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December 27, 1995

Clerk of the Court
Michigan Court of Appeals
350 Ottawa N.W.
Grand Rapids, MI 49503

Re: **People v Stephen Dennis Turner**
Court of Appeals No. 173814 & 172928
Lower Court No. 93-63014-FCB

Dear Clerk:

Enclosed for filing are an original and four (4) copies of the following pleading:

Brief on Appeal
Oral Argument Requested
Proof of Service

Sincerely,

Charles J. Booker
Assistant Defender

kt
Enclosures

cc: Kent County Prosecutor
Mr. Stephen Dennis Turner
File

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

STEPHEN DENNIS TURNER

Defendant-Appellant.
_____/

Court of Appeals No. 173814 & 172928

Lower Court No. 93-63014-FCB

KENT COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

CHARLES J. BOOKER (P31885)
Attorney for Defendant-Appellant

BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

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BASIS OF APPELLATE JURISDICTION

Defendant-Appellant Stephen Dennis Turner was convicted in the Kent County Circuit Court by a jury, and a Judgment of Sentence was entered on February 2, 1994. A Claim of Appeal was filed on March 23, 1994 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated February 2, 1994, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, sec 20, pursuant to MCL 600.308(1); MSA 27A.308, MCL 770.3; MSA 28.1100, MCR 7.203(A), MCR 7.204(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. **WAS MR. TURNER DENIED HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHEN THE TRIAL JUDGE DENIED HIS MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON THE CHARGE OF FIRST DEGREE CRIMINAL SEXUAL CONDUCT; IN THE ALTERNATIVE, IS THE VERDICT AGAINST THE GREAT WEIGHT OF THE EVIDENCE?**

Defendant-Appellant answers, "Yes".

II. **DID MANIFEST REVERSIBLE ERROR OCCUR WHEN THE TRIAL JUDGE INSTRUCTED THE JURY THAT DEFENDANT COULD BE CONVICTED OF AIDING AND ABETTING FIRST DEGREE CRIMINAL SEXUAL CONDUCT IF HE DID SOMETHING TO HELP THE PRINCIPAL "AT LEAST TEMPORARILY AVOID DETECTION"?**

Defendant-Appellant answers, "Yes".

III. **DID CLEAR REVERSIBLE ERROR OCCUR WHEN THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY THAT IT MUST BE UNANIMOUS AS TO A THEORY OF THE PRINCIPAL'S GUILT BEFORE IT COULD FIND STEPHEN TURNER GUILTY AS AN AIDER AND ABETTOR?**

Defendant-Appellant answers, "Yes".

IV. **WAS MR. TURNER DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT INTRODUCED RAPE TRAUMA SYNDROME TESTIMONY OVER DEFENDANT'S OBJECTION, WHERE THE ISSUE OF THE CHILD VICTIM'S REACTION TO THE ASSAULT WAS NOT INJECTED BY DEFENDANT, AND WHERE THE WITNESS TESTIFIED THAT THE VICTIM WAS IN FACT ASSAULTED?**

Defendant-Appellant answers, "Yes".

V. **DID MANIFEST REVERSIBLE ERROR OCCUR WHEN THE TRIAL COURT ADMITTED DAMAGING HEARSAY TESTIMONY OVER DEFENSE OBJECTION?**

Defendant-Appellant answers, "Yes".

VI. **WAS MR. TURNER DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE GAVE A CIRCULAR INSTRUCTION ON THE INTENT REQUIRED FOR AIDING AND ABETTING WHICH FAILED TO CONVEY TO THE JURY THAT THE ACCESSORY MUST ASSIST THE PRINCIPAL WITH KNOWLEDGE OF THE CRIME INTENDED BY THE PRINCIPAL?**

Defendant-Appellant answers, "Yes".

VII. **WAS MR. TURNER DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY THAT THE ASSISTANCE OFFERED BY DEFENDANT MUST HAVE HAD THE EFFECT OF INDUCING THE CRIME?**

Defendant-Appellant answers, "Yes".

VIII. **WAS MR. TURNER DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR ARGUED TO THE JURY THAT THEY HAD A CIVIC DUTY TO BELIEVE THE TESTIMONY OF THE COMPLAINING WITNESS?**

Defendant-Appellant answers, "Yes".

IX. **SHOULD MR. TURNER BE RESENTENCED BECAUSE THE TRIAL JUDGE ABUSED HIS DISCRETION IN IMPOSING AN EXCESSIVELY SEVERE SENTENCE OF 15 TO 30 YEARS IMPRISONMENT, WHERE THE GUIDELINES RANGE WAS 60 TO 120 MONTHS, AND WHERE THE JUDGE RELIED UPON A REASON FOR DEPARTURE WHICH VIOLATED THE MICHIGAN SUPREME COURT'S DECISION IN IN RE DANA JENKINS?**

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

On December 13, 1993, Defendant-Appellant **STEPHEN DENNIS TURNER** was convicted of the offenses of first degree criminal sexual conduct and second degree criminal sexual conduct, following a jury trial in the Kent County Circuit Court, the Hon. Dennis C. Kolenda, Circuit Judge, presiding. (T., Final Day of Jury Trial, 25)

The charges against Mr. Turner arose out of the alleged abduction and sexual assault of ten-year-old Lakeysha Cage, on July 7, 1993. (T 5) The prosecutor's theory of the case was that Defendant's brother, Daniel Turner, abducted the complainant as she was playing near her apartment at 4130 Oak Park Street, in Grand Rapids. (T 5) The prosecutor alleged that Daniel Turner took the complainant to an apartment at 4139 Oak Park, in the same apartment complex where the victim lived. (T 5) It was the prosecutor's theory that Daniel Turner committed an act of cunnilingus on the complainant, and forced the complainant to perform fellatio on him. (PET 16-17; T 6) Evidence was introduced during the trial that Daniel Turner was a cross-dresser. (T 52) The prosecutor alleged that Daniel Turner forced the complainant to play video strip poker and to wear women's clothing. (T 52-54)

Defendant was charged as an aider and abettor in one of the CSC I offenses committed by Daniel Turner. (T 4, 13) The precise act which Defendant was supposed to have aided and abetted was not specified in the information. The prosecutor alleged that Stephen Turner assisted his brother in the offenses by staging a photograph

purporting to show the complainant stabbing Defendant. (T 845, 849, 879) Defendant was also charged with second degree criminal sexual conduct, growing out of an alleged touching of the complainant in the apartment. (T 6)

The defense theory of the case was that there was absolutely no evidence that Defendant aided and abetted Daniel Turner's assault on the complainant, and no credible evidence that Defendant touched the complainant during the offense. (T 853-856; 862-863; 867-868) Defense counsel argued to the jury that Stephen Turner specifically refused to follow an order given by his brother. (T 17-18) Counsel also noted that Defendant called the police to the apartment after the offense. (T 870)

At the preliminary examination in this matter, the prosecutor conceded that Stephen Turner was not in the room when Daniel Turner sexually penetrated the complainant. (PET 44) (Cf. T 6)

Prior to trial, defense counsel filed a motion to sever the trials of the two brothers. (T Mot., 11/24/93, 9-12) The trial judge ordered that the trials would take place at the same time before separate juries. (T Mot., 11/24/93, 12-13)

The trial judge gave the following preliminary instruction on the elements of aiding and abetting:

> "As I said, there is no particular assist that has to be given, but you have to decide that they did something, which in a very real way, assisted the commission of the crime.
>
> You know the typical things, it probably won't occur in this case, so that's some of the reasons why I'll give the examples to give you a feel for it, you know, acting as a lookout, watching to see if the police or someone are

> coming is an assist to a person who is, in fact, engaging in a crime. Holding down someone while someone else commits a crime can be aiding and abetting.
>
> Simply encouraging the person on, even though you don't do anything physical, but you eeg [sic] them on, or encourage them to do it or help them plan. All of those things, while they aren't actually committing the ultimate crime, are assisting enough to make the person who assisted equally guilty with the person who actually carries out the crime, provided that the person who helped meant for his help to be of some assistance.
>
> Now if you help someone unwittingly, by accident, not knowing that you are helping them, that's no crime, even though you did, in fact, help. You have to help and you have to have help with the specific intent that your assistance would indeed aid them in carrying out their particular crime." (T Prel. Instr. and Opening Statements, 39-41; emphasis added.)

In his opening argument to the jury, the prosecutor stated that during one of the sexual penetrations by Daniel Turner, Defendant was "assisting, he's helping out, he's holding on to her." (T 6) (Cf. PET 32, 33, 41, 44; T 141, 144)

Following opening arguments, defense counsel objected to the trial court's use of an example in which the aider and abettor holds the victim down for the principal. (T 33-34) (See above and see T Prel. Instr. and Opening Statements, 39-41) Defense counsel stated that she did not object at the time the judge made the statement, because she assumed such an act would not be part of the prosecutor's proofs. (T 33-34) Defense counsel indicated that she was not requesting a curative instruction to the jury, because she did not want to call attention to the matter. (T 33-40)

Lakeysha Cage testified that her birthday was March 16, 1983. (T 45) The complainant stated that on July 7, 1993, she was playing on the steps near her apartment, when Daniel Turner grabbed her, put his hand over her mouth, and dragged her to his apartment. (T 47-48) The witness testified that Daniel Turner had on lipstick. (T 49) The complainant stated that Daniel Turner threw her down on a mattress in the living room and got on top of her. (T 49) (Cf. PET 8-10) According to the complainant, Daniel Turner then took her to the bedroom and took off her clothes. (T 49) (Cf. PET 8-10)

The complainant testified that Daniel Turner felt on her chest and urinated on her. (T 50) According to the witness, Defendant came into the bedroom and told Daniel Turner to take the victim out of his bedroom. (T 50) Without specifying the individual or individuals involved in the incidents, the complainant stated "he takes me to the front and then he had me trying on bras and panties." (T 50)

The complainant stated that Daniel Turner was the man who had her trying on clothes. (T 52) The witness testified that Daniel Turner made her sit on his lap and play video strip poker, while he touched the victim's chest. (T 52-54) According to the complainant, when she asked to leave, Daniel Turner said no and knocked her against the wall, causing her to become unconscious. (T 54) The witness then allegedly woke up in the back bedroom on the bed naked with Daniel Turner on top of her. (T 54) The complainant then described an act of fellatio involving Daniel Turner. (T 55)

The complainant specifically denied that an act of cunnilingus involving Daniel Turner occurred at any time. (T 56) (Cf. PET 16-17) The complainant testified for the first time that Daniel Turner also made her touch his "private part" with her hand. (T 56) The complainant also testified for the first time that Daniel Turner licked her chest when they were playing Pac-Man. (T 57)

The victim stated that after the offense she told her mother that "a man was feeling on me." (T 58) The complainant stated that her mother and father confronted Daniel Turner regarding the alleged incident, and the co-defendant said "I don't know why I did it, I don't know why I did it." (T 58)

The complainant stated that Daniel Turner threatened to kill her if she revealed the incident to anyone. (T 61) The victim described an incident in which both defendants allegedly staged a picture of the complainant stabbing Defendant with a butter knife with jelly on it. (T 61-63)

With only Defendant's jury present, the victim testified on cross-examination that Daniel Turner was alone when he initially abducted her. (T 127-128) The complainant testified that Defendant was in the back room when she was first taken to the apartment but she didn't see him at that time. (T 133) The victim described an act of touching by Daniel Turner which allegedly occurred in the living room while Defendant was in the back bedroom. (T 134-135)

The complainant offered the following description of her initial involvement with Defendant:

> "A His brother comes from out the back room and he goes out the door, and then the

man with the lipstick, he takes me back in the back room.

Q Okay. Now, let me ask you a couple questions about that. I think you said earlier that you saw Stephen, the man with the beard, come out of the back room?

A Yes.

Q When you say 'the back room,' Lakeysha, do you mean the bedroom?

A Yes.

Q The very last room in the apartment?

A Yes.

Q And I think you said earlier that it looked like Stephen had just woke up?

A Yes.

Q Okay, and he leaves?

A Yes.

Q He leaves out of the apartment?

A Yes.

Q Okay. Does he walk, do you see him walk all the way through the apartment?

A He looked in that closet, the one that's --

Q The closet right here (indicating), outside the bedroom?

A Yes. He gets his shoes and his coat, his jacket, and he goes out the front door.

Q And you saw him leave out the front door?

A Yes.

Q And then he was gone?

A Yes." (T 135-136; emphasis added.)

The complainant testified that after Defendant was gone, Daniel Turner told her to go to the back bedroom. (T 137-138) The victim stated that the act of oral sex with Daniel Turner took place before Defendant returned to the apartment. (T 144) Lakeysha Cage stated that when Defendant came back, she was in the back bedroom. (T 140) When Defendant entered the bedroom, Daniel Turner told Defendant to hold the victim down, and Defendant said no. (T 141) The complainant stated specifically that Defendant did not hold her down. (T 141) The witness testified that after Defendant came back, she played video games with Daniel Turner in the living room, but Defendant went into the back bedroom and didn't play. (T 145, 148)

The complainant testified that it was Daniel Turner, not Defendant, who dragged her from the bedroom to the living room:

> "Q When exactly, whether he was dragging you by both hands or by the collar of the shirt, When exactly did he touch your breast?
>
> A When we was playing the video games. He touched my chest and after he touched my chest he started licking my chest.
>
> Q Wait a minute, that's Dan, the man with the lipstick, right?
>
> A Yes.
>
> Q Are you telling us today that it was Dan who dragged you back out of the room?
>
> A Who is Dan?
>
> Q The man with the lipstick.
>
> A Yes.
>
> Q Not Stephen, the man with the beard?

A No." (T 155; emphasis added.)

Regarding the incident with the picture, the complainant stated that the photograph was taken with a Polaroid camera and that a flash was used. (T 156-158) The complainant testified that she thought Daniel Turner "was kind of funny" and that she had previously seen the defendants' apartment door open and peeked in as she walked by. (T 161) (See PET 36-37) The complainant testified that she did not remember her testimony at the preliminary examination that she had "told my little sister that I was going to get a camera and take pictures of them, and she starts giggling at me." (T 162) (See PET 37)

India Harris, age 10, testified that on the day of the offense, the victim told her that "this man was touching her chest and feeling on her private parts." (T 178) The witness stated that the man described by the complainant wore a black wig, a dress, lipstick and make up. (T 179, 183) On cross-examination, the witness testified that the victim told her that the man with the wig and lipstick did things to her. (T 189-190)

Laura VanGenderen, a neighbor, testified that she saw a woman confronting Daniel Turner at his apartment. (T 192-193) Ms. VanGenderen stated that the woman called for "Larry" and a man came running with a piece of metal in his hand. (T 194) On cross-examination, the witness testified that "Larry" asked her "'what good would I be to my wife and two little girls'" if "'I killed him and I'd be in jail.'" (T 199-200) Ms. VanGenderen stated that she did not see Defendant previously on the date of the offense, or at

the time of the confrontation between the woman and Daniel Turner. (T 202)

The complainant's mother, Cynthia Marble, testified that the complainant reported the offense to her and that she and her husband then confronted Daniel Turner. (T 206-207; 221-222) The complainant was taken to St. Mary's Hospital for an examination, but would not agree to a complete pelvic exam. (T 209-210) The complainant told the police that Daniel Turner had vaginally penetrated her. (T 212)[1]

Mrs. Marble testified that she had told the complainant that she might be molested if she went into anyone else's house. (T 216) The witness stated that she owned a Polaroid camera. (T 222-223)

Over a defense objection that the testimony was cumulative, several witnesses testified regarding the confrontation between Daniel Turner and the complainant's parents. (T 225-229; 231-233; 238-239, 246)

Officer Paul Mesman of the Grand Rapids Police Department testified regarding statements made by the complainant about the offense. (T 267, 269-273) Prior to, and during, Officer Mesman's testimony, the trial judge explained the concept of hearsay to the jury. (T 262-265; 268-269) In describing the concept of an "excited utterance", the trial judge stated "you can't in the middle of it think about fabricating." (T 264-265) The trial judge informed the jury that Officer Mesman's testimony regarding the

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[1] It was not the prosecutor's theory of the case that Daniel Turner vaginally penetrated the complainant. (See above.)

complainant's statements to him, satisfied one of the exceptions to the hearsay rule. (T 268-269)

Officer Mesman testified that the complainant told him that while she was in the bedroom, Defendant grabbed one of her arms while Daniel Turner laid on top of her. (T 271-272; Cf. T 141) (See above and see T Prel. Instr. and Opening Statements, 39-41; T 6; 33-40)

Officer Mesman testified that when he first spoke to Daniel Turner, the codefendant said "'Just take me to jail.'" (T 275) When Officer Mesman asked Daniel Turner why he should take him to jail, the codefendant said "'You know, what that girl's accusing me of.'" (T 275)

Officer Mesman testified that the situation at the scene of the offense was confusing. (T 295) The witness stated that the complainant's parents were nearby talking when he questioned her, and both were "very upset." (T 297, 299) Officer Mesman stated that the only thing in his report about Defendant was that Defendant was holding the victim down. (T 300) (Cf. T 141) The witness testified that the complainant appeared confused when he was questioning her. (T 309)

Sergeant Pamela Carrier of the Grand Rapids Police Department testified that the complainant told her that Defendant touched her in the breast area. (T 316, 339) The complainant said that Daniel Turner threatened her, but did not say that Defendant threatened her. (T 338)

Sergeant Carrier stated that both defendants were placed in a police car when they were arrested. (T 340-341) The witness testified that when the complainant was asked to identify which of the men in the police cruiser was the one who hurt her, she identified Daniel Turner. (T 341)

Officer Michael Barr of the Grand Rapids Police Department testified that Defendant told him "I have been here all day, but I have been sleeping and just woke up." (T 348) Officer Barr stated that the complainant told him that Daniel Turner had vaginally penetrated her. (T 356)

Dr. Steven Perry testified that he examined the complainant at St. Mary's hospital on the date of the alleged offense. (T 386-390) Dr. Perry stated that the victim "alleged that she had been assaulted by a man." (T 388) (See also T 389) The witness testified that there were no signs of injury to the complainant's body. (T 390-391) The complainant refused a pelvic examination, but there were no outward signs of injury to her vagina. (T 392)

On direct examination of Dr. Perry, the prosecutor elicited testimony over defense counsel's objection, that it was not unusual for a child who had been assaulted to refuse a pelvic exam. (T 392-393)

On cross-examination by the defense attorney for the codefendant, Dr. Perry testified that the patient "appeared relaxed and was very pleasant." (T 395) The witness noted that the complainant was "surprisingly composed for her alleged complaint." (T 396)

Dr. Perry testified that he performed a test which showed no presence of semen on the complainant. (T 409) The witness stated that he saw no injury to the victim's head or neck, and did not smell urine on the patient. (T 413-415) The doctor testified that he had not been told that the complainant was knocked out during the offense. (T 416-417) (Cf. T 54) Dr. Perry stated that when he questioned the complainant about the color of the material that came out of the man's penis, she was vague about it. (T 422)

Nurse Leslie Vandenhout testified that the complainant told her that Daniel Turner threatened her with a knife if she screamed. (T 435) Nurse Vandenhout stated that the Assault Victim Medical Report stated that there was only one assailant involved in the offense. (T 449-450)

On July 19, 1993, the complainant was examined a second time at the Children's Assessment Center. (T 457, 464) Nurse Ruth Hamstra stated that she was present when the complainant told Dr. Edward Cox that the reason she was being examined was because "he licked me down there." (T 458) Nurse Hamstra stated that the complainant denied that any other type of sexual contact took place. (T 460) Dr. Cox testified that the complainant did not report any act of fellatio or fondling. (T 471-472)

Karen Curtiss, a crime scene technician employed by the Grand Rapids Police Department, testified that she gathered evidence at the scene of the offense. (T 477-490) Ms. Curtiss identified a butter knife in the courtroom which had been seized from a jar of peanut butter in the apartment. (T 543-544 The witness testified

that there was peanut butter on the knife, but no jelly. (T 543-544) Ms. Curtiss stated that no Polaroid cameras were seized from the defendants' apartment and no shirts with jelly stains on them were confiscated. (T 544-547)

Robert Birr testified that he worked at the Michigan State Police Crime Lab in Grand Rapids in the microchem trace unit and the serology unit. (T 552) Mr. Birr testified that he examined Defendant's clothes for Negroid hairs because the victim was black. (T 570, 573) The witness found no Negroid hairs on the clothing. (T 570)

Lieutenant James Straub of the Kent County Sheriff's Department testified that he took a statement from Defendant. (T 597-601) Defendant allegedly told Lt. Straub that he was asleep in the bedroom of the apartment when he heard voices. (T 598) Defendant came out of the room and saw the codefendant with a child who was trying on clothes. (T 598-599) Defendant stated that he went back to the room and later left the apartment. (T 599) When he left, Defendant saw the child on Daniel Turner's lap, playing video strip poker. (T 600-601) When Defendant returned, the girl was gone. (T 601) Defendant asked Daniel Turner "'Who was that girl'", and the codefendant responded, "'Kayko.'" (T 601)

Lieutenant Straub testified that Defendant stated he was uncomfortable with the fact that the complainant was trying on clothes in the apartment. (T 602) Defendant denied touching the complainant. (T 602-603)

Over a hearsay objection by defense counsel, Detective Christine Karpowicz of the Grand Rapids Police Department, testified regarding a statement describing the offense, made by the complainant on July 19, 1993, 12 days after the incident. (T 609-610)

Detective Karpowicz stated that she did not ask the Michigan State Police Crime lab to determine if there was jelly present on the butter knife seized from the apartment. (T 631)

Detective Karpowicz testified that on the date of the offense, Defendant called 911, requesting assistance be sent to his apartment. (T 633-634) Defendant stated that someone was trying to beat in his door. (T 634)

Patricia Ann Haist of the YWCA Counseling Center testified that she supervised the Center's non-familial child molestation program. (T 635-636) Ms. Haist testified that the complainant's behavior of laughing while in the emergency room at the hospital, was consistent with that of a person who had been sexually assaulted. (T 636) The witness, who was not qualified as an expert in rape trauma syndrome, testified that the complainant was "very likely . . . in shock" and "may have been emotional." (T 636) Ms. Haist stated that it was "likely that she was trying to get back in control of her emotions. All of her control was taken away from her <u>when she was assaulted</u>." (T 637; emphasis added.) On cross-examination, Ms. Haist testified that she did not know the complainant, and had not interviewed her. (T 638)

The parties stipulated that at 5:43 pm on the date of the offense Defendant called the police. Defense counsel played a tape of the 911 call for the jury. (T 642-643)

Detective Debora Vazquez of the Grand Rapids Police Department, testified that the complainant told her that Defendant was not present during any of the acts of sexual penetration or sexual contact by Daniel Turner. (T 677)

Joel Kusmierz testified that on the date of the offense at around 4:30 p.m., he saw a young black girl playing on the steps near his apartment. (T 698) The door to the defendants' apartment was open, and both defendants were inside the apartment. (T 698-699) Mr. Kusmierz stated that when he left his apartment 10 minutes later, the little girl was gone, and the door to the apartment was closed. (T 700)

At the conclusion of the prosecutor's case, defense counsel made a motion for directed verdict of acquittal, arguing that there was insufficient proof that Defendant had aided and abetted Daniel Turner in the CSC I offense. (T 737-740) In ruling on the motion, the trial judge stated that Defendant could be convicted:

> ". . .even though his help may have been only at the tail end. It may not have been to perpetrate the physical acts, but merely to avoid detection. As I say, that is enough." (T 742; emphasis added.)

In his final instructions to the jury on first degree criminal sexual conduct, the trial judge did not specify the offenses with which Daniel Turner was charged, and did not instruct the jurors

that they must be unanimous as to a theory of Daniel Turner's guilt of the offense. (T 823-827)

The jury returned a verdict of guilty as charged as to Stephen Turner. (T Final Day of Jury Trial, 25) The jury in Daniel Turner's case convicted him of kidnapping, and two counts of CSC I. (T Final Day of Jury Trial, 25)

Both defendants appeared for sentencing on February 2, 1994. Daniel Turner, who was charged as an habitual offender, and had a prior conviction for burglary, received three concurrent terms of 30 to 50 years imprisonment. (ST 41) Daniel Turner was sentenced within the guidelines. (See Appendix A.)

The Michigan Sentencing Guidelines as calculated in Stephen Turner's case under the offense title "criminal sexual conduct", scored Defendant as an A-III level offender with a minimum sentence range of 5 to 10 years. (See copy of Sentencing Information Report (SIR) attached to Presentence Investigation Report (PSR), Appendix B.)

Defendant had absolutely no criminal record at the time of the instant offense. Nevertheless, the trial judge departed from the guidelines, and imposed a sentence of 15 to 30 years for the offense of aiding and abetting CSC I. The trial judge stated the departure was necessary in order to avoid sentencing disparity. (ST 39-41)

Defendant now appeals of right to this Court.

I. **MR. TURNER WAS DENIED HIS FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHEN THE TRIAL JUDGE DENIED HIS MOTION FOR DIRECTED VERDICT OF ACQUITTAL ON THE CHARGE OF FIRST DEGREE CRIMINAL SEXUAL CONDUCT; IN THE ALTERNATIVE, THE VERDICT IS AGAINST THE GREAT WEIGHT OF THE EVIDENCE.**

Defendant was charged as an aider and abettor in the CSC I offenses committed by Daniel Turner. (T 4, 13) The prosecutor alleged that Stephen Turner assisted his brother in the offenses by helping to stage a photograph purporting to show the complainant stabbing Defendant. (T 61-64; 845, 849, 879) The complainant testified that Daniel Turner told her that the purpose of staging the photograph was to provide evidence that the complainant assaulted Stephen Turner with a knife. (T 62) Thus, if the complainant told anyone about the CSC I offenses, her credibility would be undermined. (T 62-64) Throughout the trial, defense counsel attempted to discredit the complainant's testimony regarding the photograph, and argued that no physical evidence existed to support the testimony. (See Statement of Facts, supra.)

The complainant testified that Defendant Stephen Turner left the apartment before the CSC I offenses occurred and did not return until after the offenses had ended. (T 135-136; 144) Thus, the alleged incident involving the staging of the photograph apparently did not occur until after the commission of the CSC I offenses, because Defendant was not in the apartment until after the offenses. At no point did the complainant testify that the incident

with the photograph took place before Stephen Turner left the apartment.

The complainant testified at trial that Daniel Turner ordered Stephen Turner to hold her down, and Defendant refused. (T 141) More importantly, the complainant testified that Defendant did not, in fact, hold her down. (T 141) The complainant also testified that it was Daniel Turner, not Defendant, who dragged her from the bedroom to the living room. (T 155)

In many of her statements after the offenses, the complainant reported that only one person was involved in the assaults. (T 58, 178, 388, 449-450, 458) Sergeant Carrier stated that both defendants were placed in a police car when they were arrested. (T 340-341) The witness testified that when the complainant was asked to identify which of the men in the police cruiser was the one who hurt her, she identified Daniel Turner. (T 341)

At the conclusion of the prosecutor's case, defense counsel made a motion for directed verdict of acquittal, arguing that there was insufficient proof that Defendant aided and abetted Daniel Turner in the CSC I offenses. (T 737-740) In denying the motion, the trial judge stated as follows:

> "And there was some testimony here, as well as some statements by Lakeysha which are substantive evidence, although the statements weren't made here, which would ascribe to Mr. Stephen Turner sufficient knowledge as to conduct which his brother was engaging or intending to engage, if the jury finds that it happened, for which he could be held to, have intended to help commit a CSC One.
>
> Obviously, not knowing it to be called that, but through aiding and abetting the acts which

> constitutes that crime, even though his help may have been only at the tail end. It may not have been to perpetrate the physical acts, but merely to avoid detection. As I say, that is enough." (T 741-742; emphasis added.)

In his closing argument to the jury, the prosecutor relied exclusively on the staging of the photograph, as providing specific proof that Defendant aided and abetted in the offense of first degree criminal sexual conduct. (T 845, 849, 879) Referring to Defendant, the prosecutor stated:

> " . . . this man assisted, and you may find that assistance very slight or maybe, as the judge gave one of the examples, to prevent him from getting caught, but it is enough under the statute." (T 850-851; emphasis added.)

See also T 879.

In instructing the jury on the offense of aiding and abetting, the trial judge stated that a person is guilty of aiding and abetting if he did something "designed to help the principal, the person who committed the crime, at least temporarily avoid detection." (T 830)

Defendant now contends that he was denied his right to due process of law when he was convicted of first degree criminal sexual conduct based upon insufficient evidence.

Standard of Review.

This issue raises a claim that one of Mr. Turner's convictions is not supported by sufficient evidence. An appellate court reviews such claims de novo. People v Wolfe, 440 Mich 508, 513-516; 489 NW2d 748 (1992). Defendant also challenges the trial court's denial of his motion for new trial based upon a great weight of the

evidence argument. An appellate court reviews the denial of such a motion for an abuse of discretion. People v Herbert, 444 Mich 466, 477; 511 NW2d 654 (1993).

* * *

Before a defendant can be convicted of a criminal offense, due process requires that the prosecutor introduce sufficient evidence which would justify the factfinder in reasonably concluding that he or she is guilty beyond a reasonable doubt. US Const, Ams V, XIV; Const 1963, art 1, §17; Jackson v Virginia, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979); People v Hampton, 407 Mich 354, 368; 285 NW2d 284 (1979).

In the instant case the prosecutor repeatedly stated that Stephen Turner could be convicted as an aider and abettor based entirely upon the staging of the photograph, because that incident was meant to help Daniel Turner avoid detection. (See above.) This argument was, in turn, premised upon the trial court's previous instruction to the jury that Defendant could be convicted of aiding and abetting first degree criminal sexual conduct if he did something to help Daniel Turner "at least temporarily avoid detection." (T 830)[2] However, a person who merely assists the principal in avoiding detection may not be convicted as an aider and abettor. People v Lucas, 402 Mich 302, 303-304; 262 NW2d 662 (1978).

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[2] In the instant case, the trial judge instructed the jury on the elements of the offenses prior to closing arguments. (T 706, 836)

The primary theory advanced by the prosecutor at the conclusion of the trial was that Stephen Turner was guilty of first degree criminal sexual conduct, because he assisted Daniel Turner in staging the photograph. The complainant testified specifically that Defendant did not hold her down. (T 141) Moreover, the complainant ultimately testified that it was Daniel Turner, not Defendant, who dragged her from the bedroom to the living room. (T 155)

Defendant was not even in the apartment when the first degree criminal sexual conduct offenses took place, and according to the complainant's own testimony, did not assist in the commission of those offenses. Therefore, even viewing the evidence in a light most favorable to the prosecutor, the most that could be concluded is that Stephen Turner was guilty of accessory after-the-fact, not aiding and abetting. (See above and see Issue II, infra.)

Defendant's conviction for first degree criminal sexual conduct must be vacated and Defendant discharged from the offense.[3]

In the alternative, the verdict as to both first degree criminal sexual conduct and CSC II, are against the great weight of the evidence. In People v Herbert, supra, the Michigan Supreme Court stated as follows:

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[3] If Defendant's conviction for CSC I is vacated, Defendant is minimally entitled to resentencing on his remaining conviction. People v Fosse, 41 Mich App 174 (1972); People v Bennett, 71 Mich App 246 (1976); People v Flinnon, 78 Mich App 380 (1972); People v Breckenridge, 81 Mich App 6 (1978); People v Guidry, 399 Mich 803 (1977); and People v Bergevin, 406 Mich 307 (1979), modified 407 Mich 1148 (1979).

> "To determine whether a verdict is against the great weight of the evidence, or has worked an injustice, a judge necessarily reviews the whole body of proofs. Thus Justice Cooley explained in Woodin v Durfee, 46 Mich 424, 427; 9 NW 457 (1881), that, while jurors 'may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment,' the judge may set aside 'a perverse verdict' and grant a new trial.
>
> In accordance with these principles, we stated in People v Johnson, 397 Mich 686, 687; 246 NW2d 836 (1976), that 'a trial judge may grant a new trial because he disbelieves the testimony of witnesses for the prevailing party.' Accord Hampton, 407 Mich 380 (opinion of Ryan, J.).
>
> When a trial court grants a new trial on the ground that the prosecution's witnesses lack credibility, it is finding, in effect, that the verdict is against the great weight of the evidence." (Footnotes omitted.)

Mr. Turner was convicted on an aiding and abetting theory. Three alleged acts by Defendant could have formed the basis of the verdict. First, the jury could have found that Defendant held the complainant down for the principal. (See Statement of Facts, supra.) However, the complainant testified specifically that Defendant did not hold her down, and refused Daniel Turner's request that he do so. The complainant testified at trial that Daniel Turner ordered Stephen Turner to hold her down, and Defendant refused. (T 141) More importantly, the complainant testified that Defendant did not, in fact, hold her down. (T 141)

Second, the jury could have found, based upon the complainant's own testimony, that Defendant dragged the complainant from the bedroom to the living room. However, the complainant also

testified that it was Daniel Turner, not Defendant, who dragged her from the bedroom to the living room. (T 155)

Third, the jury could have based its verdict on Defendant's alleged participation in the staging of the photograph. (See above.) However, there was no physical evidence to support this aspect of the complainant's testimony, and, in any event, Defendant could not be convicted based upon this act alone. Lucas, supra.

Defendant's conviction must be reversed.[4]

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[4] This aspect of Mr. Turner's issue is fully preserved by a motion for new trial based upon a great weight argument. The motion was argued before Judge Kolenda on February 2, 1994. (See motion transcript, pp 3-6) Cf. People v McNeal, 152 Mich App 404, 417; 393 NW2d 907 (1986).

II. **MANIFEST REVERSIBLE ERROR OCCURRED WHEN THE TRIAL JUDGE INSTRUCTED THE JURY THAT DEFENDANT COULD BE CONVICTED OF AIDING AND ABETTING FIRST DEGREE CRIMINAL SEXUAL CONDUCT IF HE DID SOMETHING TO HELP THE PRINCIPAL "AT LEAST TEMPORARILY AVOID DETECTION."**

Defendant was charged as an aider and abettor in the CSC I offenses committed by Daniel Turner. (T 4, 13) The prosecutor alleged that Stephen Turner assisted his brother in the offenses by helping to stage a photograph purporting to show the complainant stabbing Defendant. (T 61-64; 845, 849, 879) Daniel Turner allegedly told the complainant that the purpose of staging the photograph was to provide evidence that the complainant assaulted Stephen Turner with a knife. (T 62) Thus, if the complainant told anyone what had happened, her credibility would be undermined. (T 62-64) Throughout the trial, defense counsel attempted to discredit the complainant's testimony regarding the photograph, and argued that no physical evidence existed supporting the testimony. (See Statement of Facts, supra.)

The complainant testified that Defendant Stephen Turner left the apartment before the CSC I offenses occurred and did not return until after the offenses had ended. (T 135-136; 144) Thus, the alleged incident involving the staging of the photograph apparently did not occur until after the commission of the CSC I offenses, because Defendant was not in the apartment until after the offenses. At no point did the complainant testify that the incident with the photograph took place before Stephen Turner left the apartment.

The complainant testified at trial that Daniel Turner ordered Stephen Turner to hold her down, and Defendant refused. (T 141) The complainant also testified that Defendant did not, in fact, hold her down. (T 141) The complainant testified that it was Daniel Turner, not Defendant, who dragged her from the bedroom to the living room. (T 155)

In many of her statements after the offenses, the complainant reported that only one person was involved in the assaults. (T 58, 178, 388, 449-450, 458) Sergeant Carrier stated that both defendants were placed in a police car when they were arrested. (T 340-341) The witness testified that when the complainant was asked to identify which of the men in the police cruiser was the one who hurt her, she identified Daniel Turner. (T 341)

At the conclusion of the prosecutor's case, defense counsel made a motion for directed verdict of acquittal, arguing that there was insufficient proof that Defendant aided and abetted Daniel Turner in the CSC I offense. (T 737-740) In denying the motion, the trial judge stated as follows:

> "And there was some testimony here, as well as some statements by Lakeysha which are substantive evidence, although the statements weren't made here, which would ascribe to Mr. Stephen Turner sufficient knowledge as to conduct which his brother was engaging or intending to engage, if the jury finds that it happened, for which he could be held to, have intended to help commit a CSC One.
>
> Obviously, not knowing it to be called that, but through aiding and abetting the acts which constitutes that crime, even though his help may have been only at the tail end. It may not have been to perpetrate the physical acts, but

merely to avoid detection. As I say, that is enough." (T 741-742; emphasis added.)

In his closing argument to the jury, the prosecutor relied exclusively on the staging of the photograph, as providing specific proof that Defendant aided and abetted in the offense of first degree criminal sexual conduct. (T 845, 849, 879) Referring to Defendant, the prosecutor stated:

> " . . . this man assisted, and you may find that assistance very slight or maybe, as the judge gave one of the examples, to prevent him from getting caught, but it is enough under the statute." (T 850-851; emphasis added.)

In instructing the jury on the offense of aiding and abetting, the trial judge stated that a person is guilty of aiding and abetting if he did something "designed to help the principal, the person who committed the crime, at least temporarily avoid detection":

> "Impeding a victim's escape. Doing something to deter a victim from reporting the matter or doing something which would damage the victim's credibility if it gets reported.
>
> Or doing something designed to help the principal, the person who committed the crime, at least termporarily avoid detection are all the kinds of things which constitute aiding and abetting." (T 830; emphasis added)

Defendant now contends that manifest reversible error occurred when the trial judge instructed the jury that Defendant could be convicted of aiding and abetting first degree criminal sexual conduct if he did something to help Daniel Turner "at least temporarily avoid detection."

* * *

Standard of Review

The within issue raises a claim that the trial judge improperly instructed the jury on the elements of aiding and abetting. Resolution of the instructional issue involves an interpretation of the aiding and abetting statute. An appellate court reviews matters of statutory construction de novo. Seals v Henry Ford Hospital, 123 Mich App 329; 333 NW2d 272 (1983).

* * *

In People v Lucas, 402 Mich 302, 303-304; 262 NW2d 662 (1978), the defendant was charged with aiding and abetting the commission of a burglary. Although evidence existed to support the defendant's conviction as an aider and abettor, some evidence was adduced suggesting that the defendant may have merely assisted the principal in making his escape. Id. The trial judge instructed the jury that a person could be convicted as an aider and abettor if he "'in any manner aids the other person to escape arrest or to escape punishment.'" Id. The Michigan Supreme Court found the trial court's instruction to be erroneous and reversed his conviction:

> "Were the jury to have disbelieved, in this case, that Lucas either committed or aided and abetted the burglary, it still could have convicted Lucas on the basis that he aided the burglary by assisting in the escape. We hold this to be error.
>
> An 'accessory after the fact', at common law, according to Professor Perkins, is 'one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment'. No case decided by this Court has construed the aiding and abetting statute to include accessories after the fact. In People v Wilborn, 57 Mich App 277, 282; 225 NW2d 727

> (1975), lv den 394 Mich 809 (1975), it was held, without citation of authority, that it was error to instruct a jury that a defendant might be guilty as a principal of an offense if he was an accessory after the fact. We believe Wilborn was correctly decided, and construe the language of MCLA 767.39; MSA 28.979-- 'concerned in the commission of an offense' -- as not including those who assist after the fact of the crime. Instead of being charged as a principal, an accessory after the fact might be charged under MCLA 750.505; MSA 28.773.
>
> Therefore, on considering Lucas's application for leave to appeal, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we reverse the burglary conviction and remand the cause for further proceedings in the trial court."

Referring to CJI 8:2:02 (now CJI2d 8.7), the Court of Appeals in People v Hartford, 159 Mich App 295, 300-301; 406 NW2d 276 (1987), noted that a standard jury instruction is available which explains the distinction between aiding and abetting and accessory after the fact:

> "The difference, the instruction explains, is that an aider and abettor knew about and intended to further the commission of the crime before it ended and did some act or gave some encouragement which helped in the commission. An accessory after the fact helped the person who committed the crime only after the crime had ended. Case law supports this distinction. People v Karst, 118 Mich App 34; 324 NW2d 526 (1982); People v Bargy, 71 Mich App 609; 248 NW2d 636 (1976). An accessory after the fact decides to help the principal only after the felony has been committed. It is impossible for one involved as a principal not to have known of the crime until after he had completed it."

In People v Karst, 118 Mich App 34, 37-38; 324 NW2d 526 (1982), the jury sent the judge a note asking whether a person who

was previously unaware of the existence of a burglary could be guilty as an aider and abettor for assisting in the principal's escape. The trial judge gave the jury an instruction which indicated that it was up to the jurors to decide whether the escape was part of the commission of the crime. Id. Citing People v Wilborn, 57 Mich App 277, 282; 225 NW2d 727 (1975), and Lucas, supra, the Court in Karst, supra, held that "it is error to instruct the jury that a defendant might be guilty as a principal of an offense if he was an accessory after-the-fact." 118 Mich App 34, 40. The Karst Court noted, however, that "[t]he distinction between aiders and abettors and accessories after-the-fact is not always clear, and given the facts, even less so in this case." Id.

The Court in Karst found that evidence existed supporting defendant's conviction as an aider and abettor, or as an accessory after-the-fact. 118 Mich App 34, 40-41. Nevertheless, the Karst Court reversed because the trial court's instruction permitted the jury to convict the defendant even if he did not intend to assist the principal until after the offense was completed:

> "In short, the jurors could have found defendant guilty of aiding and abetting depending on what testimony they chose to believe.
>
> However, the question submitted by the jury seems to indicate that it did not believe defendant knew a crime was going to occur. Thus, his mere presence in the vehicle in the vicinity of the crime would be insufficient to find him guilty as an aider or abettor. People v Burrel, supra.
>
> Although the trial court's reinstruction on escape was correct, as far as it went, it undoubtedly confused the jury and did not

> answer its question. Rather, if defendant learned of the substantive offense after its occurrence and only then aided the perpetrators in escape, he would, at most, merely be an accessory after-the-fact. Lucas, supra, 304-305. Further, such must be charged in a separate count and was not in this case. People v Bargy, 71 Mich App 609, 616-617; 248 NW2d 636 (1976).
>
> Consequently, the trial court's reinstruction on aiding and abetting constituted reversible error, since under those instructions defendant could have been found guilty based upon his mere presence in the vicinity of the crime and upon an intention, formed after the commission of the substantive offense, to aid the perpetrators of that offense.
>
> Reversed and remanded for a new trial." 118 Mich App 41-42. (Emphasis by Court.)

In the instant case the prosecutor repeatedly argued to the jury that Stephen Turner could be convicted as an aider and abettor based entirely upon the staging of the photograph, because that incident was meant to help Daniel Turner avoid detection. (See above.) This argument was, in turn, premised upon the trial court's previous instruction to the jury that Defendant could be convicted of aiding and abetting first degree criminal sexual conduct if he did something to help Daniel Turner "at least temporarily avoid detection." (T 830) Based upon the authorities cited above, the trial court's instruction was an error. Lucas, supra; Karst, supra.

Defendant's conviction must be reversed.[5]

---

[5] If Defendant's conviction for CSCI is vacated, Defendant is minimally entitled to resentencing on his remaining conviction. People v Fosse, 41 Mich App 174 (1972); People v Bennett, 71 Mich App 246 (1976).

III. **CLEAR REVERSIBLE ERROR OCCURRED WHEN THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY THAT IT MUST BE UNANIMOUS AS TO A THEORY OF THE PRINCIPAL'S GUILT BEFORE IT COULD FIND STEPHEN TURNER GUILTY AS AN AIDER AND ABETTOR.**

Stephen Turner was charged with aiding and abetting his brother, Daniel Turner, in the commission of the crime of first degree criminal sexual conduct. Although Daniel Turner was charged with two counts of CSC I, Stephen Turner was charged with only one count of aiding and abetting. (T 820-821) (See Statement of Facts, supra.)

At the preliminary examination in the instant case, the child complainant testified regarding an act of cunnilingus and an act of fellatio committed by Daniel Turner. (PET 16-17) However, at trial, the complainant specifically denied that an act of cunnilingus took place. (T 56)

In his instructions to the jury, the trial judge informed the jurors that they could convict Stephen Turner if they found that he aided and abetted Daniel Turner in the crime of CSC I. (T 821-823) Regarding the substantive charge of CSC I, the trial judge instructed the jury as follows:

> "The prosecution has to prove that Mr Daniel Turner inserted his penis, or his tongue, or a finger, or some object, any object will do, into the genital or anal openings of Lakeysha Cage.
>
> Now, any penetration, however slight that penetration, is enough if it was sufficient to go beyond the surface of the body. It doesn't have to go all the way in, to put it bluntly. As long as it goes beyond the surface of the

> body, that constitutes a sufficient penetration.
>
> It's also criminal sexual conduct in the first degree if the prosecution proves that Mr. Daniel Turner put his penis in Lakeysha's mouth. Again, any insertion beyond the surface of the skin is sufficient. Or the prosecution has satisfied its burden if it proves that Mr. Daniel Turner touched Lakeysha Cage's genitals with his mouth." (T 824; emphasis added.)

The trial judge did not instruct the jury that they must be unanimous as to a theory of Daniel Turner's guilt.

Defendant now contends that clear reversible error occurred when the trial judge failed to instruct the jury that they must be unanimous as to a theory of the guilt of the principal before Defendant could be convicted as an aider and abettor.

Standard of Review

The within issue raises a claim that Mr. Turner was denied his right to a fair trial based upon a trial court instruction. There was no objection by defense counsel to the complained-of instruction. Therefore, this Court should review this issue under a manifest injustice standard. People v Grant, 445 Mich 535; 520 NW2d 123 (1994); MCL 769.26; MSA 28.1096

* * *

In People v Yarger, 193 Mich App 532, 536-537; 485 NW2d 119 (1992), defendant was charged with one count of third degree criminal sexual conduct (CSC III). However, the complainant's trial testimony, if believed by the jury, would have supported two separate convictions of third degree criminal sexual conduct, each based on a separate sexual penetration. Id. The jury was not

instructed that it had to be unanimous as to a theory of CSC III in order to convict the defendant. Id. The Court of Appeals reversed:

> "Unless waived by a defendant, the right to a jury trial includes the right to a unanimous verdict. People v Burden, 395 Mich 462, 468; 236 NW2d 505 (1975) (opinion by Kavanagh, C.J.); People v Miller, 121 Mich App 691; 329 NW2d 460 (1982). In this case, we find it impossible to discern of which act of penetration defendant was found guilty. This problem has been previously alluded to in dicta by this Court. People v Pottruff, 116 Mich App 367, 375-376; 323 NW2d 402 (1982). See also People v Jenness, 5 Mich 305, 326-329 (1858), and People v Thorp, unpublished opinion per curiam of the Court of Appeals, decided March 7, 1991 (Docket No. 112554). We now conclude that the error requires that defendant's conviction be reversed. If this case is retried, defendant should either be charged with two separate counts of third-degree criminal sexual conduct or else an appropriate instruction should be given to the jury." 153 Mich App 532, 537. (Emphasis added.)

In People v Cooks, 446 Mich 503, 524; 521 NW2d 275 (1994), the Michigan Supreme Court stated as follows:

> "We are persuaded by the foregoing federal and state authority that if alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." (Footnote omitted.)

In the present case, the jurors may have agreed on Daniel Turner's guilt, but may not have been unanimous on the acts

supporting that finding. Some may have found guilt of CSC I based on fellatio, others may have found it based on cunnilingus. There were, indeed "materially distinct proofs" regarding the act of cunnilingus. Although the complainant made out-of-court statements in which she alleged that cunnilingus took place, she refused to testify to this act at trial. (See above.)

Although defense counsel did not object to the instructions as given, this Court may reverse where, as here, the failure to give a special instruction may have undermined a fundamental constitutional right. People v Townes, 391 Mich 578, 586; 218 NW2d 136 (1974); Berrier v Egeler, 583 F2d 515, 516 (CA 6 1978). It is constitutional error to allow Defendant Turner's conviction to stand where six jurors may have chosen one event or theory on which to predicate guilt, while six others chosen a different event and theory.

Because the trial court failed to instruct the jury that they must unanimously agree on the same act and theory in support of their verdict, Defendant's conviction for first degree criminal sexual conduct must be reversed.

IV. **MR. TURNER WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT INTRODUCED RAPE TRAUMA SYNDROME TESTIMONY OVER DEFENDANT'S OBJECTION, WHERE THE ISSUE OF THE CHILD VICTIM'S REACTION TO THE ASSAULT WAS NOT INJECTED BY DEFENDANT, AND WHERE THE WITNESS TESTIFIED THAT THE VICTIM WAS IN FACT ASSAULTED.**

Mr. Turner was charged with CSC I and CSC II. Part of the defense theory as to the CSC I, was that the offenses described by the complainant did not in fact occur. (T 20) Defendant's entire defense as to the CSC II charge was that the crime did not take place. (T 19-20)

Dr. Steven Perry testified that he examined the complainant at St. Mary's hospital on the date of the alleged offense. (T 386-390) Dr. Perry stated that the victim "alleged that she had been assaulted by a man." (T 388) (See also T 389) The witness testified that there were no signs of injury to the complainant's body. (T 390-391) The complainant refused a pelvic examination, but there were no outward signs of injury to her vagina. (T 392)

On direct examination of Dr. Perry, the prosecutor elicited testimony over defense counsel's objection, that it was not unusual for a child who had been assaulted to refuse a pelvic exam. (T 392-393)

On cross-examination by the defense attorney for the codefendant, Dr. Perry testified that the patient "appeared relaxed and was very pleasant." (T 395) The witness noted that the complainant was "surprisingly composed for her alleged complaint." (T 396)

Based upon Dr. Perry's testimony, the trial judge ruled that the prosecutor could introduce rape trauma syndrome testimony. (T 398-399; 404-408) Counsel for Defendant argued that the prosecutor had gotten into the question of the child's behavior first and that she had objected. (T 402) (See T 392) Defense counsel noted that she had consistently avoided the kind of questioning summarized above, and stated that she did not open the door to rape trauma syndrome evidence, the codefendant's attorney did. (T 402-403) In his ruling on the issue, the trial judge stated that it "would be too easy to set things up, have one lawyer object, and the other say, 'I want to let it in for one reason or another,' and we'd have constant problems." (T 406) (Cf. T 392)

Thereafter, Patricia Ann Haist of the YWCA Counseling Center testified that she supervised the Center's non-familial child molestation program. (T 635-636) Ms. Haist testified that the complainant's behavior of laughing while in the emergency room at the hospital, was consistent with that of a person who had been sexually assaulted. (T 636) The witness testified that the complainant was "very likely . . . in shock" and "may have been emotional." (T 636) Ms. Haist stated that it was "likely that she was trying to get back in control of her emotions. All of her control was taken away from her when she was assaulted." (T 637; emphasis added.) On cross-examination, Ms. Haist testified that she did not know the complainant, and had not interviewed her. (T 638)

In his closing argument to the jury, the prosecutor argued the rape trauma syndrome evidence and noted that the attorney for the codefendant had injected the issue of the child's post-incident behavior. (T 847-848)

Defendant now contends that he was denied a fair trial when the trial court introduced rape trauma syndrome testimony over Defendant's objection, where the issue of the child victim's reaction to the assault was not injected by Defendant, and where the expert witness testified that the victim was in fact assaulted.

* * *

Standard of Review

The within issue raises a claim that the trial court improperly admitted rape trauma syndrome evidence over the objection of defense counsel for Stephen Turner. A trial court's decision to admit evidence is reviewed by an appellate court for an abuse of discretion. People v Hurt, 211 Mich App 345, 350-351; 536 NW2d 227 (1995).

* * *

In People v Hurt, supra, the Court of Appeals held that rape trauma syndrome testimony is admissible only to rebut inferences regarding post-incident behavior of the complainant which is at issue; the Court in Hurt further stated that the rape trauma syndrome expert may not testify that the assault actually occurred:

> "We take our direction for resolving the issue from our Supreme Court's handling of the

> question of the admissibility of expert testimony in a child rape case. People v Beckley, 434 Mich 691; 456 NW2d 391 (1990). There, in a plurality opinion, the Court concluded that, in sexual abuse cases, a behavioral expert must function primarily in the role of advisor. The advice of the expert is required only if: (1) particular behavior of the complainant following the rape is at issue; (2) it is necessary to rebut inferences regarding post-incident behavior of the complainant which is at issue; and (3) the testimony is limited to background information on the behavior the victim is likely to exhibit following a rape. Id. The expert may not testify that the assault actually occurred or render the opinion that particular behavior that was observed indicates that a sexual assault in fact occurred. Id., pp 725 (Brickley, J.), 734 (Boyle, J., concurring in part, dissenting in part)." 211 Mich App 345, 350-351. (Emphasis added.)

In the instant case, it was the prosecutor who first injected the issue of the complainant's post-incident behavior when he asked Dr. Perry whether it was unusual for a child who had been sexually assaulted to refuse a pelvic exam. (See above.) Significantly, this testimony was objected to by defense counsel for Stephen Turner. (T 392) The issue of the victim's post-incident behavior was then fully explored by defense counsel for Daniel Turner.

However, as defense counsel for Defendant Stephen Turner noted, she had consistently sought to steer clear of this area, and had objected at the first indication that the prosecutor was inquiring into the child's post-incident behavior. (T 402-403)

Based on this record, it is clear that the prosecutor and defense counsel for Daniel Turner were the persons who injected this issue. This was done over defense objection. Therefore, this is not a case where the introduction of rape trauma syndrome

evidence was "necessary to rebut inferences regarding post-incident behavior of the complainant." Hurt, supra, at 350-351.

Moreover, the testimony actually admitted exceeded the permissible scope of this type of evidence. The witness testified that the complainant was "very likely . . . in shock" and "may have been emotional." (T 636) Ms. Haist stated that it was "likely that she was trying to get back in control of her emotions. All of her control was taken away from her when she was assaulted." (T 637; emphasis added.)

As the Court in Hurt, supra, stated:

> "The expert may not testify that the assault actually occurred or render an opinion that particular behavior that was observed indicates that a sexual assault in fact occurred." 211 Mich App 345, 351.

Because a witness was permitted to testify over defense objection in a manner which exceeded the permissible scope of rape trauma syndrome testimony, Defendant's convictions must be reversed.

V. MANIFEST REVERSIBLE ERROR OCCURRED WHEN THE TRIAL COURT ADMITTED DAMAGING HEARSAY TESTIMONY OVER DEFENSE OBJECTION.

Over a hearsay objection by defense counsel, Detective Christine Karpowicz of the Grand Rapids Police Department, testified regarding a statement describing the offense, made by the complainant on July 19, 1993, 12 days after the incident:

> "Q And what information did you obtain from Lakeysha?
>
> A I spoke to her about what had took place on that night, and she described some detail of what happened.
>
> Q What detail would that have been, please?
>
> A She described --
>
> MS. KRAUSE: Your Honor, I'm going to object to the statements Lakeysha made to Detective Karpowicz some twelve days later as hearsay.
>
> THE COURT: In the context of this overall case, the objection is overruled.
>
> BY MR. BRAMBLE:
>
> Q What type of detail did she provide you?
>
> A If I could refer to those notes, what she had told me was that she was making stuff and was grabbed by a male with lipstick, dragged into his apartment, back bedroom.
>
> Her clothes were off and his clothes were off, and he got on top of her. She told me that he touched her privates with his hands.
>
> She said that his brother had come in the room, and the one with the lipstick had told the other brother to hold her down, and he refused, so the one without the lipstick dragged her into the living room, where he held her down and rubbed her chest.

> From there I asked her how she knew the brother -- or why did he hold her down, the one without the lipstick, and she told me that he thought his brother still wanted him to.
>
> I said 'Did he want to,' and she said, 'No.'" (T 609-610) (Emphasis added.)

Defendant now contends that manifest reversible error occurred when the trial court admitted damaging hearsay testimony over defense objection.

* * *

Standard of Review

The within issue raises a claim that the trial court improperly admitted hearsay testimony over the objection of defense counsel for Stephen Turner. A trial court's decision to admit evidence is reviewed by an appellate court for an abuse of discretion. People v Hurt, 211 Mich App 345, 350-351; 536 NW2d 227 (1995).

* * *

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). Its admission is generally barred because there is no opportunity to cross-examine the out-of-court declarant. People v Burton, 177 Mich App 358, 362; 441 NW2d 87 (1989).

MCR 803A, states in part as follows:

> "A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.
>
> A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement." (Emphasis added.)

In People v Stricklin, 162 Mich App 623, 627-630 (1987), a husband and wife were convicted of engaging in various sexual acts with two of their children. 162 Mich App 623, 626-627. The trial court permitted three adult witnesses to testify to conversations each had with the children in which the children described the offenses. 162 Mich App 623, 627. The judge in Stricklin stated that it was "his practice to allow police officers and other investigators to recite for the jury what witnesses had told them at earlier stages of the investigation in order to allow the jury to fully evaluate the credibility of the witnesses." 162 Mich App 623, 627.

The Court of Appeals in Stricklin reversed, finding no applicable exception to the hearsay rule, and citing the credibility of the witnesses as a factor in its decision:

> "Defendants claimed that the children had been sexually promiscuous following the female child's sexual molestation and had been caught engaging in sexual activities with each other and neighborhood children. Both defendants further claimed that the children were sexually aggressive towards themselves and other adults. Given the conflicting testimony, the credibility of the witnesses was crucial to the jury's verdict. Under such circumstances, we find that it was error requiring reversal to bolster the testimony of the children by allowing three witnesses to corroborate their testimony. See People v Gee, 406 Mich 279, 283; 278 NW2d 304 (1979). Defendants' convictions are reversed and the case remanded for a new trial." 162 Mich App 623, 629-630. (Emphasis added).

In People v Eady, 409 Mich 356, 359 (1980), the defendant was convicted of second-degree criminal sexual conduct and assault with intent to commit criminal sexual conduct not involving penetration. The defendant's defense at trial was consent. The complainant testified she picked up the defendant in her car and later he began to assault her. She stated she began to scream and honk her horn. Id. at 359-360. A police officer was permitted to testify to hearsay statements in a radio run regarding a woman screaming and honking her horn. Id. at 360. The Michigan Supreme refused to find harmless error in the admission of the hearsay statements.

In the instant case, Lakeysha Cage testified that her birthday was March 16, 1983. (T 45) The offense allegedly occurred on July 7, 1993, and the complained-of statement was made on July 19, 1993. (T 606-610) Because the complainant was ten years old at the time

that the statement was made, the tender years exception contained in MRE 803A, is inapplicable to the instant case. (See above.) The exception is also inapplicable because the statement was one of many made by the complainant and "only the first is admissible under this rule [MRE 803A]." Moreover, the statement was not "shown to have been spontaneous" as required by 803A(2). In addition, the notice requirements of 803A were not met here. (See text of rule quoted above.)

There was no effort made by the prosecutor or the trial judge to justify the admission of the complainant's out-of-court statement to Detective Karpowicz as an excited utterance. Nor could there have been such a justification in light of the fact that the statement was made 12 days after the offense. (See above.) See People v Kreiner, 415 Mich 372, 378-379; 329 NW2d 716 (1982).

The out-of-court statement was extremely damaging because it tended to directly support the complainant's allegations regarding both offenses charged against Defendant.

Therefore, damaging hearsay testimony was admitted over defense objection. The trial court's only ruling on the subject indicated that he was admitting the evidence "[i]n the context of this overall case." (T 609) Whatever this statement means, it cannot justify the admission of otherwise inadmissible hearsay testimony.

Defendant's conviction must be reversed.

VI. **MR. TURNER WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE GAVE A CIRCULAR INSTRUCTION ON THE INTENT REQUIRED FOR AIDING AND ABETTING WHICH FAILED TO CONVEY TO THE JURY THAT THE ACCESSORY MUST ASSIST THE PRINCIPAL WITH KNOWLEDGE OF THE CRIME INTENDED BY THE PRINCIPAL.**

In his preliminary instructions to the jury, the trial judge instructed them that the intent required for aiding and abetting an offense, was "the specific intent that your assistance would indeed aid them":

> "Simply encouraging the person on, even though you don't do anything physical, but you eeg [sic] them on, or encourage them to do it or help them plan. All of those things, while they aren't actually committing the ultimate crime, are assisting enough to make the person who assisted equally guilty with the person who actually carries out the crime, provided that the person who helped meant for his help to be of some assistance.
>
> Now if you help someone unwittingly, by accident, not knowing that you are helping them, that's no crime, even though you did, in fact, help. You have to help and you have to have help with the specific intent that your assistance would indeed aid them in carrying out their particular crime.
>
> And if those things are proven, number one, that Mr. Daniel Turner did, in fact commit one of those Criminal Sexual Conduct offenses that we're talking about, and that Mr. Stephen Turner did help him, and that he intended to help him, actually help him, then the crime of Aiding and Abetting Criminal Sexual Conduct in the First or Second Degrees has happened, depending upon whichever offense you think has, in fact, happened." (T Prel. Instr. and Opening Statements, 40-41; emphasis added.)

In his final instructions to the jury on aiding and abetting, the trial judge stated as follows:

> "What the prosecution must prove is that Stephen Turner did some affirmative act which helped his brother in some way commit whatever offense you decide his brother committed, if you find that he did.
>
> No particular amount of help need be proven, so long as the help was more than insignificant. The law doesn't deal with 'insignificant,' but if it was more than insignificant, whatever it was, it constituted enough help."
>
> * * *
>
> But proving that a crime occurred at the hands of Daniel Turner and that Mr. Stephen Turner helped in one of these ways is still not enough. The prosecution has to prove one more thing.
>
> It has to prove that Mr. Stephen Turner meant for his help to indeed assist in the commission of the crime. He has to have wanted his brother to abe able to succeed with the crime, and to have done whatever he did in assisting it with that purpose in mind.
>
> * * *
>
> In sum, before you can find Mr. Stephen Turner guilty of aiding and abetting his brother, you've got to find three things beyond a reasonable doubt.
>
> Number one, that Daniel Turner committed either criminal sexual conduct in the first degree or criminal sexual conduct in the second degree.
>
> Number two, that Stephen Turner did something affirmative to help his brother commit one of those offenses.
>
> And three, that Stephen Turner intended that his brother commit one of those offenses, and intended that what his help was, whatever it was, was going to assist.

> If you help someone inadvertently, not meaning to, not knowing that you're going to, then, of course, it's not a crime. So you have to have meant for your assistance to in fact be assistance.
>
> * * *
>
> So if you're satisfied that Daniel Turner committed one of the two offenses that I've talked about, and that his brother helped him, intending to help him, then you may find him guilty of aiding and abetting whatever offense you're satisfied Daniel committed." (T 829-831; 833-834; emphasis added.)

Defendant now contends that he was denied a fair trial when the trial judge gave a circular instruction on the intent required for aiding and abetting, which failed to convey to the jury that the defendant must assist the principal with knowledge of the crime intended by the principal.

* * *

Standard of Review

The within issue raises a claim that the trial judge gave the jury an erroneous instruction on the law relating to Defendant's case. An appellate court reviews questions of law de novo. Cardinal Mooney HS v MHSAA, 437 Mich 75, 80; 467 NW2d 21 (1991); Jodway v Kennametal, Inc, 207 Mich App 622, 632; 525 NW2d 883 (1994).

* * *

In People v Murray, 72 Mich 10, 16; 40 NW 29 (1888), the Michigan Supreme Court observed that in a criminal case, the trial judge has the responsibility to see that the case goes to the jury in an intelligent manner so that the jurors can have a clear and

correct understanding of what it is they are to decide. See also People v Visel, 275 Mich 77; 265 NW 781 (1936); People v Liggett, 378 Mich 706, 714; 148 NW2d 784 (1967).

MCL 767.39; MSA 28.979, states as follows:

> "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

The above-quoted statute "'makes a defendant a principal when he consciously shares in any criminal act.'" People v Cooper, 326 Mich 514, 522; 40 NW2d 708 (1950). [See People v Penn, 70 Mich App 638, 649; 247 NW2d 575 (1976) ["Knowledge of the principal's criminal purpose and a conscious sharing of the act are necessary].

In People v Palmer, 392 Mich 370, 378; 220 NW2d 393 (1974), the Michigan Supreme Court described the concept of aiding and abetting as follows:

> "In criminal law the phrase 'aiding and abetting' is used to describe all forms of assistance rendered to the perpetrator of a crime. This term comprehends all words or deeds which may support, encourage or incite the commission of a crime. It includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary. 22 CJS, Criminal Law, § 88(2), p 261. The amount of advice, aid or encouragement is not material if it had the effect of including the commission of the crime. People v Washburn, 285 Mich 119, 126; 280 NW 132 (1938). (Emphasis added.)

In People v Gordon, 60 Mich App 412, 417-418; 231 NW2d 409 (1975), the evidence showed that the defendant was in an automobile

with stolen property shortly after a robbery. It was not the prosecutor's theory that the defendant in Gordon participated directly in the robbery or drove the car. Id. The Court of Appeals found that the evidence was insufficient to support the defendant's robbery conviction of unarmed stating as follows:

> "Beyond the pyramiding of inferences problem, the evidence is insufficient from a purely common sense approach. One aids and abets another to commit a crime when the former takes conscious action to seek to make the criminal venture succeed. People v Cooper, 326 Mich 514; 40 NW2d 708 (1950). There has been no evidence to show that defendant Broaden either knew of his associates' wrongful purpose or took any action to further that purpose. Both elements are required to find aiding and abetting. People v Poplar, 20 Mich App 132; 173 NW2d 732 (1969)." 60 Mich 412, 417-418. (Emphasis added.)

See also People v Wright (On Remand), 99 Mich App 801, 820; 298 NW2d 857 (1980) ["one aids and abets another to commit a crime where the former takes conscious action seeking to make the criminal venture succeed"].

In People v Evans, 173 Mich App 631, 636; 434 NW2d 452 (1988), the Court of Appeals stated as follows:

> "In order to aid and abet, defendant must have performed acts or given encouragement which aided and assisted in the commission of the crime. Furthermore, the aider and abettor must have intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement." (Emphasis added.)

See also People v Acosta, 153 Mich App 504, 512; 396 NW2d 463 (1986).

In the instant case, the trial judge repeatedly instructed the jury that the intent required for aiding and abetting is a "specific intent that your assistance would indeed aid them." (See above.) The only import of the trial court's intent instructions was to convey to the jury that a person cannot be convicted if he aided and abetted another "by accident".

The defense presented in this case was reasonable doubt. Mr. Turner alleged that he did now know what his brother was doing, and did not participate in the offenses in any way. Therefore, it was critical that the jury be instructed that: "Knowledge of the principal's criminal purpose and a conscious sharing of the act are necessary." People v Penn, supra at 649.

By failing to instruct the jury on the intent necessary for the crime, the trial court failed in its duty "to see that the case goes to the jury in an intelligent manner so that the jurors can have a clear and correct understanding of what it is they are to decide." Murray, supra, at 16.

Defendant's conviction must be reversed.[6]

---

[6] If Defendant's conviction for CSC I is vacated, Defendant is minimally entitled to resentencing on his remaining conviction. People v Fosse, 41 Mich App 174 (1972); People v Bennett, 71 Mich App 246 (1976); People v Flinnon, 78 Mich App 380 (1972); People v Breckenridge, 81 Mich App 6 (1978); People v Guidry, 399 Mich 803 (1977); and People v Bergevin, 406 Mich 307 (1979), modified 407 Mich 1148 (1979).

VII. MR. TURNER WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE FAILED TO INSTRUCT THE JURY THAT THE ASSISTANCE OFFERED BY DEFENDANT MUST HAVE HAD THE EFFECT OF INDUCING THE CRIME.

In his instructions to the jury on the amount of help the aider and abettor must provide, the trial court stated as follows:

> "What the prosecution must prove is that Stephen Turner did some affirmative act which helped his brother in some way commit whatever offense you decide his brother committed, if you find that he did.
>
> No particular amount of help need be proven, so long as the help was more than insignificant. The law doesn't deal with 'insignificant,' but if it was more than insignificant, whatever it was, it constituted enough help." (T 829-830; emphasis added.)

At no time did the trial judge instruct the jury that the assistance provided by the aider and abettor must have had the effect of inducing the crime.

Mr. Turner now contends that the trial judge denied him a fair trial when it failed to instruct the jury that the assistance provided by the aider and abettor must have had the effect of inducing the crime.

* * *

Standard of Review

The within issue raises a claim that the trial judge gave the jury an erroneous instruction on the law relating to Defendant's case. An appellate court reviews questions of law de novo. Cardinal Mooney HS v MHSAA, 437 Mich 75, 80; 467 NW2d 21 (1991); Jodway v Kennametal, Inc, 207 Mich App 622, 632; 525 NW2d 883 (1994).

* * *

In People v Murray, 72 Mich 10, 16; 40 NW 29 (1888), the Michigan Supreme Court observed that in a criminal case, the trial judge has the responsibility to see that the case goes to the jury in an intelligent manner so that the jurors can have a clear and correct understanding of what it is they are to decide. See also People v Visel, 275 Mich 77; 265 NW 781 (1936); People v Liggett, 378 Mich 706, 714; 148 NW2d 784 (1967).

MCL 767.39; MSA 28.979, states as follows:

> "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

The above-quoted statute "'makes a defendant a principal when he consciously shares in any criminal act.'" People v Cooper, 326 Mich 514, 522; 40 NW2d 708 (1950). [See People v Penn, 70 Mich App 638, 649; 247 NW2d 575 (1976) ["Knowledge of the principal's criminal purpose and a conscious sharing of the act are necessary"].

In People v Palmer, 392 Mich 370, 378; 220 NW2d 393 (1974), the Michigan Supreme Court described the concept of aiding and abetting as follows:

> "In criminal law the phrase 'aiding and abetting' is used to describe all forms of assistance rendered to the perpetrator of a crime. This term comprehends all words or deeds which may support, encourage or incite the commission of a crime. It includes the actual or constructive presence of an accessory, in preconcert with the principal,

> for the purpose of rendering assistance, if necessary. 22 CJS, Criminal Law, § 88(2), p 261. The amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime. People v Washburn, 285 Mich 119, 126; 280 NW 132 (1938)." (Emphasis added.)

In the instant case, Mr. Turner argued at trial that there was insufficient evidence presented to convict him of aiding and abetting first degree criminal sexual conduct. Therefore, it was critical that the jury be told that the amount of assistance offered by Mr. Turner was not material, so long as it had the effect of inducing the crime. Palmer, supra.

Because the trial court failed to adequately instruct the jury on the concept of aiding and abetting, this Court must reverse Defendant's conviction for first degree criminal sexual conduct.[7]

---

[7] If Defendant's conviction for CSC I is vacated, Defendant is minimally entitled to resentencing on his remaining conviction. People v Fosse, 41 Mich App 174 (1972); People v Bennett, 71 Mich App 246 (1976); People v Flinnon, 78 Mich App 380 (1972); People v Breckenridge, 81 Mich App 6 (1978); People v Guidry, 399 Mich 803 (1977); and People v Bergevin, 406 Mich 307 (1979), modified 407 Mich 1148 (1979).

VIII. **MR. TURNER WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR ARGUED TO THE JURY THAT THEY HAD A CIVIC DUTY TO BELIEVE THE TESTIMONY OF THE COMPLAINING WITNESS.**

In his closing rebuttal argument to the jury, the prosecutor stated as follows:

> "Well, there's a poet that once said that 'Each child born today is God's expression of hope for the future.'
>
> What hope does Lakeysha Cage have or any child have when she tells someone, 'This adult hurt me,' and we don't believe 'em?" (T 878; emphasis added.)

Mr. Turner now contends that the prosecutor denied him a fair trial by arguing to the jury that they had a "civic duty" to believe the testimony of the complaining witness.

Standard of Review

The within issue raises a claim that Mr. Turner was denied his right to a fair trial based upon the prosecutor's misconduct. There was no objection by defense counsel to the complained-of argument by the prosecutor. Therefore, this Court should review this issue under a manifest injustice standard. People v Grant, 445 Mich 535; 520 NW2d 123 (1994); MCL 769.26; MSA 28.1096.

* * *

In People v Rohn, 98 Mich App 593, 596-597; 296 NW2d 315 (1980), the Court of Appeals held that a prosecutor may not inject matters broader than the guilt or innocence of the defendant, including especially appeals to civic duty:

> "Prosecutors are accorded great latitude regarding their arguments and conduct. See

> People v Duncan, 402 Mich 1; 260 NW2d 58 (1977). However, it is paramount that prosecutors pursue any lawsuit with as equal a concern for ensuring a defendant a fair trial as for convicting him. People v Florinchi, 84 Mich App 128, 135; 269 NW2d 500 (1978). A defendant's opportunity for a fair trial may be jeopardized when the prosecution interjects issues broader than the guilt or innocence of the accused. People v Bryan, 92 Mich App 208, 221; 284 NW2d 765 (1979). This is particularly true when the prosecutor appeals to a jury's civic duty." 98 Mich App 593, 596-597. (Emphasis added.)

In People v Biondo, 76 Mich App 155, 157-160; 256 NW2d 60 (1977), the prosecutor appealed to the jury to convict the defendant of breaking and entering, as an act towards saving the City of Detroit from financial ruin. The prosecutor in Biondo, supra, also stated that the complainant had a right as a citizen to expect a guilty verdict from the jury:

> "'I indicated to you at the beginning of my closing argument that everybody is entitled, everybody's got rights.
>
> * * *
>
> Now the complainant Mr. Schwall is a businessman here in town. Being a businessman here in this city, he supplies people in the city. He pays taxes in the city. He belongs to groups in the city.
>
> And he comes into this courtroom, and he says I accuse Salvatore Biondo of going into my greenhouse and taking my stuff, my goods that I paid for, that I worked hard for; and he's saying to you, ladies and gentlemen, I'm a citizen just like you are, he took my goods, they were in his car, he did all these things; and he's saying to you, as he is entitled to say to you, what are you going to do about it.'" 76 Mich App 155. (Emphasis added.)

The Court in Biondo reversed the defendant's conviction based in part on the above-quoted argument, stating as follows:

> "The 'civic duty' tactic of jury argument has been repeatedly condemned by this Court as prejudicial since it injects into a trial issues unrelated to the particular defendant's case. In People v Farrar, 36 Mich App 294, 298-299; 193 NW2d 363 (1971), the Court adopted the language of the ABA Project on Standards for Criminal Justice, The Prosection Function, Std. 5.8(d), as applicable to this issue:
>
> > 'The prosecutor may not subtly convert the presumption of innocence into a presumption of guilt by appealing to the jurors to perform a civic duty to support the police:
> >
> > The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.'"

In the instant case, the prosecutor argued to the jury that it had a duty to believe the testimony of the complainant. (See above.) This argument was very similar to the prosecutor's argument in Biondo, supra, where the prosecutor told the jury that the victim was a hard-working taxpayer who had been the victim of a crime and who had a right to come before the jury and say "what are you going to do about it.'" 76 Mich App 155. (Emphasis added.)

Because the prosecutor appealed to civic duty to convict, Mr. Turner's conviction must be reversed.

IX. **MR. TURNER SHOULD BE RESENTENCED BECAUSE THE TRIAL JUDGE ABUSED HIS DISCRETION IN IMPOSING AN EXCESSIVELY SEVERE SENTENCE OF 15 TO 30 YEARS IMPRISONMENT, WHERE THE GUIDELINES RANGE WAS 60 TO 120 MONTHS, AND WHERE THE JUDGE RELIED UPON A REASON FOR DEPARTURE WHICH VIOLATED THE MICHIGAN SUPREME COURT'S DECISION IN IN RE DANA JENKINS.**[8]

In People v Milbourn, 435 Mich 630; 461 NW2d 1 1990, the Michigan Supreme Court discarded the "shock the conscience" test of People v Coles, 417 Mich 523; 339 NW2d 440 (1983), for determining whether a sentencing court has abused its discretion. The new standard is whether the sentence is "proportionate to the seriousness of the circumstances surrounding the offense and the offender." Milbourn, supra, at 636.

The Court based its holding on a Legislative intent analysis:

> "The Legislature in establishing differing sentence ranges for different offenses across the spectrum of criminal behavior has clearly expressed its value judgments concerning the relative seriousness and severity of individual criminal offenses. This statutory sentencing scheme embodies the 'principle of proportionality' according to which sentences are proportionate to the seriousness of the mater for which punishment is imposed. In our judgment, it is appropriate--if not unavoidable-- to include that, with regard to the judicial selection of an individual sentence within the statutory minimum and maximum for a given offense, the Legislature similarly intended more serious commissions of a given crime by persons with a history of criminal behavior to receive harsher sentences than relatively less serious breaches of the same penal statute by first-time offenders." 435 Mich 630, 635. (Emphasis added.)

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[8] 438 Mich 364; 475 NW2d 279 (1991).

The Milbourn Court held that the imposition of sentence, should be predicated upon an objective determination of the seriousness of the circumstances, not on the individual judge's sentencing philosophy:

> "With regard to the principle of proportionality, it is our judgment that the imposition of the maximum possible sentence in the face of compelling mitigating circumstances would run against this principle and the legislative scheme. Such a sentence would represent an abdication--and therefore an abuse-- of discretion. The trial court appropriately excises the discretion left to it by the Legislature not by applying its own philosophy of sentencing, but by determining where, on the continuum from the least to the most serious situations, an individual case falls and by sentencing the offender in accordance with this determination." 435 Mich 630, 653-654. (Footnotes omitted; emphasis by Court).

The Milbourn Court held that the Michigan Sentencing Guidelines constitute the best "barometer" for making this objective determination:

> "The guidelines represent the actual sentencing practices of the judiciary, and we believe that the second edition of the sentencing guidelines is the best 'barometer' of where on the continuum from the least to the most threatening circumstances a given case falls.
>
> Nevertheless, because our sentencing guidelines do not have a legislative mandate, we are not prepared to require adherence to the guidelines. We note that departures are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing." 435 Mich 630, 656-657 (Footnote omitted; emphasis by Court)

The Court of Appeals has closely scrutinized the reasons given by circuit court judges for the sentences they impose. People v McKinley, 168 Mich App 496, 512; 425 NW2d 460 (1988); People v Fisher, 166 Mich App 699, 715; 420 NW2d 858 (1988). For example, in McKinley, supra, quoted with approval in Milbourn, the Court of Appeals held that a trial court's reasons for imposing sentence should specifically support the sentence actually imposed:

> "Too frequently reasons are given for a sentence that apply equally well to a lesser or greater sentence unless an explanation is offered on the record for the specific sentence given. Such was he case here. We are unable to discern from the record why a fifteen year minimum rather than a ten-year minimum was necessary to punish this defendant for his specific conduct." 168 Mich App 496, 512.

See People v Milbourn, supra, at 660.

The Michigan Sentencing Guidelines as calculated in this matter under the offense title of "criminal sexual conduct", scored Defendant as an A-III level offender with a recommended minimum sentence range of 60 to 120 months. (See copy of Sentencing Information Report (SIR), attached to Presentence Investigation Report (PSR), Appendix B.)

Mr. Turner had absolutely no prior criminal record at the time of the instant offense. In departing from the guidelines, and imposing a sentence of 15 to 30 years imprisonment for the offense of aiding and abetting CSC I, the trial judge stated as follows:

> "Your lack of a record is why the guidelines, as they apply in your particular case, <u>are much lower for you than they are for your brother</u>. Your offense score is essentially the same, not identical, but essentially. <u>Your</u>

prior record score, however, is much lower and is therefore the reason why the guidelines in your case are only a fraction of what the guidelines authorize in his case.

I have, frankly, given this matter a great deal of thought, discussed it among my colleagues here on the bench to be sure that I was exploring every possible avenue, and I have come to the conclusion, frankly, that in your case the guidelines are not adequate, because they do one thing which sentences under the guidelines are definitely not supposed to do, and that is, result in what appears to be, to the public anyway, a mystifying disparity -- two people involved in the same crime, somewhat differently, but nonetheless essentially the same crime, ending up with what could be wildly difference [sic] sentences.

And the guidelines were specifically designed to see that that doesn't happen.

However, even when a judge departs from guidelines, he or she always starts from the guidelines as a base. Therefore, since I am staring [sic] with the guidelines in your case of considerably less than your brother's, and am imposing on you a sentence less than his to recognize your lack of a record and your lesser involvement in this particular matter, I am, nonetheless, satisfied that acting exclusively in these guidelines would, as I say, do the very thing we should be avoiding, and that is, sentences that people just don't understand, and which therefore result in a lack of credibility and confidence in this particular system." (ST 39-40; emphasis added.)

On the Departure Evaluation Form attached to the SIR, the trial judge stated as follows:

"Defendant was convicted of aiding and abetting his brother in the commission of an egregious CSC-1st. The brother's Guidelines were 180-360. This defendant's Guidelines were 60-120. To have sentenced within those Guidelines would have resulted in the very kind of inexplicable disparity the Guidelines

> are designed to avoid. The brother got 30-50 years. A sentence of 15-30 years for this defendant seemed more in keeping with the requirement of propportionaility [sic] than a 10-? sentence authporized [sic] by the Guidelines."

Mr. Turner now contends that Judge Kolenda abused his discretion in imposing an excessively severe sentence of 15 to 30 years imprisonment where the guidelines range was 60 to 120 months and where the judge relied upon inadequate and erroneous reasons for departure.

The trial judge was, of course, correct in stating that the Michigan Sentencing Guidelines system was implemented, in part, to address a perceived problem of disparity in sentencing. Coles, supra; Milbourn, supra. Indeed, one of the reasons that the Milbourn Court chose to discard the former test of Coles was that the old test was ineffective in combating sentencing disparity. 435 Mich 630, 647-648.

However, the Michigan Supreme Court would not have implemented a system of guidelines, if sentencing within the guidelines would result in sentencing disparity. More importantly, however, there may be numerous reasons why one person's guidelines would be higher than another's, thus resulting in seemingly disparate sentences. For example, in this case, the codefendant had a prior conviction for burglary and was charged with kidnapping and as an habitual offender. (See lower court file.)

Given the enormous disparity between what Daniel Turner did and what Stephen Turner did in the instant case, and given the difference in their prior records, there was obviously going to be

a great difference in the recommended sentences contemplated by the guidelines. The severity of Daniel Turner's guidelines should not be used as a basis to increase Defendant's sentence.

In In re Dana Jenkins, supra, the trial judge relied on the fact that the defendant's sentence was harsher than the codefendant's, and granted the defendant a resentencing. The Supreme Court reversed the decision of the trial court:

> "Sentences must be individualized and tailored to fit the circumstances of the defendant and the case. People v McFarlin, 389 Mich 557, 574; 208 NW2d 504 (1973). However, there is no requirement that the court consider the sentence given to a coparticipant. People v Bisogni, 132 Mich App 244; 347 NW2d 739 (1984).
>
> In any event, these two codefendants were not similarly situated, as the conclusions reached in their respective sentencing information reports indicated. Defendant Jenkins scored a final offense severity level III, with a guidelines sentence range of thirty-six to seventy-two months, while codefendant Cuthbertson scored a final offense severity level II, with a guidelines sentence range of eighteen to twenty-four months. The fact accounting for this difference is Jenkins' score on offense variable 7, offender exploitation of victim's vulnerability. Defendant Jenkins scored three points for this variable on the theory that by hitting the victim while holding a gun to her head the defendant exploited the victim's vulnerability. Codefendant Cuthbertson scored none.
>
> Despite the trial court's inability to discern upon review this reason -- which this Court finds apparent -- for the initial decision to sentence the two defendants differently, the disparity between the two sentences was justified, and did not render Jenkins' original sentence invalid."

Based upon In re Dana Jenkins, supra, it is clear that the trial court's attempt to avoid sentencing disparity, while admirable, was misguided. If a judge cannot decrease a sentence solely to avoid sentencing disparity, a judge cannot increase an otherwise valid guidelines sentence solely to avoid sentencing disparity. If Defendant's recommended guidelines sentence was inadequate, it had to be for reasons relating to Defendant and the offense. Milbourn, supra. It could not be because some other defendant received a harsher sentence. In re Dana Jenkins.

Amazingly, the trial judge imposed a sentence within the guidelines as to Daniel Turner, whereas Stephen Turner received a sentence which constituted a departure from the guidelines. (See Daniel Turner's Presentence Investigation Report (PSR) and Sentencing Information Report (SIR), Appendix A.)

Moreover, Defendant had absolutely no prior record at the time of the instant offense. If sentencing is to involve an objective determination as mandated by Milbourn, then Mr. Turner's total lack of any prior record must be weighed heavily.

However, even if this Court finds that this was an appropriate case in which to depart from the guidelines, the Court should still evaluate the extent of the departure. Milbourn, supra, at 435 Mich 630, 659-660.

Defendant must be resentenced.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant **STEPHEN TURNER** respectfully requests that this Honorable Court reverse his conviction for first degree criminal sexual conduct, dishcarge him from the offense and remand the case for a new trial on the remaining charge of second degree criminal sexual conduct; in the alternative, Defendant requests that this Court reverse his convictions and remand this case for a new trial; in the alternative, Defendant requests that this Court remand this case for resentencing.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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Dated: December 27, 1995

APPENDIX A

MICHIGAN DEPARTMENT OF CORRECTIONS

PRESENTENCE INVESTIGATION REPORT

CFJ-145 1/90
4835-6145

2/2/94

Honorable Dennis Kolenda County Kent Sentence Date

Docket 93-63014-FCA Attorney Robert Mirque, Jr. Appt. X Retained

Defendent TURNER, Daniel Arthur Age 36 D.O.B. 9-14-57

CURRENT CONVICTION(S)

Final Charge(s)	Max.	Jail Credit	Bond	Proposal B
1. Kidnapping	Life/Term	fr. days	No	
2. CSC 1st	Life/Term	7-7-93 days	No	
3. CSC 1st	Life/Term	" days	No	
4. Supp 3.	Life			

Convicted by: Plea ___ Jury X Judge ___ Plea Under Advisement ___ Nolo Contendere ___ HYTA: Yes ___ No X

Conviction Date 12-13-93 Plea Agreement

Pending Charges: Where

PRIOR RECORD

Convictions: Felonies 3 Misdemeanors 4 Juvenile Record: Yes ___ No X

Probation: Active ___ Former X Pending Violation

Parole: Active ___ Former X Pending Violation

Current Michigan Prisoner: Yes ___ No X Number

Currently Under Sentence: Offense Sentence

PERSONAL HISTORY

Education GED Employed No Where

Psychiatric History: Yes ___ No X Physical Handicaps: Yes X No ___ Marital Status Divorced

Substance Abuse History: Yes ___ No X What How Long

RECOMMENDATION

It is recommended that Daniel Arthur Turner be turned over to the Michigan Department of Corrections to serve significant concurrent prison terms on all three charges.

Subject has had mandatory AIDS test performed by Health Department.

CAB/dt

This case requires a $30.00 assessment for the Crime Victim Rights Fund.

Agent C. A. Brown 330 Caseload No. 330 Date January 11, 1994

Signature Carol A. Brown 1/11/94 Supervisor's Approval:

TURNER, Daniel Arthur
Kent County Circuit Court Docket No. 93-63014-FCA

EVALUATION AND PLAN

This subject is of Native American heritage and grew up in Wisconsin, remaining there until approximately one month prior to his arrest in the instant offense when he moved to Grand Rapids and was living with his brother. Among the positive factors in his life include the fact that although he reportedly suffers from dyslexia, he did accomplish a GED as an adult. He reports no present substance abuse problem, although he admits he used marijuana while he was in the U.S. Navy. Turner enlisted in the Navy in September of 1974 and was granted a General, under Honorable Conditions, discharge in February of 1977. Daniel was not employed at the time of his arrest, but he reports having experience as a garment finisher in the dry cleaning business and has held various employment including working as a steward at a hotel and some light industrial factory work.

Among the negative factors in Daniel's life is his prior criminal record which includes three prior adult felony convictions and four misdemeanor convictions. He reports no juvenile adjudications nor were any found. He recalls an unhappy childhood in which he was physically and emotionally abused by his parents.

Since Daniel was about 9 years old, he has been aware that he is extremely uncomfortable with his male genitalia. He began cross dressing around the time he was 11 years of age and became obsessed with the idea of becoming a female. His parents became aware of his cross dressing when he was around 14, and he reports that this knowledge added to their emotional and physical abuse of him. Daniel later came to understand that he has a "gender disorder," also called "transexualism." Daniel did marry, with his wife having knowledge of his gender disorder, but that marriage ended in divorce due to these stresses caused by Daniel's disorder. For approximately the past four years, Daniel reports that he has been living primarily as a woman, and passing as a woman except when he is at work. He has been seeking counseling and treatment "to become female," but at this point in time has had no surgeries or major hormonal treatments. Daniel told this investigator that he feels like he is a woman, and is sexually attracted to woman, and therefore defines himself as a "lesbian." The Court's attention is directed to a letter attached to this report written to this writer by Daniel Turner, which describes his feelings and related problems.

Your Honor, this subject has been found guilty by jury of kidnapping, and two counts of CSC 1st. Although he adamantly denies being sexually active or a threat to the community, the offense described herein is seen by this writer as a very heinous crime, and this writer feels he must be incarcerated for a lengthy period of time for the purposes of the protection of the community, deterrence of any further such behavior, and punishment. Any available psychological counseling is recommended for this subject while he is incarcerated.

TURNER, Daniel Arthur
Kent County Circuit Court Docket No. 93-63014-FCA

INVESTIGATOR'S DESCRIPTION OF THE OFFENSE

On July 7, 1993, Grand Rapids Police were dispatched to an apartment complex near 44th Street in Grand Rapids regarding a man with a crowbar pounding on a door and threatening people. When police arrived, they found Larry Marble with a crow bar, who approached them and told them that the men in the apartment at which he was pounding on the door had "raped" his stepdaughter. The police then spoke with 10 year old Lakeysha Cage, the victim in this case. She told police that while she was playing outside of her apartment building, a man wearing red lipstick, later identified as Daniel Turner, grabbed her and "dragged" her into his apartment in the same apartment complex. While in his apartment, he took her into a bedroom where he removed her clothing and got on top of her. She reports that he felt her breasts and then urinated on her while she was on the bed. She reported that Daniel Turner was wearing a bra and women's panties. She told police that he was rubbing his own penis and made her touch his penis and forced her to perform fellatio on him, ejaculating in her mouth. She also told police that he put his mouth on her vagina and seemed to be sucking on her "private part." During this time she requested to go home and cried, but was told she could not leave.

At some point during this time, Stephen Turner, the brother of Daniel, entered the room where Lakeysha and Daniel were. Reportedly Daniel asked him to hold Lakeysha's arms down, but he refused, stating that he didn't want her in his bedroom. He then reportedly "dragged" her into the living room and threw her on a mattress at which time he also fondled her breasts. He then reportedly left the room again. While in the living room, Daniel made her try on women's clothing, including bras and panties which were present in the apartment. He allowed her to put on her own clothing and then held her on his lap while they played a video strip poker game. While playing this game, she reports that Daniel continued to feel her chest area.

Before allowing her to leave the apartment, Daniel posed Lakeysha with a butter knife on which he placed jelly, being held to his brother Stephen's body as if she was stabbing Stephen. He then threatened Lakeysha that if she told the police, they would show them the picture and the police would not believe her. She also told police that Daniel threatened to kill her if she told anyone.

Within a half an hour, Lakeysha did report the incident to her mother who confronted Daniel at his apartment door at which time he was heard to say by the mother and other witnesses, "I don't know why I did it, I don't know why I did it." About this time, Lakeysha's stepfather, Larry Marble, approached the apartment with a crowbar and the Turners retreated into their apartment. A neighbor called the police because of the ruckus.

Daniel and Stephen Turner were arrested and taken to the county jail. Stephen denied any knowledge of what went on between his brother and the child. Lakeysha Cage was taken to St. Mary's Hospital for a medical examination. Although she described the molestation, she refused to allow the doctor to perform a pelvic exam

on her. To avoid further traumatizing her, her mother also agreed that the pelvic exam should not be done. Arrangements were made for her to be interviewed at the Children's Assessment Center at a later time. At that time she was given the name of a counselor who she has seen in counseling to help her deal with this event.

This writer spoke with Grand Rapids Detective Debora Vazquez during the preparation of this report. She told this investigator that Stephen was definitely the less involved in the actual incident, which was mainly perpetrated by Daniel. She feels that Stephen was actually afraid of his brother and afraid to stand up to him at the time of the incident. She points out that he did not come to the assistance of the child in any way and as a result, "helped put this girl through hell." She feels that he should go to prison but perhaps for not as long as Daniel. She feels Daniel should get "60 to 80 years in prison."

VICTIM'S IMPACT STATEMENT

This writer spoke with Larry Marble, the stepfather of Lakeshya. He reports that on the outside, Lakeysha appears to be okay emotionally, but he feels sure that she is "scarred on the inside." She has been involved in counseling over in Muskegon, where the family moved as a result of this incident. Some of their medical expenses have been paid through his wife's employment insurance, however, they do have some outstanding bills for which they have requested assistance through the Victims Compensation Fund. In regards to a sentencing recommendation, he told this investigator that he himself has served time in prison for a property offense, and that through his prison experience, it is his belief that sexual offenders do not change, or that it is rare for them to change. In regards to Daniel, he feels that the likelihood of him changing or getting help in the system would be extremely rare. He anticipates that Daniel would not be out to ever victimize Lakeysha again, but he expresses a fear that if Dan gets out, he will do this again to another child. He would therefore like to see him receive a lengthy prison sentence. In regards to Stephen's sentence, he made the following statement: "He's an adult, and he condoned his brother's behavior. He could have demanded that his brother stop it. Even though he did not partake as much as Daniel, he did nothing to stop it." He does feel that Stephen should be incarcerated, and feels that perhaps in his case there might be some chance for rehabilitation for him.

DEFENDANT'S DESCRIPTION OF THE OFFENSE

Daniel Turner declined to make a statement to this investigator, noting that he intends to appeal his conviction.

PRIOR CRIMINAL RECORD

Juvenile

None.

TURNER, Daniel Arthur
Kent County Circuit Court Docket No. 93-63014-FCA

Adult

4-25-78	Cudahy, Wis. PD	Carrying Concealed Knife	$75 fine. Waived atty.
9-25-79	Milwaukee PD	Burglary-Window Smash	3 yrs. prob., psychological counseling, rest. to a bridal shop. Rep. by atty D. Hyden.
8-21-80	Greendale, Wis. PD	1.Shoplifting	$120 fine. Waived atty.
		2.Poss. MJ.	$67 fine, Waived atty.
3-8-87	Jefferson Cty, Wis.	Poss. Controlled Subst. (MJ)	30 days jail. Atty Miguel Michel.
4-1-87	White Water, Wis. PD	1.Burglary	2 yrs. prison.
		2.Burglary	2 yrs. prison concurrent with above. Rep. by atty M. Michel. Disch. fr parc., 8-23-89.
7-7-93	GRPD	1.Kidnapping	Instant Offenses.
		2.CSC 1st	
		3.CSC 1st	
		4.supp. 3	

FAMILY BACKGROUND

Father: Glenn Turner, 60, Route 2-028A, Bluff Road, Eagle, Wisconsin, 414-495-4722. Employed as a janitor.

Mother: Sophia Turner, 57, of above address.

Siblings: Tom Turner, 37, Milwaukee, Wis.

Judy Turner, 33, LaCrosse, Wis.

Stephen Turner, 31, 4270 Langley Court S.E., Grand Rapids, MI 49508. (Presently being held in the Kent County Jail as a co-defendant in this case.)

Former
spouse: TFrancine Chamberlin Turner, married in 1982 and divorced in 1983.

Daniel reports that he never had a good relationship with his parents and that he actually felt "tormented" by them. He recalls being both physically and emotionally abused, primarily after his father discovered his cross dressing. He notes that he was close to his dad until that time, but had never been close to his mother. Because of his gender disorder, Daniel did not have a close relationship with his family over the last several years. Only recently did he begin trying to rebuild his relationship with his brother Stephen when he came to Grand Rapids approximately one month before his arrest.

Daniel enlisted in the U.S. Navy to try to make himself be more of a man. Due to the emotional trauma he experienced during that time, he ultimately left the service. He had a lengthy relationship with his former wife and they lived together for several years before marrying in 1982. She was aware of him being a transexual when they married, no children were born to their union, however, his wife was pregnant by another man when he met her, and he accepted that child as his own. That child died from an aspirin overdose when he was only 2½ years old.

PHYSICAL HEALTH

Daniel reports that he has had numerous broken bones as a result of car and motorcycle accidents as well as other accidents he had when he was younger as a result of being a daredevil and being involved in marshal arts. He reports that he has some mobility limitations as a result of his numerous fractures.

Michigan Department of Corrections

BASIC INFORMATION REPORT

4835-6101

CFJ-101 4/91

MDOC No.	Court Name (Last, First, Middle)
0	TURNER, Daniel Arthur Ellisworth

Alias or Maiden Name	Given Name
None	Same

Place of Birth	Citizenship	DOB	Last Known Address & Telephone No.
Milwaukee, WS	USA	9-14-57	4130 Oak Park Drive, #204 Grand Rapids, MI 49518

STATE & DLN	
None	

SSN	SID No.
398 62 1719	1704505J

FBI No.	Race	Sex	Hair	Eyes
345512T5	Native American	M	Brn	Bro

Height	Weight	Highest Grade Completed	Occupation	Health Ins.	Assets of $1,500 & Up	Monthly Income of $75 & Up
5'8	150	GED	Fabric Care	___Y_X_N	___Y_X_N	___Y___XN

Marital Status	Dependents	Religion	Military Branch	From - To	Discharge Type
Divorced	0	"Religion of Handsome Lake"	U.S. Navy	9-74/2-77	Gen. U/Hon

Marks, Scars, Amputations, Tattoos	Drug Abuse	Alcohol Abuse	Known Homosexual	Mental Health Treatment
None	___Y_X_N	___Y_X_N	___Y___XN	___Y_X_N

CRIMINAL HISTORY

JUVENILE			ADULT			
Comm.	Prob.	Esc.	Jail	Pris.	Prob.	Esc.
0	0	0	1	1	1	0

CSC Convictions	Age of First Arrest	SAI Eligible
0	18	___Y___XN

Pending Charges In Court	No. Prior Felony Convictions
___Y_X_N	3

Status at Time of Offense

- _x_ None
- ___ HYTA
- ___ Probation
- ___ District Prob.
- ___ Delayed Sentence
- ___ Parole
- ___ Jail
- ___ State Prisoner
- ___ On Bond

CURRENT OFFENSE DATA

No. 1 Docket No: 93-63014-FCA

No. 2 Docket No:

PACC Code	Offense	Max.	Circuit	Judge
750.350 750.520B1A 750.520D1A	Kidnapping ; Supp. 3 CSC 1st CSC 1st	Life or term	17th	Dennis Kolenda

PACC Code	Offense	Max.	Circuit	Judge

Codefendant(s): Stephen D. Turner

Codefendant(s):

Date of Offense	Victim(s) Relationship	Date of Arrest
7-7-93	Lakeysha Cage, none	7-7-93

Date of Offense	Victim(s) Relationship	Date of Arrest

Date of Bond	Attorney	Method of Disp. / Date of Conviction	Jail Credit	Guilty But Mentally Ill
NA	_x_ App'd ___ Retain Robert Mirque, Jr.	___Plea_X_Jury___HYTA ___Bench___Sec.7411___Nolo Cont. 12-13-93	fr 7-7-93	___Y_x_N

Date of Bond	Attorney	Method of Disp. / Date of Conviction	Jail Credit	Guilty But Mentally Ill
	___App'd ___Retain	___Plea___Jury HYTA ___Bench___Sec.7411___Nolo Cont.		___Y___N

Type of Report	County	Agent & Caseload No.	Prob. Viol. - New Sentence	Prob. Viol. - Technical
_x_ PSI ___PSI Up date 1-4-94 ___HYTA/Delay Update	Kent 41 Recommended Disposition: 4	C. A. Brown 330	___Y___xN	___Y_x_N

SENTENCING GUIDELINE RANGE Low 180 High 360 or life ☐ Not Applicable

DISPOSITION

Sentence Type	Date	CTN	Min. Yrs.	Min. Mos.	Min. Days	Max. Yrs.	Max. Mos.	Max. Days	Fine	Cost	Rest.	Jail Mos.	Jail Days
Prison	2-2-94	41 93 157194 01	30			50	life	ct / Concurr.					

Sentencing Information Report

Judge: _____ Probation Officer: _____ Circuit #: 7

Offender Name: _____ Docket #: 13-6301-FH Crime Group: CSC

Original Offense Title: _____ Conviction Offense Title: _____

Original Counts: 5 Original Stat Max: Life # Conviction Counts: 3 Conviction Stat Max: _____

Original PACC Charge Code: 750.350, 2 CS 750.520BIA, 2d Conviction PACC Charge Code: _____

Prior Record Score

PRV 1: 0 PRV 2: 40 PRV 3: _____ PRV 4: 0 PRV 5: 10 PRV 6: 0 PRV 7: 0 PRV TOTAL: 50

Prior Record Level (circle one) A [0] B [1-24] C [25-49] D [50+]

Offense Score (specify points for each variable in crime group)		Offense Severity Level (circle one) I	II	III	IV
Assault	OV 1: ___ OV 2: ___ OV 5: ___ OV 6: ___ OV 7: ___ OV 9: ___ OV 13: ___ OV 25: ___ TOTAL:	0-9	10-24	25-49	50+
Burglary	OV 1: ___ OV 2: ___ OV 5: ___ OV 8: ___ OV 9: ___ OV 10: ___ OV 11: ___ OV 13: ___ OV 17: ___ OV 24: ___ OV 25: ___ TOTAL:	0	1-10	11-25	26+
Criminal Sexual Conduct	OV 1: 0 OV 2: 0 OV 5: 15 OV 6: 0 OV 7: 15 OV 9: 10 OV 12: 0 OV 13: 5 OV 25: 0 TOTAL: 45	0-9	10-24	25-49	50+
Drug	OV 8: ___ OV 9: ___ OV 15: ___ OV 16: ___ OV 25: ___ TOTAL:	0	1-10	11-25	26+
Fraud	OV 8: ___ OV 9: ___ OV 17: ___ OV 25: ___ TOTAL:	0	1-10	11-25	26+
Homicide	OV 3: ___ OV 4: ___ OV 6: ___ OV 7: ___ OV 9: ___ OV 13: ___ OV 25: ___ TOTAL:	0-9	10-24	25-49	50+
Larceny	OV 8: ___ OV 9: ___ OV 14: ___ OV 17: ___ OV 25: ___ TOTAL:	0	1-10	11-25	26+
Property Destruction	OV 8: ___ OV 9: ___ OV 17: ___ OV 18: ___ OV 19: ___ OV 25: ___ TOTAL:	0	1-10	11-25	26+
Robbery	OV 1: ___ OV 2: ___ OV 5: ___ OV 6: ___ OV 7: ___ OV 9: ___ OV 13: ___ OV 17: ___ OV 25: ___ TOTAL:	0-9	10-24	25-49	50+
Weapons	OV 8: ___ OV 9: ___ OV 18: ___ OV 23: ___ OV 25: ___ TOTAL:	0	1-10	11-25	26+

Guideline Sentence Range: 180 to 360 mo life

Habitual Offender Information : Provide the following if convicted as an Habitual Offender

1st Subsequent Conviction: ___ **2nd Subsequent Conviction:** ___ **3rd or Greater Subsequent Conviction:** ___ **New Stat Max:** ___

Actual Sentence Length (state in months): Probation: _____ Jail: _____ Prison: _____ to Max: _____

Delayed Sentence: Y N Sentence Agreement: Y N Prosecutor Recommendation: Y N Guideline Departure Y N
(if yes, attach SIR88-2)

Sentencing Judge: _____ Date: _____

APPENDIX B

RECEIVED

MAR 29 1994

STATE APPELLATE DEFENDER OFFICE

11440.T

MICHIGAN DEPARTMENT OF CORRECTIONS
PRESENTENCE INVESTIGATION REPORT

CFJ-145 1/90
4835-6145

3/2/94

Honorable Dennis Kolenda County Kent Sentence Date 1-19-94

Docket 93-60314-FCB Attorney Tonya Krause Appt. X Retained

Defendent TURNER, Stephen Dennis Age 31 D.O.B. 12-20-62

CURRENT CONVICTION(S)

Final Charge(s)	Max.	Jail Credit	Bond	Proposal B
1. CSC 2nd degree	15y	fr ___ days	No	
2. Aid & Abetting CSC 1st degree	Life	7-7-93 days	NO	
3.		___ days		

Convicted by: Plea ___ Jury X Judge ___ Plea Under Advisement ___ Nolo Contendere ___ HYTA: Yes ___ No X

Conviction Date 12-13-93 Plea Agreement

Pending Charges: Where

PRIOR RECORD

Convictions: Felonies 0 Misdemeanors 0 Juvenile Record: Yes ___ No X

Probation: Active ___ Former ___ Pending Violation

Parole: Active ___ Former ___ Pending Violation

Current Michigan Prisoner: Yes ___ No X Number

Currently Under Sentence: Offense Sentence

PERSONAL HISTORY

Education 3 yrs college Employed No Where

Psychiatric History: Yes ___ No X Physical Handicaps: Yes ___ No X Marital Status Married

Substance Abuse History: Yes ___ No X What How Long

RECOMMENDATION

It is recommended that Stephen Dennis Turner be turned over to the Michigan Department of Corrections to serve prison terms on bout counts. Sentencing on the low end of the guidelines is recommended.

Subject had mandatory AIDS testing performed by Kent County Health Department.

CAB/dt

CONFIDENTIAL
DO NOT DUPLICATE

This case requires a $30.00 assessment for the Crime Victim Rights Fund.

Agent C. A. Brown 330 Caseload No. 330 Date January 11, 1994

Signature Carol A. Brown 1/11/94 Supervisor's Approval:

TURNER, Stephen Dennis
Kent County Circuit Court Docket No. 93-63014-FCB

EVALUATION AND PLAN

Stephen Turner presents as an intelligent, soft spoken, and sincere individual. Included among the positive factors in his life is the fact that he is a high school graduate with an Associate Arts degree from Grace Bible College. Since accomplishing that degree, he has been working on a degree in computer applications at Grand Rapids Community College. He is a deeply religious individual who came to Grand Rapids in 1981 to attend Grace Bible College, where he met his wife. The couple remain married and have four children. At the time of the instant offense he was temporarily separated from his wife. They have since reconciled and when released from custody, he anticipates returning to his family. He uses no alcohol or drugs and has never had a problem with either. He has an excellent employment history, having maintained employment at Cascade Engineering for the past eight years, until the time of his arrest. He was earning $9.25 an hour prior to his arrest. Despite his good employment history, the family has been having financial difficulties and he reports that he was in his second year of Chapter 13 bankruptcy.

Stephen maintains his innocence in this case, but was found guilty by a jury. His brother, Daniel, the co-defendant in this case, has been found guilty of three counts in this case, and appears to have been the instigator and the major player in this incident. From the evidence it appears that Stephen was present in the apartment during at least a part of the incident and that he did nothing to protect or rescue the 10 year old victim from his brother. Stephen's brother, Daniel, is a transsexual and had moved in with Stephen shortly before the instant offense occurred. Stephen, himself, admits that on occasion he has been involved in "cross dressing," but does not consider himself a "transsexual." He refers to his proclivities to cross dress as being "transgenderism." He does note that he has no desire to become a female, as has his brother. He also notes that he has normal heterosexual desires and relationships. His wife did not approve of his cross dressing, and that was one of the reasons for their recent separation. At this point in time, Stephen does not feel compelled to cross dress, and feels he can put that part of his life aside in order to save his marriage.

Your Honor, this subject's part in the instant offense was more one of failing to act to protect the victim, rather than actively victimizing her. I do not see him as a particular danger to the community; however, he has been convicted of a non probationable offense, and I would, therefore, recommend that he be turned over to the Michigan Department of Corrections to serve a period of prison confinement on the low end of the sentencing guidelines.

INVESTIGATOR'S DESCRIPTION OF THE OFFENSE

On July 7, 1993, Grand Rapids Police were dispatched to an apartment complex near 44th Street in Grand Rapids regarding a man with a crowbar pounding on a door and threatening people. When police arrived, they found Larry Marble with a crowbar, who approached them and told them that the men in the apartment at which he was

pounding on the door had "raped" his stepdaughter. The police then spoke with 10 year old Lakeysha Cage, the victim in this case. She told police that while she was playing outside of her apartment building, a man wearing red lipstick, later identified as Daniel Turner, grabbed her and "dragged" her into his apartment in the same apartment complex. While in his apartment, he took her into a bedroom where he removed her clothing and got on top of her. She reports that he felt her breasts and then urinated on her while she was on the bed. She reported that Daniel Turner was wearing a bra and women's panties. She told police that he was rubbing his own penis and made her touch his penis and forced her to perform fellatio on him, ejaculating in her mouth. She also told police that he put his mouth on her vagina and seemed to be sucking on her "private part." During this time she requested to go home and cried, but was told she could not leave.

At some point during this time, Stephen Turner, the brother of Daniel, entered the room where Lakeysha and Daniel were. Reportedly Daniel asked him to hold Lakeysha's arms down, but he refused, stating that he didn't want her in his bedroom. He then reportedly "dragged" her into the living room and threw her on a mattress at which time he also fondled her breasts. He then reportedly left the room again. While in the living room, Daniel made her try on women's clothing, including bras and panties which were present in the apartment. He allowed her to put on her own clothing and then held her on his lap while they played a video strip poker game. While playing this game, she reports that Daniel continued to feel her chest area.

Before allowing her to leave the apartment, Daniel posed Lakeysha with a butter knife on which he placed jelly, being held to his brother Stephen's body as if she was stabbing Stephen. He then threatened Lakeysha that if she told the police, they would show them the picture and the police would not believe her. She also told police that Daniel threatened to kill her if she told anyone.

Within a half an hour, Lakeysha did report the incident to her mother who confronted Daniel at his apartment door at which time he was heard to say by the mother and other witnesses, "I don't know why I did it, I don't know why I did it." About this time, Lakeysha's stepfather, Larry Marble, approached the apartment with a crowbar and the Turners retreated into their apartment. A neighbor called the police because of the ruckus.

Daniel and Stephen Turner were arrested and taken to the county jail. Stephen denied any knowledge of what went on between his brother and the child. Lakeysha Cage was taken to St. Mary's Hospital for a medical examination. Although she described the molestation, she refused to allow the doctor to perform a pelvic exam on her. To avoid further traumatizing her, her mother also agreed that the pelvic exam should not be done. Arrangements were made for her to be interviewed at the Children's Assessment Center at a later time. At that time she was given the name of a counselor who she has seen in counseling to help her deal with this event.

This writer spoke with Grand Rapids Detective Debora Vazquez during the preparation

of this report. She told this investigator that Stephen was definitely the less involved in the actual incident, which was mainly perpetrated by Daniel. She feels that Stephen was actually afraid of his brother and afraid to stand up to him at the time of the incident. She points out that he did not come to the assistance of the child in any way and as a result, "helped put this girl through hell." She feels that he should go to prison but perhaps for not as long as Daniel. She feels Daniel should get "60 to 80 years in prison."

VICTIM'S IMPACT STATEMENT

This writer spoke with Larry Marble, the stepfather of Lakeshya. He reports that on the outside, Lakeysha appears to be okay emotionally, but he feels sure that she is "scarred on the inside." She has been involved in counseling over in Muskegon, where the family moved as a result of this incident. Some of their medical expenses have been paid through his wife's employment insurance, however, they do have some outstanding bills for which they have requested assistance through the Victims Compensation Fund. In regards to a sentencing recommendation, he told this investigator that he himself has served time in prison for a property offense, and that through his prison experience, it is his belief that sexual offenders do not change, or that it is rare for them to change. In regards to Daniel, he feels that the likelihood of him changing or getting help in the system would be extremely rare. He anticipates that Daniel would not be out to ever victimize Lakeysha again, but he expresses a fear that if Dan gets out, he will do this again to another child. He would therefore like to see him receive a lengthy prison sentence. In regards to Stephen's sentence, he made the following statement: "He's an adult, and he condoned his brother's behavior. He could have demanded that his brother stop it. Even though he did not partake as much as Daniel, he did nothing to stop it." He does feel that Stephen should be incarcerated, and feels that perhaps in his case there might be some chance for rehabilitation for him.

DEFENDANT'S DESCRIPTION OF THE OFFENSE

The following is a written statement provided by Stephen Turner: "I maintain my innocence in this case, and upon advice of counsel I decline any further comment of this matter."

PRIOR CRIMINAL RECORD

Juvenile

None reported nor found.

Adult

7-7-93	GRPD	1.CSC 2nd	Instant Offense.

TURNER, Stephen Dennis
Kent County Circuit Court Docket No. 93-63014-FCB

2.Aiding and Abetting CSC 1st — Instant Offense.

FAMILY BACKGROUND

Father: Glenn Turner, 60, Route 2-028A, Bluff Road, Eagle, Wisconsin, 414-495-4722. Employed as a janitor.

Mother: Sophia Turner, 57, of above address.

Siblings: Tom Turner, 37, Milwaukee, Wis.

Judy Turner, 33, LaCrosse, Wis.

Daniel Turner, 36, presently incarcerated at Kent County Jail awaiting sentencing as a co-defendant under the same docket number.

Spouse: Alisha Persons Turner, 28, 4270 Langley Court S.E., Grand Rapids, MI, 455-2094.

Children: Amanda Turner, 8, of above address.

Angela Turner, 6, of above address.

Laura Turner, 3, of above address.

Luke Turner, 6 months, of above address.

Stephen reports that his home life was rough at times as he was growing up due to the fact that his mother had suffered serious injuries in two automobile accidents in 1971 and 1973 which left her with some head injuries and resultant problems. As a result she was frail and the children were expected to maintain the household chores. He recalls that his mother was a perfectionist and this was not an easy task. As a result he feels his two brothers rebelled against their parents and both joined the Navy to get away from home. He does recall that his brother, Dan, also had some gender identity issues which became obvious to the family and caused some problems in the home. Stephen, on the other hand, experienced a religious rebirth when he was in high school, and as a result, he feels he was not as bitter towards his parents but was able to deal more with the home situation then were his brothers.

After graduating from high school in 1981 he came to Grand Rapids to attend Grace Bible College and has lived in the Grand Rapids area since. He met his wife while a student at the Bible College and married her in 1985. Their marriage remains intact and four children have been born to the marriage.

Michigan Department of Corrections

BASIC INFORMATION REPORT

4835-6101
CFJ-101 4/91

MDOC No.	Court Name (Last, First, Middle)
0	TURNER, Stephen Dennis

Alias or Maiden Name	Given Name
"Steph"	Same

Place of Birth	Citizenship	DOB
Milwaukee, Wis	USA	12-20-62

Last Known Address & Telephone No.
4270 Langley Ct., S.E.
Grand Rapids, MI 49508
616-455-2094

STATE & DLN	SSN	SID No.
T 656 777 139 964	399 76 6155	1705505T

FBI No.	Race	Sex	Hair	Eyes
634282TA0	W	M	Red	Brn

Height	Weight	Highest Grade Completed	Occupation	Health Ins.	Assets of $1,500 & Up	Monthly Income of $75 & Up
5'10½	155	3 yrs college	shipping/Rec'g	___Y_x_N	___Y_x_N	___Y_x_N

Marital Status	Dependents	Religion	Military Branch	From - To	Discharge Type
Married	4	Protestant	NA		

Marks, Scars, Amputations, Tattoos	Drug Abuse	Alcohol Abuse	Known Homosexual	Mental Health Treatment
None	___Y_X_N	___Y_X_N	___Y_X_N	___Y_X_N

CRIMINAL HISTORY

JUVENILE			ADULT			
Comm.	Prob.	Esc.	Jail	Pris.	Prob.	Esc.
0	0	0	0	0	0	0

CSC Convictions	Age of First Arrest	SAI Eligible
0	30	___Y_x_N

Pending Charges In Court	No. Prior Felony Convictions
___Y_X_N	0

Status at Time of Offense

- _x_ None
- ___ HYTA
- ___ Probation
- ___ District Prob.
- ___ Delayed Sentence
- ___ Parole
- ___ Jail
- ___ State Prisoner
- ___ On Bond

CURRENT OFFENSE DATA

No. 1 Docket No: 93-63014-FCB

No. 2 Docket No:

PACC Code	Offense
750.520C1A 750.520B1A	CSC 2nd degree Aid & Abetting CSC 1st

Max.	Circuit	Judge
15, life	17	Dennis Kolenda

PACC Code	Offense

Max.	Circuit	Judge

Codefendant(s): Daniel Arthur Turner

Codefendant(s):

Date of Offense	Victim(s) Relationship
7-7-93	Lakeysha Cage, none

Date of Arrest
7-7-93

Date of Offense	Victim(s) Relationship

Date of Arrest

Date of Bond	Attorney	
NA	Tonya Krause	_x_App'd ___Retain

Date of Conviction	Method of Disp.	
12-13-93	___Plea_x_Jury___HYTA ___Bench___Sec.7411___Nolo Cont.	

Jail Credit	Guilty But Mentally Ill	
fr 7-7-93	___Y_x_N	

Date of Bond	Attorney	
		___App'd ___Retain

Date of Conviction	Method of Disp.	
	___Plea___Jury HYTA ___Bench___Sec.7411___Nolo Cont.	

Jail Credit	Guilty But Mentally Ill	
	___Y___N	

Type of Report	County	Agent & Caseload No.
_x_PSI___PSI Up date 1-4-94 ___HYTA/Delay Update	Kent 41	C. A. Brown 330

Recommended Disposition	Prob. Viol. - New Sentence	Prob. Viol. - Technical
4	___Y___xN	___Y___x_N

SENTENCING GUIDELINE RANGE Low 60 High 120 ☐ Not Applicable

DISPOSITION

Sentence Type	Date	CTN	Min. Yrs.	Min. Mos.	Min. Days	Max. Yrs.	Max. Mos.	Max. Days	Fine	Cost	Rest.	Jail Mos.	Jail Days
Prison Ct1 Prison Ct2	2-2-94	41 93 157194 02	10 15			15 30	Concurr.						

Sentencing Information Report

Judge: Dennis C. Kolenda Probation Officer: Carol L Jwn Circuit #: 17th.

Offender Name: Stephen Turner Docket #: 93-63014-FCB Crime Group: CSC

Original Offense Title: CSC 1st.|CSC 2nd. Conviction Offense Title: Aid and Ab. CSC 1.CSC 2

Original Counts: ~~750.520B1A~~ 2 Original Stat Max: Life|terms # Conviction Counts: Two Conviction Stat Max: Life|Terms

Original PACC Charge Code: 750.520B1A Conviction PACC Charge Code: Same

Prior Record Score

PRV 1:____ PRV 2:____ PRV 3:____ PRV 4:____ PRV 5:____ PRV 6:____ PRV 7:____ PRV TOTAL: 0

Prior Record Level (circle one) A [0] B [1-24] C [25-49] D [50+]

Offense Score (specify points for each variable in crime group)		Offense Severity Level (circle one) I	II	III	IV
Assault	OV 1:____ OV 2:____ OV 5:____ OV 6:____ OV 7:____ OV 9:____ OV 13:____ OV 25:____ TOTAL:	0-9	10-24	25-49	50+
Burglary	OV 1:____ OV 2:____ OV 5:____ OV 8:____ OV 9:____ OV 10:____ OV 11:____ OV 13:____ OV 17:____ OV 24:____ OV 25:____ TOTAL:	0	1-10	11-25	26+
Criminal Sexual Conduct	OV 1:____ OV 2:____ OV 5: 15 OV 6:____ OV 7: 15 OV 9:____ OV 12:____ OV 13: 5 OV 25:____ TOTAL: 35	0-9	10-24	25-49	50+
Drug	OV 8:____ OV 9:____ OV 15:____ OV 16:____ OV 25:____ TOTAL:	0	1-10	11-25	26+
Fraud	OV 8:____ OV 9:____ OV 17:____ OV 25:____ TOTAL:	0	1-10	11-25	26+
Homicide	OV 3:____ OV 4:____ OV 6:____ OV 7:____ OV 9:____ OV 13:____ OV 25:____ TOTAL:	0-9	10-24	25-49	50+
Larceny	OV 8:____ OV 9:____ OV 14:____ OV 17:____ OV 25:____ TOTAL:	0	1-10	11-25	26+
Property Destruction	OV 8:____ OV 9:____ OV 17:____ OV 18:____ OV 19:____ OV 25:____ TOTAL:	0	1-10	11-25	26+
Robbery	OV 1:____ OV 2:____ OV 5:____ OV 6:____ OV 7:____ OV 9:____ OV 13:____ OV 17:____ OV 25:____ TOTAL:	0-9	10-24	25-49	50+
Weapons	OV 8:____ OV 9:____ OV 18:____ OV 23:____ OV 25:____ TOTAL:	0	1-10	11-25	26+

Guideline Sentence Range: 60 to 120 mo.

Habitual Offender Information : Provide the following if convicted as an Habitual Offender

1st Subsequent Conviction: [ ] 2nd Subsequent Conviction: [ ] 3rd or Greater Subsequent Conviction: [ ] New Stat Max: [ ]

Actual Sentence Length (state in months): Probation:____ Jail:____ Prison: 10 yrs 15 yrs to Max: 15 yrs 30 yrs

Delayed Sentence: [Y] [X] Sentence Agreement: [Y] [X] Prosecutor Recommendation: [Y] [X] Guideline Departure [X] [N] (if yes, attach SIR88-2)

Sentencing Judge: Dennis C Kolenda Date: 2|2|94

REC'D & FILED
FEB 2 - 1994
Kent County Clerk

CCAO SIR88-1 COPY Attach BIR (CFO 101) to this form

Sentencing Information Report Departure Evaluation

Judge: Dennis C. Kolenda Circuit#: 17th.

Offender Name: Stephen Turner Docket #: 93-~~60314 XXXX~~ FCB

6301/4

*Whenever a judge of the circuit court or of the Recorder's Court for the City of Detroit determines that a minimum sentence outside the recommended minimum range should be imposed, the judge may do so. When such a sentence is imposed, the judge must explain on the sentencing information report and on the record the aspects of the case that have persuaded the judge to impose a sentence outside the recommended minimum range. (Administrative Order 1988-4, 430 Mich xxxi (1988))

The following aspects of this case led me to impose a sentence outside the recommended range:

Defendant was convicted of aiding and abetting his brother in the commission of an egregious CSC-1st. The brother's Guidelines were 180-360. This defendant's Guidelines were 60-120. To have sentenced within those Guidelines would have resulted in the very kind of inexplicable disparity the Guidelines are designed to avoid. The brother got 30-50 years. A sentence of 15-30 years for this defendant seemed more in keeping with the requirement of propportionaility than a 10-? sentence authporized by the Guidelines.

REC'D & FILED
MAR 9 – 1994
Kent County Clerk

Sentencing Judge: Dennis Kolenda Date: 2|2|94

SCAO SIR88 2

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

STEPHEN DENNIS TURNER

Defendant-Appellant.
_____/

Court of Appeals No. 173814 & 172928

Lower Court No. 93-63014-FCB

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

K. Terrell, being first duly sworn, deposes and says that on December 27, 1995, she filed with this Court the following:

BRIEF ON APPEAL
*******ORAL ARGUMENT REQUESTED*******
PROOF OF SERVICE

and she mailed one (1) copy of same to:

KENT COUNTY PROSECUTOR
Hall of Justice
333 Monroe Avenue, N.W.
Grand Rapids, MI 49503

K. Terrell
K. Terrell

Subscribed and sworn to before me
December 27, 1995.

Joan M. Dawley

Notary Public, Wayne County, Michigan
My commission expires: 11-1-98
IDEN NO. 11440T
Charles J. Booker

STATE APPELLATE DEFENDER OFFICE

SUITE 3300 PENOBSCOT • 645 GRISWOLD • DETROIT, MICHIGAN 48226 • 313/256-9833 • FAX 313/965-0372

CLIENT CALLS 313/256-9822

JAMES R. NEUHARD
DIRECTOR

NORRIS J. THOMAS, JR.
CHIEF DEPUTY DIRECTOR

DAWN VAN HOEK
LEGAL RESOURCES DIRECTOR

F. MARTIN TIEBER
DEPUTY DIRECTOR, LANSING

SHEILA N. ROBERTSON
SPECIAL UNIT DIRECTOR

LANSING OFFICE
340 BUSINESS AND TRADE CENTER
200 WASHINGTON SQUARE, NORTH
LANSING, MICHIGAN 48913
517/334-6069 • FAX 517/334-6987

December 27, 1995

Mr. Stephen Dennis Turner
No. 235530
Carson City Regional Facility
10522 Boyer Road
P. O. Box 5000
Carson City, MI 48811-5000

Dear Mr. Turner:

Enclosed for your information is a copy of the Brief on Appeal which I have filed in your case. The next step is for the prosecutor to file a brief in response. That usually takes from 2 to 6 months. Then the Court of Appeals will schedule oral arguments. That usually takes from 6 to 12 months more. Finally, after oral arguments the Court will make a decision. However, this does not happen immediately after orals, but usually takes 2 to 6 months. I know that all this sounds exceedingly slow. Unfortunately this is what happens in most cases.

If I have left out any of the potential issues we discussed, it is because I decided that the issues had very little or no merit. This frequently happens after I have had a chance to review the facts and law relevant to each potential issue. The final Brief represents the combination of written arguments which I believe are most likely to persuade an appellate court that you should be granted some relief. Having specialized in criminal appellate practice since 1980, I feel that such tactical decisions will provide you the best chance to win something on appeal. Keep in mind, however, that only about 10-15% of all cases will result in some form of relief. You have a right to file one supplemental brief in pro per raising any issues I have omitted. This office will supply the clerical assistance necessary for said filing.

As I have told you before, if we are successful on this appeal, it will be important that you have a good record while with the Department of Corrections. Your record will be considered by the prosecutor and the judge if you return to the trial court. Please keep me informed of any major misconducts that are charged against you.

I'll keep you informed as to all developments as soon as I learn of them. If you have any questions, do not hesitate to write.

Sincerely,

Charles J. Booker
Assistant Defender

kt
Enclosure

cc: File

STATE APPELLATE DEFENDER OFFICE

SUITE 3300 PENOBSCOT • 645 GRISWOLD • DETROIT, MICHIGAN 48226 • 313/256-9833 • FAX 313/965-0372

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200 WASHINGTON SQUARE, NORTH
LANSING, MICHIGAN 48913
517/334-6069 • FAX 517/334-6987

December 27, 1995

Clerk
Court of Appeals
350 Ottawa N.W.
Grand Rapids, MI 49503

Re: **People v Stephen Dennis Turner**
Court of Appeals No. 173814 & 172928
Lower Court No. 93-63014-FCB

Dear Clerk:

Enclosed for filing are the original and four (4) copies of the Notice of Hearing, Motion for Permission to File Brief in Excess of 50 Pages, and Proof of Service.

Thank you for your cooperation.

Sincerely,

Charles J. Booker
Assistant Defender

kt
Enclosures

cc: Kent County Prosecutor
Mr. Stephen Dennis Turner
File

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

STEPHEN DENNIS TURNER

Defendant-Appellant.
_____/

Court of Appeals No. 173814 & 172928

Lower Court No. 93-63014-FCB

KENT COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

CHARLES J. BOOKER (P31885)
Attorney for Defendant-Appellant

NOTICE OF HEARING

MOTION FOR PERMISSION TO FILE BRIEF IN EXCESS OF 50 PAGES

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

BY: CHARLES J. BOOKER (P31885)
Assistant Defender
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

STEPHEN DENNIS TURNER

Defendant-Appellant.
_____/

Court of Appeals No. 173814 & 172928

Lower Court No. 93-63014-FCB

NOTICE OF HEARING

TO:

KENT COUNTY PROSECUTOR
Hall of Justice
333 Monroe Avenue, N.W.
Grand Rapids, MI 49503

PLEASE TAKE NOTICE that on **January 9, 1996**, the undersigned will move this Honorable Court to grant the within **MOTION FOR PERMISSION TO FILE BRIEF IN EXCESS OF 50 PAGES.**

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: Charles J. Booker
CHARLES J. BOOKER (P31885)
Assistant Defender
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Date: December 27, 1995

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

STEPHEN DENNIS TURNER

Defendant-Appellant.
_____/

Court of Appeals No. 173814 & 172928

Lower Court No. 93-63014-FCB

MOTION FOR PERMISSION TO FILE BRIEF IN EXCESS OF 50 PAGES

Defendant-Appellant **STEPHEN DENNIS TURNER**, through his attorneys, the **STATE APPELLATE DEFENDER OFFICE**, by his counsel **CHARLES J. BOOKER**, respectfully moves this Honorable Court to:

1. On December 13, 1993, Mr. Turner was convicted of aiding and abetting/first degree criminal sexual conduct (CSCI) and 1 count of second degree criminal sexual conduct before the Honorable Dennis C. Kolenda in the Kent County Circuit Court.

2. On February 2, 1995, Mr. Turner was sentenced to 15 to 30 and 10 to 15 years imprisonment.

3. On March 23, 1994, the State Appellate Defender Office was appointed to pursue post conviction remedies.

4. The transcript in the instant case exceeds 900 pages. Moreover, Mr. Turner's case is complex because he was convicted of CSCI based upon proofs which establish, at most, accessory after the fact.

5. The Brief on Appeal which Defendant seeks to file is 64

pages long and raises nine highly substantial issues. Every effort has been made to reduce the size of the brief.

6. Effective appellate advocacy requires that counsel provide a detailed explanation of the facts and law pertaining to Defendant's case. Indeed, if counsel failed to adequately present a claim on appeal it could be argued that the issue had been abandoned. Ward v Frank's Nursery, 186 Mich App 120, 129-130; 463 NW2d 442 (1990).

WHEREFORE, for the reasons stated above, Defendant-Appellant respectfully requests that this Honorable Court accept his Brief on Appeal in excess of 50 pages.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: Charles J. Booker

CHARLES J. BOOKER (P31885)
Assistant Defender
3300 Penobscot Building
Detroit, Michigan 48226
(313) 256-9833

Date: December 27, 1995

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

STEPHEN DENNIS TURNER

Defendant-Appellant.
_____/

Court of Appeals No. 173814 & 172928

Lower Court No. 93-63014-FCB

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

K. Terrell, being first sworn, says that on December 27, 1995, she filed with this Court the following:

NOTICE OF HEARING
MOTION FOR PERMISSION TO FILE BRIEF IN EXCESS OF 50 PAGES
PROOF OF SERVICE

and she mailed one copy of same to:

KENT COUNTY PROSECUTOR
Hall of Justice
333 Monroe Avenue, N.W.
Grand Rapids, MI 49503

K. Terrell
K. Terrell

Subscribed and sworn to before me
December 27, 1995.

Jan M. Dewey
Notary Public, Wayne County, Michigan
My commission expires: 11-1-98
IDEN NO. 11440T
Charles J. Booker