NO._____

IN THE SUPREME COURT OF THE UNITED STATES

ALLANAH BENTON,

Petitioner,

v.

SHAWN BREWER, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME I

Allanah T. Benton #754842
In Propria Persona
Womens Huron Valley Correctional Facility
3201 Bemis Rd.
Ypsilanti, Michigan 48197
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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0273p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALLANAH T. BENTON,

Petitioner-Appellant,

v.

SHAWN BREWER, Warden,

Respondent-Appellee.

No. 18-1869

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:16-cv-13648—Denise Page Hood, Chief District Judge.

Argued: October 22, 2019

Decided and Filed: November 6, 2019

Before: CLAY, THAPAR, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Anna R. Rapa, Mears, Michigan, for Appellant. Jared D. Schultz, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Jared D. Schultz, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. Allanah Benton, Ypsilanti, Michigan, pro se.

OPINION

THAPAR, Circuit Judge. Allanah Benton alleges that her defense attorney's bad advice made her pass up a favorable plea deal. But she did not timely raise her claim and has not offered a good excuse for not raising it. Thus, she cannot obtain federal habeas relief. We affirm.

APPENDIX A

I.

Benton is a former schoolteacher who was indicted for having sex with a twelve-year-old student. She went to trial and testified that she was innocent. But a Michigan jury disbelieved her and found her guilty. The judge sentenced her to twenty-five to thirty-eight years' imprisonment. Benton then traded in her two trial lawyers for new appellate counsel, who raised several constitutional and evidentiary arguments. But her conviction was affirmed.

Six months later, the Supreme Court handed down its decision in *Lafler v. Cooper*, 566 U.S. 156 (2012). There, the Court held that defendants could make out a claim of ineffective assistance of counsel by proving that their lawyer's incompetence caused them to reject a favorable plea offer. *Id.* at 174. Benton returned to the trial court with a motion for postconviction relief, alleging that had happened to her. She filed an affidavit stating that on the first morning of her trial, her attorney Michael Cronkright told her she had twenty minutes to decide whether to accept a brand-new plea offer. The deal was good: a year in jail for a guilty plea to a lesser charge. Yet Benton was concerned: if she took the deal, would she lose custody of her infant children? According to Benton, Cronkright told her that she would. So she turned the deal down. But, Benton claimed, she would have accepted the plea had Cronkright conveyed that the termination of her parental rights would not be automatic—that is, that the state would have to begin termination proceedings and that a judge might rule in her favor.

Did all this happen? Unclear. Benton and Cronkright's pretrial conversation was off the record. Only one snippet of the record, a transcript from a pretrial hearing two days earlier, alludes to any discussion of a plea deal. And that transcript reveals precious little about where plea talks stood at the time.

But Benton faced a hurdle independent of the evidence. To get relief on her belated claim, Michigan procedural law required Benton to show not only that the claim had merit but also (1) that she had good cause for failing to raise it on direct appeal and (2) that she was actually prejudiced by Cronkright's alleged ineffectiveness. Mich. Ct. R. 6.508(D)(3)(a)–(b). To show cause, Benton's appellate counsel, who was still representing her in the postconviction proceedings, offered to stipulate to his own ineffectiveness on direct appeal.

The trial court ruled that Benton failed to meet her procedural burden. It also rejected her claim on the merits. In short, the trial court was not convinced either that Benton received a definite plea offer or that she would have accepted the plea (given her protestations of innocence). Michigan's higher courts declined to review the ruling.

So Benton, now proceeding pro se, filed a federal habeas petition. The district court rejected her claim on the merits, largely tracking the state trial court's reasoning. This court then granted a certificate of appealability.

II.

Benton's ineffective-assistance claim stumbles over what lawyers call "procedural default," an arcane-sounding term for a simple idea. While state courts (just like federal ones) must protect defendants' rights, they also may insist that defendants present their arguments on time and according to established procedures. So a federal court usually may not review a state prisoner's habeas claim if (1) the prisoner broke a state procedural rule, (2) the state court enforced the rule, and (3) the procedural forfeiture was an adequate and independent ground for denying relief. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). Comity and federalism demand nothing less. Still, a federal court may review a defaulted claim if the petitioner shows (1) good cause for the default and actual prejudice from the claimed error or (2) that she is actually innocent of the crime. *See Sawyer v. Whitley*, 505 U.S. 333, 338–39 (1992).

Benton does not dispute her procedural default. And for good reason. She didn't raise her claim on direct appeal as Michigan law requires. *See* Mich. Ct. R. 6.508(D)(3); *see also generally* Mich. Ct. R. 7.212. The state trial court relied on that rule in denying her postconviction motion. And the rule is an adequate and independent state ground. *See, e.g.*, *Dufresne v. Palmer*, 876 F.3d 248, 255 (6th Cir. 2017) (per curiam); *Amos v. Renico*, 683 F.3d 720, 733 (6th Cir. 2012); *Ivory v. Jackson*, 509 F.3d 284, 292–93 (6th Cir. 2007).

Instead, Benton aims to excuse her default. She does not argue that she is actually innocent, but only attempts to show cause and prejudice. But that argument fails at the first step—cause. Benton offers two reasons for not raising her claim on appeal: (1) *Lafler* was not yet decided and (2) her appellate counsel was ineffective. Neither holds up.

Novelty. Sometimes the novelty of a claim is good cause for not raising it sooner. *Reed v. Ross*, 468 U.S. 1, 16 (1984). But not often and not here. For novelty to amount to cause, the bar is a high one—the claim must have been "so novel that its legal basis [was] not reasonably available" at the time of default. *Id.*

Lafler was far from such a sea change. Long before *Lafler*, this circuit lent an ear to defendants who claimed that their counsel's deficient advice caused them to reject favorable plea deals. *See, e.g.*, *Magana v. Hofbauer*, 263 F.3d 542, 547 (6th Cir. 2001). Indeed, *Lafler* came to the Court on certiorari from a 2010 decision of this court granting relief on that very ground. *See Cooper v. Lafler*, 376 F. App'x 563 (6th Cir. 2010). So just because *Lafler* was decided in 2012, that doesn't mean Benton (or, more accurately, her lawyer) "lacked the tools to construct" her claim in her 2011 appeal. *Engle v. Isaac*, 456 U.S. 107, 133 (1982). Quite the contrary.

Appellate counsel's ineffectiveness.[1] Another way to show cause for a default is to show that appellate counsel's failure to raise the issue was ineffective assistance in its own right. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). But the petitioner has the burden to prove ineffective assistance. *See Harrington v. Richter*, 562 U.S. 86, 104 (2011). And Benton cannot satisfy her burden with nothing—which is what the evidence of her appellate counsel's ineffectiveness amounts to.

That evidence consists solely of her appellate counsel's offer to stipulate to his own ineffectiveness. But that offer contained no concrete facts about counsel's alleged ineffectiveness or (for that matter) about *any* aspect of his performance in Benton's appeal. And in evidentiary terms, a threadbare "stipulation" by a nonparty counts for nothing at all. When one party has the burden of proving an issue, *the opposing party* can concede that issue and lift the first party's burden. But no one else can do so *in lieu of* the opposing party. Including the person whose conduct the issue is about.

[1]Benton did not raise this argument for cause in her federal habeas petition—there, she relied only on the fact that *Lafler* came out six months after her direct appeal was decided. But Benton refers to this argument in her briefs, the state does not suggest that she has forfeited it, and considering it does not complicate our task. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

Ineffective-assistance claims are no exception. *See, e.g.*, *Ebert v. Gaetz*, 610 F.3d 404, 415 (7th Cir. 2010) (state court properly ignored counsel's "assessment of his own performance as constitutionally ineffective"); *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir. 1992) (attempts to "admit ineffectiveness" carry "no substantial weight"). So here, appellate counsel's attempt to establish his own ineffectiveness with a bare stipulation is meaningless.

It makes no difference that the state court ruled that *Lafler*'s novelty and counsel's stipulation established cause. The cause-and-prejudice standard is a federal rule dictating when federal courts will overlook a procedural default. *See Murray*, 477 U.S. at 489. As it happens, Michigan has adopted the same or nearly the same standard for when *its* courts will excuse a procedural default. Mich. Ct. R. 6.508(D)(3)(a)–(b); *see also People v. Jackson*, 633 N.W.2d 825, 830 (Mich. 2001) (per curiam). But crafting its rule that way was Michigan's choice and the state rule remains just that: a *state* rule. Benton's claim is now in *federal* court, and the existence of cause is "a question of federal law" that we must answer for ourselves under the federal standard. *Murray*, 477 U.S. at 489.

Under that standard, Benton lacks cause to excuse her procedural default. Without cause, we need not consider whether Benton has shown prejudice. We affirm.

APPENDIX B

No. 18-1869

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLANAH T. BENTON,

Petitioner-Appellant,

v.

SHAWN BREWER, Warden,

Respondent-Appellee.

ORDER

Allanah T. Benton, a Michigan state prisoner, moves for the appointment of counsel in this appeal from the district court's denial of her petition for a writ of habeas corpus under 28 U.S.C. § 2254. A certificate of appealability was granted on one claim raised in the petition, and briefs have been filed. Both parties have requested oral argument. Upon consideration of the record and the briefs, the motion to appoint counsel for purposes of oral argument is **GRANTED**. *See* 18 U.S.C. § 3006A.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C

No. 18-1869

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLANAH T. BENTON,

Petitioner-Appellant,

v.

SHAWN BREWER, Warden,

Respondent-Appellee.

ORDER

Allanah T. Benton, a Michigan state prisoner, moves pro se for a certificate of appealability to appeal a district court judgment denying her petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

In 2010, Benton was sentenced to twenty-five to thirty-eight years of imprisonment after a jury convicted her of two counts of first-degree criminal sexual conduct against a sixth-grade student. She unsuccessfully pursued a direct appeal and post-conviction relief in the state courts. In this petition for federal habeas corpus relief, four claims were presented: 1) the trial court erroneously denied admission of evidence that the victim had two prior sexual partners of his own age group; 2) the trial court erroneously allowed evidence that Benton was terminated from her teaching position after a tenure hearing; 3) her twenty-five-year mandatory minimum sentence violates the Eighth Amendment; and 4) her counsel was ineffective in advising her that if she accepted a one-year plea deal her parental rights to her toddler twins would be terminated. The district court denied the petition on the merits.

In order to be entitled to a certificate of appealability, Benton must demonstrate that reasonable jurists would find the district court's assessment of her claims debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). Claims decided on the merits by the state courts must

be shown to be contrary to or an unreasonable application of Supreme Court law or based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

Reasonable jurists could not debate the district court's assessment of Benton's first three claims. The state appellate court's determination that evidence of the victim's prior sexual experiences was irrelevant is not contrary to established federal law. *See Rockwell v. Yukins*, 341 F.3d 507, 511-12 (6th Cir. 2003). Rape of a twelve-year-old still constitutes first-degree criminal sexual conduct even if the victim had prior sexual experiences. The state appellate court's determination that evidence of a tenure hearing was properly admitted is also not contrary to clearly established federal law. *See Blackmon v. Booker*, 696 F.3d 536, 551 (6th Cir. 2012). The state appellate court held that the evidence was admitted to further explain Benton's testimony that she was fired based on the victim's allegations, which implied that she had been treated unfairly, when in fact she had an opportunity to challenge the termination at a tenure hearing. Reasonable jurists could not dispute the district court's rejection of Benton's third claim, that her mandatory minimum sentence violates the Eighth Amendment. *See United States v. Blewett*, 746 F.3d 647, 660 (6th Cir. 2013).

However, reasonable jurists could debate the district court's assessment of Benton's final claim based on *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). The trial court's rejection of this claim seems to have been based on an unreasonable determination of the facts. The district court agreed with the trial court's finding that there was no evidence of a plea offer. The district court cited *Guerrero v. United States*, 383 F.3d 409, 419 (6th Cir. 2004), but in that case the district court had conducted an evidentiary hearing before rejecting the claim. Here, the trial court found, without conducting an evidentiary hearing, that there was a contradiction between Benton's affidavit, which stated that the conversation about the plea offer occurred on the morning of the first day of trial, and a supporting affidavit from a friend, which characterized the conversation as occurring "on the eve of trial." The friend may have meant by that phrase merely that it was right before the trial. The trial court also expressed skepticism that Benton would have entered a guilty plea when she had consistently expressed her innocence, but we

rejected that line of thinking in *Guerrero*, 383 F.3d at 419. The disparity between the alleged one-year offer and the mandatory minimum of twenty-five years at least warranted an evidentiary hearing to determine whether Benton would have accepted such a plea but for counsel's erroneous advice. *See Huff v. United States*, 734 F.3d 600, 607 (6th Cir. 2013); *Smith v. United States*, 348 F.3d 545, 553-54 (6th Cir. 2003); *Griffin v. United States*, 330 F.3d 733, 738 (6th Cir. 2003). The trial court also expressed skepticism that Benton would have elected to take her chances on an acquittal at trial in the face of the twenty-five year mandatory minimum on the ground that a guilty plea would mean the termination of her parental rights. The court failed to explain how it concluded that Benton might not have weighed that choice differently.

For the above reasons, the motion for a certificate of appealability is **DENIED** in part, but is **GRANTED** as to Benton's claim that her counsel was ineffective in advising her that her parental rights would be terminated if she accepted a plea offer. A briefing schedule, limited to that claim, shall issue.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALLANAH TUMURA BENTON,

Petitioner,

v.

Civil No. 2:16-CV-13648
HONORABLE DENISE PAGE HOOD
CHIEF UNITED STATES DISTRICT JUDGE

SHAWN BREWER,

Respondent.
_____/

JUDGMENT

The above entitled came before the Court on a Petition for a Writ of Habeas Corpus. In accordance with the Memorandum Opinion and Order entered on June 29, 2018:

(1) The Petition for a Writ of Habeas Corpus is DENIED WITH PREJUDICE.

(2) A Certificate of Appealability is DENIED.

(3) Petitioner is GRANTED leave to appeal *In Forma Pauperis.*

Dated at Detroit, Michigan, this 29th , day of June, 2018.

DAVID J. WEAVER
CLERK OF THE COURT

APPROVED:

BY: s/LaShawn Saulsberry
DEPUTY CLERK

s/Denise Page Hood
HONORABLE DENISE PAGE HOOD
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX E

Order

Michigan Supreme Court
Lansing, Michigan

September 27, 2016

Robert P. Young, Jr.,
Chief Justice

153009

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 153009
COA: 329453
Genesee CC: 09-024636-FC

ALLANAH TUMURA BENTON,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the December 21, 2015 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 27, 2016

Clerk

s0919

APPENDIX E

APPENDIX F

Court of Appeals, State of Michigan

ORDER

People of MI v Allanah Tumura Benton

Docket No. 329453

LC No. 09-024636-FC

Michael J. Talbot
Presiding Judge

Kurtis T. Wilder

Michael J. Riordan
Judges

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying her motion for relief from judgment.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 21 2015
Date

Chief Clerk

APPENDIX F

APPENDIX G

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

Case No. 09-24636-FC

Hon. Geoffrey L. Neithercut

ALLANAH TUMURA BENTON,

Defendant.

/

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court held in the Courthouse, in the City of Flint, County of Genesee, Michigan, on Monday, April 13, 2015:

PRESENT: THE HONORABLE GEOFFREY L. NEITHERCUT

Defendant Allanah Tumura Benton has filed with this Court a Motion for Relief from Judgment Pursuant to MCR 6.500, *et seq*. Defendant was charged with three counts of criminal sexual conduct in the first degree.[1] On December 22, 2009, a jury found Defendant guilty of two counts and not guilty of one count. Defendant was sentenced on February 11, 2010, to a term of 25 to 38 years imprisonment on each count, to run concurrently to each other and lifetime electronic monitoring. The Court of Appeals affirmed Defendant's conviction and sentence.[2] Defendant's application for leave to appeal to the Michigan Supreme Court was denied, because the Supreme Court was "not persuaded that the questions presented should be reviewed. . . ."[3]

Defendant filed this motion for relief of judgment alleging she received ineffective assistance of counsel during plea negotiations. Defendant alleges she receives erroneous advice from trial counsel that her parental rights over her infant twins would be terminated if she accepted the prosecution's plea offer to plead to "a lesser charge, and do

[1] MCL 750.520b(2)(b).
[2] People v Benton, 294 Mich App 191 (2011)
[3] People v Benton, 491 Mich 917 (2012).

a year in the county, . . . and lifetime monitoring." In her Affidavit, Defendant states she asked Attorney Cronkright whether "the State would take [her] children from [her]" and "Attorney Cronkright responded that the State would end [her] parental rights." Defendant attests that had she known she could have contested a parental rights termination, she would have accepted the plea offer.

A review of a conviction under MCR 6.500 is very limited. Relief cannot be granted by this Court where the motion alleges grounds for relief, other than jurisdictional defects, unless defendant demonstrates good cause for failure to raise an issue and actual prejudice resulting from the alleged irregularity.[4]

Defendant's current claims were not presented to the Court of Appeals and the Supreme Court. New claims not previously raised may be considered potentially abusive.[5] However, where the defendant shows good cause and actual prejudice, the court may consider the merits of the claim.[6] The cause requirement focuses on defendant's conduct. The requirement is based on the principle that the defendant must conduct a reasonable investigation aimed at including all relevant claims for review. To establish cause, the defendant must show some external impediment such as a reasonable unavailability of a claim's factual basis.[7]

Defendant alleges there is good cause her argument was not previously raised on appeal, because the case law she relies upon is Lafler v Cooper,[8] which was not issued until after the Court of Appeals affirmed her conviction. Defense counsel also concedes appellate error for failing to explore plea negotiations in sufficient detail previously. This Court finds Defendant established good cause for failing to raise the argument previously.

Defendant alleges actual prejudice, and avers she would have accepted the plea offer had she received effective assistance of counsel regarding collateral consequences of the plea. Defendant further avers the offer would have been more favorable, such as one year in jail or a guideline sentence to a lesser felony, than the prison sentence she actually received.

Where a defendant alleges ineffective assistance of counsel resulting in rejection of a plea offer, the defendant must show: "(1) but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), (2) that the court would have accepted its terms, (3) and that the conviction or sentence, or both, under the offer's terms would have been less severe than the judgment and sentence that in fact were imposed."[9]

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[4] MCR 6.508(D)(3). People v Reed, 449 Mich 375 (1995).
[5] McCleskey v Zant, 499 US 467 (1991).
[6] Sawyer v Whitley, 505 US 333 (1992).
[7] Murray v Carrier, 477 US 478 (1986).
[8] 132 S Ct 1376 (2012).
[9] Lafler, 132 S Ct at 1385.

This Court finds there are several reasons Defendant cannot get past this hurdle. Defendant cannot show ineffective assistance of counsel as to the first and second prongs.

As to the first prong, based on a review of the transcripts and Affidavits, it is not clear there even was a plea offer extended by the prosecutor to Defendant. Defendants have no right to be offered a plea.[10] "If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise."[11] Defendant states in her Affidavit that the first time Attorney Cronkright informed her the prosecution offered she could plea was the morning on the first day of trial and the plea would be "to a lesser charge, and do a year in the county . . . and lifetime monitoring." Defendant's friend, Carolyn Gist, attested she attended a meeting between Attorney Cronkright and Defendant on the eve of trial, where she heard Attorney Conkright convey a plea offer to Defendant to plead to "a lesser CSC felony and receive a jail term." While Defendant's Affidavit and Gist's Affidavit demonstrate an inconsistency as to when this alleged conversation occurred, there is further inconsistency between Defendant's Affidavit and the record transcript. There was a pre-trial hearing held before this Court on November 30, 2009, where Defendant was not present in court. This Court asked Assistant Prosecuting Attorney Richardson what the best offer was, and APA Richardson replied "there's an unofficial offer out there that is being considered . . . It is not official until we know there is definite consideration."[12] Attorney Freeman responded that he discussed it with Defendant that very morning and Defendant had one concern which he addressed with Attorney Richardson.[13] Attorney Richardson stated "the People will keep that . . . potential offer open until tomorrow afternoon."[14] Defendant's jury trial began on December 2, 2009, with no further mention on the record about any offer or potential offer.

Defendant cannot meet her burden to show an offer was formally made, as there are only general talks of an "unofficial offer," a "potential offer," and there are no definite terms of an offer alleged. Defendant merely mentions "a lesser charge," "a year in the county," and "lifetime monitoring." APA Richardson never stated terms of an offer on the record and conveyed there was no official offer. Because there was no official offer, Defendant cannot show but for the ineffective assistance of counsel, there is a reasonable probability that the plea offer would have been presented to the court.[15]

Because Defendant cannot show the first prong, she also cannot show the court would have accepted the terms of the offer, as there is no record or statement in the Affidavit as to what the terms of the alleged offer were.

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[10] See Id. at 1387.
[11] Id.
[12] Pretrial Hearing Transcript, p.3 (Nov. 30, 2009).
[13] Id. at p. 3-4.
[14] Id. at p. 10.
[15] See People v Williams, 171 Mich App 234, 242 (1988) (finding defendant received a conditional plea offer subject to the prosecutor's approval, but could not prove the prosecutor with authority to approve the offer would have given such authority).

As to Defendant's claim she would have accepted the plea offer had she received effective assistance counsel, this Court also finds this claim lacks merit based on the record. Defendant was well aware of the twenty-five year minimum mandatory sentence when she made her decision to proceed to trial.[16] In her Affidavit, Defendant states she weighed a one year jail sentence and the notion of having her parental rights terminated against a possible sentence of twenty five years in prison at a minimum, and because she did not want her parental rights terminated, she proceeded to trial. This belies the fact that once sentenced to a term of twenty five years, all her children would be the age of majority once she is released, so there would be no parental rights to terminate.

Defendant maintained her innocence when she testified in trial and subsequently in the sentencing hearing. At her sentencing, Defendant stated, "I didn't commit any of these acts, and I'm innocent, and I maintain my innocence . . . . And I will continue to fight for my innocence."[17] Defendant claims she turned down a plea to a lesser charge with a sentence of one year in jail, because she was informed she would lose parental rights to her children, in lieu of risking a conviction, a minimum mandatory sentence of 25 years imprisonment and lifetime electronic monitoring. These circumstances are similar to the case of People v Douglas,[18] where the Michigan Supreme Court found testimony "cast[ed] significant doubt about what circumstances, if any, would have led the defendant to accept a plea." In the Douglas case, as in this case, the Defendant maintained innocence throughout the proceedings. Additionally, in the People's response to Defendant's Motion, the People raise the fact that Defendant testified under oath she had no sexual contact with the victim in this case, so Defendant would not have been able to establish a factual basis for her plea without perjuring herself.[19]

This Court finds Defendant has not demonstrated actual prejudice. *Arguendo*, even if Defendant's claim of ineffective assistance of counsel for providing her with erroneous advice about a plea could withstand muster, Defendant has not stated and this Court cannot conceive of an appropriate remedy given the facts and circumstances. Lafler addresses two possible remedies: (1) a lesser sentence; or (2) if resentencing alone will not be full redress for the constitutional injury, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal.[20] Because there is a twenty five year minimum mandatory sentence on the charge, this Court could not consider a lesser sentence. If this Court were in a position to require the prosecution to reoffer the original plea proposal, this Court would be in a precarious position, as there is no evidence a formal offer was ever made by the prosecution. Lafler further states once this occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.[21] In making this decision, the court may take into

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[16] See Affidavits of Defendant and Gist.
[17] Sentencing Hearing Transcript, p.24 (Feb. 11, 2010). See also Trial Transcript IX, p. 1768 (Dec. 16, 2009); Trial Transcript X, p. 1838, 1886, 1887, 1908, 1914, 2008, 2047 (Dec. 17, 2009).
[18] 496 Mich 557, 597 (2014).
[19] Either in the plea colloquy or trial.
[20] Lafler, 132 S Ct at 1389.
[21] Id.

account a defendant's previously expressed willingness or unwillingness to accept responsibility for her actions.[22] In this case, Defendant consistently maintained her innocence throughout trial and sentencing, demonstrating an unwillingness to accept any responsibility for her actions. This Court finds Defendant cannot demonstrate ineffective assistance of counsel regarding plea discussions, but even if Defendant could, this Court cannot conceive of an appropriate remedy given the lack of an official plea offer or any specific plea terms. Additionally, this Court notes, even if Defendant were to receive a plea, there is no guarantee the State would not initiate successful parental rights termination proceedings against Defendant.

This Court has reviewed the file and the circumstances in this matter and NOW THEREFORE,

IT IS ORDERED THAT Defendant ALLANAH TUMURA BENTON's motion is DENIED, the Court being convinced that Defendant's motion fails to meet the requirements of MCR 6.508(D)(3)(a) and (b), and furthermore, that it is without merit.

Geoffrey L. Neithercut

Geoffrey L. Neithercut, Circuit Judge

[22] Id.

APPENDIX H

Order

Michigan Supreme Court
Lansing, Michigan

May 11, 2012

Robert P. Young, Jr.,
Chief Justice

144053

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 144053
COA: 296721
Genesee CC: 09-024636-FC

ALLANAH TUMURA BENTON,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the September 22, 2011 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

t0508

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 11, 2012

Corbin R. Davis
Clerk

APPENDIX H

APPENDIX I

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLANAH TUMURA BENTON,

Defendant-Appellant.

FOR PUBLICATION
September 22, 2011
9:00 a.m.

No. 296721
Genesee Circuit Court
LC No. 09-024636-FC

Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

MARKEY, J.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(a)(1), for which she was sentenced to concurrent prison terms of 25 to 38 years. She appeals by right. We affirm.

Defendant, a former elementary school teacher, was convicted of engaging in sexual intercourse with a 12-year-old former student from her sixth grade class. The victim had academic and behavioral problems and was suspended from school for fighting with another student at the beginning of the 2007-2008 school year. Defendant intervened on the victim's behalf and persuaded the school principal not to expel the victim from school. After the victim returned to school, defendant invited him to religious activities at her Masjid (mosque) and to her home, purportedly to offer him guidance and help him with his anger and academic problems. The victim was subsequently expelled from school after a second fighting incident. After his expulsion, he spent more time with defendant at her home, with his mother's permission.

According to the victim, he and defendant progressed from hugging, to hand-holding, and to kissing, before eventually engaging in sexual intercourse. The victim testified that he and defendant had sexual intercourse on two different evenings in October 2007. After the second incident, the victim called defendant from his home and inadvertently recorded the call. During the recorded call, the victim referred to defendant as his girlfriend, and stated that he was proud to be involved with a grown woman. The victim's mother heard the recording and reported it to the school. The school board later terminated defendant from her teaching position and that decision was upheld by the tenure commission.

I. RAPE-SHIELD STATUTE

Defendant argues that the trial court erred by denying her request to cross-examine the victim concerning statements he previously made during a forensic interview in which he related prior sexual experiences with a 13-year-old girl and a 14-year-old girl. The trial court ruled that the evidence was barred by the rape-shield statute, MCL 750.520j. Defendant contends that the exclusion of the evidence violated her constitutional right of confrontation.

This Court reviews a trial court's evidentiary ruling for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). An abuse of discretion occurs when the trial court reaches a result that is outside the range of principled outcomes. *Id.* at 588-589. Preliminary issues of law, including the interpretation of the rules of evidence or the effect of constitutional provisions, are reviewed de novo. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). The constitutional question whether defendant was denied her constitutional right to confront the witnesses against her is reviewed de novo. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

At trial, when describing the two acts of intercourse with defendant, the victim testified that defendant placed a condom on his penis and put his penis into her vagina because he did not know how. The trial court denied defendant's request to cross-examine the victim concerning statements he previously made during a forensic interview in which he related prior sexual experiences with a 13-year-old girl and a 14-year-old girl.

Michigan's rape-shield statute, MCL 750.520j, provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
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> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

MRE 404(a) similarly provides, in pertinent part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion except:
>
> * * *
>
> (3) In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

In this case, defendant did not seek to introduce the evidence of the victim's prior sexual experiences for one of the purposes specified in MCL 750.520j(1)(a) or (b). Defendant contends, however, that the evidence was necessary to protect her constitutional right of confrontation.

In certain limited situations, evidence that is not admissible under one of the statutory exceptions may nevertheless be relevant and admissible to preserve a criminal defendant's Sixth Amendment right of confrontation. *People v Hackett*, 421 Mich 338, 344, 348; 365 NW2d 120 (1984). In *Hackett*, 421 Mich at 348-349, our Supreme Court explained:

> The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. [Citations omitted.]

When a trial court exercises its discretion to determine whether evidence of a complainant's sexual conduct not within the statutory exceptions should be admitted, the court "should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *Id.* at 349. When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case. *People v Morse*, 231 Mich App 424, 433; 586 NW2d 555 (1998).

Defendant argues that she should have been permitted to cross-examine the victim concerning his prior sexual experiences because his trial testimony falsely portrayed him as a sexually innocent, inexperienced virgin, thereby appealing to the jury's sympathy for a sexually uninitiated victim. We conclude that the trial court did not err by excluding this evidence. The first flaw in defendant's argument is that the victim never stated, directly or indirectly, that his

sexual contact with defendant was his first sexual experience. Indeed, when the prosecutor asked the victim why he needed defendant's "assistance" with the condom and with penetration the second time, the victim stated, "Cause *every time* I did . . . the *girl* put my penis in her vagina for me." We disagree with defendant's contention that this statement could only be understood as referring to the victim's first sexual encounter with defendant. The phrase "every time" refers to more than one occasion, not a single prior incident. Further, the victim's reference to "the girl" suggested someone other than defendant, considering that defendant was a grown woman and that the victim referred to defendant as "Miss Allanah" throughout his testimony. Accordingly, defendant failed to show that the proffered evidence was necessary to impeach the victim's trial testimony.

Furthermore, the evidence was not otherwise relevant. "Evidence is relevant when it has a tendency to make a material fact more or less probable." *People v McGhee*, 268 Mich App 600, 610; 709 NW2d 595 (2005). "Relevance involves two elements, materiality and probative value. Materiality refers to whether the fact was truly at issue." *Id.* The premise of defendant's argument is that a jury would view sexual relations with a 12-year-old virgin as being more egregious than sexual relations with a 12-year-old victim who has already had sexual relations, so it was necessary to place the victim's prior sexual experiences before the jury to defuse the prejudicial inference that defendant was the victim's first sexual partner. But, the victim's sexual experience or history was not legally relevant to any issue in the case. Sexual penetration with a person under 13 years of age constitutes first-degree criminal sexual conduct, MCL 750.520b(1)(a), irrespective of the victim's consent or experience.

Accordingly, the trial court did not abuse its discretion by excluding the proffered evidence.

II. TENURE COMMISSION EVIDENCE

Defendant next argues that the trial court erred when it permitted the prosecutor to cross-examine her concerning the results of her teacher tenure proceeding. We review this evidentiary issue for an abuse of discretion. *Dobek*, 274 Mich App at 93. Evidentiary error does not require reversal unless after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence. MCL 769.26; *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001).

Generally, all relevant evidence is admissible and irrelevant evidence is not. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, MRE 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Defendant argues that the prosecutor's question regarding the tenure hearing was unfairly prejudicial because it suggested that there had already been a judicial finding of her guilt. She argues that the outcome of the tenure hearing was not relevant because it involved different allegations, such as improper communications

with a student, and was decided by a different standard of proof. Plaintiff argues that the question was not improper because defendant opened the door by testifying about the tenure hearing on direct examination.

The record discloses that on direct examination defendant testified that the victim's mother brought the recording of the telephone call between the victim and defendant to defendant's school for school authorities to listen to, but that no one associated with the school or the school board ever gave defendant the opportunity to listen to the recording. According to defendant, she heard the recording for the first time in April 2009, when her attorney for the tenure proceeding allowed her to listen to it. Defendant also testified on direct examination that the school district terminated her employment "[a]s a result of the allegations." On cross-examination, the prosecutor questioned defendant as follows:

> *Q.* Ms. Benton, you—you have lost your job, that's true, isn't it?
>
> *A.* Correct.
>
> *Q.* They had a tenure hearing about that, didn't they?
>
> *A.* Yes.
>
> *Q.* So, you had a hearing before you lost your job, didn't you?
>
> *A.* Yes.
>
> *Q.* Wasn't just the allegation. There was actually some process--
>
> * * *
>
> *A.* Correct.

Defendant's direct examination testimony suggested that the school board had treated her unfairly by denying her the opportunity to hear the recording and explain her statements until the tenure commission hearing. Defendant's direct examination testimony opened the door to the prosecutor to further question defendant on this subject. The prosecutor's questioning did not expand on the matters raised in direct examination except to elicit defendant's acknowledgement that she was not terminated merely because of "allegations," but rather was afforded a hearing before she lost her job. Accordingly, the trial court did not abuse its discretion in allowing cross-examination on this subject.

To the extent that the prosecutor's last question improperly suggested that there had already been an "official" determination of defendant's guilt, we conclude any error arising from the question was harmless. The jury had already learned from defendant's direct examination testimony that the school board had terminated defendant's employment following a tenure commission hearing. The potential prejudice arose not from defendant's answer to the question, but rather from the prosecutor's wording of the question. Nonetheless, the jurors were instructed that the attorney's questions and statements were not evidence, and jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 286; 581 NW2d 229 (1998);

Dobek, 274 Mich App at 66 n 3 (potential prejudice from prosecutor's statement cured by instruction that statements and arguments by counsel are not evidence.) Accordingly, it is not more probable than not that any error affected the outcome. *Whittaker*, 465 Mich at 426-427.

Defendant also argues that the question regarding the outcome of the hearing was improper hearsay, and that it violated the Confrontation Clause. Defendant did not object below to the prosecutor's questioning on hearsay or Confrontation Clause grounds, so these claims are not preserved. Unpreserved claims of evidentiary error are reviewed for plain error affecting defendant's substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Defendant's hearsay and Confrontation Clause arguments are based on her attempt to equate the testimony revealing the outcome of the tenure hearing as involving the out-of-court statement of the administrative law judge (ALJ) who presided at that hearing; however, no statement by the ALJ was introduced at trial. Rather, defendant merely offered her own knowledge of the outcome of that proceeding. Accordingly, defendant has not established a plain error based on hearsay grounds or the Confrontation Clause.

Defendant lastly argues that to the extent defense counsel opened the door to this line of questioning, counsel was ineffective. Pertinent here, to establish ineffective assistance of counsel, defendant must establish (1) that her attorney's performance was objectively unreasonable in the light of prevailing professional norms, and (2) that but for counsel's error, a different outcome reasonably would have resulted. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defense counsel's direct examination questioning was intended to show that defendant was treated unfairly by the school board, which did not give her the opportunity to explain her statements on the recording. This line of questioning was a matter of strategy, and this Court will not second-guess defense counsel's judgment on matters of trial strategy. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

III. MANDATORY 25-YEAR MINIMUM SENTENCE

Defendant lastly argues that her mandatory 25-year minimum sentences for her first-degree CSC convictions are cruel and/or unusual punishments that violate the federal and state constitutions. US Const, Am VIII; Const 1963, art 1, § 16. We review issues of constitutional law de novo. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997). "Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *People v Dipiazza*, 286 Mich App 137, 144; 778 NW2d 264 (2009).

As amended by 2006 PA 169, effective August 28, 2006, MCL 750.520b(2)(b) provides that a conviction for first-degree criminal sexual conduct is punishable by "imprisonment for life or any term of years, but not less than 25 years" if the offense is committed by a person who is 17 years of age or older against an individual less than 13 years of age. Defendant argues that the mandatory 25-year minimum sentence constitutes cruel or unusual punishment because it imposes an excessively long term of imprisonment and precludes judicial discretion to consider mitigating factors or other particular circumstances of the offense and the offender.

The Michigan constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, whereas the United States constitution prohibits cruel *and* unusual punishment, US Const, Am

VIII. If a punishment "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Nunez*, 242 Mich App 610, 618-619 n 2; 619 NW2d 550 (2000).

In *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992), our Supreme Court considered whether a statutory mandatory penalty of life in prison without the possibility of parole for possession of 650 or more grams of cocaine was cruel or unusual punishment under the Michigan Constitution. The Court explained that whether a penalty may be considered cruel or unusual is to be determined by a three-pronged test that considers (1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states. *Id.* at 33-34. The Court stated that under the Michigan Constitution, the prohibition against cruel or unusual punishment included a prohibition on grossly disproportionate sentences. *Id.* at 32. But, the Court noted that "the *constitutional* concept of 'proportionality' under Const 1963, art 1, § 16 is distinct from the nonconstitutional 'principle of proportionality' discussed in *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990), although the concepts share common roots." *Bullock*, 440 Mich at 34 n 17.

With respect to the first factor, gravity of the offense and the severity of the sentence imposed, defendant argues that her sentences are disproportionate because, considering her own characteristics and the characteristics of the sentencing offense, she ranks among the least dangerous of offenders in the class of offenders subject to a 25-year minimum sentence under MCL 750.520b(2)(b). She asserts that the offenses did not involve any force, violence, coercion, or trickery, and that the victim did not sustain physical or psychological injury. Further, she has no prior criminal record of any kind, and she contends that "by all accounts she had otherwise led an exemplary life." She maintains that her sentences are unduly harsh in view of the particular offense, which she characterizes as a comparatively benign type of child assault.

We are not persuaded that defendant should be considered a less culpable offender than most persons convicted of first-degree CSC against a child victim. In *In re Hildebrant*, 216 Mich App 384, 386-387; 548 NW2d 715 (1996), this Court observed:

> Statutory rape, a strict-liability offense, has been upheld as a matter of public policy because of the need to protect children below a specific age from sexual intercourse. The public policy has its basis in the presumption that the children's immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct. *People v Cash*, 419 Mich 230, 242; 351 NW2d 822 (1984). Because this policy focuses on the exploitation of the victim, we find that the Legislature did not intend to withdraw the law's protection of the victim in order to protect the offender.

This statement of Michigan public policy conflicts with defendant's attempt to minimize the gravity and severity of her offense. Further, contrary to defendant's assertion that she did not resort to trickery, isolation, or surprise to accomplish the abuse, the evidence showed that defendant offered herself as a mentor and tutor to a particularly vulnerable victim, invited the victim to participate in activities that allowed her to isolate him in her home, and then gradually

introduced physical and emotional intimacy to the relationship that culminated in sexual intercourse. The victim's alleged acquiescence to defendant's conduct cannot be considered a mitigating factor given that "his immaturity and innocence prevent[ed] [him] from appreciating the full magnitude and consequences of [his] conduct." *In re Hildebrant*, 216 Mich App at 386.

Defendant also argues that the mandatory 25-year minimum sentence is unduly harsh compared to penalties for other offenses under Michigan law, including many violent offenses. We are not persuaded that these comparisons render the 25-year minimum sentence disproportionate to the offense. The perpetration of sexual activity by an adult with a pre-teen victim is an offense that violates deeply-ingrained social values of protecting children from sexual exploitation. Even when there is no palpable physical injury or overtly coercive act, sexual abuse of children causes substantial long-term psychological effects, with implications of far-reaching social consequences. The unique ramifications that ensue from sexual offenses against a child preclude a purely qualitative comparison of sentences for other offenses to assess whether the mandatory 25-year minimum sentence is unduly harsh in contrast to other offenses.

Finally, defendant invites a comparison of Michigan's mandatory 25-year minimum sentence with the sentencing schemes for like offenses in other states. But, our research reveals that several other states have laws that also impose a mandatory 25-year minimum sentence for an adult offender's sexual offense against a pre-teen victim, regardless of the presence of aggravating factors such as force or violence.[1] Thus, a comparison of Michigan's penalty and penalties imposed for the same offense in other states fails to support defendant's attack on the constitutionality of Michigan's sentencing statute.

For these reasons, we reject defendant's argument that her mandatory 25-year minimum sentences are unconstitutionally cruel or unusual.

We affirm.

/s/ Jane E. Markey
/s/ Deborah A. Servitto
/s/ Kirsten Frank Kelly

[1] Ark Code Ann 5-14-103(a)(3)(A) and (c)(2); Cal Penal Code 288.7(a); Del Code Ann, title 11, 4205A(a)(2); Fla Stat 775.082(3)(a)(4) and 800.04(5)(b); Ga Code Ann 16-6-4(d); Kan Stat Ann 21-4643(a)(1)(B) and 21-3502; La Rev Stat Ann 14:43.1(C)(2); Mt Code Ann 45-5-503(1)(a)(D), 45-5-503(4) and 45-5-507(5); Nev Rev Stat 200.366(3)(b) and (c); NC Gen Stat 14-27.2A and 14-27.4A; Or Rev Stat 137.700(2)(b)(D) and 163.375(1)(b); RI Gen Laws 11-37-8.1 and 11-37.82; SC Code Ann 16-3-655(C)(1); Tenn Code Ann 39-13-522) and 40-35-112(b)(1); Utah Code Ann 76-5-402.1; Wash Rev Code 9.94A.507; West Virginia Code 61-8B-3(c); Wis Stat 939.616(1r) and 948.02(1)(b).

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