EFiled: Oct 10 2023 03:23PM EDT
Filing ID 71054249
Case Number 131,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RHANDY MASSEY,	:	
	:	C.A. No. 131, 2023
Defendant-Below,	:	
Appellant,	:	ON APPEAL FROM THE
v.	:	SUPERIOR COURT OF THE
	:	STATE OF DELAWARE
STATE OF DELAWARE,	:	ID No. 2108001587A
	:	
Plaintiff-Below,	:	
Appellee.	:	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

APPELLANT'S SECOND AMENDED OPENING BRIEF

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DATED: October 10, 2023

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NATURE AND STAGE OF THE PROCEEDINGS

On August 19, 2021, the Delaware State Police arrested Rhandy Massey – the Defendant - alleging various forms of unlawful sexual contact with his two daughters. In October, 2021, the State indicted the Defendant on: three (3) counts of Sexual Abuse of a Child by a Person in a Position of Trust, Authority or Supervision Second Degree, four (4) counts of Unlawful Sexual Contact First degree, two (2) counts of Rape Second Degree, two (2) counts of Rape First Degree, two (2) counts of Sexual Solicitation of a Child, two (2) counts of Continual Sexual Abuse of a Child, and one (1) count of Endangering the Welfare of a Child.

On January 20, 2023, the Defendant filed a motion requesting an in-camera proceeding to admit evidence of the complaining witnesses' prior sexual conduct under 11 *Del. C.* §3508. On January 23, 2023, the State filed its response to the motion. A hearing addressing the motion was held on January 23, 2023, and the Defendant's request was denied based upon the Court's finding that previous allegations of sexual abuse must first be shown to be false by "clear and convincing" evidence before they may be admitted under 11 *Del. C.* §3508.

Jury trial began on January 23, 2023. On this date the count of Endangering the Welfare of a Child was severed. On January 27, 2023, the jury

found the Defendant guilty of three (3) counts of Sexual Abuse of a Child by a Person in a Position of Trust, Authority or Supervision Second Degree, five (5) counts of Unlawful Sexual Contact First degree (one count being the lesser included offense of Rape Second Degree), one (1) count of Rape Second Degree, one (1) count of Rape First Degree, two (2) counts of Sexual Solicitation of a Child, and two (2) counts of Continual Sexual Abuse of a Child. One count of Rape First Degree was dismissed. On January 27, 2023, a presentence investigation was ordered and the sentencing date was set for March 24, 2023.

On February 6, 2023, the Defendant filed a motion for a new trial on the grounds that (1) an incorrect legal standard was utilized in denying the defendant's request for an 11 *Del. C.* §3508 in-camera proceeding, and (2) there was no finding of "substantial need" before the Trial Judge granted the State's request to allow the complaining child witness the "special accommodation" of carrying and holding a stuffed comfort animal during her testimony. The State filed its response to the motion on March 1, 2023, and on March 7, 2023, the Court denied the motion.

On March 20, 2023, the sentencing hearing was rescheduled for March 27, 2023. On March 27, 2023, the Court imposed the following sentence: count I, Rape First Degree, twenty-five (25) years at level V; count II, Rape Second

Degree, twenty-five (25) years at level V; count III, Continual Sexual Abuse, twenty-five (25) years at level V; count IV, Continual Sexual Abuse, twenty-five (25) years at level V; count V, Sexual Solicitation of a Child, fifteen (15) years at Level, after serving three (3) years, decreasing levels of supervision; count VI, Sexual Solicitation of a Child, fifteen (15) years at Level, after serving three (3) years, decreasing levels of supervision; count VII, Unlawful Sexual Contact, eight (8) years at level V, after serving two (2) years, decreasing levels of supervision; count VIII, Unlawful Sexual Contact, eight (8) years at level V, after serving two (2) years, decreasing levels of supervision; count IX, Unlawful Sexual Contact, eight (8) years at level V, after serving two (2) years, decreasing levels of supervision; count X, Unlawful Sexual Contact, eight (8) years at level V, after serving two (2) years, decreasing levels of supervision, count XI, Unlawful Sexual Contact, eight (8) years at level V, after serving two (2) years, decreasing levels of supervision; count XII, Child Sexual Abuse, three (3) years at level V, after serving one (1) year, decreasing levels of supervision; count XIII, Child Sexual Abuse, three (3) years at level V, after serving one (1) year, decreasing levels of supervision; count XIV, Child Sexual Abuse three (3) years at level V, after serving one (1) year, decreasing levels of supervision. The Court also imposed fees and restitution in the amount of $703.00.

On April 21, 2023, through Counsel, the Defendant filed a timely Notice of Appeal.

This is Mr. Massey's Opening Brief.

SUMMARY OF ARGUMENT

I. The Superior Court erred in denying the Defendant's request for an 11 *Del. C.* §3508 in-camera proceeding.

II. The Superior Court erred in excluding evidence of past incidents of a sexual nature pertaining to the complaining witnesses.

III. The State committed a *Brady* violation when it failed to disclose to the Defendant a prior incident of sexual abuse committed against one of the complaining child witnesses.

IV. The Superior Court erred in allowing the complaining witness – M. M. - to carry to the witness stand and hold while testifying a "special accommodation" i.e., a stuffed comfort animal, absent a showing of "substantial need" and a specific Court ruling thereupon.

V. The Superior Court's erroneous exclusion of evidence deprived the Defendant of his right to have a meaningful opportunity to present a complete defense.

STATEMENT OF FACTS

Det. Alan Bluto of the Delaware State Police was assigned to investigate a criminal complaint alleging incidents of sexual abuse.[1] The alleged victims were between the ages of six and eight-years-old when the alleged abuse occurred and the acts allegedly spanned from approximately 2019 to 2021.[2] The alleged abuse occurred at a home in Greenwood, DE, Sussex County.[3] The address was 12850 Adamsville Rd., and this is where husband – Rhandy Massey – lived with his wife – Inga Massey – and their two daughters L. M. and M. M, who were between the ages of seven and nine when the alleged abuse occurred.[4] The alleged victims of the abuse were L. M. and M. M.[5] The alleged perpetrator was their father Rhandy Massey.[6] The accused waived his Fifth Amendment privilege not to incriminate himself. Massey elected to testify and denied all allegations.[7]

The State's evidence consisted primarily of the children's statements concerning the alleged abuse. When M.M. testified, she carried a small stuffed

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[1] A - 116, Trial Tr. at B-83.
[2] A - 107 - 108, Trial Tr. at A-7, 8.
[3] A - 108, Trial Tr. at A-8.
[4] A - 115, Trial Tr. at B-11.
[5] *Id.*
[6] A - 108, Trial Tr. at A-8.
[7] A - 121, Trial Tr. at C-142

animal to the witness stand as a comfort animal.[8] The State also presented limited DNA evidence through the testimony of Paul Gilbert, who testified that unidentified male DNA was discovered on a swab taken from M. M. [9] Gilbert also testified Massey's DNA was found on a blanket and the accused's blue T-shirt.[10]

M. M.'s allegations came into evidence via the recorded Child Advocacy Center interview which was conducted by Lauren Cooper.[11] During the interview M. M. alleged that Rhandy Massey rubbed and licked her vagina,[12] masturbated and ejaculated in her view,[13] and penetrated her anus with his finger.[14]

During direct examination L. M. alleged that Rhandy Massey touched her vagina with his hand,[15] rubbed her butt with his hand,[16] and rubbed his penis on her face and on her back.[17] The rest of L. M.'s accusations were brought into evidence via the recorded Child Advocacy Center – CAC - interview that L. M.

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[8] A - 99
[9] A - 120, Trial Tr. at C-45
[10] A - 117, 118, 119, Trial Tr. at C-38, 40, 41
[11] A - 109, Trial Tr. at A-47.
[12] A - 132, Court Exhibit 2, Transcript of M.M. Child Advocacy Interview at 11, hereafter Court Exhibit 2.
[13] A - 133, *Id.* at 22.
[14] A - 134, *Id.* at 30.
[15] A - 110, Trial Tr. at A-106.
[16] A - 111, Trial Tr. at A-112.
[17] A - 112, Trial Tr. at A-117.

had taken part in.[18] During the CAC interview L. M. alleged that Rhandy Massey licked her vagina,[19] penetrated her anus with his finger,[20] rubbed his penis on her leg,[21] had her masturbate him, and ejaculated on her hand.[22]

The evidence which was excluded from being presented by the Defendant during trial was that both L. M. and M. M. had made previous allegations of being sexually abused. On August 20th, 2017, a police report was made in reference to accusations of sexual abuse which L. M. and M. M. Massey had made against their half-brother, N. M. N. M. is the son of Rhandy Massey, the half-brother of L. M. and M. M., and he was twelve-years-old at the time.

Inga Massey – the mother – relayed quite shocking allegations allegedly made to her by the daughters to one Corporal Brent, including but not limited to: "L. M. said that N.M. pulled down his pants and told M. M. to suck his penis," "N. M. tried to put his finger in KK's [M. M.'s] butt," "while M. M.

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[18] A – 113, 114, Trial Tr. at A-128-29
[19] A - 126, Court Exhibit 3, Transcript of L. M.'s Child Advocacy Interview at 41, hereafter Court Exhibit 3.
[20] A - 127, *Id.* at 45.
[21] A - 128, *Id.* at 46.
[22] A - 29, *Id.* at 50, 52.

was sucking N. M.'s penis, [N.M.] began shaking," "[N.M.] pulled her [L. M.'s] pants down and grabbed her by the neck."[23]

Subsequently, L. M. was interviewed at the Children's Advocacy Center – CAC – and made the following statements. "L. M. stated that he [N. M.] touched her down there and then touched the area of her vagina with his hand." "L. M. stated that he plucks it sometimes but not a lot." "L. M. advised that he touched her one time, then two times, then three times, then four times, then five times, then eleven times, then six times." "L. M. advised that N. M. pulled her pants down." "L. M. advised that she felt him pinch it." "L. M. advised that he then peed on her skin but her mom washed it off. L. M. advised that the pee he peed on her was green." "L. M. stated the he touched her butt with his hand." "L. M. advised that he put a marker on her butt but it's clean now."[24]

When L. M. spoke to her father – Rhandy Massey – concerning the incident, "L. M. said N. M. put his penis in M. M.'s mouth."[25]

Inga Massey was interviewed a second time and made the following disclosures. "L. M. [...] said that N.M. told M. M. to suck his penis."[26] "M. M.

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[23] A - 26, Cpl Brent's police report at 3, attached to Massey's Motion pursuant to 11 *Del. C.* §3508 as Exhibit A.
[24] A - 27, Det. Archer's police report at 5, attached to Massey's Motion pursuant to 11 *Del. C.* §3508 as Exhibit B.
[25] *Id.*
[26] *Id.*

stated he put his butt down there and pointed to her vagina. Inga stated that M. M. calls a penis a butt."[27] In addition, she relayed: "that they have been having problems at peoples [sic] houses before that; Inga advised that she knew something had to be happening or they saw something because of what they were doing; Inga advised that they were humping stuff and playing a boyfriend girlfriend game; Inga advised that they were also playing a game where they kissed each other; Inga advised that they were also trying to put stuff in each others' [sic] butts; Inga advised that this has been going on for about three months."[28]

Additionally, "the babysitter" – name redacted – was interviewed regarding M. M. and L. M.'s claims.[29] She stated: "M. M. and L. M. were doing inappropriate things and her daughter was picking up on it [...] '[t]he babysitter' stated that she was told there was a history with the girls being molested by their dads [sic] nephew or something like that [...] 'the babysitter' stated that L. M. told her that he did stuff to M. M. [...] 'the babysitter' stated that she doesn't know the whole story but told their parents that she couldn't keep them anymore [...] 'The babysitter' stated that it seemed like they knew

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[27] *Id.*
[28] *Id.*
[29] A – 28, Det. Archer's police report at *6, attached to Massey's Motion pursuant to 11 *Del. C.* §3508 as Exhibit B.

too much for their age [...] 'The babysitter' stated that they were always trying to stick whatever object they could find up each others [sic] butts [...] 'the babysitter' advised that they just knew way to [sic] much [...] 'the babysitter' again advised that they just know way too much."[30] The police report concludes with the statement: "DAG Ewart advised that there would be no prosecution in this case at this time due to insufficient evidence at this time due to M. M. making no disclosure of sexual misconduct and numerous inconsistencies in L. M.'s statements."[31]

After the trial's conclusion Defendant's counsel became aware of yet another accusation of sexual abuse lodged by L. M., however, this only came to counsel's attention after the conclusion of the trial, when the presentence report was completed. The presentence report only includes a few sentences regarding the incident. It states that complaint number 05-15-52452 documents an allegation by L. M. "that her 11-year-old cousin, A. M., had kissed her, engaged in oral sex with her , and penetrated her with his penis."[32] L. M. was two-years-old at the time and "[it] was reported that L. M. had been acting strangely and

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[30] *Id.*

[31] A -27, 28, Det. Archer's police report at 6, 7, attached to Massey's Motion pursuant to 11 *Del. C.* §3508 as Exhibit B.

[32] A- 135, Presentence Report p. 13.

exhibiting sexual behavior."[33] The report states: "[u]ltimately, prosecution of A. M. was declined due to his age."[34]

Finally, of relevance, the prosecutor, in her closing arguments stated to the jury: "you can consider [...] the ability of the witness to have acquired the knowledge of the facts to which they testified;"[35] and, "recall the motion that she used with her finger, *as a seven-year-old child*, to show what the defendant did;"[36] and, "[t]he first argument is that the girls learned about sexual acts from spying on their parents. There's been no other testimony that this happened other than from the defendant."[37]

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[33] *Id.*
[34] *Id.*
[35] A - 122, Trial Tr. at D-40.
[36] A -123, *Id.* at 41.
[37] A -124, *Id.* at 53.

LEGAL ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION IN FINDING THE OFFER OF PROOF PRESENTED INSUFFICIENT TO HOLD AN 11 *DEL. C.* §3508 IN-CAMERA PROCEEDING AND THE NATURALLY ATTENDANT EXCLUSION OF EVIDENCE VIOLATED THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. QUESTION PRESENTED

Whether the Court abused its discretion in finding the offer of proof insufficient and subsequently failing to conduct an in-camera hearing to determine the relevancy or the truth or falsity of the complaining witnesses' prior accusations of sexual abuse, and, in so doing, excluded crucial evidence from use at trial, violating the accused's right to a fair trial and right to confront witnesses under the Sixth Amendment? This issue was preserved for appeal by filing the Motion requesting an 11 *Del. C.* § 3508 in-camera proceeding to admit evidence of the complaining witnesses' prior sexual conduct for purposes of attacking their credibility before the trial began.[38]

B. STANDARD AND SCOPE OF REVIEW

This Court "review[s] the Superior Court's evidentiary rulings for abuse of discretion. If we determine that the Superior Court abused its discretion, we

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[38]A – 103-106, Transcript of Motions and Jury Selection at 3, 20, 21, 26.
A – 18-25, Motion pursuant to 11 *Del. C.* §3508.

then determine whether the error rises to the level of significant prejudice to deny the defendant a fair trial."[39]

C. MERIT OF ARGUMENT

The Superior Court abused its discretion when it, in considering the offer of proof presented, denied an in-camera hearing and utilized an incorrect standard of proof in coming to its decision, thus excluding crucial defense evidence which denied the Defendant the right to a fair trial.

The motion considering 11 *Del. C.* § 3508 and the subsequent hearing addressed three former sexual incidents involving the complaining witnesses and argued that either (1) false accusations were made, and therefore an in-camera proceeding should be held to question the witnesses and possibly the reporting persons on the truth or falsity of the complaining witnesses' prior claims, or, in the alternative, (2) evidence of the multiple accusations and incidents should be admitted to show how two children, under the age of ten (10) and presumed sexually innocent, had knowledge and the ability to articulate mature sexual interaction and or abuse at such a tender age, an age at which the average juror presumes girls to be innocent and incognizant of such sexual behavior.

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[39] *Jenkins v. State*, 53 A.3d 302 (Del. 2012) (internal citations omitted).

This Court has articulated what is required to have evidence admitted under 11 *Del. C.* §3508:

> "Evidence of the prior sexual conduct of an alleged rape victim is admissible only when [...] the court determines that the evidence proposed to be offered by the defendant regarding the sexual conduct of the alleged victim is relevant. [T]he defendant must make a written motion stating that the defense has an offer of proof concerning the relevance of the evidence to be used to attack the complainant's credibility. If the court finds that the offer of proof is sufficient, the court must order a hearing out of the presence of the jury and allow the complaining witness to be questioned regarding the offer of proof made by the defendant."[40]

The offer of proof tendered to the Superior Court consisted of the facts found on pages 7 through 10 of this appeal – appended to the motion requesting a §3508 as exhibits - and described an alleged incident of sexual abuse between the two complaining witnesses and N.M., the half-brother of the complaining witnesses. Paramount to the resolution of the issue at hand is a determination of what standard should be used to adjudge what qualifies as a "sufficient" offer of proof in deciding whether an 11 *Del. C.* § 3508 in-camera hearing must be held.

The Superior Court applied an erroneous standard of proof when it considered whether the Defendant's offer of proof was sufficient to justify holding an in-camera hearing.

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[40] *Wright v. State*, 513 A.2d 1310, 1314 (Del. 1986).

In its written opinion[41] the Superior Court noted that it relied on Judge Barron's Superior Court opinion in *State v. Bailey,*[42] in analyzing and ruling on whether the offer of proof was sufficient to admit the proffered evidence at trial, however, this was not the precise issue, the precise issue was whether the offer of proof was sufficient to proceed to an in-camera interview, not whether it ultimately would be found admissible.

The *Bailey* opinion, in considering the dictates of 11 *Del. C.* § 3508, practically subsumes and nearly wholly relies on an Alabama Appellate Court case[43] which does not address the precise issue at bar, which is whether the offer of proof was sufficient to hold an in-camera hearing, but instead considers whether, after a hearing on the offer of proof was conducted, the evidence should ultimately be admitted at trial.

In *Bailey,* after the Defendant was convicted and sentenced, new evidence was presented to the Delaware Supreme Court on direct appeal by way of an affidavit signed by the victim's mother.[44] The affidavit is found at the accompanying footnote."[45]

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[41] *State v. Massey*, 2023 Del. Super. LEXIS 110.
[42] 1996 Del. Super. LEXIS 401 (Super. Ct. Sep. 12, 1996).
[43] See *Phillips v. State*, 545 So. 2d 221 (Ala. Crim. App. 1989).
[44] *Bailey,* 1996 Del. Super. LEXIS 401 at *1.
[45] *Id.* at *2.

Based on the affidavit, the Supreme Court remanded the case for purposes of conducting an evidentiary hearing regarding the newly discovered evidence,[46] and after the hearing was held, a new trial was granted.[47]

Obviously, in *Bailey*, the offer of proof was found sufficient to proceed to a hearing – albeit not under 11 *Del. C.* § 3508 but under a newly discovered evidence ground – and after that hearing was held, Judge Barron ruled:

> "this Court adopts the majority rule and holds that when the defendant shows by clear and convincing evidence that when a prosecutrix has made false charges of rape, such evidence is admissible at the defendant's trial notwithstanding Delaware's Rape Shield Statute. The court finds that the defendant has met this burden in this case."[48]

In the case *sub judice* no hearing was held, yet the Superior Court ruled: "[a]t the pre-trial hearing, I observed that Defendant had not met the standard of 'clear and convincing' evidence, or even a lesser standard, to allow for introduction of this evidence at trial."[49] However, as previously stated, the issue was whether the offer of proof was sufficient to hold an in-camera hearing, not whether it was admissible at trial. The "clear and convincing" evidence standard should not be used to judge whether an offer of proof is sufficient to hold an 11 *Del. C.* §3508 in-camera hearing, nor should it be the

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[46] *Id.* at 3.
[47] *Id.* at 29.
[48] *Id.* at 21.
[49] *State v. Massey*, 2023 Del. Super. LEXIS 110 at *5.

standard of proof utilized in determining, after hearing, whether such evidence is admissible.

Under *Bryant*, the offer of proof tendered by the Defendant Rhandy Massey was not only sufficient to proceed to an in-camera hearing, but made an in-camera hearing necessary.

In arguing that that the offer of proof was sufficient to proceed to an in-camera hearing the Defendant relies on the Delaware Supreme Court case *Bryant v. State*.[50] In *Bryant*, three sisters ages nine, thirteen, and fourteen made claims that their mother's live-in boyfriend had sexually abused them over a two-year period from 1994 to 1996 (three to five years before the trial took place) and Bryant denied all charges.[51] The key issue on appeal was whether "the trial court abused its discretion in excluding evidence of prior allegedly false complaints by the three complaining witnesses."[52] After examining records from the State Division of Family Services Bryant claimed that he had found evidence that, in the past, the girls had made eight distinctive allegations of sexual abuse.[53]

The Superior Court ruled - absent a hearing in which the girls would have been questioned as to the veracity of the prior accusations – that Bryant "could

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[50] *Bryant v. State*, 1999 Del. LEXIS 178 (June 2, 1999).
[51] *Id.* at 2.
[52] *Id.*
[53] *Id.* at 3-4.

explore two incidents, one involving Daughter One in March 1990 and one involving Daughter Two in 1992, because there was evidence of a specific recantation in the Division records as to those incidents."[54] The Superior Court relied on D.R.E. 608(b) and D.R.E. 403 in making its ruling.[55]

This Court found that not only was the Superior Court's limit on cross-examination an "extreme measure," but also that it was "rendered on an incomplete record."[56] This Court went on to state:

> "There is little doubt that the testimony of the three girls was crucial to the State's case in view of the limited corroborative evidence presented at trial. The logical relevance of specific evidence of previous false allegations to a claim of sexual abuse in the face of the denial of the defendant is obvious. [...] At a minimum, the defendant should have been afforded the opportunity to inquire of the girls directly, out of the presence of the jury, whether any of the five excluded claims were false. [...] We recognize that the defendant's articulation of his proffer was somewhat general, but, given the critical nature of the proffered testimony, a ruling of exclusion, that assumes the truth of the other five claims, is premature on this record."[57]

Furthermore, this Court stated that "[e]ven where the evidence is inconclusive as to falsity, prior allegations of sexual assault may be admitted to challenge credibility."[58] Finally, this Court ruled:

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[54] *Id.* at 6.
[55] *Id.*
[56] *Id.* at 8.
[57] *Id.* at 8-9.
[58] *Id.* at 9-10 (citing *State v. Oliveira,* R.I. Supr., 576 A.2d 111, 113 (1990)); *State v. Jacques,* Me. Supr., 558 A.2d 706, 708 (1989).

> "Given the minimal corroborative evidence in this case and the unusual social history of the complaining witnesses the issue of credibility looms large. Any attempt to restrict cross-examination under these circumstances must proceed on a complete record with a full appreciation of the relevance of such testimony. We conclude that, on this record, the trial court's ruling regarding the five excluded allegations, without further effort to determine their falsity, was an abuse of discretion. Because we cannot with confidence assess the impact of the excluded evidence, we must reverse and remand for a new trial."[59]

Comparing and applying the facts and conclusions of law in *Bryant* to the instant case shows that not only was the offer of proof sufficient to proceed to an in-camera hearing, an in-camera hearing was necessary.

As in *Bryant*, the complaining child witnesses in the case *sub judice* had an unusual social history. Already at the age of merely two-years had L. M. accused her eleven-year-old cousin, A. M., of sexual abuse, alleging that he engaged in oral sex with her, and penetrated her with his penis.[60] It was further reported that this abuse – whether true or false, as no finding was ever made – resulted in L. M. acting strangely and exhibiting sexual behavior.[61]

The unusual social history continues when N. M. – the half-brother of L. M. and M. M. – began living with the family at some point prior to August 20, 2017 (the date of the alleged sexual incident).[62] On the aforementioned date, the complaining witnesses accused N. M. – who was twelve-years-old at the

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[59] *Id* at 10.
[60] See *supra* text p. 11.
[61] *Id.*
[62] A - 26, Cpl Brent's Report, August 28, 2017 at 3.

time - of sexually abusing them.[63] Pertinent to the unusual social history is that Inga Massey – the mother of L. M. and M. M. and step-mother of N. M. – stated that: "she's never trusted N. M. or wanted him in her house" and also "advised that she's always told Rhandy not to ever leave him home alone with them (L. M. and M. M.)."[64] Where this mistrust and or fear came from was never elucidated.

Next, L. M. and M. M.'s babysitter claimed that they engaged in highly sexual behavior with each other, including but not limited to, "were always trying to stick whatever object they could find up each others [sic] butts"[65]

Finally, on September 23, 2018, L. M. told her aunt – the sister of Rhandy Massey – that Rhandy had hurt M. M. "down there."[66] The allegation apparently arose from an incident in which Rhandy was tickling M. M. and hit her with his elbow in the vaginal area.[67] The incident resulted in M. M. and L. M. living away from home at a residence at 3281 Woodland Church Road for a time in accordance with a "safety plan" initiated by the Delaware Department

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[63] *Id.*
[64] A - 28, Det. Archer's police report at 6, attached to Massey's Motion pursuant to 11 *Del. C.* §3508 as Exhibit B.
[65] *Id.*
[66] A - 30, Cpl Mitchell's police report at 2, attached to Massey's Motion pursuant to 11 *Del. C.* §3508 as Exhibit C.
[67] *Id.*

of Family Services.[68] After Child Advocacy Center interviews of M. M. and L. M. were concluded the Deputy Attorney General – Anderson – "stated that the case would be closed with no disclosure due to the statements that both M. M. and L. M. made having no criminal or mal intent."[69]

As in *Bryant*, in the instant case, no in-camera hearing took place and the evidence of the past possible false allegations was held inadmissible on an incomplete record. As has been documented, before Mr. Massey was arrested and prosecuted in the current case, the girls had made three accusations of purported sexual abuse and none of the accusations were verified as actually having taken place. In each instance of accusation no prosecution was initiated, nor was an arrest effectuated. While in and of itself this is not determinative of falsity, it is also not determinative of veracity. Moreover, the girls' previous accusations were never questioned in the crucible of cross-examination, nor were they probed by an external authority figure whose objective was to find the truth or untruth of the allegations. The Defendant should at least have been able to question the girls or have them questioned in an in-camera hearing to determine the truth or falsity of their prior accusations.

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[68] *Id.*
[69] *Id.*

Like *Bryant*, in the case at bar the testimony of the two girls was absolutely crucial to the State's case, as there was hardly a scintilla of corroborating evidence. Furthermore, as in *Bryant*, while the offer of proof was somewhat general, it was critical to the Defendant's case, and the Superior Court's ruling – absent an in-camera hearing – was premature. Restricting cross-examination in such a case must at least proceed on a complete record. To reiterate a quote from this Supreme Court: "[e]ven where the evidence is inconclusive as to falsity, prior allegations of sexual assault may be admitted to challenge credibility."[70]

[70] *Bryant v. State*, 1999 Del. LEXIS 178, at *9 (June 2, 1999).

LEGAL ARGUMENT

II. THE SUPERIOR COURT ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE OF PAST INCIDENTS OF A SEXUAL NATURE AND OR SEXUAL ABUSE PERTAINING TO THE COMPLAINING CHILD WITNESSES, THUS VIOLATING HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. QUESTION PRESENTED

Whether the Superior Court abused its discretion in excluding evidence of past incidents of a sexual nature and or sexual abuse involving the complaining child witnesses when the evidence would show how the complaining child witnesses had prior knowledge of mature sexual interaction, how they were able to articulate such knowledge, and, when the evidence was necessary to rebut the jury's assumption that the sexual knowledge must have come from the Defendant's conduct? The issue was preserved by filing a § 3508 motion.[71]

B. STANDARD AND SCOPE OF REVIEW

This Court "review[s] the Superior Court's evidentiary rulings for abuse of discretion. If we determine that the Superior Court abused its discretion, we then determine whether the error rises to the level of significant prejudice to deny the defendant a fair trial."[72]

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[71] A – 103-106, Transcript of Motions and Jury Selection at 3, 20, 21, 26.
A – 18-25, Motion pursuant to 11 *Del. C.* §3508.

[72] *Jenkins v. State*, 53 A.3d 302 (Del. 2012) (internal citations omitted).

C. MERIT OF ARGUMENT

As noted, the Defendant presented the Superior Court with three offers of proof attesting to the complaining witnesses' prior sexual interactions and or the sexual abuse perpetrated against them. While, particularly pertaining to the accusations lodged against N. M. and the Defendant's questioning of the veracity of those accusations, the introduction of this evidence was sought through the channel of an 11 *Del. C.* § 3508 in-camera hearing, other grounds – immaterial to § 3508 – required the introduction of the offers of proof into evidence.

After analyzing the Delaware Supreme Court's decision in *Wright,*[73] and its subsequent decision in *Scott,*[74] the Defendant, out of an abundance of caution, saw it prudent to bring the entire issue of the evidentiary admissibility of the proffer in front of the Court at the § 3508 hearing. In *Scott*, this Court stated:

> "All evidence of prior sexual conduct inevitably attacks the victim's credibility regardless of the purpose for which it was offered. [...] Nevertheless, the statute was not written to require the § 3508 filtering process whenever evidence of prior sexual conduct is introduced for a legitimate reason other than attacking the victim's credibility. Although the language in *Wright* might tend to indicate an expansion by the courts [...] [t]rial courts [...] must exercise great caution in evaluating the motive and likely result of the introduction of such evidence. If it appears that the probable impact of the evidence is to attack the credibility of the

[73] *Wright v. State*, 513 A.2d 1310 (Del. 1986).
[74] *Scott v. State*, 642 A.2d 767 (Del. 1994).

victim, the trial court has the discretion to require the screening of the evidence through the § 3508 process."[75]

Regardless of the truth or falsity of the alleged prior sexual interactions or sexual abuse of the complaining witnesses the evidence was admissible to show how two girls, of tender years, could have had knowledge – apart from the alleged abuse – of sexually mature subject matter and the ability to articulate such.

This particular issue has been addressed by myriad out-of-state courts and the vast majority find that such evidence is outside the purview of "rape shield statutes" and admissible. *See, e.g., State v. Colburn,* 366 P.3d 258 (Mont. 2016); *State v. Carver*, 678 P.2d 842 (Wash. Ct. App. 1984) (rape shield statute doesn't apply when prior sexual abuse is provided to rebut the sexually innocent inference); *Ellsworth v. Warden*, 242 F. Supp. 2d 95 (D.N.H. 2002) (prior abuse admissible to show sexual knowledge); *People v. Morse*, 586 N.W.2d 555 (Mich. Ct. App. 1998); *State v. Budis*, 593 A.2d 784 (N.J. 1991) ("The majority of out-of-state courts agree that the prior sexual abuse of a youthful victim is relevant to rebut the inference that the complainant could not describe the details of sexual intercourse if the defendant had not committed the acts in question" at 791); *State v. Howard*, 426 A.2d 457 (N.H. 1981) ("We

[75] *Id.* at 771-72.

believe that the average juror would perceive the average twelve-year-old girl as a sexual innocent. Therefore, it is probable that jurors would believe that the sexual experience she describes must have occurred in connection with the incident being prosecuted; otherwise, she could not have described it." at 462); *State v. Jacques*, 558 A.2d 706 (Me. 1989) ("A defendant therefore must be permitted to rebut the inference a jury might otherwise draw that the victim was so naive sexually that she could not have fabricated the charge." at 708); *State v. Peterson*, 667 P.2d 645 (Wash. Ct. App. 1983) (witness' prior knowledge of sexual conduct and sexual terminology can be admissible); *Commonwealth v. Ruffen*, 507 N.E.2d 684 (Mass. 1987) (prior possible incidences of sexual abuse should have been investigated through hearing as there was a good faith proffer; the evidence would go to how that child acquired sexual knowledge at such a young age); *State v. Benedict*, 397 N.W.2d 337 (Minn. 1986) ("Despite the prohibition of a rape-shield law or rule, a trial court has discretion to admit evidence tending to establish a source of knowledge of or familiarity with sexual matters in circumstances where the jury otherwise would likely infer that the defendant was the source of the knowledge." At 341); *State v. Padilla*, 329 N.W.2d 263 (Wis. Ct. App. 1982) (the Court found merit in the argument that prior sexual abuse is relevant towards knowledge of sexual interactions when that interaction was similar).

A particularly wise and cogent opinion comes from the Fifth District Appellate Court of Illinois in *People v. Hill.*[76] In *Hill*, a six-year-old complaining witness accused the Defendant of having her commit acts of fellatio upon him.[77] The witness showed knowledge of fellatio and how it affected a male's sex organ.[78] Her knowledge was naturally attributed to the Defendant's actions.[79] After conviction, the Defendant challenged an order by the Trial Court rendered in reliance on Illinois' rape shield statute excluding evidence that the girl was previously sexually abused; in a former incident, the child witness was made to perform fellatio on a different male.[80] On appeal, the Defendant argued: "that the rape shield statute's preclusion of other sexual conduct must yield where such conduct can rebut inferences of guilt that accompany a child witness's display of abnormal sexual knowledge."[81] Addressing the exclusion of the evidence and the its impact on the defense, the Court stated:

> "The jury was only told of one potential source of A.H.'s uncommon knowledge. The State raised a shield to preclude evidence of any other source. It then proceeded to wield that uncommon knowledge as a potent weapon. The shield was fashioned into a sword that struck at the defense's very heart. Defendant was rendered defenseless to the

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[76] 225 Ill. Dec. 244, 683 N.E.2d 188 (1997).
[77] *Id.* at 189.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id* at 189-90.

inferences of guilt freely drawn from A.H.'s display of sexual knowledge. He could not challenge the inference that the charged abuse occurred. Nor could he challenge the inference that the unique sexual knowledge must have been acquired from him. Because of the shield, there was no evidence from which to infer that A.H. acquired such knowledge in any other way."[82]

In the Court's discourse, addressing universally the issued posed it, the Court opined:

"[t]hankfully, small voices rarely speak of such things. When they do, their message visits our senses with unparalleled persuasive force. The reason is simple. Society protects children from exposure to worldly matters. Society's norm anticipates sexual innocence. Children should be incapable of describing such things.

It shocks the senses to hear a little girl speak about fellatio. Such age-inappropriate knowledge compels an inference of child sexual abuse. Common sense shuns any other explanation.

When a child displays unique sexual knowledge and assigns it to experience with a defendant, the inference of guilt is overwhelming. As a rule, children are not sexually schooled or sexually active. The correctly held and widely accepted notion that children are sexually innocent fortifies inferences of guilt drawn from age-inappropriate sexual knowledge. The absence of sexual innocence, evinced by display of sexual knowledge, compels the conclusion that sexual abuse indeed occurred and that it occurred with the identified abuser.

Additionally, child sexual abuse is commonly considered to be isolated in nature. The conduct is too aberrant and perverse to be regarded as anything but an extremely rare occurrence. Hence, common views dispel any thought that age-inappropriate sexual knowledge could originate from a different sexual predator. When a child connects sexual knowledge to a defendant's rapacious acts, the accusation is strained through common perception in a way that creates a powerful inference of guilt.

So it was in this case. A small voice spoke with a power conferred by its articulation of uncommon sexual knowledge. Such knowledge,

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[82] *Id* at 190.

however, was potentially derived from someone other than the man to whom A.H. attributed it."[83]

In its discussion of the law, the Court next stated:

> "The rape shield statute's preclusion of prior sexual conduct is not absolute. [...] The statutory shield should never be mechanically applied to obscure relevant evidence that bears directly on guilt or innocence. The shield should be raised in a manner consistent with its purpose. That purpose is not to preclude relevant evidence. If it were, the statute could never conform with constitutional imperative under the sixth amendment's confrontation clause (U.S. Const., amend. VI) or the fourteenth amendment's due process clause (U.S. Const., amend. XIV). The rape shield statute is expressly designed to yield to constitutional protections that assure fair trials with just outcomes. [...] Sandoval, 135 Ill. 2d 159, 552 N.E.2d 726, 142 Ill. Dec. 135."[84]

In conclusion, the Court wrote:

> "We hold that under proper circumstances, evidence of a child witness's prior sexual conduct is admissible to rebut the inferences that flow from a display of unique sexual knowledge. As this court has previously noted: 'When knowledge of sexual activities becomes an issue the rape shield statute does not apply, and due process precludes its application. *People v. Mason,* 219 Ill. App. 3d 76, 79, 578 N.E.2d 1351, 1354, 161 Ill. Dec. 705 (1991).'"[85]

The Defendant concurs entirely with the Court's elucidation, analysis and legal holding up to this point, but cannot lend credence or support to the whole of the Court's second holding. The second holding first ruled that "[t]he prior sexual conduct must be sufficiently similar to defendant's alleged conduct to

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[83] *Id.*
[84] *Id* at 191.
[85] *Id* at 192.

provide a relevant basis for its admission [and] must engage the same sexual acts"[86] The Defendant agrees with this declaration. However, the Defendant cannot agree with the final contention in the second holding asserting: "if the prior sexual conduct cannot fully rebut the knowledge displayed, if it fails to account for certain sexual details unique to the charged conduct, its admission should be precluded."[87]

The Court sets the bar to admissibility far too high. Especially when the prior sexual abuse occurred remote in time to the alleged abuse and the child was of tender years, it cannot be expected or likely that the child will recount alleged abuse with the exact same details, down to a tee, with that which the child is alleging. Particularly when the prior abuse was reported to authorities, when the child was subject to forensic interview, and when the child was undoubtedly questioned by the parent or caregiver, further knowledge of a sexual nature most probably will have come to the child's attention. Even simple questioning by a parent, guardian, or one concerned could have led to further knowledge, for example: "did anything come out of it?" or "did it hurt?" etc. We must keep in mind that the Defendant is asserting that the incident never occurred, and as such, the child used knowledge from the past sexual

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[86] *Id.*
[87] *Id.*

abuse along with any knowledge acquired in the meantime, to conjure the allegation, it is a figment of the child's imagination. To require that the details of a real incident and that of one conjured years later be identical is an unconstitutionally large hurdle to surmount.

LEGAL ARGUMENT

III. THE STATE COMMITED A BRADY VIOLATION WHEN IT FAILED TO DISCLOSE TO THE DEFENDANT A PRIOR INCIDENT OF SEXUAL ABUSE COMMITTED AGAINST ONE OF THE COMPLAINING CHILD WITNESSES, VIOLATING HIS DUE PROCESS RIGHTS.

A. QUESTION PRESENTED

Whether the State, in failing to disclose a complaint filed by one of the complaining child witnesses alleging prior sexual abuse violated the Defendant's due process rights? This issue was not "preserved" as it first came to light when the Defendant received the presentence report, however, relying on the "interests of justice" exception found in Del. Sup. Ct. R. 8, the Court may review the question as the claim is a constitutional one, and "claims of error implicating basic constitutional rights of a defendant have been accorded review by this Court notwithstanding their nonassertion at trial." *Wainwright v. State,* 504 A.2d 1096, 1100 (Del. 1986).

B. STANDARD AND SCOPE OF REVIEW

This Court "review[s] questions of law and constitutional claims, such as claims based on the State's failure to disclose exculpatory or impeaching evidence, *de novo*.[88]

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[88] *Risper v. State*, 250 A.3d 76, 87 (Del. 2021) (citing *Wright v. State*, 91 A.3d 972, 982 (Del. 2014)).

C. MERIT OF ARGUMENT

As aforementioned, first when the presentence report became available to the defense was it made aware of the prior accusation of sexual abuse lodged by L. M.[89] To reiterate, the presentence report stated: "that her 11-year-old cousin, A. M., had kissed her, engaged in oral sex with her, and penetrated her with his penis."[90] No further information was contained in the report, i.e., the veracity of the report, how a two-year-old child was able to articulate such an offense, further information regarding the time, place and details of the alleged abuse, if L. M. had been questioned about the allegation in a formal setting, if a Child Advocacy Center interview had been conducted, or how the alleged abuse came to light, etc.

This Court succinctly set forth what constitutes a *Brady* violation and when the violation requires a reversal of the verdict in *Starling v. State*.[91] In *Starling*, quoting *State v. Wright*,[92] this Court wrote:

> "Under *Brady* . . . , the State's failure to disclose exculpatory and impeachment evidence material to the case violates a defendant's due process rights. The reviewing court may also consider any adverse effect from nondisclosure on the preparation or presentation of the defendant's case. There are three components of a *Brady* violation: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its

[89] A-135, Presentence Report p. 13.
[90] *Id.*
[91] 130 A.3d 316 (Del. 2015).
[92] 67 A.3d 319 (Del. 2013).

suppression prejudices the defendant. In order for the State to discharge its responsibility under *Brady*, the prosecutor must disclose all relevant information obtained by the police or others in the Attorney General's Office to the defense. That entails a duty on the part of the individual prosecutor to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[93]

This Court went on to teach:

"[f]or a *Brady* violation to be material such that it causes prejudice, the defendant need not show that 'the disclosure of the suppressed evidence would have resulted in an acquittal.' The defendant must show, however, that the suppressed evidence 'creates a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' In other words, the suppression of evidence must 'undermine[] confidence in the outcome of the trial.' We will not reverse a conviction based on a *Brady* violation if there is 'overwhelming evidence establish[ing a defendant's] guilt.'"[94]

Finally, this Court stated:

"Evidence which the defense can use to impeach a prosecution witness by showing bias or interest, as well as exculpatory evidence, falls within the *Brady* rule. Such evidence is 'evidence favorable to an accused' so that, if disclosed and used effectively, it might make the difference between conviction and acquittal. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. Indeed, it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."[95]

First, the undisclosed incident of sexual abuse would have shown how

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[93] *Starling*, 130 A.3d 316, 332-33 (Del. 2015).
[94] *Id.* at 333 (internal citations omitted).
[95] *Id.* at 334.

L. M. acquired knowledge of sexual interaction beyond the ken of her years, putting her in a position to conjure false allegations. Multiple out-of-state courts have held that evidence showing an alternative source for a youthful victim's knowledge of mature sexual subject matter, when not disclosed to the Defendant by the prosecution, constitutes a reversible *Brady* violation. *See, e.g., People v. Butsinas,* Nos. 327796, 327799, 2018 Mich. App. LEXIS 163 (Ct. App. Jan. 23, 2018) (there existed a "child protective services" report of the alleged victim being abused by her biological father; "if the prosecution had the CPS reports in its possession and failed to share them with the defense, it violated *Brady*. In the unlikely event that the prosecution neglected to obtain either or both of the reports, it also violated its *Brady* obligations." *Id.* at 16); *United States v. Wilkens*, No. 12-74 (MJD/LIB), 2012 U.S. Dist. LEXIS 96872 (D. Minn. July 13, 2012) (the government must turn over evidence reflecting the prior abuse of a complaining witness if it becomes relevant, i.e., the government argues that sexual knowledge must have come from the defendant); *State v. Twardoski*, 491 P.3d 711 (Mont. 2021) (the Trial Court did not require the State to turnover potentially exculpatory *Brady* material, the Supreme Court of Montana found this to be error, as the evidence, among other things, could have shown how the complaining witness had unique sexual knowledge);

A particularly well reasoned analysis comes from the Supreme Court of Wisconsin.[96] In *Harris*, a 31-year-old man was accused of sexually abusing a child under the age of 13.[97] After waiving his preliminary hearing the Defendant "filed a discovery demand with the court on May 30, 2001, whereby he demanded that the State provide, inter alia, 'all exculpatory evidence . . . that could form the basis for further investigation by the defense."'[98] "Harris alleged that shortly after the sentencing hearing [the State] informed his trial counsel that [it] had failed to disclose that B.M.M. had previously made an allegation that her grandfather had sexually assaulted her on two occasions."[99] "Specifically, Harris argued that B.M.M.'s allegation concerning her grandfather's assault could be the source of prior sexual knowledge."[100] The Court ruled:

> "We agree with Harris that here, the undisclosed information is favorable to the accused because it casts doubt on the credibility of the State's primary witnesses and may have supported an inference that B.M.M. was projecting her grandfather's assaults onto Harris. [...] However, the evidence here constitutes impeachment information that could be used to challenge the credibility of witnesses whose credibility would have been determinative of Harris's guilt. *Giglio*, 405 U.S. at 154. Thus, the undisclosed information constitutes exculpatory impeachment evidence because it is relevant to B.M.M.'s credibility and that any expert the State may have called to provide evidence under *State v. Jensen*, 147 Wis. 2d 240, 432 N.W.2d 913

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[96] *State v. Harris*, 680 N.W.2d 737 (Wis. 2004).
[97] *Id.* at 742.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 743.

> (1988), as it may have provided an alternate source for B.M.M.'s sexual knowledge and may have created the inference that B.M.M. projected the assaults perpetrated by her grandfather onto Harris. Because this evidence could have undermined the credibility of the State's most influential witnesses, this is one of those situations in which fundamental fairness dictates that the evidence should have been disclosed."[101]

As in *Harris*, the undisclosed assault could have provided and shown that one of the complaining witnesses had a source of sexual knowledge separate and distinct from the abuse alleged, and it's suppression by the State undermined the Trial's fundamental fairness.

Second, the disclosure of the abuse could have opened the door for the Defendant to utilize an expert as to how a two-year-old child copes with sexual abuse, how it influences her future behavior and if it could result in subsequent false allegations. Such behavioral information is outside the general knowledge and experience of the average juror.

In *Wheat v. State,* while the facts are divergent and the expert testimony was sought to be admitted by the State, this Court laid out the general rule that: "[t]he expert's role in this area is to provide the trier of fact with background concerning the behavior of the alleged child abuse victim based on the expert's experience and training so that the jury, or judge, may place the child witness'

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[101] *Id.* at 752.

testimony in a behavioral context."[102] In the case *sub judice*, the Defendant could have sought an expert to expound on this very issue, had the incident been disclosed. Furthermore, in *Floray v. State*, this Court stated:

> "the use of expert evidence in child sexual abuse prosecutions is limited 'to assist the finder of fact, whether judge or jury, in evaluating the psychological dynamics and resulting behavior patterns of alleged victims of child abuse, where the child's behavior is not within the common experience of the average juror.'"[103]

As aforementioned, the Defendant could have used the undisclosed evidence as a basis for employing an expert and this could have helped the jury to knowledgably analyze the child's subsequent behavior and assisted the defense.

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[102] 527 A.2d 269, 275 (Del. 1987).
[103] 720 A.2d 1132, 1135 (Del. 1998).

LEGAL ARGUMENT

IV. THE SUPERIOR COURT ABUSED ITS DISCRETION IN ALLOWING A COMPLAINING WITNESS, M.M., TO CARRY TO THE STAND AND HOLD WHILE TESTIFYING A SPECIAL ACCOMMODATION, A STUFFED COMFORT ANIMAL, ABSENT A SHOWING OF SUBSTANTIAL NEED AND THUS VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

A. QUESTION PRESENTED

Whether the Court abused its discretion in allowing a complaining witness, M.M., to carry to the stand and hold while testifying a special accommodation, a stuffed comfort animal, absent a showing of substantial need? The issue was preserved when defense counsel raised an objection prior to the witness' testimony. Counsel further preserved the issue by filing a motion for new trial under Del. Super. Ct. Crim. R. 33.[104]

B. STANDARD AND SCOPE OF REVIEW

"This Court reviews trial management decisions for an abuse of discretion. 'An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice.'"[105]

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[104] A – 49-51, Motion for a New Trial under Del. Super. Ct. Crim. R. 33.
A – 106A, Trial Tr. at A-4.

[105] *Czech v. State*, 945 A.2d 1088, 1095 (Del. 2008).

C. MERIT OF ARGUMENT

The Superior Court, in allowing the special accommodation absent "extraordinary circumstances" and absent a motion by the prosecutor requesting the special accommodation and a specific ruling upon that motion in which it was demonstrated that there was a "substantial need" therefor, abused its discretion, which prejudicially affected the Defendant's substantive rights and seriously undermined the fairness of the proceeding.

In *Gomez* v. *State* this Court addressed the issue of special accommodations, in particular, the utilization of a stuffed comfort animal by a child witness who was testifying as the alleged victim of sexual abuse.[106] The trial judge did not allow the child accuser to carry the stuffed comfort animal to the witness stand but allowed her to hold it while she testified.[107] In addressing the issue the Supreme Court first quoted title 11, subchapter 31 of chapter 51 headed "Child Victims and Witnesses."[108] The Court went on to quote one of its previous opinions:

> "In *Czech v. State*, we excerpted that statement of legislative intent and explained: 'In the absence of extraordinary circumstances . . ., a trial judge should not make special accommodations *sua sponte*. We hold that such special accommodations should only be made if it has been determined, upon motion,

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[106] 25 A.3d 786 (Del. 2011).
[107] *Id.* at 788.
[108] *Id.* at 799.

that the requesting party has demonstrated a "substantial need" for their implementation.'"[109]

Apropos, in *Czech*, the Supreme Court delineated six factors that a Trial Court should consider when ruling on a motion to grant special accommodations.[110] Finally, the Court opined that the Trial Court should:

> "have required the prosecutor to demonstrate a substantial need for the additional special accommodation of the teddy bear. If the State wishes to make special accommodations at Gomez's new trial, the trial judge should permit them only if he determines, upon the State's motion, that the State has demonstrated a substantial need for their implementation."[111]

In the instant case the credibility of the witnesses was of utmost importance and they were already, by means of their tender years, seen extremely sympathetically by the juror. To add to this bolstered sympathetic effect and inherent credibility by allowing one of the complaining witnesses to bring to the stand and hold a stuffed animal, could easily have tilted the already strained scales of justice further to the side of the State. At a minimum, the dictates that this Court and the legislature set forth in allowing use of such special accommodations, should have been followed. The State should have been required to demonstrate that there was substantial need for the witness to hold the stuffed comfort animal.

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[109] *Id.*; *Czech* 945 A.2d 1088, 1094 (Del. 2008).
[110] *Czech*, 945 A.2d 1088, 1096-97 (Del. 2008).
[111] *Gomez*, 25 A.3d 786, 799 (Del. 2011).

LEGAL ARGUMENT

V. THE TOTALITY OF THE EXCLUDED EVIDENCE, CRUCIAL TO THE DEFENSE, RESULTED IN THE DEFENDANT BEING DEPRIVED OF HIS RIGHT TO PRESENT A COMPLETE DEFENSE.

A. QUESTION PRESENTED

Whether the excluded evidence deprived the Defendant of his Constitutional Right to a meaningful opportunity to present a complete defense? The Defendant did not explicitly preserve this question at the trial level, but argues that the "interests of justice" exception found in Del. Sup. Ct. R. 8 permits the Court to review the question as: (1) it is inextricably intertwined with arguments I and II (see *Clark v. State*, 957 A.2d 1, 9 (Del. 2008); and, (2) the claim is a constitutional one, and "claims of error implicating basic constitutional rights of a defendant have been accorded review by this Court notwithstanding their nonassertion at trial." *Wainwright v. State,* 504 A.2d 1096, 1100 (Del. 1986).

B. STANDARD AND SCOPE OF REVIEW

"We review alleged constitutional violations related to the trial court's evidentiary ruling *de novo*."[112]

[112] *Appiah v. State*, 244 A.3d 681 (Del. 2020).

C. MERIT OF ARGUMENT

As the U.S. Supreme Court has set out:

> "'state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.' This latitude, however, has limits. 'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"[113]

The evidence which the Superior Court excluded, coupled with the evidence the State failed to disclose, deprived the Defendant of a "meaningful opportunity to present a complete defense."[114]

As the U.S. Supreme Court ruled, the right to a complete defense is abridged when evidence rules: (1) "infringe upon a weighty interest of the accused," and (2) are "arbitrary," or "disproportionate to the purposes they are designed to serve."[115]

Regarding (1), the right to confront and impeach witnesses is obviously a "weighty interest." Regarding (2), the decision to exclude and / or suppress evidence was, in the instant case, arbitrary, and also disproportionate.

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[113] *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal citations omitted).
[114] *Id.*
[115] *Id.*

The Court opined that rules which "exclude[] important defense evidence but that d[o] not serve any legitimate interests" are arbitrary.[116] If, the State were to argue that the evidence should be excluded under Delaware's rape shield statute, this justification would not serve the purposes for which the rape shield statute was enacted.

Regarding the purpose of Delaware's rape shield statute, this Court has stated that it allows "defenses based on the complainant's credibility while protecting [the complainant] from unnecessary humiliation and embarrassment" thus "ensur[ing] the cooperation of victims of sexual offenses"[117] A defense which concedes that the past sexual abuse occurred, does not attack the witness' credibility, nor does it humiliate or embarrass, as the child was a victim of a grievous offense and incurs or is afforded absolutely no guilt. The child experiences great sympathy and support. Neither is a child victim discouraged from cooperating in the prosecution of such cases for the reason aforementioned as well as the following. In cases of child sexual abuse, especially when the child is under ten-years-old, the child – in the majority of cases - does not decide whether to bring the charges forth or whether to testify. These decisions

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[116] *Id.* at 325.
[117] *Jenkins v. State*, 53 A.3d 302, 2012 WL 3637236, at *2-3 (Del. 2012) (quoting *Scott v. State*, 642 A.2d 767, 771 (Del. 1994).

are made by the parent(s) in consultation with the prosecutor(s). It is highly doubtful that the prospect of being questioned concerning past incidents of sexual abuse where the child was the victim would deter the parent or the prosecution from going forward with the case. This is assuming that the child even need testify concerning the abuse. The prosecution could easily stipulate to the introduction of the evidence of past sexual abuse without the child ever needing to be examined in front of the jury.

Further, when a child is the victim of past sexual abuse, the introduction of this past abuse does not fall within the purview of Delaware's Rape shield statute as "sexual abuse" is not "sexual conduct" in regard to the child. Under Delaware's rape shield statute, 11 *Del. C.* § 3508, "[e]vidence of the prior sexual conduct of an alleged rape victim is admissible only when [...]." A cogent law review article analyzing Michigan's rape shield statute explains the concept.

> "The rape-shield statute does not, and was never intended to, prohibit evidence of previous sexual attacks on a child complainant. Instead, the statute prohibits evidence of a complainant's consensual sexual activities – her 'conduct.' 'Conduct' means activities that a person undertakes purposefully and volitionally; it does not include a sexual attack made upon her by another."
>
> "The legislative history and the language of the statute clearly show that the statute does not, and was never intended to, bar evidence of prior sexual assaults because sexual assault is, by definition, nonvolitional. Therefore, a sexual assault committed on a complainant is not sexual 'conduct' by that complainant. The corollary to this premise is that the statute does not, and was never intended to, bar evidence that a

child has previously been molested by a third party: an assault on a child is not that child's "conduct."[118]

Finally, the prosecutor, explicitly and implicitly argued that the young girl's sexual knowledge must have come from the Defendant's conduct.[119] This was done despite her knowledge of various previous allegations of sexual abuse perpetrated on the girls and knowledge of their previous sexual behavior. The prosecutor even argued at the 11 *Del. C.* § 3508 hearing that the prior allegations against [N.M.] were true. She stated:

> "The police reports don't show that either victim lied or provided false information. They were taken through the CAC process. They made disclosures. They may not have been the same disclosures that the mother says they disclosed to her but, again, that all factors into the State's decision to prosecute or not to prosecute, not that the girls were providing false information."[120]

And,

> "in the current investigation, the girls both reference previous abuse by [N.M.] Mr. Garey has those CAC's and the transcript. They also referenced abuse by [N.M.] when I met with them last week which Mr. Garey also has in notes that I provided to him. So the girls themselves have never made – have never said that these allegations against [N.M.] are false or recanted them."[121]

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[118] ARTICLE: MICHIGAN'S RAPE-SHIELD STATUTE AND THE ADMISSIBILITY OF EVIDENCE THAT A CHILD COMPLAINANT HAS BEEN PREVIOUSLY MOLESTED, 15 T.M. Cooley L. Rev. 391, 394-95.
[119] A – 122, 123, Trial Tr. at D - 40-41.
[120] A - 80-82, Transcript of Motions and Jury Selection - 20-22.
[121] A - 86, *Id.* at 26.

The prosecutor argued to the Superior Court that the girls had been previously sexually abused, but then turned around and argued to the Jury that the only manner in which the young girls could have acquired mature sexual knowledge was through the alleged acts of the Defendant. She, having argued that the knowledge must have come from the Defendant, opened the door to evidence rebutting this presumption.[122]

In the case *sub judice* the appellant's guilt or innocence hung on a razor's edge. It was a contest of credibility. The complaining witnesses stood before the jury and made their allegations and the Defendant stood before the jury and vehemently denied them. The Defendant, in order to have been afforded the right to a complete defense, must have been afforded the opportunity to present the defense that the complaining witnesses' knowledge came from previous sexual abuse.

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[122] *State v. Budis*, 593 A.2d 784, 793 (N.J. 1991); (citing *State v. Ross*, 592 A.2d 291, 292-93 (N.J. Super. Ct. App. Div. 1991)).

CONCLUSION

For the foregoing reasons, Appellant Rhandy Massey respectfully requests that this Court vacate the appellant's convictions and remand the matter to the Delaware Superior Court in and for Sussex County for a new trial.

Respectfully submitted,

JOHN R. GAREY, PA

/s/ John R. Garey, Esquire
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DATED: October 10, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

RHANDY D MASSEY

Alias: RHANDY D MASSEY

DOB: 03/09/1980
SBI: 00583561

CASE NUMBER:
S2108001587A

IN AND FOR SUSSEX COUNTY
CRIMINAL ACTION NUMBER:
IS21-08-0568
RAPE 1ST <12(F)
IS21-08-0570
RAPE 2ND <12(F)
IS21-08-0572
CONT SEX ABUSE(F)
IS21-08-0573
CONT SEX ABUSE(F)
IS21-08-0574
SEX SOLIC CHILD(F)
IS21-08-0575
SEX SOLIC CHILD(F)
IS21-08-0571
USC <13(F)
LIO:RAPE 2ND <12
IS21-08-0576
USC <13(F)
IS21-08-0577
USC <13(F)
IS21-08-0578
USC <13(F)
IS21-08-0579
USC <13(F)
IS21-08-0580
CHILD SEX ABUSE(F)
IS21-08-0581
CHILD SEX ABUSE(F)
IS21-08-0582
CHILD SEX ABUSE(F)

COMMITMENT
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE
SEX OFFENDER NOTIFICATION IS REQUIRED
TIER 3
Enhanced Penalty
SEE NOTES FOR FURTHER COURT ORDER-TERMS/CONDITIONS

SENTENCE ORDER

NOW THIS 27TH DAY OF MARCH, 2023, IT IS THE ORDER OF THE COURT THAT:

Exhibit A

STATE OF DELAWARE
VS.
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The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IS21-08-0568- : TIS
RAPE 1ST <12

Effective March 27, 2023 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5 with credit for 595 day(s) previously served

- No probation to follow.

- The Court has concluded that Defendant is in need of correctional treatment.

- Defendant to be assessed at Level 5 by DOC using an objective verified tool for risk/needs/responsivity for placement in programming at Level 5 to address offender's criminogenic risk and treatment needs.

- If the defendant is deemed appropriate for treatment defendant shall fully participate in and successfully complete any treatment or programming recommended or required.

AS TO IS21-08-0570- : TIS
RAPE 2ND <12

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- No probation to follow.

AS TO IS21-08-0572- : TIS
CONT SEX ABUSE

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- No probation to follow.

AS TO IS21-08-0573- : TIS
CONT SEX ABUSE

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- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- No probation to follow.

AS TO IS21-08-0574- : TIS
SEX SOLIC CHILD

- The defendant is placed in the custody of the Department of Correction for 15 year(s) at supervision level 5

- After serving 3 year(s) at supervision level 5

- Balance of sentence is suspended for 6 month(s) supervision level 4 **HALFWAY HOUSE SEX OFFENDER**

- Followed by 2 year(s) at supervision level 3 **GPS**

- Hold at supervision level 5

- Until space is available at supervision level 4 **HALFWAY HOUSE SEX OFFENDER**

- Hold at supervision level 4 **HALFWAY HOUSE SEX**

- **Until space is available at supervision level 3 GPS**

The level 3 probation is concurrent to any level 3 now serving.

AS TO IS21-08-0575- : TIS
SEX SOLIC CHILD

- The defendant is placed in the custody of the Department of Correction for 15 year(s) at supervision level 5

- After serving 3 year(s) at supervision level 5

- Balance of sentence is suspended for 2 year(s) supervision level 3 **GPS**

The level 3 probation is concurrent to any level 3 under criminal action number S21-08-0574

AS TO IS21-08-0571- : TIS
USC <13

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5

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- After serving 2 year(s) at supervision level 5

- Balance of sentence is suspended for 2 year(s) supervision level 3 **GPS**

The level 3 probation is concurrent to any level 3 under criminal action number 21-08-0574

AS TO IS21-08-0576- : TIS
USC <13

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5

- After serving 2 year(s) at supervision level 5

- Balance of sentence is suspended for 2 year(s) supervision level 3 **GPS**

The level 3 probation is concurrent to any level 3 under criminal action number S21-08-0574

AS TO IS21-08-0577- : TIS
USC <13

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5

- After serving 2 year(s) at supervision level 5

- Balance of sentence is suspended for 2 year(s) supervision level 3 **GPS**

The level 3 probation is concurrent to any level 3 under criminal action number S21-08-0574

AS TO IS21-08-0578- : TIS
USC <13

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5

- After serving 2 year(s) at supervision level 5

- Balance of sentence is suspended for 2 year(s) supervision level 3 **GPS**

The level 3 probation is concurrent to any level 3 under criminal action number S21-08-0574

Exhibit A

STATE OF DELAWARE
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RHANDY D MASSEY
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AS TO IS21-08-0579- : TIS
USC <13

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5

- After serving 2 year(s) at supervision level 5

- Balance of sentence is suspended for 2 year(s) supervision level 3 **GPS**

The level 3 probation is concurrent to any level 3 under criminal action number S21-08-0574

AS TO IS21-08-0580- : TIS
CHILD SEX ABUSE

- The defendant is placed in the custody of the Department of Correction for 3 year(s) at supervision level 5

- After serving 1 year(s) at supervision level 5

- Balance of sentence is suspended for 2 year(s) supervision level 3 **GPS**

The level 3 probation is concurrent to any level 3 under criminal action number S21-08-0574

AS TO IS21-08-0581- : TIS
CHILD SEX ABUSE

- The defendant is placed in the custody of the Department of Correction for 3 year(s) at supervision level 5

- After serving 1 year(s) at supervision level 5

- Balance of sentence is suspended for 2 year(s) supervision level 3 **GPS**

The level 3 probation is concurrent to any level 3 under criminal action number S21-08-0574

AS TO IS21-08-0582- : TIS
CHILD SEX ABUSE

- The defendant is placed in the custody of the Department of Correction for 3 year(s) at supervision level 5

- After serving 1 year(s) at supervision level 5

Exhibit A

STATE OF DELAWARE
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- Balance of sentence is suspended for 2 year(s) supervision level 3 **GPS**

The level 3 probation is concurrent to any level 3 under criminal action number S21-08-0574

Exhibit A

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
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The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Have no contact with the victim(s) Makayla Massey , the victim's family or residence.

Have no contact with the victim(s) Layla Massey , the victim's family or residence.

Have no contact with any minor under the age of 18 years.

Pursuant to 29 Del.C. 4713(b)(1), the defendant having been convicted of a sex offense, it is a condition of the defendants probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

Pursuant to 11 Del.C. 3912, the defendant shall undergo HIV testing under the direction of the Division of Public Health and the results shall be made available to the state, pursuant to statute.

Must comply with any special conditions imposed at any time by the supervising officer, The Court, and/or The Board of Parole.

The provisions of 11 Del. C. Sections 4120, 4121 and 4336 - Sex Offender Registration and Community Notification - apply to this case. NOTE: Victim is under 16 years of age.

Defendant shall comply with Tier 3 sex offenders GPS Program .

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Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

Be evaluated for substance abuse and follow any recommendations for counseling, testing or treatment deemed appropriate.

Defendant shall complete Sexual Disorders counseling treatment program.

Should the defendant be unable to complete financial obligations during the period of probation ordered, the defendant may enter the work referral program until said obligations are satisfied as determined by the Probation Officer.

The defendant is to register as sex offender pursuant to statute.

S.B. 50 limits do not apply, 11 DEL.C. 4333(d) (1)

For the purposes of ensuring the payment of costs, fines, restitution and the enforcement of any orders imposed, the Court shall retain jurisdiction over the convicted person until any fine or restitution imposed shall have been paid in full. This includes the entry of a civil judgment pursuant to 11 Del.C. 4101 without further hearing.

NOTES

1) Enhanced penalties pursuant to 11 Del. C. 4205(a)(2) apply to S21-08-0568, S21-08-0570, S21-08-0572 and S21-08-0573.
2) The victims may, if they desire, initiate contact with the defendant once they reach age 18. However, any such contact will only occur at the request of the victims once they reach adulthood and may be terminated by them at any time.

JUDGE CRAIG A KARSNITZ

Exhibit A

FINANCIAL SUMMARY

STATE OF DELAWARE
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SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	60.00
SHERIFF, KENT ORDERED	15.00
SHERIFF, SUSSEX ORDERED	150.00
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	14.00
DELJIS FEE ORDERED	14.00
SECURITY FEE ORDERED	140.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	210.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	
TOTAL	703.00

Exhibit A

AGGRAVATING-MITIGATING

STATE OF DELAWARE
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AGGRAVATING
STATUTORY AGGRAVATION
CHILD DOMESTIC VIOLENCE VICTIM
NEED FOR CORRECTIONAL TREATMENT
VULNERABILITY OF VICTIM
UNDUE DEPRECIATION OF OFFENSE
OFFENSE AGAINST A CHILD