STATE OF MICHIGAN
IN THE OAKLAND COUNTY CIRCUIT COURT
CRIMINAL DIVISION

STATE OF MICHIGAN,

Plaintiff,

Case No. 10-[redacted]-FH
v Hon. Mark A. Goldsmith

[redacted]

Defendant.
_____/

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_____/

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MOTION FOR SUPPLEMENTAL DISCOVERY

Defendant, by his attorney Thomas M. Loeb, requests supplemental discovery, and in support, states as follows:

1. The Defendant is charged by way of information with the offense of second degree criminal sexual conduct, contrary to MCL 750.520c(1)(b).

2. The complaining witness is his niece.

3. Defense counsel has received initial discovery in this matter.

4. The critical issue for the jury in this case will be the Complainant's credibility. There is no physical evidence supporting the existence

of any sexual contact between the Complainant and Defendant. Also, there are no witnesses to any such alleged conduct.

5. Defendant requests discovery of the following school records:

a. counseling, behavior, discipline, and academic records from Hillside Middle School, Northville, Michigan. The Complainant attended sixth and seventh grades at this school, and will be starting the eighth grade in September, 2010;

b. Thornton Creek Elementary School in Novi, Michigan. Complainant attended third, fourth, and part of the fifth grades at this school from 2005 to 2008. Upon information and belief school administrators suggested that the Complainant be transferred to a different school better suited to treat her emotional problems;

c. counseling, behavior, discipline, and academic records from Moraine Elementary School, Northville, Michigan. Upon information and belief, the Complainant transferred to this school sometime in the 2007-2008 school year;

d. Our Lady of Good Counsel School, Plymouth, Michigan. Upon information and belief, the Complainant attended the

first and second grades at this school from 2003 - April, 2005. Upon information and belief, the Complainant was asked to leave the school in April or May of the school year because she had behavioral problems. Apparently she would sit and cry at her desk repeatedly, and a teacher thought she was "manipulative".

6. Defense counsel requests discovery of the Complainant's therapy records. The Complainant has been seeing a therapist (Dr. Goldman) on a weekly basis for quiet some time. Upon information and belief, she discussed this alleged incident with the therapist on more than one occasion. Defense counsel requests specifically the following information:

   a. any records, interview notes, typed notes, memorandums, correspondence, documentation, or reports of any kind conducted during the course of the Complainant's therapy;

   b. diagnostic or evaluation sessions;

   c. treatment sessions;

   d. and the like.

7. The above-requested materials are appropriately discoverable pursuant to ***People v Stanaway***, 446 Mich 130 (1994) and MCR

6.201(C).

8. The above-requested material are also discoverable, and denial of discovery would violate Defendant's right to confrontation, right to compulsory process and right to due process under both the State and Federal Constitutions. See US Conts, am VI, XIV; Conts 1963, art 1§ 20.

9. Without the above-requested discovery, Defendant will have no basis from which to evaluate the credibility of the witnesses, or to test (through confrontation and cross examination) any testimony offered by the prosecution.

10. While some of the requested discovery may arguably be protected by privilege, it is the responsibility of the privilege holder to assert privilege. Moreover, the Defendant's constitutional rights trumps any privilege that may exist (presumably the school records privilege or the therapist-patient privilege).

11. Any existing privileges have already been waived during the course of the police investigation because both school authorities and the treating therapist have broken the privilege, spoken to authorities, and, upon information and belief, revealed privileged information with the consent of the privilege holder. Where the prosecution has

access to information related to the Complainant, Defendant is entitled to equal access - even when that information was previously protected by privilege.

12. Lastly, even that this Court holds that Defendant's constitutional rights do not trump privileges that exist but not yet waived, this Court should conduct an *in camera* review of the documents requested, to determine whether the documents contain information material to the defense. This *in camera* procedure is contemplated by ***Stanaway,*** *supra*, and MCR 6.201(C).

13. Expanded pretrial discovery adds the truth-seeking process at trial by both promoting the "fullest possible presentation of the facts", and "minimizing opportunities for falsification of evidence". ***People v Wimberly***, 384 Mich 62, 66 (1970).

14. Moreover, if the Complainant or her family is concerned about revelation of any information found in these documents, the parties can stipulate to entry of an appropriate protective order to deal with this concern.

THEREFORE, for all the above reasons Defendant respectfully requests this Honorable Court to enter an order for the release of the complaining witness' medical, psychological, and school records to the defense.

Respectfully Submitted,

_____
Thomas M. Loeb (P25913)
Attorney for Defendant

Dated: August 18, 2010

MEMORANDUM IN SUPPORT

Facts

Defendant stands accused of sexual contact with his thirteen year old niece. Specifically, he is accused of improperly touching her breast while in the basement of her home on a Saturday in March, 2010. At the time that this allegedly occurred, her father was a few steps away in the kitchen cooking lunch, and the Complainant's sister was allegedly either in the same room when this occurred, or in another room working on a computer. Defendant denies the charges.

Initial discovery has already been received. However, Defendant respectfully requests additional discovery under both the court rules and pursuant to his constitutional rights. Any privilege argument that may exist does not prevent discovery of these material because the privileges have either been waived, or his constitutional rights trump considerations of privacy.

Defendant maintains that this Court should order production of all the additional discovery requested. Alternatively, this Court could order production of non-material, and review any privilege records *in camera* to determine whether they contain information material to Mr. [redacted] case.

This request is no mere "fishing expedition". At the preliminary hearing, Defendant's niece testified that both her mother and her school social worker met with her and helped her prepare for her testimony. Specifically, they both helped her come up with the phrase "my uncle sexually abused me", a statement offered by the prosecution in direct examination at the beginning of the preliminary hearing. See preliminary exam, pp 14, 31. Moreover, she sees her therapist (Dr. Goldman) every week, and had been seeing this therapist for quiet some time before this incident occurred. She has discussed this alleged event with Dr. Goldman. See preliminary examination, p 32. Mr. [redacted] niece testified that both her parents, her therapist, and her school social worker told her that this prosecution "is going to get him (the defendant) the help that he needs". See preliminary examination, pp 40-42.

In this case, the Defendant adamantly denies having sexual contact with his niece. Defendant has known the Complainant her entire life. The Defendant's wife and the Complainant's mother are sisters. It is well known throughout this close knit family that the Complainant has had treatment for

emotional problems. Upon information and belief, the Complainant has had more than one incident at school where she had emotionally acted out, been accused of being manipulative, exaggerated, or outright lied. In fact, the officer in charge reluctantly admitted at the preliminary examination that the Complainant's own mother told him that she (the Complainant) sometimes lies. The officer conveniently left this information out of his police report. See preliminary exam, p 54.

Defendant submits that the discovery being requested is mandatory under the court rules. Firstly, the records will likely contain statements pertaining to the case by a lay witness. See MCR 6.201(A)(2). Moreover, at this writing it is unknown whether the child's therapist may be called as a witness. If he is, then MCR 6.201(A)(3) applies because the records in the therapist's file would form the basis of his opinion. Moreover, the records contain favorable information under MCR 6.201(B)(2). A wealth of impeachment material exists in these records. It can not be overlooked that the Complainant herself admitted in her testimony that both her mother and her school counselor helped her prepare her for her testimony by giving her provocative phrases for her to repeat in open court.

This writer has no intention of unnecessarily embarrassing anyone. However, this writer has been advised by others in the family close to both the

Complainant and the Defendant that the Complainant has significant emotion problems, is a very troubled child, and has been in therapy for many years. She has a reputation among her family of often exaggerating things. The information being sought would, this writer submits, support these claims. In a case like this, which turns on credibility, this information is critical.

The physician-patient privilege is a statutory creation. It is in derogation of common law, and should be narrowly construed. ***La Count v Von Platen-Fox Co***, 243 Mich 250 (1928). Exceptions to statutory privileges should be broadly construed***.*** ***People v Love***, 425 Mich 691, 700 (1986). An attempt to use a privilege to control the timing of the release of information exceeds both the purpose of the privilege and corrodes the purpose of waiver by repressing evidence. This is contrary to the open discovery policy of our state. ***Domako v Rowe***, 438 Mich 347, 354-355 (1991). Once a privilege is waived, there are no sound legal or policy grounds for restricting access to the information. ***Domako,*** *supra*, at 361. Selective waiver, or an attempt by a privilege holder to waive privilege as to one person but sustain it as to others, is disfavored in both Michigan and federal courts. In ***Landelius v Sackellares***, 453 Mich 470 (1996), the court held that a witness was stopped from asserting his privilege as to medical records when he had disclosed those same records in a previous litigation. Similarly, because a parol board can review a prisoner's psychological

records for parole hearing, the psychologist-patient privilege does not protect from discovery a prosecutor's review for consideration of an appeal of the parole grant. See ***Oakland County Prosecutor v Department of Corrections***, 222 Mich App 654 (1997). "Once otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if in otherwise confidential communication is necessarily intended to be disclosed to a third party, the privilege disappears". ***Oakland County Prosecutor,*** *supra*, at 658. See also ***In Re Ford State***, 206 Mich App 705, 708-709 (1994).

In the event this Court does not find a privilege waiver, Defendant submits that his constitutional rights to due process of law, to discover favorable material, and to compulsory process and confrontation require that this Court order production of the requested discovery. Defendant submits that the school records will rebut any claim that the Complainant's emotional problems began with this alleged sexual abuse. Instead, Defendant suggests that these records will present a troubled, manipulative, emotional young lady who at times exaggerates events and acts out in a histrionic way.

The constitutional right to due process under both the State and Federal Constitutions require "fundamental fairness in a criminal trial". ***Spencer v Texas***, 385 US 554 (1967). The trend in Michigan and other states is towards broader criminal discovery. The Michigan Supreme Court has explained that

broad criminal discovery is important "to promote the fullest possible…presentation of the facts, minimize opportunities for falsification of evidence and eliminate the vestiges of trial by combat…" ***People v Johnson***, 356 Mich 619, 621-622 (1959). This policy flows from the understanding that trial is not a duel or game, but a quest for truth. ***Winberly,*** *supra*, at 62.

Supplemental pretrial discovery should be allowed in this case. Defendant submits that this information is necessary to the proper presentation of his trial defense. Cf ***People v Walton***, 71 Mich App 478, 481 (1976). In ***Walton,*** *supra*, the Court of Appeals stated:

> "….fairness to the Defendant in an adequate opportunity to prepare a defense, including preparation for cross examination of witnesses, requires that the Defendant be given access to all relevant information….this is particularly true, as in the case at bar, where the question of credibility may be preeminent. Any inconsistent or conflicting statements may have considerable impact upon the determination of the credibility of the parties and witnesses and may therefore be determinative of the outcome of this prosecution. Also, without an examination of the requested information, it is impossible to see if such information would be relevant and whether its suppression would lead to a failure of justice." ***Walton,*** *supra*, at 381-382.

At ***People v Mikuli***, 84 Mich App 108, 115 (1978) it is stated:

> "In a case such as the one before us, where the verdict necessarily turned on the credibility of the Complainant, it is imperative that the Defendant be given an opportunity to place before the jury evidence so fundamentally effecting the Complainant's credibility".
> Give the nature of these charges, the potential for harm is very high.

There is a human tendency to sympathize with perceived victims of sexual assault, and a gut desire to see that "justice is done". This is even more true where the perceived victim is a child. This Court has a duty to be extra vigilant in preventing human emotion from subconsciously skewing the process. It is crucial for defense counsel to have access to all information in order to cross exam the Complainant. The jury must be able to hear all evidence to determine the Complainant's credibility.

At trial, the Defendant has the constitutional right to confront witnesses against him. See US Const, am VI; Const 1963, art 1 §§ 17, 20. As part of the right to confront witnesses, Defendant submits he is entitled to discovery of the allegations leveled against him, including information proletive of the credibility of the Complainant. The right to discover all relevant information is a necessary aspect of the accused's right to confront and cross examine the witnesses against him, and to right to compel production of evidence in his favor. As explained in general terms in ***In Re Bay County Prosecutor***, 109 Mich App 476 (1981)...

> "Fairness to the Defendant and an adequate opportunity to prepare a defense, including preparation for cross-examination of witnesses, requires that the Defendant be given access to all relevant information....Any inconsistent or conflicting statements may have considerable impact upon the determination of the credibility of the parties and witnesses and may therefore be determinative of the outcome of this prosecution".

The constitutional right to affective cross examination is so essential to a fair trial that protection of these right can out weigh a state's or an individual's otherwise valid claim of confidentiality to various records. See ***Davis v Alaska***, 415 US 308 (1974).

Defendant's submits that this Court should grant his motion for additional discovery, as any privilege attached to the records is not absolute. It must yield to his right to confront witnesses and to discover information in support of his defense. Defendant submits that the Complainant's school records are particularly important to his defense. This is especially true when, Defendant submits, the Complainant candidly admits that both her mother and the school social worker met with her and helped her prepare for her testimony. This preparation specifically included giving the Complainant provocative statements to be repeated in open court ("my uncle sexually abused me"). See preliminary exam, pp 14, 31.

Defendant maintains that he has made a sufficient offer of proof of the necessity and materiality of these records as required by ***Stanaway,*** *supra* and MCR 6.201(C)(2).

Stanaway requires the Defendant to have a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability the records are likely to contain material information necessary to his defense. Certainly,

Mr. [redacted] has a due process right to keep trial strategy confidential. He should not be force to disclose it prior to trial. However, as an offer of proof, Defendant states that his strategy of the defense at trial will focus on the Complainant's credibility, which is, of course, the "paramount issue" in this case.

Defendant submits that this offer for proof, including the information previously provided concerning this child's excitable, exaggerated, and emotional state more than fulfills this requirement. Defendant will turn 55 two days before the trial's scheduled in this case. He has no criminal record. The Complainant, although only 13, has been treated for emotional problems for many years, is known to exaggerate, and even lie. The school and therapy records being requested are relevant and critical to his defense. Defendant respectfully submits that he should be allowed to review the records for information both relating to the current charges, or relevant to the Complainant's credibility.

THEREFORE, for all the above reasons Defendant respectfully requests this Honorable Court grant his motion for additional discovery, and order the release of the complaining witness' medical, psychological, and school records to the defense. Alternatively, this Court should require production of these records to the Court for *in camera* review, to determine the materiality and the

necessity of these records.

Respectfully Submitted,

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Thomas M. Loeb (P25913)
Attorney for Defendant

Dated: August 18, 2010