

No. 127129

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IN THE  
MICHIGAN SUPREME COURT

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PEOPLE OF THE STATE OF MICHIGAN,

*Plaintiff-Appellee*

v.

GENNARO JOSEPH PISCOPO

*Defendant-Appellant*

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ON APPEAL FROM THE COURT OF APPEALS  
(Griffin, PJ, Cavanagh and Fort Hood, JJ)  
Court of Appeals No. 245835  
Macomb County Circuit Court No. 2002-001210-FH

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**APPELLANT'S REPLY BRIEF  
TO BRIEFS SUBMITTED BY THE APPELLEE,  
THE WAYNE COUNTY PROSECUTOR'S OFFICE, AND  
THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN**

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**ORAL ARGUMENT REQUESTED**

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**ORIGINAL**

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I. THE PEOPLE'S ISSUE RE: FALSE PRIOR ACCUSATIONS AND MRE 608.<sup>1</sup>

The Appellant did not argue at trial that he was innocent because the complainant had falsely accused another of sexual assault, thus making the complainant an unreliable witness. Rather, it was the Appellant's position that while he had touched the complainant during the deliverance, he had not touched her for a sexual purpose. The seven questions posed by this Court did not ask the parties to brief the admissibility of prior false accusations as a means of attacking the complainant's credibility. Yet, the two amicus briefs and the People's primary brief make extensive arguments about the standards that should be used before evidence of one or more prior false accusations of sexual assault can be admitted. (E.g., Peo .Br. at pp. 13-15; Wayne County Br. at pp. 5-26; PAAM Br. at pp. 3-15).

Although the PAAM brief acknowledges that there are significant documented instances of false prior sexual accusations (PAAM Br. at p. 4), all three briefs argue for an extremely high bar for a criminal defendant to meet before this area can be the subject of examination. Specifically, the three briefs argue that a criminal defendant must first establish that the prior accusations were "demonstrably false." PAAM defines "demonstrably false" in terms of physical impossibility or a victim admission. (PAAM Br. at p. 13). The three briefs then argue that even if the criminal defendant can cross this very high hurdle, MRE 608 would preclude anything but a direct question. In the view of the People and the amici, if the complainant denies making a false accusation, the inquiry should end.

The Appellant submits that the proposals made by the People and the amici create an

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<sup>1</sup> Because of the 10 page limitation, the Appellant relies on his opening brief for any issue not addressed in this reply.

evidentiary burden that almost no criminal defendant could meet. The proposals protect the lying complainant because the criminal defendant would not have any meaningful way to establish the lie. In this regard, the Appellant is aware of no legally recognized policy which protects perjury. Finally, the proposals leave the criminal defendants who are in fact the victim of a lying complainant without a defense. Said differently, under the combined proposals, the People could obtain a conviction based on the uncorroborated and false accusations of the complainant, while the defense would have to muster significant evidence of falsity to present a defense. The Appellant submits that, as a result, the combined proposals give the prosecution an extremely unfair advantage.

In sum, however, the Appellant submits that the arguments are inapposite because they neither address the facts of the Appellant's case nor respond to the questions posed by this Court. The Appellant will be prepared to further argue the issue if the Court wishes to pursue the issue or if the Court has questions at oral argument.

## II. THE RAPE SHIELD STATUTE DOES NOT BAR THE ADMISSION OF EVIDENCE OF PAST SEXUAL ASSAULT.

The Appellant's opening brief argued that this Court should draw a distinction between evidence of a complainant's voluntary sexual conduct and evidence of involuntary sexual assault. (App. Br. at pp. 16-23). The Appellant further argued that the phrase "victim's sexual conduct" in the rape shield statute, MCL 750.520j, should be interpreted as including consensual sexual conduct only. *Id.*

Among other things, the Appellant argued that the policy reasons behind the rape-shield statute, as set forth in authorities such as *People v. Arenda*, 416 Mich 1, 330 N.W.2d 814 (1982),

did not extend to a situation where the complainant had been a victim as opposed to a willing actor. Revelations about a person's private consensual sexual life can be embarrassing and/or humiliating, exposing that person to the approbation of others. By contrast, it was the Appellant's position that the jury would be more likely sympathetic towards a complainant who had been previously victimized. The Appellant also argued that such evidence did not attack the complainant's general credibility or morality. In addition, excluding this evidence from the rape shield bar would not guarantee admissibility. The criminal defendant would still have to establish relevancy and establish that the evidence was otherwise admissible pursuant to the Michigan Rules of Evidence.

The People and the two amici oppose this position and argue that evidence about past sexual assault should be deemed within the scope of the rape shield statute. (Peo. Br. at pp. 2-6; Wayne County Br. at pp. 2-3; PAAM Br., at pp. 2-3).

The general gist of the People's argument is that the rape shield statute should be broadly construed to protect any complainant from being scrutinized about any past sexual experiences other than those specifically allowed by the statute. The Appellant submits that this argument ignores the fact that the scope of the rape shield statute has been limited for a number of reasons, making clear that the statute's protections are not as broad as advocated by the People. *E.g.*, *Davis v. Alaska*, 415 U.S. 318 (1978) (statutory protections must give way to constitutional rights); *People v. Ivers*, 459 Mich 320, 587 N.W.2d 10 (1998) (statements relating to speaker's sexual desires outside of statute's scope).

The People argue that the victim would be re-victimized if evidence of past sexual assault was not within the scope of the statute. (P. Br. at pp. 4-5). The Appellant disagrees. Specifically,

when past consensual conduct is at issue, there is a distinction between the past conduct (which was consensual) and the more recent accusation of sexual assault (which was against the actor's will). By contrast, when past sexual assault is at issue, both the past experience and the current experience are assaultive. It is the Appellant's position that the fact that a complainant had been a victim on multiple occasions is a reason for sympathy not re-victimization.

The People argue that "conduct is conduct" and that there should be no distinction between sexual assault and consensual sexual conduct. (P. Br. at p. 5). The Appellant submits that this argument ignores the fact that the policy reasons behind the rape shield statute do not necessarily extend to sexual assault. For example, a sexual assault does not bring the complainant's morality or consensual sexual history into play. In a consensual situation, the complainant is a willing actor. In the case of sexual assault, the complainant is an unwilling victim. Moreover, contrary to the People's argument, evidence of a past sexual assault is not evidence which impeaches the complainant's credibility.

The Wayne County Prosecutor expresses doubt that evidence of a prior actual assault could be relevant. (Wayne County Br. at p. 3). PAAM argues that the Appellant's argument is novel. (PAAM Br. at p. 2). Both amici cited *State v. Quinn*, 200 W.Va. 432, 490 S.E.2d 34 (1997) for the proposition that evidence of past sexual assault should be excluded. (Wayne County Br. at p. 3, n.2; PAAM Br. p. 2).

At the threshold, the Appellant has repeatedly acknowledged that evidence must be relevant in order for it to be admissible. The Appellant argued that evidence of the past sexual assault by the complainant's pastor-father was relevant because it went to bias and state of mind. Given the inconsistency between the complainant's testimony and the testimony of numerous

eyewitnesses, the Appellant submitted that this evidence would have assisted the jury in reconciling this inconsistency (e.g., by concluding that the complainant was mistaken or that she had misperceived the Appellant's purpose when he touched her during the deliverance).

As to *Quinn*, that case did not involve actual past sexual assaults. Rather, the defendant wanted to use the proposed evidence to show that the complainant had falsely accused others of sexual assault and that, as a result, the complainant's accusations against him must also be false. Thus, the case does not address instances of an actual past sexual assault and is therefore inapposite.

### III. THE RAPE SHIELD STATUTE DOES NOT BAR THE ADMISSION OF EVIDENCE OF IMAGINARY SEXUAL ACTIVITY.

Among other things, the Appellant argued that evidence of imaginary activity went to state of mind and was therefore not conduct. (App. Br. at pp. 28-29). Both amici agree that "imaginary" sexual activity is not conduct and therefore not within the scope of the rape shield statute. (Wayne County Br. at p. 3; PAAM Br. at p.15). The Wayne County brief argues that relevancy is still an issue. (Wayne County Br. at p. 3). That brief also opines that the existence of demons may have religious overtones and may thus not be viewed as imaginary by adherents. (Wayne County Br. at p. 3, n.3). The PAAM brief also notes that there may be a religious connection and that there are relevancy concerns. (PAAM Br. at p. 15).

The Appellant agrees that imaginary activity is not within the scope of rape shield and that the Appellant in this case has shown relevance. The Appellant further submits that the religion-related arguments are not relevant to the analysis. Whether the imaginary event is based on a religious belief or some other reason, it is not conduct and therefore not within the rape-

shield statute. As to the instant case, it is the Appellant's position that the demon-rape evidence was relevant because, among other things, it went to the complainant's state of mind and potentially explained the inconsistency between her perceptions of how she was touched and the perceptions of numerous eyewitnesses who had seen nothing sexual.

The People stress the religious issue and argue that the complainant's demon-rape belief was about her religious sexual conduct and that the beliefs were thus conduct within the scope of the rape shield statute. (Peo. Br. at pp. 5-8). The Appellant strongly disagrees. As the amici and the Appellant agree, the demon-rape was thought and state of mind rather than conduct. The People's contrary opinion has no factual or legal support. The Appellant also submits that, in this case, religion is a red-herring. As argued *supra*, people hold beliefs for many different reasons. It is the Appellant's position that the source of the belief—religious or otherwise—does not change the fact that a belief is not conduct and that, as a result, a belief is not within the scope of the rape-shield statute.

#### IV. BARRING ADMISSION OF ACTUAL PAST ASSAULT OR EVIDENCE OF AN IMAGINARY ASSAULT WOULD CONSTITUTE A DENIAL OF THE APPELLANT'S CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT WITNESSES.

In his opening brief, the Appellant argued that he had the Constitutional right to cross-examine the complainant about matters such as bias, motive, and interest and that his constitutional rights trumped the rape-shield statute. (App. Open. Br. at pp. 38-44). The Appellant argued that the father-pastor-sexual abuse evidence went to bias and motive and explained why the complainant may have viewed the Appellant's acts of touching her to have a sexual purpose. (App. Open Br. at p. 43). The Appellant also argued that the demon-rape

evidence was to show that even if the complainant believed she was telling the truth about what had happened between her and a demon, there were reasons to conclude that the belief was based on fantasy and/or misperception rather than on fact. The evidence also would have given the jury an explanation about the inconsistency between the complainant's testimony and the testimony of numerous eyewitnesses who saw nothing sexual.

The People argue that the evidence was not relevant. (Peo. Br. at pp. 17-20). For the reasons stated in this brief and in the opening brief, the Appellant submits that this argument is without merit. The People argue that the evidence presented a danger of unfair prejudice. (Peo. Br. at p. 20). The Appellant disagrees. The complainant herself admitted that she believed that her pastor father had sexually abused her and that a demon had raped her. The jury knew that the complainant had life-issues because she had signed up for the exorcism as a way of addressing those issues. The purpose of the proposed evidence was to assist the jury in reconciling the complainant's testimony with the testimony of numerous eyewitnesses. For these reasons, the Appellant submits that there was no meaningful risk of prejudice, much less unfair prejudice.

The Wayne County brief argues that barring the evidence does not raise any constitutional issues. (Wayne County Br. at p. 4). This argument is based on arguments about prior false allegations of sexual abuse and the interaction of MRE 608. *E.g., id* at p. 15. However, as cases such as *Davis v. Alaska*, 415 U.S. 318 (1978) make clear, the Constitutional issue focuses on the right to confront and examine. The Constitutional issue thus goes beyond issues of prior false allegations (an issue not in the Appellant's case) and the invocation of an evidentiary rule. Among other things, the complainant did not deny either the demon-rape or the father-pastor-abuse incidents. The Appellant submits that he had a Constitutional right to cross-examine about

these facts and then to argue to the jury that there was a way to explain the inconsistency between the complainant's perceptions and the observations of numerous eyewitnesses.

PAAM also argues that barring the evidence did not violate the Constitution. (PAAM Br. at pp. 15-20). PAAM first argues that the evidence was offered as a general attack on credibility. (PAAM Br. at pp. 16-17). The Appellant disagrees. At the threshold and contrary to PAAM's characterization at page 17 of its brief, the Appellant was not arguing that "a woman who is victimized once is more likely to make up allegations than one who had not been victimized."

To the contrary, the Appellant did not take the position that the complainant had falsely accused her pastor-father or that she did not believe that she had been raped by a demon. Rather, the Appellant argued that it was important for the jury to know this information as a means of resolving the inconsistency between the complainant's allegations and the eyewitness accounts. The importance was underscored because the issue at trial was perception. Specifically, there was no dispute over whether the Appellant had touched the complainant in an effort to persuade her to participate in the exorcism. The complainant perceived the touching as sexual. The Appellant and numerous eyewitnesses testified that the touching was not sexual. The evidence at issue would have given the jury an explanation of the inconsistency which the jury could then have factored into its deliberations. For these reasons, the Appellant submits that the proposed evidence was not offered for general credibility purposes. Rather, it was offered for the proper purposes of bias, motive, and, interest.

The PAAM brief then argues that the Appellant's argument was a "classic Aristotelian logic fallacy." (PAAM Br. at p. 15). The Appellant submits that this is not an argument about admissibility but about the weight that should be given to the evidence once-admitted. The

prosecution would certainly be entitled to make such an argument to the jury, but it is the jury that would ultimately decide whether the evidence was or was not useful to its decision-making process.

The PAAM brief quotes extensively from a 6<sup>th</sup> Circuit case, *Boggs v. Collins*, 226 F.3d 728 (6<sup>th</sup> Cir. 2000). (PAAM Br. at pp. 17-20). The Appellant submits that the case is completely inapposite. As explained by PAAM on page 17 of its brief, the defendant in that case had accused the complainant of falsely accusing others. Among other things, the defendant wanted to call one witness who would testify that the complainant had accused a man of assaulting her and to then call that man to testify that he had not assaulted the complainant.

The Appellant submits that this is essentially a meritless strawman argument since the instant case has nothing to do with false prior accusations of assault and/or with the companion argument that the complainant has falsely accused the criminal defendant because she has falsely accused others in the past.

#### V. THE TRIAL COURT ERRED IN BARRING THE ADMISSION OF EVIDENCE REGARDING THE QUESTIONNAIRE FILLED OUT BY THE COMPLAINANT PRIOR TO THE CHURCH RITUAL.

The People argue that the questionnaire was properly excluded. (Peo. Br. at pp. 21-23). Among other things, the People noted that the Court of Appeals had deemed the evidence irrelevant because it was not similar to the allegations made against the Appellant. (Peo. Br. at p. 22). The Appellant submits: 1) There was similarity because both the Appellant and the complainant's father were pastors; and 2) similarity is not really the issue because the Appellant was not seeking to introduce the evidence to establish that a past assault had occurred or that the complainant had actually been raped by a demon. Rather, the purpose of the evidence was to

explain the inconsistency between the complainant's perceptions and the perceptions of numerous eyewitnesses.

The Wayne County Prosecutor's brief opines that the questionnaire was not offered for any proper purpose. (Wayne County Br. at p. 4). For the reasons stated in the opening brief and *supra*, the Appellant submits that the evidence had proper purposes.


PAAM argues that the questionnaire was hearsay and not admissible under the business records exception, MRE 803(6), "because it was not prepared as a record of church business activity by one with a duty to accurately record church business activity." (PAAM Br. at p. 20). The Appellant disagrees. The church sponsored the exorcism and charged a fee to the participants. The questionnaire was duly processed and retained by the church, and deliverances were routinely offered as part of the church's activities.

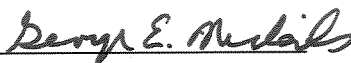
#### RELIEF SOUGHT

For the reasons stated in the opening brief and this brief, the Appellant is respectfully asking this Court to vacate his conviction and sentence.

Respectfully submitted,

Dated: September 11, 2007

  
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David A. Dodge (P22906)

  
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George E. Michaels (P17685) by *ASJ*