STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan

Plaintiff-Appellee,

v.

Robert Lance Propp

Defendant-Appellant.

MSC No. 160551

COA No. 343255

Saginaw County Circuit Court
Case No. 16-042719-FC

Filed under AO 2019-6

Appellant Robert Lance Propp's

Brief on Appeal

— Oral Argument Requested —

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STATEMENT OF QUESTIONS PRESENTED

First Question:

Did the Court of Appeals correctly apply *People v Kennedy*, 502 Mich 206 (2018), when it affirmed the trial court's decision to deny the defendant's motion for expert funding?

Robert Propp answers: No.

The Court of Appeals answered: Yes.

Second Question:

Did the Court of Appeals correctly interpret MCL 768.27b to provide for the admission of evidence of other acts of domestic violence, even where standard evidentiary rules relating to hearsay would prevent the evidence from being admitted?

Robert Propp answers: No.

The Court of Appeals answered: Yes.

STATEMENT OF FACTS

Robert Propp and Melissa Thornton had a two-year-old daughter, and lived together in Saginaw until March 2018. Ms. Thornton moved out because they were fighting and he was using drugs. She and her daughter moved in with her sister, Angela. 58a. She continued to spend time with Mr. Propp, and he did not hide his desire to get back together. 58a-59a.

When Angela went to bed on July 5, her sister and Mr. Propp were in the kitchen eating snacks and drinking, after getting back from the bar. 66a. Angela was awoken at around 3:00 a.m. by loud noises and assumed they were having sex. 66a-69a. She woke up again a half hour later and saw Mr. Propp drunkenly stumbling between her sister's bedroom and the bathroom. She told him to get back in bed. 82a-83a. When she left at around six that morning to go to work, Angela noticed Mr. Propp's truck was gone. She did not check on her sister. 74a-75a.

Mr. Propp called 9-1-1 at about 10:00 a.m. on July 6, and reported that Ms. Thornton was not breathing. 40a. When police arrived at her home, he was performing chest compressions on her on her bed. 42a. An officer touched her skin and could tell she was was dead. 42a, 51a. He told Mr. Propp, who collapsed and began crying. 42a. Her death was deemed to have been the result of neck compression. 39a.

Mr. Propp told police the last time he saw Ms. Thornton alive had been at around 3:00 a.m. 47a-48a. The next morning when she did not answer her phone he went to her house. When she did not answer the door he pried it open with a crowbar, and found her unconscious on her bed. 45a-46a. When Mr. Propp was interviewed by police a second time, he added that he and Ms. Thornton had had sex that evening, and he knocked over some things when he got up to go home. 94a.

One of the first things police noticed when they responded to the 9-1-1 call was Mr. Propp's black eye, which he originally claimed was the result of a bar fight. 48a-49a. When he was interviewed by detectives the third time, he told them that after they had sex, he and Ms. Thornton got into an argument, and she gave him the black eye with her elbow. 99a-101a. He said in the midst of the altercation, they both fell off the

bed, he landed on top of her, and a dresser landed on top of him. He said his hand was on her neck, and he pressed down with the weight of his body when he lifted the dresser and himself up. 100a-103a. He said he did not know she was dead when he put her back in her bed and left. 103a, 109a.

Mr. Propp was bound over for murder. 110a.

Evidence of Other Acts of Domestic Violence

The state filed a motion to admit evidence Mr. Propp engaged in other acts of domestic violence involving Ms. Thornton and his ex-wife, pursuant to MCL 768.27b. It asserted this evidence was relevant to rebut Mr. Propp's assertion Ms. Thornton's death was an accident because it would show his propensity to to stalk, strangle, and sexually assault women. 111a-118a. He objected because the witnesses through whom the prosecutor intended to offer this evidence could only provide hearsay accounts of his alleged misconduct. 122a-124a. He also argued the evidence should be excluded because it was irrelevant and unfairly prejudicial. 135a. Both parties' pleadings seperately and specifically addressed the admissibility of each witness' proposed trial testimony, based on their testimony at an evidentiary hearing. 125a-141a. The trial court issued a blanket order granting the prosecution's motion in its entirety without explanation. 142a.

The parties' pleadings accurrately described the nature of the other acts evidence the trial court's orders allowed the prosecutor to introduce at trial. Mr. Propp's ex-wife, Deanne Hollinghead, testified that while they were married he raped her on a weekly basis. 196a. She divorced him because of his drug problems and verbal abuse. 196a. After she had moved out, she saw someone attempting to pry open her window and called the police. The officers who responded told her they had found Mr. Propp a block away from her house with a knife. 197a.

No one other than Ms. Hollingshead claimed to have personal knowledge Mr. Propp was violent or physically abusive to anyone. Several witnesses testified Ms. Thornton told them he was. Ms. Thornton's former coworker testified she "told me [Mr. Propp] choked her in her sister's bathroom," and "he had her neck like that and had

her against the wall, and she had told me that she was afraid she was going to pass out because she was starting to see spots or stars and he eventually let her go." "She told me that he told her then, 'see how easy if it would be for me to shut you up?' " 205a. The coworker also said Ms. Thornton told her Mr. Propp would inflict injuries on her where they were not visible when their daughter was not present. She saw a bruise on Ms. Thornton's arm once, and assumed Mr. Propp was responsible. 205a.

Ms. Thornton told her sister, Stefanie, that Mr. Propp would steal her money, cell phone, and car keys, have temper tantrums, break things, and make messes. 192a-193a. According to Stefanie, Ms. Thornton said Mr. Propp was controlling and would harass her when she wore revealing outfits. 193a Stefanie testified her sister also told her that when she tried to leave, Mr. Propp would take her car keys and throw them into the road. 193a.

Ms. Thornton told her sisters and friends that she and Mr. Propp broke up because he had a drug problem and was stealing from her. 193a, 135-36. Afterward, she told her friends and sisters he would stalk her, drive past the bars she was drinking at, and call and text her constantly. 185a-186a, 198a-200a, 207a. Ms. Thornton told one friend Mr. Propp admitted to her that he left his young children alone unattended to go out and stalk her. 187a, 193a-194a.

Despite the breakup and the stalking, Ms. Thornton continued to spend time with Mr. Propp. However, her sister and friend testified she told them she only continued seeing him because he threatened that if she refused to, he would take their daughter away from her. 195a, 202a.

Mr. Propp admitted he had a drug problem, and that he called and texted Ms. Thornton incessantly. He said he did this because he was still in love with her and hoped that they would get back together, but also attributed it to loneliness, jealousy, and cocaine. 219a-220a, 240a. Mr. Propp denied all the other misconduct his ex-wife and Ms. Thornton's friends and sisters accused him of. 226a-227a, 240a.

The Defense Request for an Expert

Prior to trial, Mr. Propp moved for the appointment and payment of an "expert regarding the sexual phenomenon known as erotic asphyxiation." 143a-144a. At the hearing, counsel told the court that there was no dispute that Mr. Propp caused Ms. Thornton's death, or that she had died as a result of neck compression. The only question was his intent. 163a-164a.

Counsel said Mr. Propp told him that on the night of her death, he and Ms. Thornton had been engaged in erotic asphyxiation. She passed out, as she had on prior occasions, so he put her back in bed instead of calling for help. Counsel also said Mr. Propp told him he did not tell police what actually happened because he was embarrassed. 167a-168a. The defense also informed the court that Ms. Thornton's autopsy supported Mr. Propp's claim that what happened was consensual and an accident. There were no defensive wounds on her body and the state's pathologist relayed to him erotic asphyxiation could result in neck compression. 164a-165a.

Counsel acknowledged he did not completely understand why people practice erotic asphyxiation, and admitted he was not competent to explain the practice to a jury. But he told the court he had identified an expert who could. 163a-165a. His proposed expert had acted as a consultant in another case where a similar defense was raised. This expert was necessary to explain the practice to the jury, and inform the jury of its inherent risks, which include death. 164a-165a.

The trial court indicated it was going to deny the motion because counsel could not cite to any evidence that Ms. Thornton's death occurred during erotic asphyxiation. It issued an opinion accurately describing the defense argument that "expert testimony is required to suport his theory that the victim's death was accidentally caused by this sexual practice," but denying the request because it "fail[ed] to identify facts that would support the admission of expert testimony concerning the subject." 179a-180a.

Mr. Propp Denies Malice

Mr. Propp testified that about a year before Ms. Thornton's death, they were having difficulties in their sex life, and she suggested erotic asphyxiation. They tried it, and it helped, so they kept doing it. 224a-226a.

Mr. Propp struggled to explain autoerotic asphyxiation to the jury:

> We call it extreme sex. It was where I, you know, she would place her hands – my hands – she would be place them on her neck so that it would be, you know, pressure on her neck for exhileration to help her. She had a problem climaxing, and we proceeded to do that. [223a-224a]

Mr. Propp testified he never choked Ms. Thornton other than with her consent while were having sex. 243a.

According to Mr. Propp, he met Angela and Melissa Thornton at the bar at around 11:00 p.m. on July 5, 2018. They left at around midnight and Mr. Propp followed them back to their house. When Angela went to bed, Ms. Thornton was making a taco salad and Mr. Propp was mixing a cocktail. 187a; 214a-216a, 222a.

Angela testified she woke up some time after 3:00 a.m., went to the basement to check on her cat, and heard, a "headboard sound." She assumed Mr. Propp and her sister were having sex, registered her frustration to them by speaking loudly to her cat, then went back to bed. 187a-188a. She woke up about twenty minutes after falling asleep and heard "a big thump on the floor." 188a. She went to the living room, and saw Mr. Propp stumbling out of her sister's room. He told her he had fallen out of bed and she told him "to keep his drunk fucking ass in bed." She went back to bed too, and left for work the next morning without checking on her sister. 188a.

Mr. Propp testified that after Angela went to bed that night, he and Ms. Thornton went to her room and cuddled in her bed. They eventually had sex. 222a-223a. After he finished, they switched positions and he performed oral sex on her. 223a. She then placed his hands on her neck,

as she had done several times before, and he began to apply pressure. 223a-224a.

While they were laying sideways on the bed, Mr. Propp pushed off of something with his foot. He and Ms. Thornton both slid off the bed, he landed on top of her, and her dresser landed on top of him. 227a, 257a-259a. The impact caused him to see stars. He was unsure if he lost consciousness, and did not know how much time passed before he began to lift the dresser off of his back and himself off Ms. Thornton. He did this instinctively by pushing down with his hand, which, as he told police, was still on Ms. Thorntion's neck. 260a, 272a-273a, 276a.

Once he was up, Mr. Propp realized Ms. Thornton was unconscious. He thought little of it because she often passed out when they engaged in erotic asphyxiation. He saw Angela on his way to the bathroom, then went back to Ms. Thornton's room to gather his things to leave. 230a-232a.

Mr. Propp testified that he started using cocaine after he left. He drove to his grandfather's cabin because he did not want Ms. Thornton to find him or see him while he was on drugs. When he got to the cabin, he saw his aunt's car, so he decided to drive back to Saginaw. 232a-235a.

Ms. Thornton did not answer his phone calls so he drove to her house. She was supposed to be at work, but her car was still parked outside. He used a crowbar to open the back door and found Ms. Thornton unresponsive. He called 9-1-1. 236a-238a.

When he was questioned by police, he lied because he wanted to keep his and Ms. Thornton's sex life and his drug addiction private. He also lied because he understood the optics were "horrible." 234a, 237a, 242a. Mr. Propp was adament he did not intentionally kill Ms. Thornton. 240a.

The State's Pathologist Rebuts Mr. Propp's Defense

Dr. Virani, the state's pathologist testified Ms. Thornton died as a result of neck compression. 183a. He concluded she had not been strangled because he could not identify any ligature mark, or any bruising on the the sides of her neck, which occurs when someone's hand

squeezes both sides of another person's neck, because the person being strangled struggles back and forth to try to breathe. 183a. According to Dr. Virani, if a person were "perfectly strangled," completely preventing the flow air and oxygen, they would lose consciousness in about one minute, and die after one additional minute. 182a.

At the hearing for funds for a defense expert, Mr. Prop's attorney told the trial court:

> I spoke to Dr. Virani and asked him, under the circumstances of this case, neck compression, could this have been the result of an … erotic asphyxiation?
>
> And he said, "Yes." [165a]

At trial, counsel asked Dr. Virani the same question, but did not receive the same response:

> Q. Given the circumstances and what you see here, is erotic asphyxiation a possibility in this case?
>
> A. If during the erotic asphyxiation, when person is undergoing asphyxiation process and passes out, the other person usually releases the pressure and then, like I say, the brain has still reserve energy to come back. … So, if the pressure is not maintained for a minute or two after that unconscious state, then that person would not die. [183a-184a]

Mr. Propp was convicted of first degree premeditated murder. He was sentenced to life in prison without the possibility of parole. 11a.

The Appeal

Mr. Propp appealed. He challenged the trial court's order denying him funds to retain an expert and excluding his proposed expert's testimony. He also challenged the court's admission of all other acts evidence the prosecutor sought to admit under MCL 768.27b, including evidence that should have been excluded under MRE 402, 403, and 802.

The Court of Appeals majority found no error in the trial court's rulings. It held Mr. Propp failed to demonstrate a due process right to his requested expert because "Defendant did not make any statements during any of his police interviews that the victim's injuries were the result of erotic asphyxiation … [and] the victim's sister suggested that defendant and the victim were not getting along at the time of the victim's death." 22a. It also found Mr. Propp was not denied the ability to present his defense because he personally testified about erotic asphyxiation, and his attorney asked Dr. Virani about the practice. 24a-25a.

The majority also found that as a matter of first impression, evidence that satisfies MCL 768.27b's statutory requirements for admission is not required to comply with the other rules of evidence, like those pertaining to hearsay. 29a-31a. As a result, it held the trial court lacked the discretion to exclude the other acts evidence under MRE 802, and the his ex-wife's testimony that he sexually assaulted her and tried to break into her house was probative of Mr. Propp's propensity to commit domestic violence against women with whom he is in a relationship. 32a-33a.

This Court granted Mr. Propp leave to appeal, and directed him to address:

(1) whether the Court of Appeals correctly applied *People v Kennedy*, 502 Mich 206 (2018), when it affirmed the trial court's decision to deny the defendant's motion for expert funding; and

(2) whether the Court of Appeals correctly held that evidence of other acts of domestic violence is admissible under MCL 768.27b regardless of whether it might be otherwise inadmissible under the hearsay rules of evidence.

Mr. Propp appeals by leave granted.

ARGUMENTS

I. The trial court violated Mr. Propp's right to due process when it denied his motion for an expert after he described how the expert would assist his defense and demonstrated that his trial would be fundamentally unfair without such assistance

Standard of Review and Issue Preservation

"This Court reviews de novo a question of constitutional law." *People v Kennedy*, 502 Mich 206, 213 (2018).

Mr. Propp moved for the appointment and payment of an expert witness, and cited his indigency and right to present an adequate defense. 143a-144a. This issue is preserved. *People v Johnny Ray Kennedy*, 941 NW2d 385 (Mich, 2020).

Discussion

After being bound over for murder, Robert Propp's attorney moved for state funds to retain an expert. The defense acknowledged Mr. Propp caused Mellissa Thornton's death, but asserted he was not guilty of murder because he had not intended to kill her. Her death was accidental, and occurred while they were engaged in erotic asphyxiation, which was an aspect of their sex life. Counsel explained that erotic asphyxiation involves one partner choking another for sexual gratification, and described how Ms. Thornton's autopsy was consistent with Mr. Propp's account of her death. Counsel acknowledged he did not understand the practice and could not explain it to a jury. He requested funds to retain an expert who could educate the jury about why people do this and explain the risks it entails.

The defense motion satisfied the requirements set forth in *Kennedy*, but was denied by the trial court because Mr. Propp had not told police or previously testified that he and Ms. Thornton were engaged in erotic asphyxiation at the time of her death. The Court of Appeals endorsed this reason for withholding expert funds, and added that preliminary testimony from the government's witnesses describing Mr. Propp as

physically and emotionally abusive provided an additional basis for the denial.

"[F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Ake v Oklahoma*, 470 US 68, 77 (1986), quoting *Ross v Moffitt*, 417 US 600, 612 (1974). "[T]he assistance of an expert c[an] be so important to the defense that without it an innocent defendant could be convicted or, at the very least, the public's confidence in the fairness of his trial and its outcome could be undermined." *Moore v Kemp*, 809 F2d 702, 709 (CA 11, 1987).

At the time Mr. Propp's motion for an expert was denied, Michigan courts still analyzed indigent defendants' entitlement to experts as a statutory right, and not a fundamental one. This approach required defendants to "show a nexus between the facts of the case and the need for an expert," to demonstrate they could not "safely proceed to a trial," in the expert's absence. *People v Jacobsen*, 448 Mich 639, 641 (1995), quoting MCL 775.15. This analysis set a difficult, if not "an impossible goal for defense counsel," because:

> If counsel fully understands the prosecution's scientific evidence, there would be no need for an expert to explain it. If, as here, counsel is not expert in certain scientific matters, the majority seems to require counsel to petition for funds for an expert using an expert's grasp of the subject matter.

People v Tanner, 460 Mich 437, 446 (2003) (KELLY, J., dissenting).

In adopting the *Moore* standard, this Court sought to avoid setting impossible goals for the defense. *Kennedy*, 502 Mich at 226. In affirming Mr. Propp's conviction, however, the Court of Appeals interpreted *Kennedy* as erecting new barriers that placed state assistance even further out of reach.

A. Mr. Propp demonstrated a due process entitlement to an expert

To be entitled to the appointment of an expert at government expense, "a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Kennedy*, 502 Mich at 227, quoting *Moore*, 809 F2d at 712. "[I]f a defendant wants an expert to assist his attorney in confronting the prosecution's proof—by preparing counsel to cross-examine the prosecution's experts or by providing rebuttal testimony—he must inform the court of the nature of the prosecution's case and how the requested expert would be useful." *Id.* Mr. Propp's motion for funds to retain an expert who could testify about the practice and risks involved in erotic asphyxiation fully satisfied these requirements.

Counsel specifically informed the trial court of the nature of the prosecution's case. Mr. Propp was charged with murder after he discovered his estranged significant other dead in her bedroom. The autopsy revealed her death resulted from neck compression, but the autopsy showed no signs of defensive wounds or resistance. The evidence also indicated Ms. Thornton and Mr. Propp had sex before she died. 164a, 145-146a. Counsel added that the state's pathologist told him it was possible death as a result of neck compression could occur as a result of erotic asphyxiation. 165a

Counsel explained that Mr. Propp told him that he had not intended to kill Ms. Thornton, but that she died while they were engaged in erotic asphyxiation. At the hearing, counsel explained Mr. Propp put Ms. Thornton back in bed instead of calling an ambulance because he assumed she was still alive, since she often passed out afterward. 170a. Counsel also said Mr. Propp had not told police the circumstances of her death because he was embarrassed. 167a.

Counsel educated himself about the subject and relayed what he learned to the trial court. He explained that erotic asphyxiation is "where partners choke each other to intensify the experience," 163a, and said his proposed expert told him that there are two or three deaths each

year on Michigan college campuses that involve erotic and autoerotic asphyxiation. 164a.

Counsel also explained how the expert he sought would assist the defense and why the expert was necessary for Mr. Propp to receive a fair trial. "This is this young man's defense, and this is what he says happened." 165a. However, "[t]his is something that a jury may not understand." 164a. Counsel admitted that he was not competent to explain the practice to a jury, in part because he did not completely understand it himself. 164a. Counsel then explained that "in order for him to be able to present this defense, we got to have someone who can explain it to the trier of fact," and explain "what the reasons are that people do this, why they take this risk, [and] what the risk is." 164a.

The defense motion and offer of proof was a greater showing than *Kennedy* requires to establish the right to expert assistance. The trial court denied the motion because "[t]here [was] nothing in the record that show[ed] that" Ms. Thornton died during erotic asphyxiation. 166a. The Court of Appeals majority held the motion failed to satisfy *Kennedy*, because (1) it did not establish a substantial basis for an affirmative defense; (2) Mr. Propp and Dr. Virani's testimony and defense counsel's argument rendered the requested expert's testimony unnecessary; (3) it failed to cite evidence in the pretrial record; and (4) the state's preliminary evidence undermined the defense Mr. Propp sought an expert to support.

B. The Court of Appeals' erroneous understanding of due process undermined its entire analysis

Ake v Oklahama, 470 US 68 (1985), "sets forth the due process analysis that a court must use when an indigent criminal defendant claims he or she has not been provided 'the basic tools of an adequate defense' and therefore did not have 'an adequate opportunity to present [his or her] claims fairly within the adversarial system.' " *Kennedy*, 502 Mich at 218, quoting *Ake*, 470 US at 77. It does so by establishing the "elementary principle," that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his

defense," and he or she is afforded the "opportunity to participate meaningfully participate in the judicial proceedings." *Id.*

The Court of Appeals' due process analysis was inherently flawed as a result of its misunderstanding of the competing interests at stake. *Ake* incorporated the standard three-factor balancing test to determine whether the state provided procedure comports with due process. This analysis considers: (1) "the private interest that will be affected by the action of the state," (2) "the governmental interest that will be affected if the safeguard is to be provided"; and (3) "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake*, 470 US at 77.

The Court of Appeals' conception of these interests is off:

> With respect to the first two factors, in criminal cases, both defendants and the government share an interest in fair and accurate adjudication.
>
> Accordingly, in such cases, the third factor, regarding the probable value of the requested safeguard, is typically the determinative factor as to whether the defendant is entitled to government funds to obtain an expert. [21a-22a (alterations omitted)]

As *Ake* explained, Mr. Propp's interest in the accuracy of the trial was "almost uniquely compelling," and his interest in its outcome was "obvious and weighs heavily in [the] analysis." *Ake*, 470 at 78. Conversely, "the governmental interest in denying Ake the assistance of a psychiatrist is not substantial," and its "interest in maint[aining] a strategic advantage over the defense," is "***not legitimate***[]." *Kennedy*, 502 Mich at 216, quoting *Ake* 470 US at 79 (emphasis added). The state's interest in an accurate adjudication is not a counterweight to a defendant's interest in having the ability to effectively present his defense. Those interests are aligned. In our adversarial system, "it is the litigants' job to demonstrate to the jury, through questioning or other means," what the truth is, *People v Swilley*, 504 Mich 350, 374 (2019), and it is the "province of the jury to decide questions of fact." *Sparf v*

United States, 156 US 51, 65 (1895). The state's interest is in ensuring defendants can effectively compete in the adversarial function so its juries can render accurate verdicts and its citizens are not wrongly convicted. The majority's due process analysis "threatens the jury's ability properly to perform [its] function [and] poses a similar threat to the truth-determining process." *Brown v Louisiana*, 447 US 323, 334 (1980).

C. Accident is not an affirmative defense

The Court of Appeals next erred in concluding Mr. Propp "sought appointment of an expert in order to assert the affirmative defense that the victim died accidentally," and was therefore required to demonstrate a "substantial basis for the defense." 22a. *Kennedy*, 502 Mich at 227 held that the defense must demonstrate a "substantial basis" for the defense when the defendant seeks "an expert so that he can present an affirmative defense, such as insanity." Conversely, if the expert is sought to assist "in confronting the prosecution's proof," the defense must simply, "inform the court of the nature of the prosecution's case and how the requested expert would be useful." *Id.*

"An affirmative defense admits the crime but seeks to excuse or justify its commission. It does not negate specific elements of the crime." *People v Dupree*, 486 Mich 693, 704 n 11 (2010). A defense theory that the death was accidental does not qualify because "[t]he burden of proof rests with the prosecution to show that the killing was intentional." *People v Lester*, 406 Mich 252, 253 (1979), overruled in part on other grounds by *People v Hawthorne*, 474 Mich 174 (2006). "If the defendant did not mean to kill …. then he is not guilty of murder." M Crim JI 7.2(2).

The heightened standard the Court of Appeals considered in analyzing Mr. Propp's motion was not applicable. Further, given the level detail within Mr. Propp's motion, it is unclear how a defendant could ever demonstrate a "substantial basis" for an affirmative defense under the Court of Appeals' conception of the standard without "already know[ing] what the expert would say." *Kennedy*, 502 Mich at 226. The *Moore* Court found the defendant in *Ake* demonstrated a substantial basis for his insanity defense. *Moore*, 809 F2d at 712. However, that

defendant could do so because the trial court *sua sponte* ordered that he receive a psychiatric examination, and then directed his psychiatrists to testify about his competence. *Ake*, 470 US at 71. As with its flawed due process analysis, the Court of Appeals' view that Mr. Propp sought funds to support an affirmative defense prevented it from properly evaluating his entitlement to funds to confront the prosecution's proofs.

D. *Kennedy* does not require citation to evidence in the pretrial record

The Court of Appeals held that to satisfy *Kennedy*, a defendant is required "to demonstrate a factual basis for the defense." 22a. It is not clear what this would require in other cases, but the majority found Mr. Propp had failed to make such a showing, "because there was no evidence that the victim's death occurred as a result of erotic asphyxiation … [a]t the time the defendant moved for appointment of an expert." 22a. It suggested Mr. Propp may have been entitled to the expert had he mentioned erotic asphyxiation during the police interrogations. 22a.

A defendant cannot be denied a necessary expert because the preliminary evidence does not demonstrate the validity of his defense, or because the defendant did not tell police about his defense while being interrogated, or even because he lied to police during the interrogation. For the most part, and in most cases, 'record evidence' will be unavailable prior to trial. Requiring indigent defendants to introduce such evidence before the prosecutor rests at trial would put them at a severe disadvantage in relation to moneyed defendants, and would frequently require the defendant perform the impossible task of presenting evidence that can only come from the expert his motion seeks funds to retain. This was an issue under *Jacobsen* and *Tanner*, it should not continue to be an issue under *Kennedy*.

The Eleventh Circuit, which developed the *Moore* standard, has consistently recognized indigent defendants are not required to support their motions with evidence. Its opinions are carefully worded to avoid confusion on this point. In *Moore*, 809 F2d at 710 (emphasis added), it held a defendant's right to an expert "necessarily turns on the

sufficiency of [his] ***explanation*** as to why he needed an expert." Shortly after *Moore* issued, it made this point again, explaining the defense must "intelligently ***phrase his request*** so as to ***inform the judge*** why an expert is needed and what this expert is capable of performing," and "provide a reasonably specific ***description*** of the expert services sought." *Stephens v Kemp*, 846 F2d 642, 647-48 (CA 11, 1988) (emphasis added). The only 'evidence' the defense must describe is the "evidence which incriminates the defendant," which is necessary so the court can understand how the requested expert would assist the defense in rebutting the state's case. *Id.* at 647. Even so, it does not require the incriminating evidence be in the record before the defendant can support his motion.

Aside from the Michigan Court of Appeals, courts throughout the country are in agreement on this point. See, e.g., *Dingle v State*, 654 So 2d 164, 166 (Fla Dist Ct App, 1995) (emphasis added) (court denied defendant due process where counsel "specifically ***identified*** for the court the experts he sought to have appointed, ***explained*** to the court their expertise, their proffered testimony, ***outlined*** for the court the testimony from the states experts the requested experts were rebutting, and ***illustrated*** why the proffered testimony was crucial to defendant's theory of defense"); *Dubose v State*, 662 So2d 1156, 1184 (Ala Crim App, 1993) (emphasis added), aff'd 662 So2d 1189 (Ala, 1995) (vacating conviction where "appellant specifically ***alleged*** that he needed an expert … [and] also satisfied the requirement that he inform the court how the requested expert would be useful: he ***asserted*** that only an expert could determine whether the prosecution's results are valid and reliable."); *State v Clemons*, 946 SW2d 206, 222 (Mo banc, 1997) (emphasis added) (a defendant "must ***allege*** facts, not state mere legal conclusions and theories.").

Where the Eleventh Circuit has found a defendant failed to satisfy *Moore*'s pleading requirement, it has been for lack of explanation, not lack of evidence. Its opinions have suggested: "counsel should have ***informed*** the court whether" testing was still possible, and "***informed***" the court, "what an expert could be expected to contribute to the defense." *Stephens v Kemp*, 846 F3d 642, 649-50 (CA 11, 1988) (emphasis added). See also *Messer v Kemp*, 831 F2d 946, 962 (CA 11, 1987)

(emphasis added) (defense failed to satisfy requirement where counsel said that he believed his client was insane, but "did not ***articulate*** the factual basis for his belief, and later renewed request on information and belief psychiatric problems will arise during trial preparation," "but ***revealed*** none of the facts that led him to believe that.").

E. A defendant cannot be denied the tools to present his defense simply because his defense is contradicted by the prosecution's preliminary evidence

The Court of Appeals also erred in concluding that "defendant's mere assertion that the victim's death was the result of erotic asphyxiation," was not enough to satisfy his burden of persuasion. According to the majority, this was insufficient because Mr. Propp failed to mention erotic asphyxiation to police, and also because the state's witnesses had already testified Mr. Propp was abusive and had threatened to strangle Ms. Thornton to death. 22a-23a. To find Mr. Propp had satisfied the requirements of *Kennedy*, the majority said, "the trial court would have been required to ignore a significant amount of evidence from the other witnesses." 23a.

Due process did require the trial court to "ignore" this evidence when deciding Mr. Propp's motion. The Supreme Court has previously addressed why a procedure that conditions an indigent defendant's entitlement to appellate counsel on a court's cursory evaluation of the likely merits of his appeal violates the Fourteenth Amendment:

> At this stage in the proceedings only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. ***Any real chance he may have had of showing that his appeal has hidden merit is deprived him when the court decides … that the assistance of counsel is not required***.

Douglas v California, 372 US 353, 355-56 (1963) (emphasis added).

Unlike an indigent appellant, an indigent defendant who requests funds for an expert to assist him at trial is presumed innocent. The

Court should reject the Court of Appeals' holding that trial courts may consider the strength of the government's pretrial proofs when deciding whether to provide funds to the defense so it can effectively attack those proofs at trial. Such judgments would have a self-fulfilling effect, and would undermine the adversarial process and the defendant's right to have an informed jury decide whether he is guilty.

The lower courts' approach was also flawed because it ignored the practical realities of pretrial criminal procedure. The defense objective at the preliminary examination is generally not to rebut the prosecutor's case, but to obtain as much information about its case as possible. See LeFave, et al, 4 Criminal Procedure § 14.1(d) (4th ed) ("conventional wisdom advises the defense against presenting its witnesses," because "testimony most often will present a slight likelihood, at best, of precluding a bindover, while having the witnesses testify will give the prosecution discovery and cross-examination opportunities that will strengthen its hand at trial") and *Coleman v Alabama*, 399 US 1, 9 (1970) ("skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial"). Further, because "testimony given by the defendant at the preliminary examination for the sole purpose of defeating a finding of probable cause can be used at trial … [e]xperience indicates that this tactic is rarely employed." *People v James*, 29 Mich App 522, 526 (1971). Mr. Propp had little incentive to address the state witnesses' hearsay allegations of abuse prior to taking the stand at trial, at which point he vehemently denying those allegations were true. TIII 79.

As with other procedural requirements essential to a fair trial, such as the right to a jury and an attorney, a defendant's due process right to an expert cannot be dictated by a pretrial or *post hac* evaluation of his likelihood of securing an acquittal with and without the requested expert. Rather, the Court should clarify fundamental fairness requires the appointment of an expert when the defendant demonstrates the expert is necessary for him to effectively participate in the adversarial process, in light of the competing theories of both parties.

F. A defendant's right to testify in his own defense and cross examine the state's expert does not exculpate the state's failure to provide him the tools necessary to present his defense

The Court of Appeals concluded the trial court's refusal to appoint an expert did not undermine Mr. Propp's right to a fair trial because he was not prohibited from testifying Ms. Thornton died during erotic asphyxiation or from cross examining the state's pathologist about the subject. 24a-25a. This holding simply ignored established law. *Ake* and its progeny require =the defense receive an "expert who is sufficiently available to the defense and independent from the prosecution." *McWilliams v Dunn*, 137 S Ct 1790, 1799 (2017).

Dr. Virani, the state's pathologist, was employed by the Oakland County Medical Examiner's Office as a forensic pathologist. 181a. He was required to "testify in behalf of the state," MCL 52.212, and his "duty is owed to the state," not to the defense. *Maiden v Rozwood*, 461 Mich 109, 132 (1999). See also *People v Dimambrio*, 318 Mich App 204, 215 (2016). Dr. Virani was not "independent from the prosecution," as *Ake* requires. *McWilliams*, 137 S Ct at 1799. More significantly, Dr. Virani testified that the Mr. Propp's explanation was at best implausible. 183a-184a. He did not support the defense or help ensure Mr. Propp received a fair trial. He did the opposite.

Mr. Propp could not convince his jury that despite Dr. Virani's certainty that it was not possible for accidental death to occur during erotic asphyxiation, he knew better than the state's expert pathologist. He was neither capable, 226a, nor qualified, MRE 702, of explaining the practice and its risks to a jury. Due process required the state appoint an expert who could so Mr. Propp's factual testimony could be properly evaluated and considered.

* * *

The trial court denied Mr. Propp expert assistance because it incorrectly understood *Tanner* to provide it the discretion to condition an expert on a statement in the record made by the defendant. The Court of Appeals affirmed Mr. Propp's conviction because it incorrectly

assumed *Kennedy* created new impossible goals for indigent defendants. Mr. Propp was entitled to an expert who could explain to his jury how erotic asphyxiation is performed and the risks it entails. His motion disclosed that Ms. Thornton died during erotic asphyxiation, and acknowledged this defense would not make sense to the average juror without the testimony of someone qualified to explain the practice and its risk, given that the practice is not common knowledge. This offer not only demonstrated a reasonable probability the trial would be fundamentally unfair without the requested expert, it was an accurate prediction.

E. The erroneous denial of a necessary expert is never harmless

Kennedy did not address whether the erroneous denial of an expert can ever be harmless. However, because it requires defendants to demonstrate a reasonable probability in advance of trial that their trial will be fundamentally unfair without the requested expert, "the error always results in fundamental fairness," and "the effects of the error are simply too hard to measure." *Weaver v Massachusetts*, 137 S Ct 1899, 1908 (2017). An error under *Kennedy* is structural.

An appellate court's determination that *Kennedy* was violated necessarily carries with it the conclusion that at the time the error occurred, "the denial of expert assistance would result in a fundamentally unfair trial." *Kennedy*, 502 Mich at 228. This error has necessarily resulted in the defendant's conviction after he was denied "an adequate opportunity to present their claims fairly within the adversarial process." *Ake*, 470 US at 77. This breakdown in the adversarial process "will inevitably signal fundamental unfairness," and "blocks the defendant's right to make the fundamental choices about his own defense." *McCoy v Louisiana*, 138 S Ct 1500, 1511 (2018). See also *Rey v State*, 897 SW2d 333, 345–46 (Tex Crim App, 1995) ("The structural underpinnings of appellant's trial, from beginning to end, were affected by his inability to present an effective defense. Accordingly, we hold that the denial of the appointment of an expert, consistent with *Ake*, amounts to structural error which cannot be evaluated for harm.").

The effect of wrongful denial of expert assistance also defies harmless error analysis because the effect of such errors are simply too hard to measure. The *Ake* Court reversed and remanded for a new trial without addressing harm. *Ake*, 470 US at 87. In *Tuggle v Netherland*, 516 US 10 (1995) the Court again declined to explicitly hold such errors are structural, but its attempt to address how the denial of a defense expert for a single discrete could have impacted the jury showed why harm is too hard to measure. Even though the expert was sought by the defense to support one sentencing factor, the Court found the absence of a defense expert could have affected the jury's view of the other independent factors, for any number of reasons. *Id.* at 13-14. It was for that reason the Eleventh Circuit recently found harmless error cannot apply to an error under *Ake*, as the impact of such an error is "unknown and, as such, cannot be quantitatively assessed in the context of the evidence presented to the sentencing judge." *McWilliams v Commissioner*, 940 F3d 1218, 1225 (CA 11, 2019).

The impact of the wrongful denial of an expert prior to his trial likely caused more changes to the defense strategy than Mr. Propp and his attorney can now or could have ever articulated. It undoubtedly impacted the jury's view of Mr. Propp's credibility and intent and of Dr. Virani's competence. Even if, in a given case, a prosecutor could prove beyond reasonable doubt the verdict would have been the same even if the requested expert had been provided, the error would still not be harmless. In violating the defendant's right to due process in this manner, the court will have "block[ed] the defendant's right to make the fundamental choices about his own defense," *McCoy*, 138 S Ct at 1511, and will have also, "at the very least, [undermined] the public's confidence in the fairness of his trial and its outcome." *Moore*, 809 F2d 709. Errors of this nature are always structural.

II. MCL 768.27b does not provide for the admission of evidence that does not comply with the standard Rules of Evidence.

Standard of Review and Issue Preservation

"Constitutional questions and issues of statutory interpretation are questions of law, which this Court reviews de novo." *People v Watkins*, 491 Mich 450, 466–67 (2012).

This issue was preserved by Mr. Propp's objection to the prosecution's motion in limine and supplemental briefing further opposing the admission of the other acts evidence. 119a-124a, 135a-141a.

Discussion

Most, if not all, of the evidence supporting the prosecution's assertion Mr. Propp had a premeditated intent to murder Ms. Thornton was hearsay that lacked the circumstantial guarantees of trustworthiness this Court and the Legislature have consistently required. See MRE 803-804; MCL 766.11b; MCL 768.27c. The Court of Appeals majority held, however, that MCL 768.27b must be interpreted to eliminate the 'discretion' of trial courts to exclude evidence under MRE 802, and all other evidentiary rules prohibiting the evidence's admission:

> The ***only*** limiting provision of MCL 768.27b is that the evidence is still subject to analysis under MRE 403, and … the Legislature explicitly chose to include MRE 403 as a limiting rule of evidence and chose ***not*** to include any other rules of evidence. [29a.]

The Court should reject the Court of Appeals' interpretation of MCL 768.27b. It is at odds with the plain language of the statute and conflicts with *People v Mack*, 493 Mich 1 (2012), which indicated MCL 768.27b was only in conflict with MRE 404(b)(1), not with every rule of evidence except for MRE 403. The Court of Appeals' interpretation of the statute should also be rejected because it would render MCL 768.27b unconstitutional. The hearsay rule, and its established exceptions, are

deeply embedded in our understanding of due process, and have been since before our state's founding. This case demonstrates the fundamental unfairness that results when a state's case is based on rumors and whispers that cannot be cross examined and that bear no indicia of reliability.

A. The Court has historically prohibited the admission of inherently unfair and unreliable evidence

For most of Michigan's history, this Court's authority to determine the admissibility of evidence was not controversial. The authority was granted by the citizens of the state, Const 1850, art 6, § 5; Const 1908, art 7, § 5; Const 1963, art 6, § 5, and by the Legislature. MCL 600.223; MCL 768.22(1). The responsibility was accepted by the Court. GCR 1963, 16; MRE 101. See also *Harker v Bushouse*, 254 Mich 187 (1931); *Perin v Peuler*, 373 Mich 531 (1964); *People v D'Angelo*, 401 Mich 167 (1977).

In even its earliest opinions, the Court has used that authority to promote trials' truth-seeking function by excluding unreliable evidence and evidence that would divert juries from their true purpose. These foundational evidentiary rules, like those restricting hearsay and prohibiting propensity evidence, were considered well settled by the time the Court first addressed them in its earliest opinions. See *People v Jenness*, 5 Mich 305, 320 (1858) ("The general rule in criminal cases is well settled, that the commission of other, though similar offenses, by the defendant, cannot be proved for the purpose of showing that he was more likely to have committed the offense for which he is on trial, nor as corroborating the testimony relating to the commission of such principal offense") and *Stockton v Williams*, 1 Doug 546, 570 (Mich, 1845) ("The nature of hearsay evidence, the reasons on which it is generally excluded, and the rules which regulate its admission, are too familiar to need illustration").

In 1999, the Court reversed its prior interpretation of our current and prior Constitutions, and held that where a 'substantive' rule of evidence passed by the Legislature conflicts with a 'substantive' rule of evidence promulgated by the Court, the legislation prevails. *McDougall*

v Schanz, 461 Mich 15, 30-31 (1999) held "a statutory rule of evidence violates Const 1963, art 6, § 5 only when no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified," and "if a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration the court rule should yield." Based on this conclusion, the Court ruled the Legislature could impose additional requirements than those set forth in MRE 702 to qualify as an expert witness in medical malpractice actions. *Id.* at 37.

Following *McDougall*, legislation that would become MCL 768.27b was introduced in the Senate. It initially provided in part:

> evidence of the defendant's commission of other domestic violence is not made inadmissible by Michigan rule of evidence 404 regarding character evidence or evidence of other crimes, wrong, or acts. [2005 SB 120, § 27a(1)]

Legislation that would become MCL 768.27c was introduced the following month, and was similarly explicit in its intended effect:

> evidence of a statement by a declarant is not inadmissible as hearsay if… [2005 SB 263, § 27a(1)]

The legislation that would become MCL 768.27a was the last of the three statutes to be introduced, but the first to become law. 2005 PA 135. MCL 768.27b and MCL 768.27c passed three months after MCL 768.27a. 2006 PA 78-79.

At the time of its passage and Mr. Propp's trial, MCL 768.27b(1) provided:

> Except as provided in subsection 4 [generally excluding acts that occurred more than ten years before the pending action was charged] in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for

> which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403. [2006 PA 78]

B. The Court construed legislative silence in MCL 768.27a to avoid conflict and preserve its constitutionality

In *People v Watkins*, 491 Mich at 455-56, the defendants challenged the constitutionality of MCL 768.27a under Const 1963, art 6, § 5, given its apparent conflict with MRE 404(b)(1), and held:

> MCL 768.27a irreconcilably conflicts with MRE 404(b), which bars the admission of other-acts evidence for the purpose of showing a defendant's propensity to commit similar acts, and that the statute prevails over the court rule because it does not impermissibly infringe on this Court's authority regarding rules of practice and procedure under Const. 1963, art. 6, § 5.

In *People v Mack*, 493 Mich 1 (2012), the Court held the "reasoning of *Watkins* fully control[led]," its conclusion that "MCL 768.27b does not infringe on this Court's authority to establish rules of 'practice and procedure' under Const. 1963, art. 6, § 5."

Watkins primarily addresed the differences between the two statutes, but ultimately concluded their differences were inconsequential or unintended. For instance, unlike MCL 768.27b, MCL 768.27a did not specifically incorporate MRE 403 or a time limitation. While MCL 768.27a used the permissive term, "may be considered," MCL 768.27b used only the mandatory term, "is admissible."

Though unlike MCL 768.27b, MRE 403 is not specifically incorporated in MCL 768.27a, the Court declined "to presume that the Legislature intended that MRE 403 not apply to other-acts evidence admissible under the statute," because "[t]he Legislature could have expressly exempted evidence admissible under MCL 768.27a from analysis under MRE 403, but it did not." *Id.* at 482-83. MRE 403 was only considered absent in MCL 768.27a "by virtue of the subsequent enactment," of MCL 768.27b. Similarly, the Court concluded that the

permissive language within MCL 768.27a could be attributable to its omission of MRE 403 and the time-limitation.

C. MCL 768.27b should not be interpreted to unnecessarily conflict with the Rules of Evidence or the Constitution

If the Legislature intended MCL 768.27b to have the radical impact of excluding evidence of other acts of domestic violence from the ordinary rules of evidence, such as those pertaining to hearsay and privilege, it "could have expressly exempted evidence admissible under MCL 768.27[b] from analysis under [MRE 802 and all evidentiary rules other than] MRE 403, but it did not." *Watkins*, 491 Mich at 482-83. When the Legislature intends to exempt certain proceedings or evidence from the rules of evidence, it does so explicitly. See, e.g., MCL 771.4 ("Hearings on the revocation ... [are] not subject to the rules of evidence."); MCL 28.723a(3) ("The rules of evidence, except for those pertaining to privilege … do not apply to a hearing under this section."); MCL 766;11b(1) ("The rules of evidence apply at the preliminary examination except…"); MCL 600.4961(2) ("The Michigan rules of evidence do not apply before the mediation panel."); MCL 423.236 ("Technical rules of evidence do not apply"); MCL 780.621e(6) ("The rules of evidence do not apply to a hearing under this section.").

Even if MCL 768.27b's failure to mention any evidentiary rule other than MRE 403 created an ambiguity about whether MRE 802 continued to apply, it should not be "lightly presume[d] that the Legislature intended a conflict," and the first step in resolving the ambiguity would be to determine if it could "be construed so as not to conflict." *McDougall*, 461 Mich at 24, quoting *People v Dobben*, 440 Mich 679, 697 n 22 (1992). Unlike MCL 768.27b and the prohibition in MRE 404(b)(1), there is no inherent conflict between MCL 768.27b and MRE 802. Courts, including the Court of Appeals, previously had no difficulty applying both in concert. See *People v Stenberg*, unpublished per curiam opinion of the Court of Appeals, issued October 12, 2010 (Docket No. 290918) (finding no error in admission of hearsay other acts evidence admitted under MCL 768.27b because statement qualified as an excited utterance).

The Court of Appeals construed the absence the words "may be considered" from MCL 768.27b and MCL 768.27c as evidencing the Legislature's intent to prohibit trial courts from exercising any discretion, including the discretion to follow rules promulgated by this Court, to exclude evidence that satisfies the explicit requirement within those statutes. It based this conclusion on the fact that MCL 768.27a includes that language, and provides:

> evidence that the defendant committed another listed offense against a minor is admissible and ***may be considered*** for its bearing on any matter to which it is relevant. [MCL 768.27a(1) (emphasis added).]

The *Watkins* Court said no distinctions could be drawn from the omission of MRE 403 from MCL 768.27a, despite its explicit incorporation in MCL 768.27b,because they were not passed simultaneously. There is no reason such a substantial leap should be drawn from the absence of the term "may be considered," from MCL 768.27b and MCL 768.27c simply based on its presence in MCL 768.27a. If the permissive language in MCL 768.27a signals anything, it is the Legislature's acknowledgment that it cannot dictate or predict how juries consider evidence or what such evidence will help to establish. The "is admissible" language appears targeted toward reversing the first sentence of MRE 404(b)(1), which provides other acts evidence "is not admissible to prove the character of a person." The "is admissible" phrase first appeared in 1882, when the Court held "proof of previous acts of the same kind is admissible for the purpose of proving guilty knowledge or intent." *People v Henssler*, 48 Mich 49, 52 (1882). *Hennsler* gave no indication that when other acts evidence is admissible to prove knowledge, it need not comply with rules related to hearsay and privilege.

Unlike the irreconcilable conflict between MCL 768.27b and MRE 404(b), there is no inherent conflict that prevents the normal application of MRE 802. Construing the statute to require the admission of hearsay evidence lacking any indicia of reliability would render it unconstitutional and in violation of due process. The hearsay rules "are designed as safeguards against essentially unfair procedures," because

"to allow men to be convicted on unsworn testimony of witnesses [is] a practice which runs counter to the notions of fairness on which our legal system is founded." *Bridges v Wixon*, 326 US 135, 154-54 (1945). See also *People v Malone*, 445 Mich 369, 399 (1994) ("Hearsay is repugnant to the truth-seeking function of litigation because the statement is made in the absence of testimonial safeguards implemented to foster reliability.").

MCL 768.27c irreconcilably conflicts with MRE 802, but notably includes numerous requirements intended to ensure the out of court statements it provides for the admission of are trustworthy. Additionally, since a statement made to a police officer about an assault or threat will in most or all circumstances be testimonial, the declarant will almost always be subject to cross examination about the statement. MCL 768.27c does not and cannot constitutionally be interpreted to prevent the traditional application of Confrontation Clause. See, *C F Smith Co v Fitzgerald*, 270 Mich 659, 667 (1935) ("In a clear case of conflict between the Constitution of the United States or the Constitution of this state and an act of the Legislature, this court has no discretion but to uphold the provisions of the Constitution adopted by the people"). *Watkins* declined to address whether MCL 768.27a would violate defendants' due process right in the absence of its incorporation of MRE 403, but it clearly would in many cases. The Court of Appeals specifically held that trial courts lack the discretion to exclude evidence that satisfies the requirements of MCL 768.27c under MRE 403 or any other evidentiary rule.

D. MCL 768.27b incorporated and did not alter the traditional balancing test provided in MRE 403

In *Watkins*, 491 Mich at 486, the Court acknowledged "[p]ropensity evidence is prejudicial by nature, and it is precisely the danger of prejudice that underlies the ban on propensity evidence in MRE 404(b)." It concluded that the traditional application of MRE 403 "would gut the intended effect of MCL 768.27a, which is to allow juries to consider evidence of other acts the defendant committed to show the defendant's character and propensity to commit the charged crime." *Id.* at 487. As a result, it held that "when applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor

of the evidence's probative value rather than its prejudicial effect." *Id.* at 487.

This Court has never addressed how MRE 403 should be applied to evidence sought to be admitted under MCL 768.27b, but several Court of Appeals opinions have held the modified balancing test announced in *Watkins* applies. See, e.g., *People v Pattison*, 276 Mich App 613, 620 (2007); *People v Cameron*, 291 Mich App 599, 610 (2011). On this basis, the Court of Appeals held the trial court properly admitted Mr. Propp's ex-wife's allegations that he frequently raped her and tried to break into her house with a knife. It considered these claims "highly relevant and probative because they spoke directly to defendant's propensity to commit domestic violence against women." 33a.

Unlike MCL 768.27a, MCL 768.27b explicitly incorporates MRE 403. "[I]t is a well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation." *Pulver v Dundee Cement Co*, 445 Mich 68, 75 (1994). Whether *Watkins*' accurately determined how the Legislature intended MRE 403 to interact with MCL 768.27a evidence, there is no need to speculate how proposed MCL 768.27b evidence should be considered under MRE 403.

If the Legislature intended courts to engage in anything other than the traditional MRE 403 balancing test when a prosecutor seeks to admit evidence under MCL 768.27b, it would have signaled that intent in the plain language of the statute, and would not have explicitly incorporated MRE 403 without modification or limitation. MCL 768.27b does not dictate or imply that propensity evidence should be treated differently than any other kind of evidence under MRE 403. Indeed, this was how the congressional sponsors of Rules 13, 14, and 15 of the Federal Rules of Evidence, which served as the apparent inspiration for MCL 768.27b, envisioned those Rules interacting with Rule 403:

> the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence rule 403 to exclude

> evidence whose probative value is substantially outweighed by its prejudicial effect. …
>
> The practical effect of the new rules is to put evidence of uncharged offenses in sexual assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule. The presumption is in favor of admission. The underlying legislative judgment is that the evidence admissible pursuant to the proposed rules is typically relevant and probative, and that its probative value is normally not outweighed by any risk of prejudice or other adverse effects.

140 Cong Rec H8968-01 (August 21, 1994).

The MRE 403 analysis regarding other acts evidence the Court explained in *People v Crawford*, 458 Mich 376 (1998) should guide courts' analysis of the admissibility of other acts evidence sought to be admitted under MCL 768.27b. Such evidence may not be excluded unless its probative value is substantially outweighed by the danger of unfair prejudice. However, the Court should clarify that just because other acts evidence is highly probative of a defendant's criminal propensity does not necessarily mean that the other acts evidence or the defendant's propensity is highly probative of a fact of consequence at trial. And where MCL 768.27b evidence is probative of a fact that truly is consequential, it should still be excluded under MRE 403 where the evidence's probative value is substantially outweighed by the danger that such evidence will cause the jury to prejudge the defendant because of his "bad general record and deny him a fair opportunity to defend against a particular charge.' ". *Crawford*, 458 Mich at 384, quoting *Michelson v United States*, 335 US 469, 476 (1948).

E. The admissibility of evidence under MCL 768.27b is necessarily constrained by a defendant's right to due process

Several states have found similar statutory rules providing for the admission of other acts evidence to prove propensity unconstitutional.

State v Gresham, 173 P3d 207 (Wash, 2012); *State v Cox*, 781 NW2d 757 (Iowa, 2010); *State v Ellison*, 239 SW3d 603 (Mo, 2007). Those jurisdictions that have upheld the constitutionality of similar rules have stated they would violate due process "without the safeguards embodied in Rule 403." *United States v Enjady*, 134 F3d 1427, 1433 (CA 10, 1998). See also *United States v Rodriguez*, 581 F3d 775, 794 (CA 8, 2009); *United States v LeMay*, 260 F3d 1018, 1027 (CA 9, 2001); *United States v Wright*, 53 MJ 476, 482 (2000); and *People v Beaty*, 377 Ill App 3d 861, 884 (2007). Those courts have not implemented *Watkins*'s inversed Rule 403 balancing test because that test perversely considers the likelihood the evidence will violate the defendant's right to due process in favor of its admissibility.

At some point, other acts evidence becomes so probative of the defendant's criminal propensity that it necessarily prevents the jury from presuming he is innocent or imagining he is not guilty. That line was crossed in this case and Mr. Propp's trial was fundamentally unfair as a result. No jury instruction could possibly prevent this, and the relevant model jury instruction, M Crim JI 4.11a, appears to have been authored in recognition of its own futility.

"A fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 US 133, 136 (1955), and "[t]he presumption of innocence … is a basic component of a fair trial under our system of criminal justice." *Estelle v Williams*, 425 US 501, 503 (1976) (citation omitted). "The character evidence prohibition is deeply rooted in our jurisprudence," and "reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence." *Crawford*, 458 Mich at 383–84. Practical experience shows that juries "prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v United States*, 335 US 469, 475-76 (1948).

* * *

There will hopefully never a case that better illustrates the fundamental unfairness caused by the lower courts' erroneous interpretation of MCL 768.27b. The night before Ms. Thornton died, Mr.

Propp was at the bar with her and her sister. They went back to Ms. Thornton's house at the end of the night, and her sister left them alone to go to bed. When she was awoken in the middle of the night by loud noises, she assumed they were having consensual sex, and did not consider the possibility her sister was the victim of domestic violence or sexual assault.

Yet Ms. Thornton's friends and sisters testified that while she was alive, Mr. Propp would have violent fits of anger. He would physically assault her, while carefully and cruelly leaving injuries on her body only where they would not be seen. He once choked her until she started to pass out and see stars, then told her: "see how easy it would be for me to shut you up." When Ms. Thornton would try to leave Mr. Propp, he would take her car keys or phone so she could not go. After they broke up, Mr. Propp threatened to kidnap their daughter unless Ms. Thornton continued to spend time with him and kept posting new photos family photos on Facebook.

This could be considered highly probative of Mr. Propp's intent to kill Ms. Thornton if any of the witnesses who made those allegations had personal knowledge any of it was true. The memories and testimony of Ms. Thornton's sisters and friends were likely impacted by time and by the knowledge that Mr. Propp was responsible for the death of someone they loved. If Ms. Thornton said any of these things, she said them to people who apparently disliked Mr. Propp and disapproved of their relationship. There is no contemporaneous documentation to support that Mr. Propp was ever physically abusive to Ms. Thornton or manipulated her by threatening to kidnap their daughter. There are no police reports or family court filings regarding the abuse and the kidnapping threats, no applications for personal protection orders, photos of bruises on Ms. Thornton's neck or arm, text messages, emails, medical records, or anything else one might expect from the witnesses' description of Mr. Propp's constant abuse. Ms. Thornton did not make any of these allegations under penalty of perjury and was never subject to cross examination.

It has been more than 150 years since this Court said that the admission of hearsay as substantive proof was an error "too manifest to

admit discussion," and that "[s]uch a practice would lead to endless frauds, and cannot be sanctioned." *Dewey v Campau*, 4 Mich 565, 568-69 (1857). There is no indication that the Legislature intended to sanction the admission of hearsay, let alone hearsay lacking any circumstantial guarantee of trustworthiness, when it enacted MCL 768.27b. There is no doubt the Fourteenth Amendment would prohibit it from doing so. "Due process encompasses the requirement that the state prove the charges beyond a reasonable doubt." *People v Beck*, 504 Mich 605, 620 (2019). "If such witnesses, under such circumstances, can be relied on as truthful, when they have not even been subjected to cross-examination, and have been allowed to indulge in hearsay and inadmissible statements, it would not be very difficult to satisfy a court of anything." *Leavitt v Leavitt*, 13 Mich 452, 461 (1865).

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Robert Propp respectfully requests that the Court vacate his conviction and grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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