STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Honorable Neff, P.J., and Cooper and R.S. Gribbs, J.J.

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs

Supreme Court
No. 127897

MAURICE LAMONT NYX,

Defendant-Appellee.

Court of Appeals No. 248094
Lower Court No. 02-007289-01

Defendant-Appellee's Brief on Appeal

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STATEMENT OF JURISDICTION

Defendant-Appellant accepts the Statement of Jurisdiction contained in the Brief filed by the Prosecution.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHERE THE TRIAL COURT IN A BENCH TRIAL, WITHOUT NOTICE TO OR CONSENT FROM THE PARTIES, IMPLIEDLY ACQUITTED THE DEFENDANT OF ALL THREE ORIGINAL CHARGES, AND CONSTRUCTIVELY AMENDED THE INFORMATION DURING ITS VERDICT DELIVERED FROM THE BENCH, AND CONVICTED DEFENDANT OF TWO LESSER, COGNATE OFFENSES, UPON WHICH THE DEFENDANT HAD NOT BEEN BOUND OVER AND WHICH WERE NOT CHARGED IN THE INFORMATION, WAS THE DEFENDANT DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO NOTICE OF THE CHARGES AGAINST HIM, AND AN OPPORTUNITY TO DEFEND AGAINST THOSE CHARGES, AS WELL AS HIS STATE STATUTORY RIGHT NOT TO BE TRIED FOR LESSER COGNATE OFFENSES, AND MUST THE DEFENDANT'S CONVICTIONS BE VACATED?

The Trial Court says: "NO".

The Court of Appeals says: "YES"

The Prosecution-Appellant says: "NO"

The Defendant-Appellee says: "YES".

II. WAS THE DEFENDANT DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

The Trial Court did not answer this question. .

The Court of Appeals did not answer this question. .

The Prosecution-Appellant says: "NO"

The Defendant-Appellee says: "YES".

STATEMENT OF PROCEEDINGS AND FACTS

A. Statement of Proceedings

Defendant-Appellee (hereinafter "Defendant," Appellee," or "Mr. Nyx") Maurice Nyx was arrested and charged with three counts of Criminal Sexual Conduct in the First Degree, contrary to MCLA 750.520b(1)(b); MSA 28.788(2)(1)(b) (hereinafter: CSC I). (See Information, at 3a-4a).

Mr. Nyx was tried by the Court, and convicted of two counts of Criminal Sexual Conduct in the Second Degree, contrary to MCLA 750.520(c); MSA 28.788(3) (hereinafter "CSC II'). (See Trial Court Findings of Fact and Verdict from the Bench, at 208a – 213a; Judgment of Sentence, at 5a).

The trial court found that Mr. Nyx had improperly touched a 15 year old student at a High School where Mr. Nyx was employed in an administrative position. The defense at trial was that the complainant's allegations against Mr. Nyx were fabricated as part of a scheme involving her and other students to extort money from Mr. Nyx by threatening to go public with false accusations of criminal sexual conduct.

Mr. Nyx was sentenced to two concurrent prison terms of three to fifteen years. Judgment was entered October 17, 2002. (Judgment of Sentence, at 5a).

Mr. Nyx appealed to the Court of Appeals by right pursuant to Mich. Const. 1963, Art. 1 §20 and MCR 7.203(A). On January 13, 2005, the Court of Appeals vacated the two counts of conviction, and remanded for entry of an order of acquittal (6a-9a). The Court of Appeals opinion only addressed one of the issues Mr. Nyx raised on appeal; the Court specifically declined to address the remainder of his claims on appeal, as moot. (9a).[1]

Mr. Nyx was bound over at a Preliminary Examination (P. Exam.) held in the 36th District

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1/ References in this Brief to pages from the Prosecution Appendix will be identified by "a"; References to pages from the Defendant-Appellee's Appendix will be identified by "b".

Court on June 5, 2002. He was arraigned on the Information in the Circuit Court on June 12, 2002. At a final pretrial conference on July 19, 2002, the prosecution disclosed it had possession of a security videotape of a student I the school where Mr. Nyx was employed, placing a letter addressed to Mr. Nyx, in Mr. Nyx's school mailbox. (8b-13b). This letter demanded that Mr. Nyx pay $3,000, or a police report would be made charging Mr. Nyx with sexual misconduct with the complainant. This extortion letter was ultimately admitted as Trial Exhibit 8 (158a –162a).

This matter was scheduled for trial on September 17, 2002. On that day, Mr. Nyx waived his right to trial by jury. (14b-18b).

B. Evidence Produced at Trial

At the time of the alleged incidents, Mr. Nyx was employed as the Dean of Students at the Detroit School for the Industrial Arts (DSIA), a charter school. In that position, he was responsible for imposing discipline for minor offenses (those not involving suspension or expulsion), and was also responsible for building security (88a – 89a). Ms. Susan Diehl, an administrator with Schoolhouse, the Company hired to run the school, testified that on a Monday, which she believed was March 25, 2002, she received a telephone call from the principal of DSIA informing her of the nature of the complainant's allegations. She contacted Schoolhouse's attorney, Stephen Scapelliti; Ms. Diehl and Mr. Scapelliti both went to DSIA and met there (91a – 93a).

After determining the nature of the complainant's allegations, Ms. Diehl, on behalf of Schoolhouse and DSIA, conducted an internal investigation with respect to these allegations. When she learned of the extortion letter which had been left for Mr. Nyx, her investigation broadened to include this incident, as well. Her internal school investigation included interviewing and obtaining witness statements from several students, and the preparation of various written memoranda and reports regarding both the complainant's allegations, and the attempted extortion of Mr. Nyx. Ms.

Diehl's testimony described the scope of her investigation, and she identified a number of students and staff whom she interviewed over the next several days (91a – 97a).

The complainant is Ebony Wilson. Appellee Maurice Nyx accepts the summary of her testimony contained in the Prosecution's Brief, at 2-19, with the following additions and corrections.

Wilson testified she skipped school on March 5th, several weeks before the incidents in question, and Mr. Nyx found out about this. Wilson said she was confronted by Mr. Nyx on March 5, and he demanded to know where she had been when she was supposed to be in school. Wilson admitted to Mr. Nyx she had skipped school in order to have sex with her ex-boyfriend (40a – 42a). Wilson testified Mr. Nyx asked her if she used protection during sex, and she said yes. She said Mr. Nyx emphasized the importance of using protection (41a – 42a). Wilson did not believe Mr. Nyx told her parents about her sexual activity; she claimed she was scared he would do so (42a – 44a). Wilson admitted she had been getting in so much trouble her parents had told her if she got in trouble again, she would be sent to a girls' home (71a).

Wilson also admitted that on March 5th, her mother dropped her off at school, but she left the premises without going inside the school building. She was caught by Mr. Nyx when she returned to the school about 2:45 p.m. She was then taken to Mr. Nyx's office for about one half hour. She claims she kept her mother waiting in her car for 45 minutes the school while she was in Mr. Nyx's office. She did not tell her mother she skipped school (78a – 80a).

On Tuesday, March 19, 2002, Wilson claimed she was sent to the school's Resolution Center ("RC") (which is also the lunchroom) because she had a stye on her eye. Mr. Nyx was present and in charge of the students. Wilson sat with a friend, Shadonna Stubbs, and began doing schoolwork (21a – 24a). Wilson told Mr. Nyx about the stye on her eye, and asked for an ice pack. Mr. Nyx got an ice pack, but it was wrapped in a big black garbage bag. Mr. Nyx gave Wilson permission to go to

restroom to get paper towels to wrap around the ice pack instead of the garbage bags (II, 18-19).

Wilson said she went upstairs to the girls' restroom, which is on the second floor, directly above the RC. As summarized in the prosecution's brief, Wilson claims Mr. Nyx met her in the hallway when she came out of the restroom, and told her to meet him by the double doors at the end of the hallway; he then left. She next saw Mr. Nyx when he opened the double doors from the other side, and let her in. These doors led to a stairway between the School and an adjourning church. She claims Mr. Nyx then took her down several flights of stairs to the bottom of the stairwell, which is an area immediately adjacent to the RC (25a – 33a). Wilson claimed Mr. Nyx then initiated sexual activity with her. (34a –40a).

Although Wilson claimed she was scared when she went to the bottom of the stairwell with Mr. Nyx, she admitted she never cried out for help at any time. Further, she never turned around and tried to walk away (II, 79; 24b).

Wilson claimed that when the sexual activity was over, she and Mr. Nyx walked upstairs together, and Mr. Nyx told her to return to the RC. She told her friend Stubbs she had been sick in the bathroom. A few minutes later, Mr. Nyx came back into the RC; about 20 minutes after that, school ended, and Wilson went home (43a – 46a). Wilson admitted she did not tell her mother about the alleged sexual assault which she claims had occurred on that day. She claimed she was afraid because she thought her mother would find out she had skipped school on March 5 (47a).

Wilson then testified that on Thursday, March 21st, she was doing "lunch duty", which was a penalty she had been assigned by Mr. Nyx for skipping school. This involved sweeping the floors and cleaning off the tables in the lunchroom (48a – 50a). On that day, her "lunch duty" was after fourth hour (30b-31b). Wilson said she again asked Mr. Nyx if she could go to the restroom, and he gave her permission (50a – 52a).

When she came out of the restroom, she claimed she again saw Mr. Nyx in the hallway on the second floor. She claimed Mr. Nyx again told her to stand by the double doors at the end of the hallway; he again took her to the bottom of the stairwell, and initiated sexual activity (50a – 57a).

Wilson claimed that while the sexual activity was taking place, the doors they were standing next to started to open, and Mr. Nyx pushed the doors back into the closed position. Wilson claimed she could then hear her friend Stubbs laughing on the other side. Wilson claimed Mr. Nyx told her to return to the RC, and then he left (56a – 58a). Wilson claimed she did not see Stubbs again until the sixth hour when Wilson allegedly asked her if she had pushed on the doors between the lunchroom and the stairway (58a – 59a).

After sixth hour, Wilson went home. Once again, she did not tell her parents about her allegations of sexual misconduct against Mr. Nyx. However, the next day she allegedly told two friends, Melisa and Tiffany, about the alleged incidents (59a – 60a).

Sometime later, Wilson was back in the RC and allegedly told a good friend named Dwayne Credit about what occurred between her and Mr. Nyx; Credit was one of the first students she claimed to have spoken to about these accusations. Further, she admitted that Credit then wrote an extortion letter to Mr. Nyx. She claimed she learned about the extortion attempt on March 20th when Credit told her about it. Wilson claimed she did not have anything to do with the extortion letter, and denied she was supposed to receive $500 as part of the scheme. However, Wilson admitted that when she made her police report, she did not tell the police there was an ongoing attempt to extort money from Mr. Nyx. (48a-49a, 64a – 65a, 81a – 82a).

Wilson did not tell her mother what allegedly happened until a friend named Portia called her mother. After talking to her mother, Wilson told her father (61a – 63a). Wilson was then taken to the Fifth Precinct to make a police report (63a – 64a). She made a statement there and was then

taken to the Sex Crimes Unit where she made a written statement (66a-69a). At some point, on March 22nd or 24th, she was taken to the hospital for an examination (64a – 76a).

Wilson denied telling hospital personnel the second incident occurred in Mr. Nyx's office; she claimed the medical records, which said she made such a statement, were incorrect (74a – 76a).

Contrary to Wilson's P. Exam. testimony that she told the teacher who sent her to the RC on March 19th she was going to the lunchroom to do her homework, she testified at trial she told the teacher she needed to get ice for the sty on her eye (21b-22b). Further, at the P. Exam. she testified the March 19th incident took place during fifth hour; at trial, she said it was sixth hour (22b-23b). The trial court acknowledged the impeachment on this point (31b). Wilson testified at trial that on March 21st, she did not skip her fifth hour class; she was allegedly in the lunchroom performing her "lunch duty;" her punishment for having skipped school on March 5. However, at the P. Exam, she testified she skipped Algebra and was therefore in the lunchroom without permission. Wilson testified at trial that the testimony she gave under oath at the preliminary exam was false (31b-33b).

Further, Wilson testified at the P. Exam that Mr. Nyx did not have an erection during the alleged March 19th incident; she testified at trial he did have one (77a). She admitted that at the time of the P. Exam, she knew the difference between erection and ejaculation, but claimed she got confused (34b-35b).

Wilson said her height is only 5'4" or 5'5" (77a-78a), and she weighed about 120 lbs. She guessed Mr. Nyx is about 5'11" or 6' tall (86a). Nevertheless, she insisted Mr. Nyx had inserted his penis into her vagina while in a standing position (77a – 78a).

Wilson said she told medical personnel at the hospital she had penis to vagina penetration with Mr. Nyx on March 21st, however, at trial she testified this occurred on the 19th (104b-106b).

Wilson also testified Mr. Nyx attempted to have anal intercourse with her on March 19. She

claimed she told this to the Sex Crimes investigator. She also claimed this allegation was in her police witness statement (83a – 85a). But Sex Crimes Investigator Thomas admitted Wilson never told her Mr. Nyx made any attempt at anal intercourse (173a). Wilson also claimed she told hospital personnel that Mr. Nyx attempted and penetration. However, the medical records state Wilson denied any rectal penetration by the penis (39b-40b).

Defendant-Appellee Maurice Nyx also accepts the summary of the testimony of the following witnesses as contained in its Brief, with the following additions and corrections.

Susan Diehl testified concerning the scope of her investigation of both the alleged sexual misconduct and of the attempted extortion of Mr. Nyx. She interviewed Shadonna Stubbs, Dwayne Credit and about four other students, several teachers, and she met with Mr. Nyx (90a – 97a).

Diehl went to the back stairwell that connects the church to the school, which is an area behind the double doors in the RC. Schoolhouse has a lease to use the school building but not the church, so they do not allow the students to use this stairwell, which goes into the lobby of the church. When Diehl examined the doors which separate the lunchroom/RC from the stairwell, she found they were closed and chained shut (96a – 98a). To open these doors, the lock and chain must be undone, and the door pushed open. Diehl identified four school personnel, including Mr. Nyx, who had keys to these doors. (99a) Diehl admitted the double doors separating the first and second floor hallways from this stairwell are normally closed, but are kept unlocked by order of the Fire Marshal (100a). Students are told the areas behind these doors are off limits (100a – 101a).

Stubbs she is a friend of Wilson's. On Tuesday, March 19th, Stubbs was in the RC. She saw Wilson showing Mr. Nyx the bump on her eye (II, 160-61). Stubbs claimed that Wilson and Mr. Nyx both left the RC and she did not see Wilson again for about 45 minutes (106a – 119a).

A few days later, Stubbs and Wilson were in the RC again, because they had both been late

for class. It was either fifth or sixth hour. Mr. Nyx was present, supervising the students in the RC. Stubbs claimed she turned her head for a brief time, looked up, and noticed Wilson and Mr. Nyx were gone (120a – 122a). Stubbs then got up and went with Melisa, Wesley, and Dwayne Credit to the doors separating the lunchroom/ RC from the bottom of the stairwell. She was able to push the doors open because on this day the chains were not in place. She then felt something push the door back at her. She and the others got scared, returned to their chairs, and sat down (123a – 128a). Stubbs said Oh, my god, and sat back down on her chair; she denied there was any laughter in her voice (140a –141a). A minute later, Stubbs tried the door again. This time it opened and there was a chair behind the door. Stubbs admitted she did not report this to anyone in the school (123a – 128a).

Stubbs made a police statement on April 22nd, which said the first incident occurred on March 15th (41b-42b). She admitted she does not know who was behind the doors on March 21st (129a). She could not recall why she was in the RC on March 19th. She thinks she was being disciplined for being late for class, not because she had a headache. However, in her police statement, she said she was in the RC because she had a headache (129a – 130a, 139a). Stubbs also claimed the second incident on March 21st happened during fifth hour, not sixth hour. (45b).

Detective Audrey Thomas is the detective in charge of this case (153a – 154a). When she went to the school to investigate and interview Susan Diehl, she was given both a security videotape of Dwayne Credit placing the extortion note in Mr. Nyx's mailbox, and the extortion note itself. (159a – 162a). The extortion note was admitted as Exhibit 8, and reads as follows:

> Nicks [sic], I know what you did with Ebony. I want 3,000 dollars or I will go to the cops and you know you don't want your family to find out that you are a [illegible]. Have it by the day of the variety show. I will give you more instructions at another time. From: Bout to Get Paid. P.S. No funny stuff or I go to the cops!!!

Det. Thomas admittedly did not investigate the attempted extortion of Mr. Nyx (172a– 173a).

Det. Thomas prepared an Investigator's Report which stated: Admissions: Defendant--no statement (48b). Det. Thomas admitted she prepared the Investigator's Report after she was allegedly informed Mr. Nyx had allegedly given a statement to Sgt. Alma Hughes-Grubbs (175a).

Sgt. Alma Hughes-Grubbs ("Grubbs")interrogated Mr. Nyx on April 21, 2002 (179a–181a). Mr. Nyx denied having done anything sexually with Wilson (186a–187a). However, Grubbs claimed that eventually Mr. Nyx told her that Wilson had been following him around the school for several weeks; and he allegedly admitted he did go to the downstairs area of the school with Wilson. Grubbs claimed Mr. Nyx said that Wilson had pulled her pants partially down and that Mr. Nyx then touched her vagina (187a–188a). When asked for Mr. Nyx's exact words, Grubbs testified from her report:

> Mr. Nyx stated that Ebony grabbed his penis, and attempted to put it inside her vagina. And that he had put both his arms around Ebony at the time, and his hand went between Ebony's legs, touching her vagina. (188a – 189a).

Grubbs also claimed Mr. Nyx told her that, while this was occurring, someone came to the door and tried to push the door from the other side. Mr. Nyx allegedly said he pushed the door back with his arm and never saw who was on the other side (189a).

Grubbs testified she then asked Mr. Nyx to make a statement in his own handwriting. She claimed Mr. Nyx tried to write out a statement but said he could not spell very well. She left the room, and allegedly watched on a monitor. When she came back, Mr. Nyx had balled the paper up and thrown it in the trash (191a, 198a). Grubbs' interview with Mr. Nyx was not tape recorded. Grubbs said she had no particular reason for not writing out a statement herself and then allowing Mr. Nyx to sign it (194a – 195a). Grubbs then admitted she did not mention in her report that Mr. Nyx balled up the paper and threw it in the trash (194a – 195a). Grubbs then volunteered that she had the balled up paper with her, and it was admitted into evidence as Exhibit 10 (196a, 199a).

The only defense witness was Edward Wardell, a school teacher at DSIA who taught a fifth hour Algebra class during the events in question. He kept his own attendance records. Based on his records, he testified that on March 19, 2002, complainant Wilson and her friend Stubbs were both present in class during fifth hour Algebra; however, both were late (199a – 201a). Wardell also testified he did not give Wilson permission on March 19th to leave class and go to the RC (202a).

On March 21, 2002, Wilson was present in Wardell's fifth hour Algebra class, but Stubbs was absent (201a–202a). Wardell's records do not indicate Wilson was tardy that day. (52b-53b).

Wardell also confirmed that on March 5th, both Wilson and Stubbs missed his third and fifth period classes (205a – 206a). Wardell was also aware that during March, 2002, Wilson was assigned by Mr. Nyx to lunch duty as a punishment (206a – 207a). He did not recall if she was still on lunch duty as of March 19th or 21st. (49b-52b).

C. Findings of Fact, Verdict, and Sentence of the Trial Court

After closing arguments, the trial court made its findings of fact and verdict. At no time prior to the Court's announcement of its verdict on the record were the defense or the prosecution given any notice that the trial court intended to consider any offenses other than the offenses charged in the Information. The trial court's complete findings of fact and verdict are found in the Prosecution's Appendix (208a – 213a), and, in part, in the Prosecution's Brief, at 21 – 24. The trial court found Mr. Nyx guilty of two counts of CSC II (212a – 213a).

On October 17, 2002, Mr. Nyx was sentenced to two concurrent prison terms of three to fifteen years (Judgment of Sentence, at 5a).

D. Post-Conviction Proceedings

Mr. Nyx appealed as of right; On January 13, 2005, the Court of Appeals reversed in an unpublished per curium opinion (Neff, P.J., and Cooper, and R.S.Gribbs, J.J.) (6a–9a). The

prosecution sought Leave to Appeal. On March 31, 2006, this Court granted Leave to Appeal (10a).

This is Mr. Nyx's Brief on Appeal, in which he contends the Court of Appeals should be affirmed; or, in the alternative, if this Court should see fit to reverse the Court of Appeals, this case should be remanded to that Court for consideration of the remaining issues Mr. Nyx raised on appeal which were not addressed by that Court because it considered them moot in light of its decision.

ARGUMENTS

I. WHERE THE TRIAL COURT IN A BENCH TRIAL, WITHOUT NOTICE TO OR CONSENT FROM THE PARTIES, IMPLIEDLY ACQUITTED THE DEFENDANT OF ALL THREE ORIGINAL CHARGES, AND CONSTRUCTIVELY AMENDED THE INFORMATION DURING ITS VERDICT DELIVERED FROM THE BENCH, AND CONVICTED DEFENDANT OF TWO LESSER, COGNATE OFFENSES, UPON WHICH THE DEFENDANT HAD NOT BEEN BOUND OVER AND WHICH WERE NOT CHARGED IN THE INFORMATION, THE DEFENDANT WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO NOTICE OF THE CHARGES AGAINST HIM, AND AN OPPORTUNITY TO DEFEND AGAINST THOSE CHARGES, AS WELL AS HIS STATE STATUTORY RIGHT NOT TO BE TRIED FOR LESSER COGNATE OFFENSES, AND THE DEFENDANT'S CONVICTIONS MUST BE VACATED.

A. Standard of Review:

Whether CSC II is a necessarily included lesser offense or a cognate lesser offense of CSC I is a question of law that this Court reviews de novo. People v Mendoza, 468 Mich 527 531; 664 NW2d 685 (2003); People v Perry, 460 Mich 55; 594 NW2d 477 (1999). The interpretation of a statute or court rule is a question of law and subject to de novo review. People v Chavis, 468 Mich 84, 91; 658 NW2d 469 (2003). The issue of whether a defendant's right to notice and due process were violated is a constitutional question, which this Court reviews de novo. People v Sierb, 456 Mich 519, 522; 581 NS2d 219 (1998).

B. Summary of Argument I

During this bench trial, Mr. Nyx was tried on three counts of CSC I; neither party ever requested the Trial Court to consider any verdict other than Guilty or Not Guilty of the three counts of CSC I; neither party ever agreed to the Trial Court's consideration of any verdict other than Guilty or Not Guilty of three counts of CSC I; and neither party had any notice in advance of the verdict that the Trial Court would consider any verdicts other than guilty or not guilty of three counts of CSC I; nevertheless, without any advance notice, the Trial Court announced in its Verdict,

delivered from the bench, that it was convicting Mr. Nyx of two counts of CSC II (212a – 213a).

Although the Trial Court did not state it was amending the Information, it constructively amended the Information by convicting Mr. Nyx of two counts of CSC II (212a – 213a).

As noted by the Court of Appeals in its Opinion, (7a), this Court held in People v Lemons, 454 Mich 234, 253-254; 562 NW2d 447 (1997), that CSC II is not a necessarily included lesser offense of CSC I: "because CSC II requires proof of an intent not required by CSC I – that defendant intended to seek sexual arousal or gratification – CSC II is a cognate lesser offense of CSC I." Lemons, supra, at 253. Cf. Id., at 254, n. 29. Thus, under People v Cornell, 466 Mich 335; 646 NW2d 127 (2002), the Trial Court was without authority to convict Mr. Nyx of lesser cognate offenses in this bench trial. Retroactivity is not an issue in this case because Cornell was decided on June 18, 2002, and the trial in the instant case began on September 17, 2002.

Further, MCL 767.76 does not allow the trial court to constructively amend the Information after the close of proofs to add cognate offenses. This interpretation is supported by the plain language of MCL 767.76, and by reading MCL 767.76 in conjunction with MCL 768.32(1). In addition, the constructive amendment after the close of proofs is not constitutional in light of Schmuck v United States, 489 US 705, 718; 109 S Ct 1443; 103 L Ed 2d 734 (1989). Mr. Nyx did not receive adequate notice he would have to defend against charges of CSC II, where CSC II is not a necessarily included lesser offense of CSC I. US Const, Ams VI, XIV; Const 1963, Art 1, §§17, 20.

If this Court finds this error to be unpreserved, the error here was jurisdictional. Further, the error here was so egregious, affecting the substantial right of Mr. Nyx to notice and the opportunity to defend, that it constituted plain error. The error implicates a constitutional right that is so basic to a fair trial that it can never be treated as harmless. Alternatively, the prosecutor cannot show that the error was harmless beyond a reasonable doubt.

Finally, if this Court deems this error was forfeited, then:

> "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." People v Carines, 460 Mich 750, 763; 597 NW2d 130 (1999).

First, Mr. Nyx asserts he is actually innocent; and that the complainant's CSC allegations were intended to set him up for extortion. Second, the error here was so egregious, affecting his substantial right to notice and the opportunity to defend, that it constituted plain error. Government of the Virgin Islands v Joseph, 765 F2d 394, 398 (3rd Cir 1985). The failure to give notice and an opportunity to defend meets all three prongs of the Carines test – it affects the fairness, integrity and public reputation of the judicial proceedings. This constructive amendment at the end of trial implicated such constitutional rights as fair notice, double jeopardy, and the effective assistance of counsel. See Watson v Jago, 558 F2d 330, 338 (8th Cir 1988). For all these reasons, the decision of the Court of Appeals should be affirmed.

C. Argument

1. **THE OFFENSE OF SECOND DEGREE CRIMINAL SEXUAL CONDUCT IS NOT A NECESSARILY INCLUDED LESSER OFFENSE OF FIRST DEGREE CRIMINAL SEXUAL CONDUCT, AND UNDER PEOPLE v CORNELL, THE TRIAL COURT WAS WITHOUT LEGAL AUTHORITY TO CONVICT MR. NYX OF THIS COGNATE OFFENSE IN DEFENDANT'S BENCH TRIAL.**

The Defendant's convictions of two counts of CSC II must be vacated and set aside where the defendant was bound-over for trial on three counts of CSC I, and where the trial Court impliedly acquitted him of those charges by entering a Judgment of Conviction as to two counts of CSC II.

This Court's interpretation of MCL 768.32(1) in People v Cornell, 466 Mich 335; 646 NW2d

127 (2002), is relevant as this Court now must decide how to interpret MCL 767.76.[2]

In People v Cornell, supra, this Court explained and enforced the requirements of MCL 768.32(1), which, with some modifications not pertinent to this analysis, has long provided:

> "Except as provided in subsection (2) [concerning certain controlled substance offenses], upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense." (Bracketed material added).

This Court in Cornell, supra, at 353, recognized that the Legislature correctly controlled what charges the factfinder could consider. After an extensive review of earlier Michigan law, this Court held that MCL 768.32(1) only permits the consideration of necessarily included lesser offenses "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." Id., at 357. Consideration of cognate lesser offenses is foreclosed. Id., at 354-355. The strictures of MCL 768.32 apply equally to bench trials. Id., at 349, n 5.

In Cornell, supra, at 341, this Court noted that the predecessor statute to MCL 768.32(1) was originally enacted in 1846. The earlier version of this statute was authoritatively construed by this Court in Hanna v People, 19 Mich 316 (1869). Cornell, supra, at 341-344. The rule set forth in Hanna prevailed in this state for 106 years. Then, as pointed out in Cornell, supra, at 344-353, in 1975, this Court began issuing decisions in this area of law which ignored, or only played lip-service to, MCL 768.32(1), and to the earlier decisions interpreting it, beginning with Hanna,

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[2] MCL 768.32(1) and MCL 767.76 are intertwined in the instant case. Whether the trial court's verdict is viewed in the context of an improper instruction in a bench trial under MCL 768.32(1) (see sub-issue C.1), or in the context of an improper constructive amendment under MCL 767.76 and MCR 6.112(H)(see sub-issue C.2.A.), the constitutional concerns are the same (see sub-issue C.2.B.), and the error here is not harmless (see sub-issue C.3). Further, the doctrine of implicit acquittal prohibits the conviction of Mr. Nyx at this time of CSC I (see sub-issue C.4).

supra, which construed it. Therefore, this Court found it necessary in Cornell, supra, at 353, to return to the original understanding of MCL 768.32(1), as set forth by Hanna and progeny, and as explained by Justice Coleman's dissenting opinion in People v Jones, 395 Mich 379; 236 NW2d 461 (1975). Justice Coleman's dissent in Jones addressed the blurring of roles and the threats to due process that are inherent in the cognate offense approach, and which are at issue in the case at bar:

> "Justice Coleman dissented from the majority opinion in Jones because she disagreed with the theory of lesser included offenses adopted by the majority. She explained that it would blur the lines of responsibility in the criminal justice process, reasoning:
>
> > 'The "cognate," "related," or "allied" lesser offense (it is not in reality 'included') theory as here presented conjures up visions of increased rather than diminished confusion.
> >
> > It invites appeals because of its formlessness. It blurs the roles of prosecutor, judge and defense counsel. If not contrary to our statutes, it adds a new act or section to the existing legislation.
> >
> > It threatens due process as to defendant and fundamental fairness as to the people in the preparation and presentation of the case.
> >
> > Unless the tendencies of past history are altered, we can anticipate in some cases a result the opposite of that desired by my colleagues. Considering the number of offenses by our definition "related" or "allied" to this or other major crimes, juries presented with foreseeable smorgasbords of possibilities conceivably will return unjustifiable verdicts of guilty.
> >
> > In my opinion, the theory adopted today neither promotes the efficient and careful operation of the criminal justice system nor is likely to result in a fairer trial for the defendant.' [Id., 406.]
>
> In explaining the reasons for her disagreement with the majority's theory, Justice Coleman noted that the decision to charge a person with a crime was the prosecutor's responsibility and that the Court had held that courts may not interfere with that process. She explained that after the crime was charged and a trial held, MCL §768.32 permits the jury to consider other offenses. However, the statute did not leave the jury free to convict for any felony or misdemeanor; only degrees or an attempt of the offense charged could be considered. Thus, as Justice Coleman construed the statute, MCL § 768.32 only permits consideration of necessarily included lesser offenses."

Cornell, supra, 346-347 (emphasis added).

The prosecution brief argues that, in the name of "textualism," this Court should adopt a mechanistic and formalistic interpretation of the word "degrees" as that word is used in MCL 768.32(1). But the interpretation urged by the prosecution was expressly rejected by Hanna, supra., and by Justice Coleman's dissent in Jones, supra. In, Cornell, supra, this Court reaffirmed the original understanding of this statute, as it was applied in this state during the 106 years following Hanna. Hanna interpreted the predecessor statute to MCL 768.32(1), to permit a defendant who was tried on a charge of Assault With Intent to Commit Murder, to be convicted of the lesser included offense of Assault and Battery, even though these offenses are not expressly divided into "degrees." The Hanna decision reasoned:

> I [Christiancy, J., writing for a unanimous Court] do not think this provision [section16, of Chapter 161 of the Revised Statutes of 1846 (Comp. L.Sec. 5,952), the predecessor statute to MCL 768.32(1)] was intended to be restricted in its application to offenses divided by the statutes contained in this title (which included all the provisions in reference to crimes), into classes expressly designated by the name of "degrees." Thus confined, it would apply, so far as I have been able to discover, only to the single case of an indictment for murder in the first degree, and would not even include manslaughter as a lower degree of the offense, but only murder in the second degree; since murder is the only offense divided by the statute into classes expressly designated as "degrees."
> Hanna, supra, 19 Mich 316, at 320.

The decision in Hanna went on to point out that the legislature could not possible have meant that the word "degrees" as used in the statute was intended to apply only to offenses which the legislature had expressly divided into "degrees" (which at that time would have included only the crime of murder) because there was another statute, in the very next section at that time, which provided for a conviction of murder in the second degree where a defendant was charged with murder in the first degree. Hanna, Id., at 321. Such a construction of the word "degrees" would have rendered the predecessor statute to MCL 768.32(1) meaningless. Thus, Hanna concluded:

> [T]his provision...must...be construed as extending to all cases in which the statute has substantially, or in effect, recognized and provided for the punishment of offenses of different grades, or degrees of enormity, wherever the charge for the higher grade includes a charge for the less. In this view only, can any effect be given to it [the statute], as declaratory of, or altering the common law.
> Hanna, supra, 190 Mich, at 321;
>
> Accord: Cornell, supra, at 342. .

Reaffirming its commitment to the historic interpretation which this Court has given to MCL 768.32(1), this Court held in Cornell, supra at 353-354, that MCL 768.32(1), applies only to necessarily lesser included offenses; or, using the language from Hanna, supra: "wherever the charge for the higher grade includes a charge for the less." Hanna, supra. Cornell held that MCL 768.32(1) prevents either a jury or a judge sitting without a jury from considering any cognate lesser offense to the charge for which the defendant stands trial..

The prosecution argues that because Mr. Nyx was convicted of a different degree of the charged offense (CSC second degree, as opposed to CSC first degree), his conviction should stand, because MCL768.32(1) expressly authorized the trial court to consider and convict him of an offense of a lesser degree than the charged offense. But Hanna and Cornell did not interpret and apply MCL 768.32(1) in this way. The plain language of Hanna and Cornell prohibited the trial court in this case from convicting Mr. Nyx of the lesser cognate offense of CSC II, because both cases holds it is it is a violation of the rights of a defendant to be convicted of any offense which contains elements different from the elements of the offense which the defendant was bound over on, and stands trial for.

The fact that the legislature, many years after MCLA 768.32(1) was originally enacted, has chosen to create the offenses of CSC in the first, second, third, and fourth degrees does not mean that any time a defendant is charged with CSC I, s/he can potentially be convicted of any other degree of

the offense. Cornell, supra, squarely held that it violates the legal rights of a defendant for him/her to be convicted of any offense not charged in the Information which is not a necessarily lesser included offense. Cognate offenses, because they contain elements different from the elements of the charged offense, cannot be considered.

Hanna and progeny established a well-settled and uniformly applied interpretation of MCL 768.32(1) which was the law of this state for 106 years until 1975, when this Court began to apply a very different interpretation. During that 106years, the state legislature was presumably aware of the construction given to MCL 768.32(1) by Hanna, and that this construction was being followed by the Courts of this state. Yet, the Legislature made no move to amend the statute. Had the state Legislature desired to change the interpretation given to MCL 768.32(1) by Hanna, it had 106 years to do so, but it did not do so. In People v Cash, 419 Mich 230, 241; 351 NW2d 822(1984), this Court recognized that the Legislature is "presumed to know of and legislate in harmony with existing laws," citing People v Harrison, 194 Mich 363, 369; 160 NW 623 (1916). Where the Legislature permits a long-standing and settled judicial interpretation of a statute to stand without statutory modification for a long period of time, it can be concluded that the judicial interpretation of the statute was the correct one. Cash, supra. Cf. People v Langworthy, 416 Mich 630, 643-644; 331 NW2d 171 (1982). Thus, it must be concluded that Hanna, supra, represented an interpretation of MCL 768.32(1) which was approved by the state Legislature; this Court thus acted correctly in Cornell in returning to this earlier and accepted understanding of Hanna.

Thus, this Court concluded in Cornell, supra, at 353-354:

> Therefore, in our opinion, it is necessary to return to the statute and the construction it was given by the Hanna Court and by Justice Coleman in her dissent in Jones.
>
> In pertinent part, the statute provides that the jury "may find the accused person guilty of a degree of that offense inferior to that charged in the

> indictment." MCL 768.32(1). As the Hanna Court explained, the provision was not intended to be limited only to those expressly divided into "degrees," but was intended to extend to all cases in which different grades of offenses or degrees of enormity had been recognized.....Thus, application of the statute is ...[not] limited to those crimes expressly divided into degrees.....
>
> Moreover, Justice Coleman opined that MCL 768.32 only permitted consideration of necessarily included offenses, not cognate lesser offenses. The language of the statute supports this conclusion. The statute permits the jury to convict a defendant of a degree of "*that offense inferior to that* charged in the indictment." The language of the statute only permits consideration of a degree of those offenses that are inferior to the greater offense charged [footnote omitted].
>
> Cornell, supra, at 354-355 (italics in original, underscoring added); Cf. Cornell, supra, at 347.

"A necessarily lesser included offense is an offense whose elements are completely subsumed in the greater offense." People v Mendoza, supra, 540, quoting Cornell, supra, 356. "[T]he defendant's due process notice rights are not violated [where a jury or judge is instructed on a necessarily lesser included offense] because all the elements of the lesser offense have already been alleged by charging the defendant with the greater offense." Id. at 354-355, quoting People v Torres (On Remand), 222 Mich App 411, 419-420; 564 NW2d 149 (1997) and People v Membres, 34 Mich App 224, 191 NW2d 66 (1971).

The argument propounded by the prosecution in this appeal, which asks this Court to approve instructions on lesser cognate offense which are not lesser-included offenses, so long as they are designated as a lesser "degree" of the charged offense, is therefore contrary to Hanna, supra, and to Justice Coleman' s dissent in Jones, supra. Since Cornell re-affirmed this Court's commitment to Hanna, supra, and adopted Justice Coleman's dissent in Jones, supra, acceptance of the prosecution position in this appeal would require reversal of Cornell, and the subsequent cases which have applied Cornell.

In Counts I, II and III, Mr. Nyx was charged with three counts of CSC I involving the use of a

position of authority to commit sexual penetration with a complainant between the ages of 13 and 16, MCL 750.520b(1)(b). This statute provides that:

> "A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *
>
> (b) That other person is at least 13 but less than 16 years of age and any of the following:
>
> (iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit. [MCL 750.520b(1)(b)].

In comparison, the statute describing the offense of CSC II, MCL 750.520c(1)(b) provides:

> "A person is guilty of criminal sexual conduct in the second degree if he or she engages in sexual contact with another person and if any of the following circumstances exists:
>
> * * *
>
> (b) That other person is at least 13 but less than 16 years of age and any of the following:
>
> (iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit." [MCL 750.520c(1)(b)].

Further, the phrase "sexual contact" as used in the CSC II statute is specifically defined in MCL 750.520a(n) as follows:

> "(n) 'Sexual contact' includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:
>
> (i) Revenge.
> (ii) To inflict humiliation.
> (iii) Out of anger."

In this case, because CSC II is not a necessarily included lesser offense of first-degree criminal sexual conduct, the trial court's convictions of Mr. Nyx for two counts of CSC II are invalid. As indicated in the above statute, a conviction of first-degree criminal sexual conduct involving sexual penetration does not require evidence that the penetration was done for the purpose of sexual

arousal or gratification. However, a conviction of CSC II does so require.

As noted by the Court of Appeals in its Opinion in this case, (7a), this Court held in People v Lemons, 454 Mich 234, 253-254; 562 NW2d 447 (1997), that CSC II is not a necessarily included lesser offense of CSC I:

> "because CSC II requires proof of an intent not required by CSC I – that defendant intended to seek sexual arousal or gratification – CSC II is a cognate lesser offense of CSC I." Lemons, supra, at 253. Therefore, it is possible to commit CSC I without first having committed CSC II. Id. The Lemons Court also noted:
>
>> Like the Court of Appeals in People v Garrow, "[w]e recognize that in most cases, second-degree [CSC] is a factually included offense within first-degree [CSC], for sexual penetration is usually for a sexual purpose." However, the additional intent requirement for CSC II mandates that it be considered a cognate lesser offense of CSC I. [Id. At 254 n. 29 (brackets in original)(citations omitted).
>
> People v Nyx, COA No. 248094, unpublished per curiam opinion, January 13, 2005, Slip Opinion at 2 (7a).

Thus, the convictions of Mr. Nyx for two counts of CSC II violate the rule set down in Cornell, supra, which held that MCLA 768.32 prohibits consideration of lesser cognate offenses, especially where, as here, the defendant was not bound over on the lesser cognate charges, and he was never given notice he would have to be prepared to defend against the lesser cognate charges, and where CSC II contains an element that the criminal sexual conduct must be committed with the intent to obtain sexual gratification, which is not an element of the original charges of CSC I.

The prosecution argues that the trial court properly considered the lesser offenses, because the statute permits consideration of any offense which is labeled a lesser "degree" of the charged offense. But another panel of the Court of Appeals rejected this precise argument in People v Finnerty, (unpublished opinion of the Mich COA, No. 247310, November 2, 2004)(1b-7b). In Finnerty, the defendant was charged with one count of CSC I for an alleged act of sexual penetration with a 12 year old girl. The defense attorney requested that the jury also be instructed on CSC II.

The defendant was convicted of CSC II. Finnerty held that Cornell prohibited the jury from considering CSC II, as follows:

> Here, [the defendant] was only indicted on CSC I, but the jury was instructed on and convicted him of, CSC II. CSC II is not a *necessarily included* lesser offense of CSC I because CSC II requires proof of an intent to seek sexual arousal or gratification, and CSC I does not require this element.
> 10/Accordingly, CSC II is a cognate lesser offense of CSC I, not a *necessarily included* lesser offense, 11/ and allowing the jury to consider CSC II was therefore erroneous. 12/
>
> 10/ People v Lemons, 454 Mich 234 , 253; 562 NW2d447 (1997)
> 11/ Id. at 253-254.
> 12/ See MCL 768.32; Cornell, supra at 357. We are unconvinced, to say the least, by the prosecutor's assertion that Cornell is inapplicable here because MCL 768.32 does not apply to offenses that are formally divided into degrees. The statute expressly applies to situations in which an accused is indicted for an offense "consisting of different degrees." Finnerty, supra, Slip Opinion, at 4. (Italics in original; underlined emphasis added) (4b).

The text of footnote 12 from Finnerty, supra, directly addresses and rejects the argument advanced by the prosecution in this case. Mr. Nyx contends that the reasoning and analysis in Finnerty, supra, is persuasive, both as to the Cornell violation (where the trial court here improperly considered the lesser offenses of CSC II), and as to the application of Cornell generally to lesser cognate criminal sexual conduct offenses. Thus, Finnerty completely supports Mr. Nyx's position.

The Finnerty Court nevertheless affirmed the defendant's conviction because defense counsel in that case had requested the instruction on CSC II. Finnerty, supra, (4b). The Court decided that defendant Finnerty could not profit from the Cornell violation because the error was caused by his attorney's "affirmative conduct." Finnerty, supra, (4b). In Mr. Nyx's case, to the contrary, his trial counsel did not request or concur in the trial court's consideration of CSC II. Therefore, neither Mr. Nyx nor his attorney engaged in any "affirmative conduct" which invited the error, as defense counsel did in Finnerty.

In People v Nickens, 470 Mich 622;685 NW2d 657 (2004), this Court determined that

Assault With Intent to Commit CSC involving Sexual Penetration is a necessarily included lesser offense of CSC I. In reaching this conclusion, the Court rejected the position taken by the Court of Appeals that Assault With Intent to Commit CSC involving Sexual Penetration required proof the defendant acted with an improper sexual purpose or intent. This Court decided that the intent element for Assault with Intent to Commit CSC involving Sexual Penetration was identical to the intent element for CSC I. Nickens, supra, 627-628, 631-632. In reaching this conclusion, Nickens, supra, at 626, discussed Cornell:

> In Cornell, supra at 357, this Court held that, under MCL 768.32 [footnote omitted], a lesser offense instruction is necessarily included in the greater offense. "Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense." Mendoza, supra, at 532 n. 3. Thus, an instruction on a lesser offense is proper where "all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." Id., at 533. [footnote omitted].
> Nickens, supra, at 626.

Importantly, this Court held in Nickens, supra, by implication, that if in fact the lesser offense was one which required proof of an improper sexual purpose or intent, then it would not be a necessarily included lesser offense. Thus, CSC II, which requires proof that the touching was done for purposes of sexual gratification, is not a necessarily included lesser offense of CSC I, but is only a lesser cognate offense of CSC I.

Similarly, in Mendoza, supra, at 531-533, this Court held that manslaughter is a necessarily included lesser offense of murder; therefore, an instruction on manslaughter should be given in a murder trial if a rational view of the evidence supports such a verdict. Mendoza, supra, at 544, 547. Cf. People v Reese, 466 Mich 440, 446 (2002), which states that the holding of Cornell: "only permits instructions on necessarily included lesser offenses, not cognate lesser offenses."

On the other hand, in People v Alter, 255 Mich App 194, 198-201 (2003), Lv. App. Den.,

___ Mich ___ (8/29/03), the defendant stood trial on four counts of CSC I, and two counts of CSC II. As to two of the counts of CSC I, the jury was instructed on the lesser offense of Sexual Intercourse Under the Pretext of Medical Treatment (SIPMET). The jury convicted the defendant of the two lesser offenses. The Court of Appeals reversed the two convictions of SIPMET, finding that the jury should not have been permitted to consider this offense, as it is not a necessarily included lesser offense of CSC I. Id., at 199-201. The Court of Appeals then upheld the separate convictions for two counts of CSC II. Id., at 201-203.

These cases all support the proposition that the Court of Appeals should be affirmed .

The prosecution's argument must fail, because the offense of CSC II is clearly not a lesser included offense of CSC I, but is only a lesser cognate offense. The trial court's findings of fact specifically found Mr. Nyx acted for sexual purposes (211a), which is not an element of the three counts of CSC I which Mr. Nyx was charged with in the Information. Compare CJI2d 20.1 with 20.2. Thus, Mr. Nyx was expressly convicted of conduct that he had never been placed on notice he was charged with, or should be prepared to defend against.

Importantly, neither the defense nor the prosecution were given any notice that the trial court intended to consider any offenses other than the offenses charged in the Information, prior to the Court's announcement of its verdict on the record. Thus, Mr. Nyx was deprived of his right to notice of the elements of the crimes which the Court would consider convicting him of (208a - 213a). The analysis of Cornell leads inexorably to the conclusion that Mr. Nyx could not properly be convicted of the cognate offenses of CSC II degree under the circumstances of this case. Therefore, Mr. Nyx's convictions must be vacated.

Furthermore, this was an all or nothing case. Mr. Nyx's defense was that the charges were a complete fabrication based upon a motive to extort $3,000.00 from him. Mr. Nyx did not

assert a defense that he improperly touched the complainant for the purpose of sexual gratification but did not penetrate her. Mr. Nyx's plea of Not Guilty was a denial of all of the allegations by the complainant. In Cornell, supra, at 357, this Court held that an instruction on a necessarily included lesser offense is only proper where the charged greater offense requires the jury to find a disputed factual element and a rational view of the evidence would support it. In the instant case, the fact finder should have found Mr. Nyx guilty of the charged offenses of CSC I, or acquitted him because there was no evidence warranting a different result, and no circumstances which would lessen the offense.[3] See People v Mendoza, supra, at 546-548.

Because this Court's decision in Cornell does not allow convictions for offenses which are not necessarily included, Mr. Nyx's convictions for two counts of CSC II must be vacated.

2. MCL 767.76 AND MCR 6.112(H) DO NOT PERMIT THETRIAL COURT TO AMEND THE INFORMATION AFTER THE CLOSE OF PROOFS.

This appeal also raises the issues o f whether MCL 767.76 allows the trial court to amend the Information after the close of proofs to charge a cognate offense; and, if so, whether such an amendment after the close of proofs is constitutional in light of Schmuck v United States, 49 US 705, 718, 109 S Ct 1443, 103 L Ed 2d 734 (1989) In the present case, the trial court's verdict is

[3] As trial defense counsel indicated, this case involved a credibility contest (54b-65b), and the evidence did not suggest a middle ground. The trial judge stated at the post-conviction hearing that she was deliberately trying to give Mr. Nyx a "break", by trying to convict him only of an offense for which he might be eligible for probation. This is a strong suggestion that the trial court was trying to give Mr. Nyx an impermissible "waiver break" for waiving his right to a jury trial. (216a-218a). See People v Ellis, 468 Mich 25 658 NW2d 142 (2003); People v Walker, 461 Mich 908; 603 NW2d 784 (1999).

properly viewed as the trial court moving *sua sponte* to make a substantive amendment of the Information to add the cognate charges of two counts of CSC II. The trial court then granted its own motion. See People v Perry, supra, at 64, n. 19. Seen in this light, the trial court's "grant" of its own motion was reversible error under MCL 767.76 and MCR 6.112(H). In essence, the trial court "constructively amended" the charging document to charge two new offenses, without notice and without an opportunity afforded to Mr. Nyx to defend against the new offenses.

This is the quintessential example of a case in which the constructive amendment of the information at the end of trial caused both prejudice to Mr. Nyx as well as a failure of justice in violation of his state and federal constitutional rights to notice of the charges against him and an opportunity to defend. US Const, Ams VI, XIV; Mich Const 1963, art 1, §§17, 20. Here, Mr. Nyx had proceeded through several months of pre-trial investigation and trial preparation, followed by two days of trial. He had presented an opening argument, conducted cross-examination, argued evidence issues, made a closing argument — with a focus upon defending himself against the allegations he used his position of authority to induce the complainant o engage in sexual penetration. Then, on the last day of trial, the Trial Court essentially permitted the prosecution to substantively amend the Information by adding the scenario that Mr. Nyx physically touched the complainant's private areas with the intent to obtain sexual arousal or gratification. This was improper, for several reasons.

(A) VIOLATION OF MCL 767.76 AND MCR 6.112(H)

Pursuant to MCL 767.45(1), an Indictment or Information must state the nature of the offense in

language which will fairly apprise the accused and the court of the offense charged.[4] "'An information must be specific for two reasons: it affords the defendant due notice of the charges against him and protection against double jeopardy should he be retried.'" People v Traughber, 432 Mich 208, 215; 439 NW2d 231 (1989), quoting People v Covington, 132 Mich App 79, 88; 346 NW2d 903 (1984) (Maher, J., concurring); Watson v Jago, 558 F2d 330 (CA 6, 1977).

Michigan law permits a trial court to amend an information in certain circumstances.[5] MCL 767.76, MCR 6.112(H). MCL 767.76 states, in relevant part, as follows:

> "The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefore no writ of error other appeal

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[4] The test for sufficiency of an information is as follows: "Does it identify the charge against the defendant so that his conviction or acquittal will bar a subsequent charge for the same offense; does it notify him of the nature and character of the crime with which he is charged so as to enable him to prepare his defense and to permit the court to pronounce judgment according to the right of the case?" People v Adams, 389 Mich 222, 243 205 NW2d 415 (1973).

[5] Although MCL 767.76 refers to indictments, unless specifically noted otherwise, all laws applying to prosecutions on indictments also apply to prosecutions by information. MCR 6.112(A); MCL 750.10; MCL 767.2.

> based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted."

MCR 6.112(H) says: "the court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant."

MCL 767.76 provides for amendments "in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." MCL 767.76. With respect to timing, MCL 767.76 allows for an amendment "before, during or after the trial." The statute also provides that if the amendment is "made to the substance of the indictment or to cure a variance between the indictment and the proof," the defendant may request a discharge of the jury or a reasonable continuance "unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made..." Id.

MCL 767.76 speaks of a range of amendments – from correcting a mere "defect," to an amendment "to the substance" of an indictment, to the most serious amendment which is to "cure a variance." In the context of amending an indictment, United States v Solorio, 337 F3d 580 (CA 6, 2003), addressed the difference between a variance, an amendment, and a constructive amendment:

> "'A variance [to the indictment]" occurs when the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged in the indictment. In contrast, an amendment involves a change, whether literal or in effect, in the terms of the indictment.' United States v Chilingirian, 280 F3d 704, 711 (6th Cir 2002)(quotations omitted). 'This Court has held that a variance rises to the level of a constructive amendment when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.' Id. at 712 (quotation omitted). Although the distinction between a variance and a constructive amendment has been called 'sketchy,' we have noted that the 'consequences of each are significantly different.' Id. 'A variance will not constitute reversible error unless "substantial rights" of the defendant have been

affected,' while a constructive amendment is per se prejudicial. Id. (citation omitted)." United States v Solorio, supra, 589-590.

In light of the accepted definitions of the terms variance and amendment, the plain language suggests that the framers of MCL 767.76 intended the statute to cover those situations in which there has been some minor factual or technical variance between the charge and the proof, but did not intend to allow an amendment that changed the nature of the charged offense.[6] Reading MCL 767.76 in conjunction with MCL 768.32(1), it is evident that the framers did not intend to eviscerate the type of notice contemplated by the Sixth Amendment.[7] Even assuming arguendo that MCL 767.76 is subject to two possible interpretations, a statute is to be construed where fairly possible so as to avoid substantial constitutional questions. People v Tombs, 260 Mich App 201; 679 NW2d 77; (2003); affirmed, 472 Mich 446; 697 NW2d 494 (2005). In accordance with this principle, this Court should reject any interpretation of MCL 767.76 that allows the state to change the nature of the charged offense by adding a new or cognate offense at the end of trial.

(1) REGARDING ADDING A NEW OFFENSE

People v Sims, 257 Mich 478, 481; 241 NW 247 (1932), interpreted MCL 767.76 as follows:

"The statute does not authorize the court to permit the changing of the offense nor the making of a new charge by way of amendment, as feared by counsel for defendant. It permits only cure of defects in the statement of the offense which is already sufficiently charged to fairly apprise the accused and court of its nature. Being thus procedural, it does not violate article 2, § 19, of the Constitution, which provides that

[6] When interpreting a statute, the goal is to ascertain and give effect to the intent of the Legislature. This Court begins by reviewing the plain language of the statute. If the language is clear and unambiguous, no further construction is necessary. People v Chavis, 468 Mich 84, 92 658 NW2d 469 (2003).

[7] A defendant's Sixth Amendment right to notice is relevant to amending the information and to permissible lesser included offense instructions. United States v Solorio, supra, 590.

> the accused shall have the right to be informed of the nature of the accusation. People v Meyer, 204 Mich 331, 169 NW 889. There being no new or different charge introduced by amendment, there is no occasion for a new examination or a rearraignment." People v Sims, supra, 481-482.

The Court of Appeals has also held that a new offense cannot be added to an information by a motion to amend at the close of proofs. People v Price, 126 Mich App 647, 652; 337 NW2d 614 (1983); People v Willett, 110 Mich App 337, 343; 313 NW2d 117 (1981), remanded on other grounds, 414 Mich 970; 327 NW2d 71 (1982). For all practical purposes, this is the same procedure which was followed by the trial court in the instant case.

In People v Hunt, 442 Mich 359, 364; 501 NW2d 151 (1993), this Court found no unfair surprise, inadequate notice, or insufficient opportunity to defend existed when the prosecutor moved *at the end of the preliminary examination* to amend the information to charge third-degree criminal sexual conduct instead of gross indecency between males. The prosecutor explained that she had not been aware of the penetration before the P. Exam. because the investigative report only described sexual contact. Id., 154. See also People v Fortson, 202 Mich App 13, 15-17; 507 NW2d 763 (1993)(which relied on Hunt, and allowed the amendment of the Information to add a new charge of felony firearm four months after the P. Exam., but *five months before trial*).

In People v Goecke, 457 Mich 442, 458; 579 NW2d 868 (1998), this Court held that MCR 6.112(G) authorized the trial court to review the magistrate's bindover decision upon the prosecutor's motion to amend the information.[8] In Goecke, the defendant was charged with OUIL causing death and second-degree murder. At the P. Exam., the magistrate refused to bind the defendant over on the charge of second-degree murder, and instead bound the defendant over on OUIL causing death. In

[8] In Goecke, this Court found it unnecessary to find the court rule inconsistent with the statute. This Court did note that as a rule of procedure, the court rule superseded the statute. People v Goecke, supra, 460 and n 18, citing MCR 6.001(E).

the trial court, presumably in advance of trial, the prosecutor moved to amend the information to reinstate the second-degree murder charge. The motion was granted. This Court concluded that the circuit court had jurisdiction and that the "only legal obstacle to amending the information to reinstate the second-degree murder charge was whether the amendment would cause undue prejudice to the defendant because of '"unfair surprise, inadequate notice, or insufficient opportunity to defend."' Id. at 462. This Court held that "[w]here a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial..." Id.

The trial court in the instant case implicitly held that MCL 767.76 and MCR 6.112(H) allow it to amend the Information to add a new charge in the instant case after the close of proofs. Although the prosecution could have charged Mr. Nyx with CSC II at the outset, or moved to remand this case for further P. Exam. in advance of trial to add this new offense, the Prosecution did not do so.[9] Even during trial, the prosecution here never moved to amend the Information. This decision by the trial court to add the two new offenses after the close of proofs caused undue prejudice because of unfair surprise, inadequate notice, and an insufficient opportunity to defend.[10] Because the constructive amendment was after the close of proofs, Mr. Nyx had no opportunity to adjust his trial strategy to include the added offense. This Court should hold that MCL 767.76 and MCR 6.112(H) do not permit the Information to be amended to add new offenses after the close of proofs. The rule of Hunt and Fortson should not be stretched to encompass the situation at hand, as it would

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[9] As the Court noted in People v Willett, 110 Mich App 337, 344 313 NW2d 117 (1981), "Prosecutors should take care in drafting their complaints to avoid the need for later amendment absent surprise developments at trial." See also People v Payne, supra, 721 fn 7.

[10] In Hunt, supra, 364, this Court listed these factors disjunctively and indicated that these factors were relevant to the defendant's right to a fair opportunity to meet the charges against him. In Mr. Nyx's case, he has suffered all three.

eviscerate a defendant's right to notice and to defend the charges brought against him.

(2) REGARDING ADDING A COGNATE LESSER OFFENSE

As set forth in sub-issue C.1., supra, CSC II is a lesser cognate offense of CSC I. However, the trial court cannot add a cognate offense after the close of proofs at trial without obliterating a defendant's constitutional right to notice.

In People v Gibbons, 260 Mich 96; 244 NW 244 (1932), the defendant was charged with attempt to rape and ravish. At trial, prior to the introduction of evidence, the prosecutor was allowed to amend the information to charge assault with intent to commit rape. This Court interpreted MCL 767.76 to preclude the prosecution from amending the information to add the "similar" offense:

> "While the statute, being part of Code of Criminal Procedure of 1927, was adopted to eliminate some of the technicalities which have surrounded the practice of criminal law, it does not permit the amendment of an information after trial has been begun so as to charge the accused with a different crime, punishable with a more severe penalty. There is no proper information charging defendant with the crime of assault with intent to commit rape." Id. at 99.

In People v Adams, 202 Mich App 385; 509 NW2d 530 (1993), during the course of trial, the prosecutor requested that the trial court instruct the jury on an uncharged cognate lesser offense of receiving and concealing stolen property, where the defendant had only been charged with breaking and entering a building with intent to commit a larceny. The Court of Appeals considered this to be an effective amendment of the information and concluded that the amendment of the information prejudiced the defendant because it came after the proofs were closed and the defense had no opportunity to adjust its defense strategy. The Court stated:

> "We conclude that where, as here, the charged offense and the offense sought to be added are dissimilar in their elements, such late notice of the prosecutor's intent to seek an instruction on the lesser offense is inadequate. Where offenses are dissimilar, with the focus being on different factual elements, the defendant may well prepare his defense, including the cross-examination of prosecution witnesses, in an entirely

different manner for the lesser offense than he would for the greater offense. However, once the trial is completed, or even nearly completed, it is difficult, if not impossible, for the defendant to adjust his trial strategy to encompass the newly added offense. Had the prosecutor notified defendant before the opening of proofs that he would also seek an instruction on receiving and concealing stolen property, that may well have been entirely adequate notice to allow the trial court to grant a request for such an instruction, particularly if the trial court were generous in granting any request by defense counsel for a continuance to allow for any additional preparation necessary for the changed character of the trial to come. In the case at bar, however, that notice simply came too late.

In sum, we conclude that where a prosecutor seeks to add a cognate lesser included offense that is dissimilar to the charged offense, and the information does not suggest the need to prepare a defense against that cognate lesser included offense, and notice to the defendant does not come until after the prosecutor begins to present evidence, the trial court should not grant the prosecutor's request for an instruction on that cognate lesser included offense. Under those circumstances, the notice to the defendant is not adequate. Accordingly, we conclude that in the case at bar the trial court erred in granting the prosecutor's request for an instruction on the cognate lesser included offense of receiving or concealing stolen property." People v Adams, supra, 391-392.

The habeas case of Gray v Raines, 662 F2d 569, 572 (CA 9, 1981), addressed the substitution of an offense with different elements than the offense actually charged. The defendant was charged with first-degree (forcible) rape where the age of victim was irrelevant and consent was a defense. Near the end of trial, the prosecution sought an instruction on statutory rape, where the victim's age was relevant and consent was unavailable as a defense. The Ninth Circuit vacated the statutory rape conviction, noting that although both types of rape were included in the Arizona rape statute, each offense was distinct with different elements and the state was obligated to comply with the Sixth Amendment notice requirement. Cf. Government of the Virgin Islands, supra, at 396-98.

Here, the trial courts's motion to add the two charges of CSC II, made *sua sponte* after the close of the proofs, was simply too late. Mr. Nyx had no notice, as even though CSC II is a cognate lesser offense, it is dissimilar to the charged offense of first-degree CSC and the information did not suggest the need to prepare a defense to CSC II. Where the motion is brought and granted after the

close of proofs, this Court should hold that MCL 767.76 and MCR 6.112(H) do not allow the trial court to amend the information to add a cognate lesser offense.

(B) WHETHER AN AMENDMENT OF THE INFORMATION AFTER THE CLOSE OF PROOFS IS CONSTITUTIONAL IN LIGHT OF SCHMUCK V UNITED STATES

An amendment of the Information after the close of proofs is unconstitutional in light of Schmuck v United States, 489 US 705; 109 S Ct 1443; 103 L Ed 2d 734 (1989). Under both the state and federal constitution, a defendant has the right to be informed of the nature of the accusation. The right to be apprised with specificity of the accusation charged is a fundamental element of due process. US Const, Ams VI, XIV; Const 1963, art 1, §§17, 20. The Sixth Amendment guarantees a criminal defendant a fundamental right to be clearly informed of the nature and cause of the charges in order to permit adequate preparation of a defense. Sheppard v Rees, 909 F2d 1234, 1236 (CA 9, 1990). The notice provision of the Sixth Amendment is incorporated within the Due Process Clause of the Fourteenth Amendment and is fully applicable to the states. See Gray v Raines, supra, 571-572. "'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence.'" People v Darden, 230 Mich App 597, 600; 585 NW2d 27 (1998), quoting In re Oliver, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682 (1948). It is a violation of due process to convict a defendant of a crime not charged. Cole v Arkansas, 333 US 196; 68 S Ct 514; 92 L Ed 644 (1948). Likewise, a defendant cannot be held to answer a charge not contained in the indictment brought against him. See Stirone v United States, 361 US 212, 215-217; 80 S Ct 270; 4 L Ed 2d 252 (1960). A defendant's due process right to notice of the charges brought against him allows him to adequately prepare his defense, and to protect a defendant from subsequent prosecution for the same conduct. People v Traughber, 432 Mich 209, 215; 564 NW2d 231 (1989).

In the federal system, where there is a Fifth Amendment right to a grand jury, the rule is that after an indictment has been returned, the charges may not be broadened through amendment except by the grand jury itself. Stirone, supra, 361 US at 215-16. Therefore, "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." It has further been held that "a constructive amendment of the indictment is a reversible error per se if there has been a modification at trial of the elements of the crime charged." United States v Salinas, 601 F2d 1279, 1290 (CA 5, 1979).

However, The Fifth Amendment's guarantee of a grand jury indictment in cases of capital crimes, has never been incorporated into the Fourteenth Amendment and therefore is not applicable to the states. Watson v Jago, supra, at 337. Further, the Federal Rules of Criminal Procedure provide:

> "Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding." Fed.R.Crim.P. 7(e).

Federal courts have found that an amendment of a state Information can raise constitutional Fourteenth Amendment due process and Sixth Amendment notice problems sufficient to call for habeas corpus review. Every accused has the right to be informed of the nature of the accusations filed against him. US Const, Ams VI, XIV; Const 1963, art 1 §17; Watson v Jago, supra, at 338.

In Koontz v Glossa, 731 F2d 365 (CA 6, 1984), the defendant was originally charged with having committed an aggravated arson. He filed a notice of alibi. Three days before trial, the state moved to amend the charge to a different section of the same statute to charge "arson for hire." The Court found a denial of due process in amending the charge, noting that three days was insufficient time to allow the defendant to prepare an adequate defense to the added charge.

Tague v Richards, 3 F3d 1133, 1141 (CA 7, 1993), noted that a "'last-minute change in the charge could prejudice a defendant's opportunity to defend himself; if that prejudice is severe enough, a due process violation could occur.'" The resolution of the question depends on whether the defense was adequately apprised of the new allegation and had time to prepare. See also Wright v Lockhart, 854 F2d 309, 312 (CA 8, 1988). Obviously, a constructive amendment to an Information after the close of the proofs is the most telling example of inadequate time to prepare to defend different charges.

Hunter v New Mexico, 916 F2d 595 (CA 10, 1990), granted habeas corpus relief in a criminal sexual conduct case where the jury instructions constituted a constructive amendment of the information by allowing the jury to convict on a theory of guilt different from that specified in the charging document.

In another habeas case, Lucas v O'Dea, 179 F3d 412, 416-417 (CA 6, 1999), the petitioner was charged with intentional murder. The jury was instructed, however, that "it is immaterial which one of them fired the shot that killed Paul Zurla." The Sixth Circuit granted habeas relief, as the trial court's jury instructions constituted a constructive amendment of the indictment that deprived petitioner of his Fourteenth Amendment right to notice of the charges against him. The Sixth Circuit found that petitioner was exposed to charges for which he had no notice and thus no opportunity to plan a defense. Id. at 417. The Sixth Circuit also found that trial counsel was ineffective in failing to object. Id. at 418-419. The Court declined to decide whether the federal system's per se prejudicial principle regarding constructive amendments was applicable to habeas corpus cases. Id. at 419.

The U. S. Supreme Court's decision in Schmuck v United States, supra, also requires that the Court of Appeals decision in the instant case be affirmed.. In Schmuck, the petitioner was charged with multiple counts of mail fraud. He moved under FRCP 31(c) for a lesser included offense

instruction on the crime of tampering with an odometer. In resolving a conflict amongst the circuits[11] over which test to apply in determining what constitutes a lesser included offense for the purposes of FRCP 31(c),[12] the Supreme Court rejected the fact-based, "inherent relationship" analysis and specifically adopted the "traditional elements" approach. 489 US 716-717. The Court set forth three reasons for adopting the elements approach. The first reason involved a defendant's Constitutional right to notice:

> "It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him. See Ex parte Bain, 121 US 1, 10, 7 S Ct 781, 786, 30 L Ed 849 (1887); Stirone v United States, 361 US 212, 215-217, 80 S Ct 270, 272-273, 4 L Ed 2d 252 (1960); United States v Miller, 471 US 130, 140, 142-143, 105 S Ct 1811, 1817, 1818-1819, 85 L Ed 2d 99 (1985). This stricture is based at least in part on the right of the defendant to notice of the charge brought against him. United States v Whitaker, 144 U.S. App D.C., at 350-351, 447 F2d, at 320-321. Were the prosecutor able to request an instruction on an offense whose elements were not charged in the indictment, this right to notice would be placed in jeopardy. Specifically, if, as mandated under the inherent relationship approach, the determination whether the offenses are sufficiently related to permit an instruction is delayed until all the evidence is developed at trial, the defendant may not have constitutionally sufficient notice to support a lesser included offense instruction requested by the prosecutor if the elements of that lesser offense are not part of the indictment. Accordingly, under the inherent relationship approach, the defendant, by in effect waiving his right to notice, may obtain a lesser offense instruction in circumstances where the constitutional restraint of notice to the defendant would prevent the prosecutor from seeking an identical instruction. The elements test, in contrast, permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge. This approach preserves the mutuality implicit in the language of Rule 31(c)."
> Schmuck v United States, 489 US at 717-718 (footnote omitted).

The second reason was that the history of Rule 31(c) supported the adoption of the elements approach, and the third reason was based on the ability to apply the test:

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[11] Compare United States v Whitaker, 144 US App DC 344, 349 447 F2d 314, 319 (1971)(inherent relationship test), and United States v Campbell, 652 F2d 760, 761-762 (CA 8, 1981).

[12] FRCP 31(c) provides in relevant part: "The defendant may be found guilty of an offense necessarily included in the offense charged."

> "Third, the elements test is far more certain and predictable in its application than the inherent relationship approach. Because the elements approach involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial, the elements approach permits both sides to know in advance what jury instructions will be available and to plan their trial strategies accordingly. The objective elements approach, moreover, promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of inference. The inherent relationship approach, in contrast, is rife with the potential for confusion. Finding an inherent relationship between offenses requires a determination that the offenses protect the same interests and that "in general" proof of the lesser "necessarily" involves proof of the greater. In the present case, the Court of Appeals appropriately noted: "These new layers of analysis add to the uncertainty of the propriety of an instruction in a particular case: not only are there more issues to be resolved, but correct resolution involves questions of degree and judgment, with the attendant probability that the trial and appellate courts may differ." 840 F2d at 389-390. This uncertainty was illustrated here. The three judges of the original appellate panel split in their application of the inherent relationship test to the offenses of mail fraud and odometer tampering. 776 F2d at 1373-1375 (opinion concurring in part and dissenting in part). In the context of rules of criminal procedure, where certainty and predictability are desired, we prefer the clearer standard for applying Rule 31(c)." Schmuck v United States, 489 US at 720-721.

This Court's decision in Cornell brings Michigan's jurisprudence in line with Schmuck.[13] In Cornell, this Court clarified that MCL 768.32(1) only permits the consideration of necessarily included lesser offenses "if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." Cornell, supra, 357-358. Instructions on cognate lesser offenses are foreclosed. Id. at 354. This Court also made it clear that the strictures of MCL 768.32(1) apply equally to bench trials. Cornell at 349, n 5. This Court now needs to bring Michigan's jurisprudence regarding amending the information in line with Schmuck. This Court should clarify that MCL 767.76 only permits the trial

[13] As this Court noted in Cornell, 466 Mich 356 fn 9, "[w]hile MCL 768.32 does not use the same phrasing as F.R. Crim. P. 31(c), which refers to 'an offense necessarily included in the offense charge,' as we have already explained, the wording of MCL §768.32 also limits consideration of lesser offenses to necessarily included lesser offenses."

court to amend the information after the close of proofs to add a necessarily included lesser offense.

Mr. Nyx's case is the quintessential example of a case in which the constructive amendment of the Information at the end of the trial, after the close of proofs, caused both prejudice to Mr. Nyx, as well as a failure of justice in violation of his state and federal constitutional rights to due process and to notice of the charges against him. US Const, Ams VI, XIV; Mich Const 1963, art 1, §§17, 20. Mr. Nyx had proceeded through the entire two-day trial with a focus upon defending the allegations of sexual penetration which are the essence of CSC I. Then, at the very end of the trial, the trial judge *sua sponte* amended the Information while rendering its verdict, added two counts of CSC II, and then convicted him of these counts. Mr. Nyx decided to waive trial by jury, went through opening statements, the examination of all the witnesses, and closing arguments, with no idea he would end up having to defend against two counts of CSC II. Then, during its findings of fact and law, the trial court constructively amended the Information and convicted Mr. Nyx of the two newly added counts. The trial court's constructive amendment of the Information allowed it to convict Mr. Nyx of charges different from those charged in the Information. He did not have adequate notice that it would be alleged, after the parties had rested, that he committed two counts of CSC II.

Importantly, trial counsel had to know at the time the decision was made to waive trial by jury that the prosecution would present evidence that Mr. Nyx had made a statement to Sgt. Hughes-Grubbs, he which he allegedly admitted touching the vagina of the complainant, but not engaging in penetration. Trial counsel was obviously concerned that this evidence would sway the jury emotionally into believing the allegations that there had been penetration, and thus result in convictions of the three counts of CSC I. But trial counsel obviously hoped that the trial court would see that Mr. Nyx did not admit to sexual penetration in his police statement, and conclude that, in light of all the inconsistencies and contradictions in the complainant's story, and in light of the

attempted extortion, there was a reasonable doubt as to Mr. Nyx's guilt of the element of penetration. If the trial court had a reasonable doubt on the issue of penetration, trial counsel's strategy would be successful, as Mr. Nyx would be acquitted of all charges. Trial counsel's strategy failed, however, because the trial court *sua sponte* added charges at the very end of the trial he did not know he would have to defend against. Trial counsel's strategy boomeranged; at that point, instead of providing a road-map to an acquittal, trial counsel's strategy provided Mr. Nyx with a road-map to prison.

Prior to the constructive amendment, Mr. Nyx was seeking to convince the trial court that a reasonable doubt existed as to the essential element of CSC I-- penetration. After the constructive amendment, Mr. Nyx was also facing the allegation that he committed CSC II by touching the vagina of the complainant with the intent to obtain sexual gratification. He was thus left to rely on a defense that had only been designed to counter CSC I. The addition of the charges of CSC II resulted in unfair surprise. This unfair surprise and inadequate notice deprived Mr. Nyx of his state and federal constitutional due process rights to be apprised of the charges, and to present a defense.

Mr. Nyx recognizes that his trial attorney did not object to the trial court's constructive amendment of the information when the trial court rendered its verdict. However, this is a jurisdictional defect that can be raised at any time. Although a defect in an information ordinarily cannot be raised for the first time on appeal, the Court of Appeals has held that where the amendment seriously prejudiced a defendant's right to due process, a defendant is entitled to reversal:

> "The trial court erred by amending the information. The defendant, however, did not object to the amendment and, ordinarily, a defect in an information cannot be raised for the first time on appeal, see MCL 767.76; MSA 28.1016. Nevertheless, the amendment seriously prejudiced defendant's right to due process. If the information had been amended before trial, the defendant may have been able to prepare a defense to the added offense. But it was amended at trial after both parties had rested. Defendant was thus left to rely on a defense to receiving and concealing stolen property that had been designed to counter only the breaking and entering charge. This lack of notice denied the defendant his right to due process

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> People v Price, supra, 655.

Finally, if defense counsel's failure to object during the trial court's findings of fact and law precludes appellate review, the error here was so egregious, affecting the substantial constitutional rights of Mr. Nyx to notice and the opportunity to defend, that it constituted plain error. Government of the Virgin Islands v Joseph, 765 F2d 394, 398 (CA 3, 1985). Alternatively, defense counsel was ineffective in failing to object. See Issue II, infra. His convictions must be reversed.

3. WHERE THE AMENDMENT AFTER THE CLOSE OF PROOFS WAS UNCONSTITUTIONAL, THE ERROR WAS EITHER PREJUDICIAL PER SE, OR NOT HARMLESS BEYOND A REASONABLE DOUBT.

The error here was a structural error not subject to harmless error analysis. Harmless error analysis applies only to trial errors and not to structural defects. Because structural defects infect the entire trial process, they defy harmless error analysis. Consequently, structural defects require automatic reversal. Brecht v Abrahamson, 507 US 619; 113 S Ct 1710; 123 L Ed 2d 353 (1993); Arizona v Fulminante, 499 US 279, 306-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991); People v Anderson (After Remand), 446 Mich 392, 405-406; 521 NW2d 538 (1994); People v Mitchell, 454 Mich 145, 153-155; 560 NW2d 600 (1997); People v Duncan, 462 Mich 47, 51-52; 610 NW2d 551 (2000). This Court has defined a structural constitutional error as one that constitutes a defect in the constitution of the trial mechanism itself rather than an error in the conduct of the trial, which is

amenable to harmless-error analysis in light of the quantum and strength of the untainted evidence. People v Anderson (After Remand), supra, 406-406 (citing Fulminante, supra, 307-308).

Many constitutional errors can be harmless, but where the amendment actually modified the offense charged and deprived the defendant of his right to notice and the opportunity to defend in violation of the Sixth and Fourteenth Amendments, the error is structural, requiring automatic reversal. See Hunter v New Mexico, supra, 599.

State v Sanders, 68 P3d 434, 446 (Arizona App Div 1, 2003), found that an amendment during trial that changed the nature of the charged offense was prejudicial per se. In reaching this conclusion, the Court noted the following "practical underpinning to the reversible per se rule":

> "The existence of prejudice in a given case generally must be determined from a review of the proceedings in which the conviction was obtained. However, when a trial commences with one charge and that charge is thereafter amended to change the nature of the offense, the record of that trial is useless as a tool to determine whether a defendant was prejudiced by the amendment.
>
> To illustrate, if a defendant's counsel is notified that his client faces a certain charge, he prepares for trial on that charge with the result that his opening statement, his cross-examination of the state's witnesses, his presentation of his client's case, and all other efforts are targeted at the elements contained in the charged offense. He justifiably neglects to prepare for or pursue inquiry into matters that are irrelevant to those elements, even though evidence of such matters might arise during trial and event though the evidence might constitute another crime.
>
> When the state is nevertheless permitted to amend in order to charge this other crime, the resulting conviction cannot be justified on the basis that there is evidence in the record to support the amended charge, and that defendant was therefore not prejudiced by the amendment. Such an approach overlooks the fact that the trial record is irrevocably tainted because we can never know from that record whether the evidence of the amended charge could have withstood a well-prepared cross-examination, a different justification defense, or any other of the many testing devices inherent in our adversarial process. 'The constitutional requirement of a fair trial is not satisfied merely by the existence in the record of sufficient evidence to establish guilt. To apply such a test as dispositive would be to ignore other mandatory components of a fair trial, and would defeat the purpose of the notice requirement.' Sheppard, 909 F2d at 1238."
> State v Sanders, supra, 441.

See also People v Foster, 971 P2d 1082, 1087 (Colo App 1998)("A variance that broadens an indictment constitutes a constructive amendment and is reversible per se."). In Lucas v O'Dea, supra, 419, the Court declined to decide whether the federal system's per se prejudicial principle regarding constructive amendments was applicable to habeas corpus cases.

Assuming that this Court does not find that the error is reversible per se and assuming that this Court finds the failure to object to be excusable under the circumstances, Mr. Nyx submits that because the constructive amendment after the close of proofs was unconstitutional, the beneficiary of the error cannot show that it was harmless beyond a reasonable doubt. People v Anderson (After Remand), supra, 405-406. Mr. Nyx denied the complainant's allegations, and argued she had a motive to lie because of the attempt of a class-mate to extort money from Mr. Nyx. Trial counsel also questioned the complainant about the incidents. Despite these efforts by defense counsel with regard to the CSC I charges, they were insufficient to constitute an adequate defense to CSC II. Further, as the Court noted in United States v Dhinsa, 243 F3d 635, 668 (CA 2, 2001), the appellate court cannot and should not speculate whether the defendant would have chosen a different trial strategy had he been aware that the trial court would *sua sponte* amend the Information after the proofs had closed to charge him with additional crimes.

Finally, if this Court deems that this error was unpreserved, then "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." People v Carines, supra, 763. First, Mr. Nyx contends he is actually innocent, and the trial court in fact implicitly found him innocent of all three charges he was put on trial for. Second, the error was so egregious, affecting his substantial right to notice and the opportunity to defend, that it constituted plain error. Government of the Virgin Islands v Joseph,

supra, 398. The failure to give notice and an opportunity to defend meets all three prongs of the Carines test – it affects the fairness, integrity and public reputation of the judicial proceedings. This constructive amendment at the end of trial implicated such constitutional rights as fair notice, double jeopardy, and the effective assistance of counsel. See Watson v Jago, supra, 338.

Furthermore, it is fundamentally unfair to allow the trial judge to ambush Mr. Nyx in this manner. The prosecutor here failed to charge CSC II anytime when it would have been appropriate. See People v Hunt, supra, 154; People v Willett, supra, 344. In addition, the trial judge failed to announce that she was formally amending the information; rather, she simply announced her findings and verdicts of guilt. Despite these multiple omissions by the trial judge, it is Mr. Nyx who is made to suffer under Carines. Perhaps if the trial prosecutor had filed a formal motion to amend prior to trial or even at the beginning of trial, and/or the trial judge had announced that she was formally amending the information after the close of proofs, defense counsel would have objected. For all these reasons, Mr. Nyx has met the plain error test and is entitled to have his convictions for CSC II reversed; the Court of Appeals should be affirmed.

4. THE DOCTRINE OF IMPLIED ACQUITTAL REQUIRES THAT THE DECISION OF THE COURT OF APPEALS TO VACATE MR. NYX'S TWO COUNTS OF CONVICTION, AND REMAND FOR ENTRY OF A JUDGMENT OF AQUITTAL, MUST BE AFFIRMED.

The Trial Court found Mr. Nyx guilty of the lesser cognate offenses of CSC II. Double jeopardy principles require a determination that the trial court implicitly acquitted Mr. Nyx of CSC I. The doctrine of "implied acquittal" was set forth in Green v United States, 355 US 184; 78 S Ct 221; 2 LEd2d 199 (1957). This doctrine holds that where a defendant is convicted of a lesser charge, he is implicitly acquitted of all other charges of which he could have been convicted but was not. This doctrine has been repeatedly recognized in Michigan Courts. See for example, People v

McMiller, 389 Mich 425, 430-31 (1973); People v Charles Jackson, 71 Mich App 395, 400 (1976).

Very similar to the instant case is the unusual case of People v Lewis, 91 Mich App 542, 543-46; 283 NW2d 790 (1979). In that case, the defendant went to trial on a charge of Assault With Intent to Commit Murder. The Court did not instruct the jury as to any lesser included or cognate offenses or related offenses as to that count. Despite not having been instructed on any lesser offenses, the jury returned a verdict finding the defendant guilty of the offense of Assault With Intent to Do Great Bodily Harm Less than the Crime of Murder. No explanation is provided in the Opinion as to how the jury was aware of the existence of the crime of which they convicted the defendant. In any event, the trial court accepted the verdict of the lesser assault crime and sentenced the defendant accordingly. Because the jury convicted the defendant of an offense which they were not entitled to consider, the Court of Appeals held that the jury had implicitly acquitted the defendant of the only offense available to them, which was Assault With Intent to Murder. Therefore, the Court vacated the conviction of Assault With Intent to Do Great Bodily Harm Less than Murder and entered a Judgment of Acquittal.

Similarly, in the instant case, neither of the parties ever agreed that the Court could consider the offense of CSC II. The defense had no knowledge that it should be prepared to argue or defend against such an offense until the Court rendered its verdict. In light of Cornell, *supra*, the conviction offense is not an offense which the Trial Court was legally entitled to consider under the circumstances of this case. Therefore, the remedy in the instant case is the same remedy as in Lewis. As determined by the Court of Appeals, the conviction offenses of CSC II must be vacated.

D. Conclusion

In interpreting the parameters of MCL 767.76, this Court should reaffirm the clear standards of Cornell and Schmuck, supra, and hold that an Information can only be amended after the close of proofs to add necessarily included lesser offenses. This approach will avoid the concerns raised by Justice Coleman in Jones, supra: -- the "smorgasbords of possibilities," the threats to due process and fundamental fairness," and "the blurring of roles" -- and instead, will satisfy the notice requirements of the Sixth Amendment and provide certainty and predictability.

Furthermore, as a matter of policy, prosecutors and trial judges should not be permitted to constructively amend the Information after the close of proofs, without formal notice and without any allegation of surprise by the proofs. Where the Information is constructively amended after the close of proofs to add a new offense, this Court should find that it is per se prejudicial.

For all these reasons, and for all the reasons stated in the Opinion of the Court of Appeals, the Court of Appeals should be affirmed. This Judgment of Conviction in this case should be vacated, and this case should be remanded to the Trial Court for entry of an Order of Dismissal.

II. DEFENDANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. STANDARD OF REVIEW

Questions of constitutional law are reviewed de novo. People v LeBlanc, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Argument

The accused's right to counsel encompasses the right to the "effective" assistance of counsel. US Const, Ams VI, XIV; Const 1963, art 1, § 20; Powell v Alabama, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932). In Strickland v Washington, 466 US 668, 698; 105 S Ct 2052; 80 L Ed 2d 674 (1984), the Court set forth the two-part test for determining whether the performance of counsel is constitutionally deficient. First, a defendant must show that counsel's errors were so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment. Id. at 687. Second, a defendant asserting an ineffective assistance of counsel claim must generally show that defense counsel's deficient performance prejudiced the defense. Id. at 691-692. To show "prejudice" under Strickland, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also People v Pickens, 446 Mich 298, 311; 521 NW2d 797 (1994).

In Lucas v O'Dea, 179 F3d 412 (CA 6, 1999), the Sixth Circuit found ineffective assistance of counsel, where trial counsel failed to object to the trial court's constructive amendment of the indictment:

> "As the district court noted, the failure of Lucas's counsel to object to the jury instructions in question rendered his defense -- that he did not shoot Zurla -- meaningless. When deciding cases arising within the federal court system, this court has held that constructive amendments to an indictment are per se prejudicial, warranting reversal. See Ford, 872 F2d at 1235. We need not decide whether this per se principle is applicable to the habeas corpus review of cases

> arising from state courts, however, because we conclude that the instruction in the present case had the effect of directing a verdict of 'guilty' on the murder charge. In light of the failure of Lucas's attorney to address the fact that the constructive amendment was constitutionally impermissible, we find that (1) his performance fell below the level of competence required by Strickland, and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' Strickland, 466 US at 694, 104 S Ct 2052." Lucas v O'Dea, 179 F3d at 419.

Similarly, in Mr. Nyx'S case, defense counsel's failure to object to the trial court's constructive amendment of the information as constitutionally impermissible rendered his performance deficient. Further, trial counsel failed to object to the trial court finding Mr. Nyx guilty of offenses that were not necessarily included lesser offenses. Counsel's failure to object rendered Mr. Nyx's defense meaningless. This cannot be deemed a legitimate trial strategy. People v Dalessandro, 165 Mich App 569; 419 NW2d 609 (1988). There is no conceivable reason why a defense attorney would not have jumped up and objected when the trial court found Mr. Nyx not guilty of the CSC I charges, but then proceeded to find him guilty of two offenses not charged in the Information, and which were not necessarily included lesser offenses. Further, there is a reasonable probability that but for counsel's failure to object, the result of the proceeding would have been different.

Because the record is clear, and there is no possible trial strategy to justify trial counsel's failure to object, review is possible without an evidentiary hearing. People v Cicotte, 133 Mich App 630; 349 NW2d 167 (1984); People v Johnson, 124 Mich App 80; 333 NW2d 585 (1983). Nonetheless, if the Court feels that an additional record is required, Mr. Nyx hereby moves to remand to the trial court, pursuant to People v Ginther, 390 Mich 436, 442-43; 212 NW2d 922 (1973).

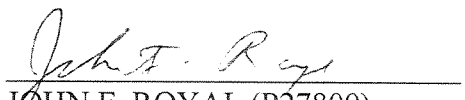
For all the above reasons, Mr. Nyx's convictions must be reversed.

SUMMARY AND RELIEF REQUESTED

Wherefore, for all the above reasons, Defendant-Appellee Maurice Nyx asks that this Court affirm the decision of the Court of Appeals vacating his two convictions of two counts of CSC II, and remand this case to the Trial Court for entry of a judgment of acquittal; However, should this Court see fit to reverse the decision of the Court of Appeals on this issue, then Defendant-Appellee Maurice Nyx respectfully requests that this case be remanded to the Court of Appeals for consideration of the additional issues raised in this appeal which the Court of Appeals has not yet decided, because it considered them moot; or, that this court grant whatever relief is just and reasonable under the circumstances.

Respectfully submitted,

DATED: November 6, 2006



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