUPPRESS AND REQUEST FOR EVIDENTIARY HEARING

NOW COMES Defendant, X, by and through his attorney, ROBYN B. FRANKEL and hereby requests that the Court grant the within Motion to Suppress and states in support:

1. Defendant is charged with one count of possession of less than 25 grams of cocaine, MCL §333.7408a, resulting from a traffic stop on June 6, 2016, in which Defendant was a passenger in a vehicle stopped for a traffic violation, in the City of Hazel Park;

2. Defendant was bound over for trial after preliminary examination before the Honorable Charles G. Goedert, in the 43rd District Court for the City of Hazel Park, on June 21, 2016;

3. The officer's extension of the traffic stop beyond the time necessary to investigate and resolve the traffic violation and the subsequent search of Defendant was unreasonable under the

States and Michigan constitutions. US Const Ams IV, XIV; Const.1963, art. 1, § 11; See also, *Michigan v Long*, 463 US 1032, 1051, 103 SCt 3469, 3481, 77 LEd2d 1201 (1983); *Terry v Ohio*, 392 US 1, 19, 88 SCt 1868, 1878–79, 20 LEd2d 889 (1968); *United States v. Davis*, 430 F3d 345, 353–354 (6th Cir. 2005). *United States v Noble*, 762 F3d 509, 519-520 (2014).

4. The officer's pat-down of Mr. X exceeded constitutional limitations where there was no reasonable suspicion that Mr. X was armed and dangerous. US Const Ams IV, XIV; Const 1963, art. 1, § 11; See also *Arizona v Johnson*, 555 US 323129 SCt 781172 LEd2d 694 (2009); *Terry v Ohio*, 392 US 1, 19, 88 SCt 1868, 1878–79, 20 LEd2d 889 (1968); *United States v Noble*, 762 F3d 509, 519-520 (2014).

5. Defendant hereby incorporates by reference and relies upon the simultaneously filed memorandum in support of this motion to suppress.

WHEREFORE, Defendant X respectfully requests that this Honorable Court hold an evidentiary hearing (scheduled for August 31, 2016) and grant the within motion to suppress.

Respectfully submitted,

ROBYN B. FRANKEL P43629

Attorney for Defendant
26711 Woodward Ave., Ste. 200
Huntington Woods, Michigan 48070

(248) 541-5200
robyn720@comcast.net

DATED: xxxxxxx

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE
STATE OF MICHIGAN,

CASE NO: xxxxx

Plaintiff,

Hon xxxxxx

v

X,

Defendant.
_____/

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS
AND
REQUEST FOR EVIDENTIARY HEARING

X was the passenger in an automobile which was stopped by the police on June 6, 2016. Mr. X was charged with one count of possession of less than 25 grams of cocaine as a result of that police contact. Preliminary examination was held on June 21, 2016, and the matter bound over for trial. Mr. X was arraigned before this Court on June 30, 2016. An evidentiary hearing was scheduled for August 31, 2016 at 1:30 p.m. and counsel directed to file a written motion by August 17, 2016. Defendant now files the instant motion and memorandum in support thereof.

STATEMENT OF RELEVANT FACTS

Officer Ryan McCabe, a two year employee of the Hazel Park Police Department, was on patrol on June 6, 2016. He was traveling on Eight Mile Road at 2:00 a.m., and followed a Chevrolet Tahoe onto

across a solid white line without using a turn signal and the officer initiated a traffic stop on the right-hand shoulder of the highway (PX 7).

The officer approached the passenger side of the vehicle. There was a female in the driver's seat, a female passenger in the back seat and Mr. X was seated in the front passenger seat. The officer obtained identification from the driver and from Mr. X (PX 18). There were no wants or warrants for anyone in the vehicle (PX 19). The officer addressed the driver through the passenger window - Mr. X being seated about 4 inches from the officer - and asked her where she had been and where she was going (PX 20). Mr. Matttice interrupted her to explain that they were coming from his brother's house near State Fair and Greeley, and were on their way to Berkley (PX 8). The officer then addressed Mr. X.

Mr. X said that his brother had recently moved to the State Fair/Greeley area (PX 21). Office McCabe "began to ask him some questions in regards to his brother's house, if he knew the address or anything of that nature that could kind of verify that that's where they were coming from due to the fact that that area is a high known – highly known drug area." (PX 10). Mr. X did not know his brother's house address. Officer McCabe agreed that it was possible that Mr. X had told him that the house was the second block north of Seven Mile Road and four blocks west of Dequindre. The officer thereafter engaged in a conversation with the rear seat passenger (Mr. X's girlfriend).

Officer McCabe's interaction with the two passengers lasted 5-10 minutes. As a result, "due to the area that they're coming from as well as Mr X's actions, I asked Mr. X if he would mind stepping out of the vehicle and coming back and speaking to me in front of my patrol

"demeanor and the way he was interjecting in all the conversations [the officer] was trying to have with the other passengers of the vehicle as well as the driver." (PX 12).

There was no odor of alcohol in the vehicle and no indication that the driver was under the influence (PX 21). The officer did not smell narcotics. No traffic citation was issued (PX 21). No one threatened the officer and no weapons were observed (PX 22). None of the occupants tried to escape (PX 22). Officer McCabe described that he was concerned about the vehicle and its occupants because most of the Hazel Park Police Department's narcotics cases "come from" the neighborhood identified by Mr. X. The officer could not recall the last time that a drug arrest in Hazel park was associated with State Fair/Greeley (PX 23). He surmised that he had "talked"to people or investigated the area sometime over the previous month (PX 23).

There had been no dispatch on June 6th regarding criminal acts occurring at State Fair and Greeley (PX 23-24). Neither the Chevy Tahoe nor any of its occupants matched the description of anyone involved in criminal conduct nor did the officer recognize any of them (PX 24).

Mr. X complied with the officer's request and exited the vehicle. Officer McCabe "ask[ed] him the same question I normally ask people when they step out of a vehicle and come back to talk to me, I asked him if he had anything on him, any weapons, anything illegal, anything that would hurt my person." (PX 13, 26). Mr. X replied that he did not and the officer could search him. The officer began a pat-down (PX 13). Officer McCabe described his usual pat-down procedure - employed herein - "I usually have people I'm patting down take their shoes off if they're willing." (PX 14, 26). Officer McCabe

movements as the officer began patting down the inside of his right sock/ankle area (the police report refers to "subtle furtive movements" - Appendix B). Offier McCabe felt what he believed, based upon his experience, to be a plastic corner tie and pulled a baggie from Mr. X's sock. It contained a white powder and was seized by the officer. A field test returned a positive result for cocaine. The within charges were thereafter filed.

ARGUMENTS

I.THE OFFICER'S EXTENSION OF THE TRAFFIC STOP BEYOND THE TIME NECESSARY TO INVESTIGATE AND RESOLVE THE TRAFFIC VIOLATION AND THE SUBSEQUENT SEARCH OF DEFENDANT WAS UNREASONABLE UNDER THE CIRCUMSTANCES PRESENTED AND WAS UNCONSTITUTIONAL UNDER THE UNITED STATES AND MICHIGAN CONSTITUTIONS. US CONST AMS IV, XIV ; CONST.1963, ART. 1, § 11.

A person is "seized" within the meaning of the Fourth Amendment if, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Michigan v Chesternut, 486 US 567; 108 SCt 1975; 100 LEd2d 565 (1988). Stopping an automobile and detaining its occupants constitutes a seizure, although the purpose of the stop is limited and the resulting prearrest detention is quite brief. New York v Class, 475 US 106, 115; 106 SCt 960, 966; 89 LEd2d 81 (1986). Thus, a law enforcement officer's stop of an automobile results in a seizure of both the driver and the passenger. Brendlin v California, 551 US 249; 127 SCt 2400; 168 LEd2d 132 (2007). A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver,

police activity that normally amounts to intrusion on "privacy and personal security" does not normally distinguish between passenger and driver. United States v Martinez–Fuerte, 428 US 543, 554, 96 SCt 3074, 49 LEd2d 1116 (1976). Thus, "[i]f either the stopping of the car, the length of the passenger's detention thereafter, or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit" Brendlin v California, supra, citing 1 W. Ringel, Searches & Seizures, Arrests and Confessions § 11:20, p. 11–98 (2d ed. 2007).

The Fourth Amendment and the parallel provision in the Michigan Constitution guarantee the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. U.S. Const. Am. IV; Const.1963, art. 1, § 11. This is not a guarantee against all searches and seizures but only against those which are unreasonable. United States v Sharpe, 470 US 675, 682; 105 SCt 1568, 1573; 84 LEd2d 605 (1985); People v Shabaz, 424 Mich 42, 52 (1985), cert dis 478 US 1017; 106 SCt 3326; 92 LEd2d 733 (1986); People v Orlando, 305 Mich 686, 690 (1943). Therefore, the touchstone of a reviewing court's Fourth Amendment analysis is always "the reasonableness in all the circumstances of the governmental invasion of the citizen's personal security." Michigan v Long, 463 US 1032, 1051, 103 SCt 3469, 3481, 77 LEd2d 1201 (1983) (quoting Terry v Ohio, 392 US 1, 19, 88 SCt 1868, 1878–79, 20 LEd2d 889 [1968]).

The standard developed by Terry v Ohio, supra, is applied in analyzing the propriety of a detention. See, People v Williams, 472 Mich 308 (2005), citing Knowles v Iowa, 525 US 113, 117; 119 SCt 484; 142 LEd2d 492 (1998). In applying Terry, the reasonableness of a

at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, *supra* at 20.

In this matter, Defendant does not contend that the initial traffic stop was improper. Thus, the issue is whether the detention, which continued beyond the amount of time necessary to complete the traffic stop, was reasonable. A seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. *United States v Noble*, 762 F3d 509, 519-520 (2014). A seizure justified solely by the interest in issuing a traffic ticket can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. *Id.* at 520 (Citation omitted).

> Probable cause to believe that a traffic violation has occurred is unlike probable cause to believe that a criminal violation has occurred and thus does not allow the police to detain a suspect indefinitely. *See Knowles v. Iowa*, 525 U.S. 113, 116–18, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (discussing the constitutional limitations of a traffic stop). "We have held that [a]n ordinary traffic stop ... is more akin to an investigative detention rather than a custodial arrest, and the principles announced in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), apply to define the scope of reasonable police conduct." *United States v. Bailey*, 302 F.3d 652, 657 (6th Cir.2002) (internal quotation marks and citation omitted). Thus, "any subsequent detention after the initial stop must not be excessively intrusive in that the officer's actions must be reasonably related in scope to circumstances justifying the initial interference." *United States v. Hill*, 195 F.3d 258, 264 (6th Cir.1999), *cert. denied*, 528 U.S. 1176, 120 S.Ct. 1207, 145 L.Ed.2d 1110 (2000). Once the purpose of the initial traffic stop is completed, an officer cannot further detain the vehicle or its occupants unless something happened *during the stop* to cause the officer to have a "reasonable and articulable suspicion that criminal activity [is] afoot." *Id.*; *see also Bailey*, 302 F.3d at 657–58; *United States v. Erwin*, 155 F.3d 818, 823 (6th Cir.1998) (en banc), *cert. denied*, 525 U.S. 1123, 119 S.Ct. 906, 142 L.Ed.2d 904 (1999).

United States v. Davis, 430 F3d 345, 353–354 (6th Cir. 2005).

and the subsequent search of Mr. X, the prosecution must establish that something occurred during the initial stop to create a reasonable suspicion of criminal activity. Reasonable suspicion only exists where the officer can articulate specific, particularized facts that amount to more than a "hunch" that criminal activity may be afoot. United States v Jeter, 721 F3d 746 (CA6, 3013); People v LoCicero, 453 Mich 496, 502 (1996). No such facts are present in this case.

In this case, the officer clearly articulated why he asked Mr. X to exit the vehicle. He did so because (1) Mr. X was interjecting answers to questions posed to other individuals in the vehicle and (2) the occupants were coming from a "high crime area." The officer failed to identify any criminal activity for which he had a reasonable suspicion. He neglected to so because there is none that fits the objective facts.

There is nothing reasonably suspicious about the objective fact that Mr. X could not recall the house numbers on his brother's residence. There is nothing reasonably suspicious about the fact that Mr. X answered the officer's questions since it was his brother's residence which they had been visiting. There is nothing reasonably suspicious about the fact that Mr. X interacted with the officer in light of the fact that the officer was standing at Mr. X's passenger side window, four inches from Mr. X's face and speaking into the vehicle. And, there is nothing reasonably suspicious about the fact that Mr. X told the officer that they had been in the area of State Fair and Greeley - where there were no ongoing criminal investigations nor any specific descriptions of criminal conduct involving the Chevy Tahoe or any of its occupants. The officer's arrest and subsequent search of Mr. X, which occurred after the completion of the reason for the traffic stop, were unlawful.

CONSTITUTIONAL LIMITATIONS WHERE THERE WAS NO REASONABLE SUSPICION THAT MR. X WAS ARMED AND DANGEROUS. US CONST AMS IV, XIV ; CONST.1963, ART. 1, § 11.

Most traffic stops represent a minor inconvenience to the vehicle's occupants but they represent potential danger to police officers. As a result, police officers may order drivers and passengers out of the automobile during the traffic stop without offending the Fourth Amendment. Maryland v. Wilson, 519 US 408, 414; 117 SCt 882; 137 LEd2d 41 (1997).

> However, while this interest in officer safety is "legitimate and weighty," Pennsylvania v. Mimms, 434 U.S. 106, 110, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), an officer may "perform a 'patdown' of a driver and any passengers [only] upon reasonable suspicion that they may be armed and dangerous." Knowles [v. Iowa, 525 U.S. 113, 118; 119 S.Ct. 484; 142 L.Ed.2d 492 (1998)], (citing Terry, 392 U.S. 1, 88 S.Ct. 1868).
>
> United States v Noble, supra at 521.

"Reasonable suspicion is based on the totality of the circumstances," Joshua v. DeWitt, 341 F3d 430, 443 (6th Cir.2003) (citation omitted), and it exists if "a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger," Terry, 392 U.S. at 27, 88 S.Ct. 1868. Thus, in order to justify a pat-down of the driver or a passenger during a traffic stop, the police must harbor reasonable suspicion that the person subjected to the frisk is specifically armed and dangerous. Arizona v Johnson, 555 US 323129 SCt 781172 LEd2d 694 (2009). No such facts existed in the matter before the Court.

Officer McCabe was not afraid of the subjects in the Chevy Tahoe. In fact, he remained at the side of the vehicle talking with each of the occupants for a period of time before he ever requested Mr. X to exit the vehicle. He spoke with the driver, with Mr. X and then

family issues prior to asking Mr. X to join him on the side of the highway. Had there been a reasonable suspicion that Mr. X was armed and dangerous it might have been prudent to have Mr. X outside of the vehicle prior to the officer diverting his attention and observations away from Mr. X (who was four inches from the officer's face) and engaging in social conversation with the rear-seat passenger.

In United States v Noble, supra, the Sixth Circuit reversed the defendants convictions on a finding that the officers lacked reasonable suspicion that the defendants were armed and dangerous. Therein, the suspect vehicle - a Chevy Tahoe - was under surveillance and thought to be connected to narcotics trafficking. The defendant was a passenger in the vehicle. Officers initiated a traffic stop, asked the defendant to exit the vehicle and frisked him for weapons on the basis of his nervousness, the fact that the Tahoe was suspected in a DEA investigation, and because the officer's training told him that drug traffickers were often armed. The officer located narcotics on Mr. Noble's person and an indictment was obtained. Defendant's challenge to the search was denied. On appeal, the Sixth Circuit reversed the conviction and found the frisk to be unsupported by any reasonable suspicion that Mr. Noble had been armed and dangerous.

The Sixth Circuit ruled the defendant's nervousness was an unreliable indicator of dangerousness and an improper basis for the weapons frisk. Id. at 522. The Court specifically rejected the argument that the defendant's presence in a vehicle suspected of involvement in drug trafficking supported the frisk. Although the Court agreed that the officer's belief that individuals involved in drug trafficking carry weapons was relevant, the Court added that they have "always required some corroboration that particular individuals are involved in dealing drugs before allowing a frisk for weapons". Id. Thus, the Court

> Here, there is no specific fact that links Noble to the drug-trafficking operation beyond the Tahoe. Detective Hart never saw the occupants of the Tahoe at the La Quinta Inn, let alone saw them do something suspicious. Cf. Heath, 259 F.3d at 528–29 (6th Cir.2001) (holding that there was reasonable suspicion after the police observed the suspect, who had a prior drug-trafficking conviction, at suspected drug locations, engaging in suspicious behavior). Officer Ray did not recognize Adkins as a drug trafficker, nor did he have any idea who Noble was prior to the frisk. Cf. Bell, 762 F.2d at 501 (holding that there was reasonable suspicion, in part, because a suspect's companion was known to be armed and dangerous). As a result, there is nothing linking Noble to the drug-trafficker profile that might allow for a frisk. We think that the Fourth Amendment requires such a link. See United States v. Moore, 390 Fed.Appx. 503, 507 (6th Cir.2010) (upholding the suppression of evidence, in part, because the police officer never corroborated that individuals in a car with suspected ties to drug trafficking had links, themselves, to drugs). Otherwise, the police could frisk any "nervous" passenger, who is in a car suspected of having drug-
> trafficking ties, including a fourth grader, a ninety-five-year-old gentleman with Parkinson's disease, or a judge of this court.
>
> United States v. Noble, 762 F.3d 509, 524–525 (6th Cir. 2014) 9footnotes omitted).

The case presented herein is analogous to Noble, with the exception that in this case, there was even less support for the frisk. In this case, there was no pre-existing surveillance or alleged connection to drug trafficking. In this case, the officer merely imagined a narcotics connection because the parties were coming from a particular geographic location. No such imagined connection to drug trafficking supports a reasonable suspicion that Mr. X was armed and dangerous.

Similarly, as was the case in Noble, the officer did not recognize any of the vehicle occupants, none of them threatened him nor gave any indication that they possessed a weapon. There was no pre-existing evidence that X was involved in drug trafficking. There was no reason to suspect that Mr. X was going to assault the officer or was hiding anything in his hands. There was definitely no evidence

socks or in his shoes nor any other threat of danger to the officer's safety. The frisk for weapons was unreasonable.

Defendant anticipates that the prosecution may contend that Mr. X consented to this generalized search of his person. He did not. The officer, by his testimony, asked Mr. X, "if he had anything on him, any weapons, anything illegal, anything that would hurt my person." (PX 13). He later clarified that he had asked whether Mr. X had any guns, knives bombs or anything illegal that could be used to hurt the officer (PX 26). It was in response to that question that Mr. X responded, no, go ahead and search me. An objective and fair assessment of the situation illustrates that Mr. X's comment was made to show that he intended to cooperate with the officer. It was a simple acquiescence to the forthcoming pat-down. It was nothing more and it would be intellectually dishonest to contend otherwise. X is not police officer and he is not a lawyer. Legal distinctions and legal terminology should not and cannot be imputed to him. The officer indicated a concern for his safety and Mr. X's response was nothing more than saying, okay, go ahead and check that I'm not armed.

III.CONCLUSION

The narcotics discovered in Mr. X's sock were unlawfully obtained. The physical evidence represents the fruit of the poisonous tree. That evidence must be suppressed. The connection between the unconstitutional police conduct and the evidence seized was not sufficiently attenuated to permit use of that evidence at trial. *See Wong Sun v United States*, 371 US 471; 83 SCt 407; 9 LEd2d 441 (1963), *Nardone v United States*, 308 US 338; 60 SCt 266; 84 LEd 307 (1939), *Silverthorne Lumber Co. v. United States*, 251 US 385; 40 SCt 182; 64 LEd 319 (1920).

Respectfully submitted,

ROBYN B. FRANKEL P

Attorney for Defendant
26711 Woodward Ave.,

Huntington Woods,

(248) 541-5200
robyn720@comcast.net

43629

Ste. 200

Michigan 48070

DATED: August 17, 2016

APPENDIX A

APPENDIX B

[1]Transcript attached as Appendix A.

STATE OF MICHIGAN

IN THE CIRCUIT COURT OF THE COUNTY OF OAKLAND

STATE OF MICHIGAN,

Plaintiff, Case No. Xxxxx

v

Honorable

xxxxxx
X

Defendant.
_____/

ROBYN B. FRANKEL (P43629)
Attorney for Defendant

Oakland County Prosecutor
200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656
_____/

MOTION TO QUASH COUNTS II AND IV

NOW COMES Defendant, **X**, by and through his attorney, **ROBYN B. FRANKEL** and moves this Honorable Court, to grant the within Motion to Suppress, and states in support thereof that:

1. Defendant X is charged in a four count Information with, Count I: Delivery/Manufacture Marijuana, Count II: Possession of a Firearm in the Commission of a Felony, Count III: Felon in Possession of a Firearm, and Count IV: Possession of a Firearm in the Commission of a Felony.

2. Preliminary Examination was held before the

10, 2004. Defendant was bound over as charged .

3. That under information and belief the judge at the preliminary examination abused his discretion in binding Defendant over for trial as to Counts I and IV, for the reasons that the prosecutor failed to make a showing of the necessary elements.

4. This motion is supported by the attached Memorandum in Support of Motion to Quash, which is attached hereto and made a part hereof.

WHEREFORE, Defendant respectfully requests that this Court grant the within motion and quash Counts II and IV of the Information.

Respectfully submitted,

_____

ROBYN B. FRANKEL (P43629)

Dated: xxxxxx

STATE OF MICHIGAN

IN THE CIRCUIT COURT OF THE COUNTY OF OAKLAND

STATE OF MICHIGAN,

Plaintiff, Case No. Xxxx

v

Honorable

xxxxx
X

Defendant.
_____/

ROBYN B. FRANKEL (P43629)
Attorney for Defendant

Oakland County Prosecutor
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656
_____/

MEMORANDUM IN SUPPORT OF MOTION TO QUASH COUNTS II AND IV

STATEMENT OF FACTS

Defendant X is charged in a four count Information with, Count I: Delivery/Manufacture Marijuana, Count II: Possession of a Firearm in the Commission of a Felony, Count III: Felon in Possession of a Firearm, and Count IV: Possession f a Firearm in the Commission of a Felony. Preliminary Examination was held before the Honorable Michael Martinez in the 50th District Court on June 10, 2004. Defendant was bound over as charged. The

2004, at 123 Green Street in the City of Pontiac (PX 5).

A warrant authorizing the search of Defendant's residence was issued on April 30, 2004. That warrant authorized the search of the residence at 123 Green Street in Pontiac, and granted permission to search for marijuana and other illegally possessed controlled substances as well as drug paraphernalia, proof of residency, proof of identity of the suspects, drug proceeds and other various evidence of narcotics trafficking.

Pontiac Police Officer Charles Janczarek testified that he participated it the execution of the search warrant at 123 Green Street on April 30, 2004 (PX 4-5). Defendant was the only person present at the time the warrant was executed (PX 5). He was in a bedroom in the home near an open window (PX 6). The officer seized $252.00 fro Mr. X's person and located correspondence with Mr. X's name and address in that bedroom (PX 10). He also located a $1205.00 inside of a coat pocket in the bedroom closet (PX 11). The officer also searched the kitchen. He did not locate any weapons in either the kitchen or the bedroom (PX 16).

Officer Daniel Main also participated in the search of the residence at 123 Green Street (PX 21). He observed Defendant throw a shoe-box out the bedroom window (PX 23). It was later learned that the shoe-box contained a one-pound bag of marijuana (PX 23). The officer searched the bedroom and located a digital scale, a small amount of money and .38 caliber rounds in a dresser drawer (PX 24). He opined that the amount of marijuana recovered was consistent with an intent to distribute (PX 27).

Officer Shannon Makowski participated in the search of 123 Green Street as well. She located a box of baggies in a

the bedroom as well (PX 37). Subsequently, Officer Makowski searched a 1995 Dodge Intrepid in the driveway and located a loaded .38 revolver inside of a box of blank CDs (PX 38, 40). The vehicle was titled to Reuben X (PX 38). Officer Makowski also testified that while inside of the residence, Officer Chandler had drawn her attention to a folded up treadmill against the wall of the living room – near to the treadmill was an Adidas knit cap which - when opened - contained a handgun (PX 43). There was no direct entry from the bedroom into the living room (PX 50). There was a wall between the two rooms (PX 55).

The prosecution moved to bind over Defendant as charged. Both felony firearms charges were attached to the underlying narcotics allegation - that Defendant possessed the two firearms during the commission of the marijuana - one firearm in the living room and the other in the car outside of the home. The trial court ruled that the issue of constructive possession of the weapons was a factual question for the jury and bound over Defendant as charged (PX 70-72). Defendant now files the instant motion to quash as to the two felony firearms charges.

ARGUMENT

THE DISTRICT COURT JUDGE ABUSED HIS DISCRETION IN BINDING DEFENDANT OVER ON TWO COUNTS OF FELONY FIREARM WHERE THERE WAS NO EVIDENCE THAT DEFENDANT POSSESSED EITHER OF THE FIREARMS AT THE TIME THAT HE COMMITTED THE CONTROLLED SUBSTANCE FELONY.

An examining magistrate is required to bind over a defendant for trial if it appears after the Preliminary Examination that a felony has been committed and there is probable cause to

MSA 28.931. This inquiry is not limited to whether the prosecution has presented evidence on each element of the offense. Rather, the magistrate is required to make his determination "after an examination of the whole matter." See People v Gadient, 185 Mich App 280, 285 (1990). And, although the prosecution may have presented some evidence on each element, if upon an examination of the whole matter the evidence is insufficient to satisfy the magistrate that the offense charged has been committed and that there is probable cause to believe that the defendant committed it, then he should decline to bind the defendant over on the offense charged. Id, see also People v Stafford, 434 Mich 125, 133 (1990). One of the primary purposes of Preliminary Examination is to "weed out" unnecessary charges and allegations. People v Duncan, 388 Mich 489 (1972). An examining magistrate's decision to bind over for trial is reviewed for an abuse of discretion. See People v King, 412 Mich 145 (1981); People v Sherman, 188 Mich App 91, lv den 439 Mich 878 (1991); People v Nickleberry, 121 Mich App 150 (1982). A reviewing court "will not substitute its judgment for that of the examining magistrate, but will only reverse if it appears that the magistrate clearly abused his discretion. People v Talley, 410 Mich 378, 385-388; 301 NW2d 809 (1981)." People v Gadient, supra at 286; see also People v Selwa, 214 MA 451 (1995); People v King, supra; People v Sherman, supra; People v Nickelberry, supra; People v Goode, 106 Mich App 129, 136 (1981); People v Doss, 406 Mich 90, 101 (1979).

In this matter, the District Court Judge abused his discretion in binding over Defendant on the two counts of felony firearm. In order to support a bind-over for felony firearm, the

firearms during the commission of the underlying felony. People v Avant, 235 Mich App 499, 505 (1999); People v Davis, 216 Mich App 47, 53 (1996). A person has possession of a weapon when it is accessible and available at the time that the crime is committed. People v Terry, 124 Mich App 656, 662 (1983). Possession may be actual or constructive. People v Hill, 433 Mich 464, 469-471 (1989). Possession may be proved by circumstantial evidence. People v Burgenmeyer, 461 Mich 431, 437-438 (2000).

Burgenmeyer repesents the current state of the law in Michigan - at least in cases where the underlying charge is possession of narcotics. Therein, the police executed a search warrant at the defendant's home. They located narcotics in a dressed drawer as well as a weapon on top of the dresser. The defendant was not present at the tie that the warrant was executed, nonetheless, the Michigan Supreme Court upheld the conviction for felony firearm finding that the fact that the defendant did not possess the firearm at the time of the police raid was legally irrelevant. The Court held that proper inquiry is whether the defendant possessed a firearm at the time that he committed the felony, with particular focus on the offense dates specified in the information. In Burgenmeyer, the police found the cocaine in defendant's dresser drawer and firearms on top of the dresser, and thus, the jury could reasonably infer from the close proximity of the items that defendant possessed both at the same time. Since the prosecution charged and presented evidence that the possession crimes were committed shortly before defendant's arrest and the police search, the proximity of the firearm to the drugs at the time of the search was sufficient to establish defendant's earlier possession.

Burgenmeyer Court noted that constructive possession exists if there is proximity to the article together with the indicia of control - if the location of the weapon is known and it is reasonable accessible to the defendant. *Id* at 470-471. The facts herein are distinguishable, and *Burgenmeyer* does not govern the result.

In this case, the narcotics and the weapons were not found in the same room. Neither weapon was in an area that was immediately accessible to the marijuana. No evidence was presented that Mr. X was aware of the existence of either firearm. In fact, neither firearm was found in an open and obvious location. One firearm was inside of a hat in the living room on a folded up treadmill, and the other was in a vehicle outside of the home containing the narcotics. No evidence was presented that either weapon was registered to Mr. X - which might have supported a finding that he knew of their existence in his home or vehicle. Nor was there any evidence presented that would support a finding that Mr. X was in the vehicle or in the living room on the date alleged - April 30, 2004. All of the evidence was that he was in his bedroom at all times. Nowhere did the informant or affiant alleged that any illegal behavior occurred anywhere else in the residence nor was there any evidence that any illegal behavior occurred iteh vehicle on April 30, 2004. The Supreme Court in *Burgenmeyer* noted that the key focus is whether the defendant possessed a firearm at the time that he committed the felony, with particular focus on the offense dates specified in the information. In this case, those elements have not been established. Furthermore, prior case law supports the conclusion that Mr. X was not in possession of the firearms for purposes of criminal culpability under the circumstances

narcotics charges are instructive in this regard.

The element of "possession" denotes dominion and control over the item at issue, to the exclusion of all others except the rightful owner. Pearson v United States, 192 F2d 681, 689 (6th Cir, 1951). To be in possession, "a person must knowingly have both the power and the intention at a given time to exercise dominion and control over a thing." United States v Henneberry, 719 F2d 941, 945 (8th Cir, 1983). Such control must be actual or constructive, and not merely "a passing control, fleeting and shadowy in its nature." United States v Parent, 484 F2d 726, 732 (7th Cir, 1973), quoting from United States v Wainer, 170 F2d 603, 606 (7th Cir, 1948).

Michigan case law has mirrored federal law in holding that the term "possession" necessarily contemplates physical dominion or right of control over the substance with knowledge of its presence and character. People v Germaine, 234 Mich 623 (1926); People v Mumford, 60 Mich App 279 (1975); People v Stewart, 52 Mich App 477 (1974). Circumstantial evidence from which reasonable inferences can be drawn may support a conviction. However, mere presence of an individual at a location where drugs are found is not sufficient to sustain a conviction. People v Wolfe, 440 Mich 508, 520 (1992). See, e.g., People v Butler, 413 Mich 377, 384-385; 319 NW2d 540 (1982); People v Harper, 365 Mich 494, 500; 113 NW2d 808 (1962); People v Burrel, 253 Mich 321, 323; 253 NW 170 (1931); People v Summers, 68 Mich 571, 581-582; 243 NW2d 689 (1976); People v Gordon, 60 Mich App 412, 418-419; 231 NW2d 409 (1975); United States v Castillo, 844 F2d 1379, 1392 (CA 9, 1988); United States v Rackley, 742 F2d 1266, 1271 (CA 11, 1984). "Physical proximity to drugs, or mere presence in an

White, 932 F2d 588, 589 (CA 6, 1991).

In Wolfe, the Supreme Court recognized that:

> "It is well established that a person's mere presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. See e.g., Harper, supra, [365 Mich 494 (1962)] at 500; People v Summers, 68 Mich App 571, 581-582 (1976); United States v Castillo, 844 F2d 1379, 1392 (CA 9, 1988); United States v Rackley, 742 F2d 1266, 1271 (CA 11, 1984). Instead, some additional connection between the defendant and the contraband must be shown. Castillo, supra, citing United States v Disla, 805 F2d 1340 (CA 9, 1986)." Id at 520.

Some nexus between the defendant and the contraband is most essential, especially where other persons to whom possession might be attributed are also present in proximity to or have access to the contraband. People v Davenport, 39 Mich App 252 (1972); People v Ridgeway, 74 Mich App 306 (1977); People v Simpson, 104 Mich App 731 (1980).

As the Court explained in People v Fetterley, 229 Mich App 511, 515; 583 NW2d 199 (1998):

> A person need not have physical possession of a controlled substance to be found guilty of possessing it. [People v Wolfe, 440 Mich 508, 519-20; 489 NW2d 748, amended 441 Mich 1201 (1992).] Possession may be either actual or constructive, and may be joint as well as exclusive. Id. The essential question is whether the defendant had dominion or control over the controlled substance. People v Konrad, 449 Mich 263, 271; 536 NW2d 517 (1995). **A person's presence at the place where the drugs are found is not sufficient, by itself, to prove constructive possession; some additional link between the defendant and the contraband must be shown.** Wolfe, supra at 520; People v Vaughn, 200 Mich App 32, 36; 504 NW2d 2 (1993). However, circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. People v Sammons, 191 Mich App 351, 371; 478 NW2d 901 (1991). (Emphasis supplied).

In short, Michigan Courts have repeatedly held that the prosecution must produce evidence, beyond a defendant's mere

the offense. A sufficient nexus must exist. Wolfe, 440 Mich at 521.[1] In this case, no such nexus has been established and thus, this Court must quash Counts Ii and IV, charging possession of a firearm during the commission of a felony.

WHEREFORE, Defendant respectfully requests that this Court grant the within motion and quash Count II and IV of the within Information.

Respectfully submitted,

ROBYN B. FRANKEL

(P43629)

Attorney for Defendant

Dated: xxxxxx

1

Under federal law also, more is required to sustain a conviction of carrying a firearm in relation to a drug trafficking crime. In United States v Brown, 151 F3d 476 (CA 6, 1998), the Sixth Circuit Court of Appeals held that the federal district court properly dismissed the charge of carrying a firearm in relation to a drug trafficking crime based upon the insufficiency of the evidence. The firearm was merely present at the location where the defendant was found. See also Bailey v United States, 516 US 137; 116SCt 501; 133 LEd2d 472 (1995), where the Supreme Court held that for purposes of 18 USC 984(c)(1), which prohibits the use or carrying of a firearm during a drug trafficking crime, evidence that the police discovered a loaded pistol in the trunk of the car the defendant was driving, as well as 30 grams of cocaine in the passenger compartment, was insufficient to support the defendant's conviction for use.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, Case No. xxxx

v Hon. Xxxx

X,

Defendant.
_____/

ROBYN B. FRANKEL (P43629)
Attorney for Defendant

Oakland County Prosecuting Attorney
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656
_____/

MOTION *IN LIMINE* TO ADMIT EVIDENCE OF PRIOR ALLEGATIONS OF MOLESTATION

Defendant, **X**, by and through his attorney, **ROBYN B. FRANKEL**, hereby moves this Court for an order granting the within Motion *in limine* to Admit Evidence of Prior Allegations of Molestation, and states in support thereof that:

1. Defendant is charged with two counts of criminal sexual conduct in the first degree and two counts of criminal sexual conduct in the second degree. Jury trial is scheduled to begin March 7, 2008.

2. During the original trial of this matter, Defendant's prior counsel sought to introduce evidence that the complainant had been

under the provisions of the rape-shield statute. Defendant now requests a pretrial ruling as to the admissibility of this evidence and contends that it is not prohibited by the rape-shield statute.

3. Defendant is *not* seeking to introduce evidence that the complainant was in fact sexually active in the past or had a history of sexual promiscuity. Defendant only seeks to admit evidence that the complainant's mother *believed* that her son had been the subject of an earlier sexual molestation. Defendant seeks admission of this evidence in order to explain the motivations of the complainant's mother and the likelihood that her resulting extensive and excessive interrogation of her son resulted in a false allegation.

4. In this matter, because Defendant is not seeking to introduce evidence of the complainants prior sexual activity, the statute is not implicated. Defendant is not seeking to introduce the fact that the complainant had a history of sexual promiscuity or otherwise engaged in sexual activity in the past. It is the fact that his mother believed the allegation that is important to this case.

5. Venita Williams believed that her son had been previously sexually molested. Research establishes false allegations may be the result of a parent's hyper-vigilance and over-
zealous questioning where a child has been subject to prior abuse. Her knowledge of that prior allegation and her belief therein is thus relevant to her motive and bias in this matter. Thus, the evidence is not precluded by the rape-shield statute.

6. Even if this Court rules that the rape-shield statute is implicated under the fact of this case, the statute does not prevent the admission of the proffered evidence herein. While Michigan's rape-shield law, MCL 750.520j, operates to limit a defendant's presentation of evidence in certain circumstances, it may not be applied to deny a

witnesses. See *People v Arenda*, 416 Mich 1 (1982); *People v Hackett*, 421 Mich 338 (1984); *People v Lalone*, 432 Mich 103 (1989); see also *People v Morse*, 231 Mich App 424 (1998). The statute is not a blanket prohibition on the admission of evidence of prior sexual activity.

7. The Michigan Supreme Court has consistently ruled that in the face of a constitutional challenge based upon the right of confrontation, "evidentiary rules and policy are secondary to the protection of individual freedoms." *People v Lalone, supra*, citing *Rock v Arkansas*, 483 US 44; 107 SCt 2704; 97 LEd2d 37 (1987).

8. In *People v Hackett, supra* the Michigan Supreme Court ruled that application of the rape-shield statute must be made on a case-by-case basis and that its application might violate the Sixth Amendment rights of a defendant in a particular case:

> "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." *Hackett, supra* at 348.

9. Defendant has a constitutional right to present a defense under the federal constitution's Sixth Amendment protections of his right to confront the witnesses against him, as well as from the Due

Mississippi, 410 US 284, 302, 93 SCt. 1038, 1049, 35 LEd2d 297 (1973); *; Washington v Texas*, 388 US 24; 87 S Ct 1920; 18 L Ed 2d 1019 (1967); *People v Whitfield*, 425 Mich 116, 124-25 n 1 (1986). *Davis v Alaska*, 415 US 308, 94 SCt 1105, 39 L.Ed.2d 347 (1974); *California v Trombetta*, 467 US at 485, 104 SCt, at 2532; cf. *Strickland v Washington*, 466 US 668, 684-685, 104 SCt 2052, 2063, 80 LEd2d 674 (1984); *United States v. Cronic*, 466 US 648, 656, 104 SCt 2039, 2045, 80 LEd2d 657 (1984).

10. The right of compulsory process, which enables the accused to present favorable evi

dence, is crucial to a fair trial. *Rock v Arkansas*, 483 US 44; 107 S CT 2704; 97 LEd2d 37 (1986), *Chambers v Mississippi,* 410 US at 302; *Ake v Oklahoma*, 470 US 68; 105 S CT 1087; 84 LEd2d 53 (1985); *Washington v Texas,* 388 US at 19 ("...the right to offer the testimony of witnesses...is in plain terms...the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies").

11. If this Court excludes the evidence of Ms. Williams' belief in the prior molestation of her son, Defendant will be prohibited from presenting a complete defense to the charges herein.

12. Defendant's argument is further detailed in the simultaneously filed memorandum in support of the within motion, which is incorporated by reference herein.

WHEREFORE, for all of the reasons stated herein, this Honorable Court must permit the admission of the proposed evidence.

Respectfully submitted,

ROBYN B. FRANKEL

(P43629)

Attorney for Defendant

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, Case No. Xxxxx

v Hon. xxxxxxx

X,

Defendant.
_____/
ROBYN B. FRANKEL (P43629)
Attorneys for Defendant

Oakland County Prosecuting Attorney
_____/

MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE* TO ADMIT

EVIDENCE OF PRIOR ALLEGATIONS OF MOLESTATION

Relevant Facts

During the original trial of this matter, DJ testified regarding the alleged offenses. During cross-examination, defense counsel reviewed the Care House notes of DJ's interview. Part of that interview established that DJ had alleged a prior sexual molestation by another individual. The following colloquy occurred:

> Q Do you remember telling the people at Care House that a boy named Nas has squeezed your stuff before?
>
> A Who?

A Who.

Q N-A-S, Nas?

A No.

Q Do you remember being asked, 'What did Nas do'?
'He's a little kid and he did it when I was asleep'.
'What did he do?'
'He squeezed it. My stuff'.
Do you remember that?

A No." (TV 52-53)

Subsequently, the prosecution called Sarah Visger Killips as a witness. Ms. Killips was the counselor who interviewed DJ and Dion Turner at Care House (TV 68). Ms. Killips had taken and provided detailed notes of the interviews with both boys. Defendant moved to admit those documents in order to impeach DJ and his lack of recollection of the interview and of the answers that he provided to Ms. Killips (TV 84). The prosecution objected to the admission of the documents on hearsay grounds. The prosecutor also contended that the portion of DJ's statement wherein he referred to the prior molestation by "Nas" was also prohibited by the rape- shield statute (TV 88). This Court ruled that the documents would be admitted but that the references to "Nas" were to be deleted under the rape-shield statute (TV 92-93).

In February 2007, this Court granted a new trial in this matter. As a result, Defendant retained new counsel and certain witnesses were re-interviewed. One of those witnesses was Lynn Duncan. Ms. Duncan had been called as a prosecution witness in the original trial. Ms. Duncan was a kindergarten teacher at Key Elementary School. Her room was across the hall from Mr. Perry's classroom and the complainants were her students. During her interview, Ms. Duncan advised that within several days of the alleged incident, Venita

this (or something similar) had happened to DJ previously (See Affidavit attached as Appendix A). Ms. Williams indicated that she felt really bad that this had happened again.

Defendant now contends that this evidence should not be excluded under the provisions of the rape-shield statute. The evidence that Venita Williams *believed* that her son had been previously molested is not prohibited by the statute. Furthermore, any such exclusion would deprive Defendant of his constitutional rights to a fair trial and specifically interfere with his constitutional rights to present a defense and his right to confrontation.

Argument

The right to present a defense arises from both the federal constitution's Sixth Amendment - which protects the accused's rights to compel the attendance of witnesses and to confront the witnesses against him - as well as from the Due Process Clause's fundamental fairness guarantee. *Chambers v Mississippi*, 410 US 284, 302, 93 SCt. 1038, 1049, 35 LEd2d 297 (1973); ; *Washington v Texas*, 388 US 24; 87 S Ct 1920; 18 L Ed 2d 1019 (1967); *People v Whitfield*, 425 Mich 116, 124-

25 n 1 (1986). *Davis v Alaska*, 415 US 308, 94 SCt 1105, 39 L.Ed.2d 347 (1974); *California v Trombetta*, 467 US at 485, 104 SCt, at 2532; cf. *Strickland v Washington*, 466 US 668, 684-685, 104 SCt 2052, 2063, 80 LEd2d 674 (1984); *United States v. Cronic*, 466 US 648, 656, 104 SCt 2039, 2045, 80 LEd2d 657 (1984). This right has been long recognized under Michigan law as well. *People v Whitfield*, 425 Mich 116, 124 fn 1; 388 NW2d 206 (1986); *People v Hackett*, 421 Mich 338, 353 (1984); *People v Posby*, 227 Mich App 219, 226 (1997); *People v Adamski*, 198 Mich App 133, 138; (1993). Few rights are more

testimony of witnesses who support his version of the facts.

The right of compulsory process, which enables the accused to present favorable evidence, is crucial to a fair trial. Rock v Arkansas, 483 US 44; 107 S CT 2704; 97 LEd2d 37 (1986), Chambers v Mississippi, 410 US at 302; Ake v Oklahoma, 470 US 68; 105 S CT 1087; 84 LEd2d 53 (1985); Washington v Texas, 388 US at 19 ("...the right to offer the testimony of witnesses...is in plain terms...the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies"). "[T]he Constitution guarantees criminal defendants `a meaningful opportunity to present a complete defense.'" Crane v Kentucky, 476 US 683, 690; 106 S Ct 2142, 2146; 90 L Ed 2d 636 (1986) (internal citation omitted); Rock v Arkansas, 483 US 44, 55, 58; 107 S Ct 2704; 97 L Ed 2d 37 (1987); Chambers v Mississippi, supra, 410 US at 302 (defendant is entitled to a "fair opportunity to defend against the State's accusations"). The defendant's right to present evidence in support of his defense "stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States." Washington v Texas, supra, 388 US at 18.

The Rape-Shield Statute is not a Blanket Prohibition on the Introduction of Evidence of Prior Sexual Conduct.

The right to confrontation is not altogether without limits. Under certain circumstances, Michigan's rape-shield law, MCL 750.520j, operates to limit a defendant's presentation of evidence. People v Arenda, 416 Mich 1, 8 (1982). The statute provides in part:

> "(1) Evidence of specific instances 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 is inflammatory or prejudicial nature does not outweigh its probative value:

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy or disease."

The statute reflects a legislative policy determination that evidence of sexual conduct as evidence of character and for impeachment, while perhaps logically relevant, is not legally relevant. People v Hackett, supra at 346; People v Morse, 231 Mich App 424, 429-430 (1998). However, in the case of a child complainant, the appellate courts have consistently held that there may be a proper purpose, unrelated to character or impeachment, for the introduction of such evidence. Thus, case law illustrates that the statute does not represent a blanket prohibition.

The rape-shield legislation was passed in 1974. Subsequent to that time, challenges were raised to the constitutionality of the statute. The Michigan Supreme Court, in a handful of cases, explained the basis for the development of the legislation and sought to qualify its application. See People v Arenda, 416 Mich 1 (1982); People v Hackett, 421 Mich 338 (1984); People v Lalone, 432 Mich 103 (1989); see also People v Morse, 231 Mich App 424 (1998).

In People v Arenda, supra, the defendant was charged with criminal sexual conduct involving an eight year old boy. He sought to introduce evidence of the complainant's sexual conduct with others - if any such evidence existed. The trial court excluded the evidence. On appeal, the defendant raised a challenge to the constitutionality of the statute. The Court of Appeals reversed his conviction, but it was reinstated by the Michigan Supreme Court. The Michigan Supreme Court found that the statute was facially constitutional and was also constitutional in its application to the facts of the case.

The Arenda Court upheld the facial constitutionality of the

interest.[1] Yet, in so ruling, the Court did not foreclose any or all constitutional challenges by other defendants. On the contrary, the Court specifically acknowledged that constitutional challenges to the application of the statute must be made on a case-
by-case basis - again rejecting a blanket prohibition on the introduction of prior sexual conduct evidence. Id at 13.

As time went on , additional specific challenges were raised to the application of the statute. In People v LaLone, supra, Justice Archer performed an exhaustive review of the history and purpose of the rape-shield legislation (some of which had been previously referenced by the Arenda Court). Justice Archer noted that prior to the passage of the legislation, opinion and reputation evidence of a complainant's consensual sexual activity was routinely admitted at trial as a reflection of a woman's credibility and the likelihood that she had consented to sexual activity with the charged defendant. This resulted in discouraging many complainants from prosecuting, and in those cases that did result in trial, "the evidence served to shift a trial's emphasis away from the defendant's guilt or innocence, to a determination of whether a woman's sexual decisions lent an air of suspicion to her assertions or were probative of the possibility of consent with the defendant." Id at 124-125. Subsequently, Justice Archer noted that societal views changed and sexuality became viewed as distinct from crimes of sexual violence:

> "In response to mounting criticism, the Michigan Legislature in 1974 enacted sweeping statutory reforms of the rape laws. In addition to redefining the crime of 'rape' into the more expansive and gender-neutral concept of criminal sexual conduct, the Legislature also

prosecutions to focus upon the merits of the accused's guilt or innocence rather than a the victim's sexual behavior." Id at 124-125 (citations omitted).

Thus, the Legislature made a determination that the introduction of evidence of a complainant's sexual conduct with parties other than the defendant did not accurately measure the complainant's veracity nor was it determinative of the likelihood of consensual relations with the defendant. People v Lalone, supra at 125, citing People v Arenda, supra; People v Hackett, supra; People v Khan, 80 Mich App 605 (1978). The rape-shied statute was born. But, just as it was created out of a concern for individual privacy and individual freedom, the appellate courts soon recognized that its application could interfere with other more substantial and compelling constitutional rights. The outcome was consistent - the state interest protected by the rape-shield legislation could not supercede a defendant's constitutional rights at trial.

Thus, the Michigan Supreme Court ruled that in the face of a constitutional challenge based upon the right of confrontation, "evidentiary rules and policy are secondary to the protection of individual freedoms." People v Lalone, supra, citing Rock v Arkansas, 483 US 44; 107 SCt 2704; 97 LEd2d 37 (1987).

In People v Hackett, supra the Michigan Supreme Court again ruled that application of the rape-shield statute might violate the Sixth Amendment rights of a defendant in a particular case:

> "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

supra at 348.

Subsequently, in applying these principles, the Court of Appeals reversed a criminal sexual conduct conviction and remanded the matter to the trial court for further proceedings. In People v Morse, supra, the defendant had been convicted of numerous counts of criminal sexual conduct involving his former wife's young daughters. On appeal, he contended that the trial court had erred in preventing him from offering evidence that the children had previously been sexually abused by another individual and that the instant allegations were similar in nature. Defendant sought admission of ths evidence to explain the childrens' age-inappropriate sexual knowledge, and to illustrate that the children had a motive to make false charges. The Court of Appeals agreed and reversed the defendant's convictions. The Court noted:

> "The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. 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." Morse, supra at 434 citing People v Hackett, supra at 347-348 (Emphasis added, citations omitted).

Thus, contrary to the prosecution's view in the instant matter, the rape-shield statute does not strictly prohibit the introduction of evidence of a complainant's prior sexual conduct. It is never an automatic conclusion that such evidence, when offered by the defense, is inadmissible.

The Rape-Shield Statute does not Prohibit the Proffered Evidence in this Case.

In this matter, the proffered evidence is admissible. The proposed evidence is not governed by the rape shield law.[2] Defendant is not seeking to introduce the fact that the complainant, DJ, engaged in sexual activity in the past or has a history of sexual promiscuity. It is the simple fact of the allegation and the fact that his mother **believed** it to be true, that is the focus of the requested admission.

The evidence is being sought as relevant to Defendant's theory of the case. Any prejudice to exposing this evidence is de minimus and is outweighed by the constitutional right to confrontation. See People v Adair, 452 Mich 473, 484-485 (1996).

The evidence in this case is important for two reasons. First, as in other cases cited above, if the molestation did occur, then the allegations of prior abuse offers an explanation for the complainant's sexual knowledge. But, perhaps more important, the proffered evidence supports Defendant's theory of the case, that is, that Ms. Williams' believed that her son had been sexually molested in the past and thus, her hyper-vigilance led to the allegations herein.

of a parent's concerns regarding a child's safety where the child has been subject to prior abuse. As is indicated by Dr. Debra Poole, PhD, in her attached report (Appendix B):

> "A frequent feature of false allegation cases is that allegations initially arose when parents were concerned about children's safety. For example, consider the famous Wee Care daycare case, in which numerous children claimed that a teacher, Kelly Michaels, did highly implausible things during school hours, including rubbing peanut butter on the children and inserting knives into their vaginas (Rosenthal, 1995). This case began when a child was having his temperature taken rectally at a doctor's office and said, 'That's what my teacher does to me at nap time at school.' When asked to explain, he replied, 'Her takes my temperature' (Ceci & Bruck, 1995, p. 2). The specific questions that followed eventually elicited reports of abuse.
>
> * * *
>
> In sum, there is a common dynamic in many false allegation cases: Something alarms an adult, the adult tries to investigate by asking the child many specific questions, the child answers those questions by saying the first thing that pops into his or her head, and the adult ignores answers that don't make sense and focus on answers that point to abuse. This dynamic is especially likely to occur when children are young because they are more likely than older children to answer specific questions with information that is not grounded in what actually happened." (Appendix B at 3-4).

Dr. Poole's research is confirmed in the instant matter. The evidence in this case illustrates that Ms. Williams acted exactly in the manner consistent with the formulation of false allegations. Her vigilance in protecting her son and in obtaining the correct answers - because she believed that he had been molested on a prior occasion - led to the charges herein.

Ms. Williams' concerns began when she came to school to bring DJ his lunch and when he was not in the room where she expected to find him (TIV 152-154). She became more agitated when she saw him coming from an area of the school which she believed to have been unauthorized. She described him as looking worried. Ms.

had been in the cafeteria, but she was not satisfied and she did not stop questioning him until she obtained the answers for which she was searching.

Ms. Williams' written statement reflects that she repeatedly questioned DJ about his location in the hallway (Appendix C - written statement of Venita Williams). She questioned him at the time that she initially located him. She questioned him later that afternoon when she picked him up at school. She questioned him later in the evening while at home. She questioned him on the following day. DJ initially denied any impropriety on anyone's behalf but under repeated questioning, he ultimately told his mother what she wanted to hear. His answers progressed from denying any wrongdoing, to telling his mother that someone had rubbed lotion on his back, to ultimately telling her that someone had sexually molested him.

Ms. Williams acknowledged that she also spoke to DJ about the incident after visiting the emergency room (TIV 180). She admitted that she and DJ role-played the incident (TIV 199). And Ms. Williams' influence did not stop there. Once she decided that her young son had been molested yet again, she engaged in numerous conversations with him. This was documented in the Care House interview where the interviewer asked DJ whether anyone had helped him remember the allegations and he answered yes, that his mother had helped him: "She told me . . . she was just saying stuff and I said 'yes'."

Venita Williams believed that her son had been molested on a prior occasion. She was protective of him for that reason. When she believed that he had been in an unauthorized area of the school, she became upset and responded in the manner of a mother who believed that her child had been sexually victimized on a prior occasion. She questioned her young son repeatedly until she received an answer that

Ms. Williams' motivation was the protection of her child. Yet, her motivation was framed by her beliefs about the past. Her hyper-vigilance resulted in her excessive questioning. Her excessive questioning resulted in allegations that followed a progression from initial denials to horrific fantastical stories. In fact, by the time that Ms. Williams made her second written statement, in February 2006, she wrote that DJ told her that he had been tied to a pole in the bathroom (TIV 200).[3]

The evidence regarding the prior alleged abuse is necessary to support Defendant's theory of the case, to establish Ms. Williams' bias, and to preserve Defendant's constitutional rights to confrontation. If this Court prohibits the admission of evidence that Venita Williams believed that her son had been the subject of prior sexual abuse, then Defendant will be prohibited from introducing evidence that supports his defense. If this evidence is excluded then Defendant will be denied the opportunity to meaningfully and effectively cross-examine the witnesses.

The evidence is necessary in order to explain Venita Willimas'hyper-vigilance. Without access to this background evidence, the jury will be permitted to believe that Ms. Williams' responses to her son were based only upon his demeanor and presentation rather than on her own assumptions. Ms. Williams' motivations are central to explaining the origin of the instant allegations. The admission of this evidence is crucial to Defendant's case.

Furthermore, not only is the evidence not prohibited by the rape-shield statute by its very language, but it is admissible as it is relevant to Ms. Williams' motive and bias in this matter. The right to

outside of the prohibitions of the rape-shield statute.

MCL 600.2158 provides in part:

> "that "interest . . . [or] relationship may be shown for the purpose of drawing into question the credibility of a witness."

Michigan courts have a long history of permitting challenges on the bias of a witness:

> "* * * the interest or bias of a witness has never been regarded as irrelevant. It goes directly to his credit. * * * A party cannot be compelled to put up with the statements of a witness concerning his own interest or personal relation to know his position. The administration of justice would be very defective if every witness could, without contradiction, make himself out impartial and disinterested, and run no risk of exposure." **Geary v People**, 22 Mich 220, 222-223 (1871).

Thus, it is always permissible to impeach by bias. **People v Jackson**, 390 Mich 621, 625 n 2 (1973) **after remand** 63 Mich App 249 (1974). See also **People v Sesson**, 45 Mich App 288, 301-302 (1973). Such evidence is always an appropriate subject for the jury's consideration as it is always relevant to a witness' credibility:

> "A witness' motivation for testifying is always of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony." **People v Minor**, 213 Mich App 682, 685 (1995).

See also **People v Mumford**, 183 Mich App 149, 152 (1990); **People v Lester**, 232 Mich App 262 (1999) (evidence of bias or interest is highly relevant to credibility).

The facts of this case, as outlined, **supra**, demand that the proffered evidence be admitted at trial. The evidence is not prohibited by the plain language of the rape-shield statute. And, even if this Court were to hold otherwise, the exclusion of the evidence in this case would violate Defendant's constitutional rights to confrontation and to present a defense.

case wherein the Michigan Supreme Court has noted that the evidence is not only relevant, "but its admission [is] required to preserve a defendant's constitutional right to confrontation." People v Hackett, supra at 348.

WHEREFORE, for all of the reasons stated herein, this Honorable Court must permit the admission of the proposed evidence.

Respectfully submitted,

ROBYN B. FRANKEL

(P43629)

Attorney for Defendant-Appellant

Dated: xxxxxxx

STATE OF MICHIGAN

IN THE 48TH DISTRICT COURT FOR THE COUNTY OF OAKLAND

STATE OF MICHIGAN,

Plaintiff, Case No.xxxx
v PO No. Xxxx

X, HON. xxxxx

Defendant.
_____/

ROBYN B. FRANKEL (P43629)
Attorney for Defendant
26862 Woodward Avenue
Royal Oak, Michigan 48067
(248) 543-8000

Assistant Oakland County Prosecuting Attorney
1200 North Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656
_____/

MOTION FOR *IN CAMERA* REVIEW OF COMPLAINANT'S MEDICAL, PSYCHOLOGICAL AND SCHOOL RECORDS AND FOR EVIDENTIARY HEARING AS TO COMPETENCY OF CHILD WITNESS

Defendant, **X**, by and through his attorney, **ROBYN B. FRANKEL**, hereby moves this Court, pursuant to MRE 104 and 601, for an order granting the within motion for *in camera* review of complainant's medical, psychological and school records and for evidentiary hearing as to competency of child witness, and states in support thereof that:

1. Defendant is charged with three counts of criminal sexual

2. MRE 104(a) requires a court to determine the competency of a person to be a witness as a preliminary question of law prior to trial.

3. Michigan Rule of Evidence 601 defines the rule of general competency.

> "Unless the court finds after questioning a person that he does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules."

4. The trial court cannot leave the determination of competency to the jury, but rather it must be determined as a question of law by the trial court. *Bowdle v. Detroit St. Ry. Co.*, 103 Mich 272 (1894).

5. The test of competency is "whether the witness has the capacity and sense of obligation to testify truthfully and understandably." *People v Breck*, 230 Mich App 450, 457 (1998); see also *People v Norfleet*, 142 Mich App 743, 748 (1985); *People v. Watson*, 245 Mich App 572 (2001).

6. A review of the discovery provided by the prosecution (police reports, medical reports, DVD of Care House interview), as well as the results of independent investigation, makes it apparent that the complainant's ability to testify in these proceedings may have been compromised prior to his making the original allegations. As such, and in order to assess the reliability of the complainant's allegations *at the time that they were made* and thus his competency to testify, Defendant hereby requests that this Court undertake an *in camera* review of the complainant's school, medical and psychological records.

7. Under certain circumstances, the records of a psychologist, a sexual assault counselor, a social worker and a juvenile diversion worker should be discoverable in a criminal trial. *People v Stanaway*,

> "(2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records."

8. The statements of various witnesses as well as a report prepared by Dr. Ira Schaer all support a finding that at the time that of the complainant against Claudio Caffelli, the complainant was not developmentally capable of relating events truthfully and understandingly. Further, those same witnesses support Defendant's assertion that the requested records "are likely to contain material information necessary to the defense."

9. Defendant's argument is further detailed in the simultaneously filed memorandum in support of the within motion and attached affidavits, which are incorporated by reference herein.

WHEREFORE, Defendant respectfully moves this Court for an Order finding that the

requested records are subject to an *in camera review*, and scheduling the matter for a hearing

regarding the complainant's competency.

Respectfully submitted,

ROBYN B. FRANKEL

(P43629)

Attorney for Defendant-Appellant

Dated: xxxxxxx

STATE OF MICHIGAN

IN THE 48TH DISTRICT COURT FOR THE COUNTY OF OAKLAND

STATE OF MICHIGAN,

Plaintiff, Case No. xxx
v PO No. xxx

X , HON. Xxx

Defendant.
_____/

MEMORANDUM IN SUPPORT OF MOTION FOR *IN CAMERA* REVIEW OF COMPLAINANT'S MEDICAL, PSYCHOLOGICAL AND SCHOOL RECORDS AND FOR EVIDENTIARY HEARING AS TO COMPETENCY OF CHILD WITNESS

Relevant Facts

Defendant, X, has been charged with three counts of criminal sexual conduct in the first degree. It is alleged that Mr. X engaged in sexual acts with CA, who was under the age of 13. Upon a review of the discovery provided by the prosecution (police reports, medical reports, DVD of Care House interview), as well as the results of independent investigation, it has become apparent that the complainant's ability to testify in these proceedings may have been compromised prior to his making the original allegations. Defendant is therefore requesting that this Court undertake an in camera review of the complainant's medical, psychological and school records to determine whether the "records reveal evidence necessary to the defense." MCR 6.201(C)(1)(b).

Argument

The Michigan Supreme Court has held that under certain circumstances, the records of a psychologist, a sexual assault counselor, a

criminal trial. *People v Stanaway*, 446 Mich 643 (1994). In so deciding, the Court noted that to the extent that the records are privileged, a defendant's federal and state constitutional rights to due process require a pretrial review of the requested records. See also *Pennsylvania v. Ritchie,* 480 US 39, 56, 107 SCt 989, 1000-01, 94 LEd2d 40 (1987) (leading case on pretrial access to privileged records).

In determining whether a review is appropriate, the trial court must consider whether a criminal defendant has illustrated that there is a reasonable probability that the requested information is "necessary to a preparation of its defense" and that disclosure is "in the interests of a fair trial." The Court held:

> "* * * our review of the jurisprudence of other states, along with our own precedent in dealing with discovery and evidentiary principles, coupled with a prudent need to resolve doubts in favor of constitutionality, prompts us to hold that in an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on an showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense. *People v Stanaway, supra* at 677.

This ruling was subsequently codified into Michigan Court Rule 6.201, which provides in relevant part:

"(C) Prohibited Discovery.

> (1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).
>
> (2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in

> (a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the trial court shall suppress or strike the privilege holder's testimony.
>
> (b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.
>
> (c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.
>
> (d) The court shall seal and preserve the records for review in the event of an appeal
>
> (I) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or
>
> (ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.
>
> (e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide."

In the instant case, Defendant X contends that a review of the requested records is necessary in order for the defense to frame a challenge to the reliability of the complainant's allegations *at the time that they were made* and thus, the competency of his potential testimony.

Principles of due process establish that "Reliability [is] the linchpin in determining admissibility" of evidence. *Manson v Braithwaite*, 432 US

at trial is sufficiently reliable so that it may be of use to the finder of fact". *State v Michaels*, 642 A.2d 1372 (NJ SCt, 1994). See also *Idaho v Wright*, 497 US 805 (1990); *People v Katt,* 242 Mich App 282 (2001). Evidence which is unreliable must be excluded to preclude the possibility of a wrongful conviction.

MRE 104(a) requires a court to determine the competency of a person to be a witness as a preliminary question of law prior to trial:

> **"(a) Questions of Admissibility Generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges."

In *Bowdle v. Detroit St. Ry. Co.*, 103 Mich 272 (1894), the Michigan Supreme Court held that a trial court cannot leave the determination of competency to the jury, but rather it must be determined as a question of law by the trial court.

Michigan Rule of Evidence 601 defines the rule of general competency.

> "Unless the court finds after questioning a person that he does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules."

MRE 602 requires that a witness, in order to testify, possess

> "A person may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself . . ."

The test of competency focuses on "whether the witness has the capacity and sense of obligation to testify truthfully and understandably." *People v Breck*, 230 Mich App 450, 457 (1998); see also *People v Norfleet*, 142 Mich App 743, 748 (1985); *People v. Watson*, 245 Mich App 572 (2001). This is a threshold issue that must be determined by the trial court before a witness testifies. *Id*, at 584. It is within the discretion of the trial court to find a witness sufficiently reliable so as to permit his testimony to be admitted at trial. *People v LaPorte*, 103 Mich App 444 (1981). That discretion necessarily includes a determination of competency by the court based on examination of the witness and other evidence, including psychiatric and medical records. *People v Atcher*, 65 Mich App 734 (1975).

Thus, this Court must determine whether or not the witness has not only a moral sense of obligation to tell the truth, but also whether or not the witness has the *ability to testify truthfully and understandably from his own knowledge*. In order to do so, Defendant is entitled to those records which support the allegations that CA lacks the ability to testify in a competent and reliable fashion.

Defendant contends that he has a good faith belief that the requested records "are likely to contain material information necessary to the defense." Defendant can illustrate a particularized need for this information in that adults who came into contact with the complainant prior to the time that the allegations arose, and who had a background in child development, overwhelmingly indicated concerns that the complainant was

fantasizing. Various adults voiced concerns *at that time* that the complainant appeared developmentally inappropriate for his stated age (Affidavits attached as Appendices B-F). These various adults also possessed specific information that the school district had attempted to provide special education services for the complainant and that he was being medicated - though unsuccessfully - for Attention Deficit Disorder.

Genevieve X has known CA since his birth (Appendix B). Ms. X and CA's mother (Tiffany Harper) grew up together. Ms. X regularly cared for CA when his mother was unavailable - both before and after Ms. X's marriage to X. The child spent a great deal of time with Genevieve X, as well as with Genevieve's mother and step-father (Marie and Doug Maskin). There were also numerous occasions that CA would spend the night at Genevieve's home.

Genevieve is the owner and executive director of Coach Genevieve Sports, LLC, a corporation which facilitates sports and educational programs for children between the ages of 2 ½ and 18, throughout the metropolitan Detroit Area. She has a Masters Degree in Education and has worked with thousands of children through her employment. CA would accompany Genevieve to sporting events where she was coaching and on social outings with other families and their children. Ms. X always noted that the complainant had trouble interacting with other children. He told wild and detailed stories far beyond those of other children in his age group. He had a tremendous imagination and advanced vocabulary. Some of the stories were about things that clearly could not have happened. Others were simply untruths. Ms. X was often concerned that he was untruthful.

Ms. X noted that Chris was very difficult to handle as he was very hyperactive and was often unpredictable in his behavior. Chris' mother, Tiffany Harper, had advised Ms. X that her son had been diagnosed with Attention Deficit Disorder and that he was on prescribed medication. Ms.

with her son and his diagnosis. She told Ms. X that the doctor had a great deal of difficulty in determining the appropriate dosage. Ms. Harper was not comfortable giving so much medication to a child as young as CA but felt that there was no other way to control his behavior. Ms. Harper would leave medication for CA when he spent the night with Ms. X. Ms. Harper left instructions for dispensing the medications throughout the day and at night. CA took several medications during the day, including one that was to be given if he had break-through behaviors that were not adequately controlled by his initial medication dosage.

Ms. Harper also had conversations with Ms. X regarding concerns over Chris' schooling as well. When Chris was in kindergarten, Mr. Harper indicated that the school wanted to provide special education services to Chris as he progressed into the first grade. Ms. Harper had met with the school social worker (or school psychologist) and believed that the school wanted to advance Chris to the first grade because they did not want to deal with his behavior problems in the kindergarten classroom. Ms. Harper also told Ms. X that Chris had trouble making and keeping friends in school.

Other adults conveyed similar information. Marie Maskin also cared for CA when his Ms. Harper was unavailable (Appendix C). He was very hyperactive and had a wild imagination. He would talk about how he had flown out the window and could fly around outside. He explained how he lived in a spaceship and talked about it as if it were true. He talked incessantly. Ms. Maskin also had conversations with Ms. Harper about school-related issues including discussions regarding the school district's attempts to have him placed into special education. Ms. Maskin was likewise familiar with Chris' medication regime. Other family friends had spent time interacting with Chris and had similar experiences.

Marisa Hickson met Chris when her three children were playing soccer as a part of Genevieve X's recreational program (Appendix E). She

talkative and hyperactive. He seemed to have difficulty socializing with other children. He acted much younger than his stated age. At the age of six, Chris did not play with other six year old children, rather, it was more likely that he would be playing with Ms. Hickson's three year old.

Stephanie Winter also described Chris as an unusual child (Appendix D). He was extremely verbal but he fantasized constantly. He told made-up stories and made statements that were simply not true. Sometimes he did not make sense a all. Ms. Winter's own children had described Chris as "goofy" and told her that he talked about crazy things that they knew to be untrue. His behavior was often out of control and non-stop. On one occasion, Ms. Winters' husband refused to take Chris on a weekend camping trip due to his hyperactivity and his exaggerated story-telling.

Chris' diagnosis of Attention Deficit Hyperactivity Disorder[1] was confirmed by his mother when he was taken to Beaumont Hospital following the instant allegations. Ms. Harper told the medical personnel that "[Chris] has attention deficit hyperactivity disorder and takes Adderall 2 times a day and Ritalin as needed." (Appendix F). This "as needed" is an apparent reference to the inability to control Chris' behavior with a routine dosage of medication.

Dr. Ira Schaer, Ph.D., has reviewed the DVD of the complainant's forensic interview at Care House (Appendix A). Dr. Schaer has been a psychologist licensed in the State of Michigan in excess of 30 years. His practice includes the treatment of both children and adolescents including the diagnosis and treatment of psychopathology and the assessment of Attention Deficit Disorder and Learning Disabilities and he has also had a focus of his long career, the assessment and treatment of victims of sexual abuse, their families, and perpetrators of abuse. He is a member of numerous professional organizations including the American Psychological Association, the Michigan Psychological Association and the Michigan

courses in child and adolescent development and has authored publications regarding sexually and physically abused children. In reviewing the DVD in this matter, Dr. Schaer concluded that the complainant had difficulty distinguishing fantasy from reality.

Dr. Schaer noted "[a] number of concerns regarding the mental status of the child are apparent, raising issues about both the credibility and reliability of information that can be drawn from this interview." Dr. Schaer opined that the child appeared younger than his stated seven years of age and that "the structure of his language thinking, behavior, and his relational patters are far more consonant with that of a four or five year old child." He commented that the child resembled one having an Attention Deficit Disorder and either not medicated or inadequately medicated. He noted that the child engaged in "gross distortions" and lapsed into fantasy even though he had earlier shown an understanding of what the difference was between the truth and a lie.

Dr. Schaer summarized his findings by noting that "In summary, CA does not appear to act, think, verbalize, or react to others as would be expected of a child of his chronological age. His general behavior was uncontrolled, unfocused, and often unresponsive to the Examiner." He opined that several possibilities existed with respect to the child's capacities. He might have intellectual deficits which could compromise his ability to make accurate reports of past events, he might have a psychopathology that distorts his reality, he might suffer from Attention Deficit Disorder that would effect his recall abilities, or some combination of factors might exist. Dr. Schaer thus concluded that "this child's past medical, academic, and psychological records should be examined and assessed." Dr. Schaer also suggested certain testing to gauge Chris' more immediate functioning.

Additional independent research supports the conclusion that lying can be a significant behavior manifested by children with Attention Deficit

ADHD is far more likely to fabricate and confabulate. One study suggests that 49% of children with Attention Deficit Disorder engage in lying behaviors as compared to only 5% of typical children. Barkley, R.A., Fischer M., et al. "The Adolescent Outcome: An 8-Year Prospective Follow Up." 29 Journal of the American Academy of Child and Adolescent Psychiatry 546-557. This behavior is not necessarily intentional on the part of the child. "Most ADHD kids who lie don't mean to be dishonest." Yannick, Pauli. "ADHD and Compulsive Lying: How to Get Your Child to Tell the Truth." http:/unritalinsolution.com/adhdblog/2010/05/17. Nonetheless, impulsive and spontaneous story-telling and embellishment are commonplace among children with inadequately treated ADHD.

Based on prior reports, school history, and obvious performance during a Care House interview, it is apparent the complainant, at least at the age of 7 and before, experienced psychological and medical influences that effected his behavior and mental activities. It is also evident that even though he was medicated, his medication was inadequate to address the symptoms for which he had been prescribed Adderall, Ritalin and other medications. In spite of being diagnosed as ADD, according to his mother, Tiffany, CA's conduct and development were not being corrected by any treatment. Although children normally understand the difference between truth and fantasy by ages 6 through 7[2], CA did not develop any appreciation for reality or source-testing. Moreover, his impulsivity was noticeably unallayed and interfered with normal activities, interaction and general performance.[3]

The extent to which his diagnosed condition, delayed or unmet developmental markers , or other undiagnosed conditions interfered with historically accurate or reliable reporting cannot be evaluated in the absence of concurrent observations and records generated by professionals.

according to MRE 601 and 602, the issue is twofold: (1) whether he was developmentally capable of relating events truthfully and understandingly, at the time, and (2) whether he can currently testify from his own knowledge. The first issue is addressed *supra* in Defendant's request for discovery of records which would assist in an assessment of his mental and emotional status. The second issue must be addressed in an evidentiary hearing during which Defendant believes he can establish that CA's allegations were generated by unduly suggestive questioning which resulted in altered memories.[4] Obviously, an understanding of CA's propensity to fantasize, exaggerate, and speak and act impulsively, would provide foundational information for the Court's findings. Neither the complainant's ability to provide a coherent version of his allegations at his current age and developmental status, nor his confidence in his own memories are relevant to the inquiry: the Court must make it's decisions regarding the complainant's competence based on all of the factors that contribute to a finding that CA's allegations against Mr. X were reliable when made to his mother, to others who questioned him, and during his Care House interview, such that the Court can determine that he would be testifying, reliably, from his own knowledge.

WHEREFORE, Defendant respectfully moves this Court for an Order finding that the requested records are subject to an *in camera review*, and scheduling the matter for a hearing regarding the complainant's competency.

Respectfully submitted,

ROBYN B. FRANKEL (P43629)
MITCHELL RIBITWER

(P26054)

Attorneys for Defendant
26862 Woodward Avenue, Ste. 200
Royal Oak, Michigan 48067
(248) 543-8000

Dated: April 13, 2010.

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX E

APPENDIX F

[1] It is unclear whether the actual, or proper diagnosis was (or is) ADD or ADHD.

[2] True and False Allegations of Child Sexual Abuse: Assessment and Case Management (Ney, Tara, Ed. 1995), Perry, Nancy Walker, *Children's Comprehension of Truths, Lies, and False Beliefs* 73-99.

[3] "Executive Dysfunction: But executive functions do not always mature progressively, linearly, or as effectively as desired to strategically yet flexibly navigate and organize our ongoing responses to a complex environment. The remainder of this article will specifically address known difficulties in executive functions associated with common neuropsychological disorders.

1. ADHD. From a neuropsychological perspective, the concept of attention as an executive function includes the ability to filter extraneous, non relevant, or distracter stimuli; to focus or sustain mental effort; to execute and self-monitor a response; and to shift and direct attention to acquire information. In other words, attention involves the ability to focus, execute, sustain, and shift. Children with ADHD have difficulty thinking before they act. They do not efficiently weigh the consequences of their plans or actions or consider the consequences of their past behavior. It is a struggle for them to follow rule-governed behavior due to their problems with separating experience from response, thought from emotion, and action from reaction. In the heat of the moment, their limited capacity for self control is quickly overwhelmed by their immediate need to act.

Children with ADHD have difficulty sustaining attention to repetitive, effortful, uninteresting, or non preferred tasks. Due to lack of inhibition they tend to be excessively restless, overactive, and easily emotionally aroused. Again due to problems with inhibition, children with ADHD can tend to require immediate, frequent, predictable, and

http://www.wellspringutah.com/index.php?/main/newsletters/executive_dysfunction_in_children_and_teens/

[4] The effect of suggestive questioning, whether intentional or unintentional. has been examined in both scientific literature and recent appellate decisions. A witness whose memory has been influenced, and makes source-monitoring errors, cannot distinguish between real events and created memories, and may never be able to undue the contamination. The problem is not dissimilar from the disability caused by hynotically-influenced memories. As noted by the Court of Appeals in *People v Gonzalez*, 108 Mich App 145, 156 (1981) which extensively reviewed the mechanism of suggestion inherent in hypnosis: A subject who has lost the memory of the source of his learned information will assume that the memory is spontaneous to his own experience. Such a belief can be unshakeable, last a lifetime, and be immune to all cross-examination.