

# Order

Michigan Supreme Court  
Lansing, Michigan

November 23, 2016

Robert P. Young, Jr.,  
Chief Justice

154064

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-Appellant,

v

SC: 154064  
COA: 332447  
Muskegon CC: 16-000044-FH

DARYL DELAPAZ,  
Defendant-Appellee.

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On order of the Court, the application for leave to appeal the June 6, 2016 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

YOUNG, C.J. (*dissenting*).

I respectfully dissent from the order denying leave to appeal. I would grant leave to appeal because I believe that this Court's peremptory order in *People v Johnson* was poorly reasoned and inconsistent with the text of MCL 750.520a(r), the statute defining sexual penetration.<sup>1</sup> *Johnson* is erroneous and should be overruled.

The prosecution in this case sought to amend the information to charge defendant with one count of first-degree criminal sexual conduct pursuant to MCL 750.520b(1)(c). The defendant had pushed a 14-year-old girl's head down onto his penis, forcing the victim's mouth to make contact with defendant's penis. The trial court denied the prosecution's motion, concluding it was bound by this Court's order in *Johnson* to hold that under the circumstances there was no "sexual penetration" as required by MCL 750.520b(1)(c).

MCL 750.520a(r) defines "sexual penetration" to include "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight,

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<sup>1</sup> *People v Johnson*, 432 Mich 931 (1989). See *People v Conway*, 469 Mich 857, 857 (2003) (YOUNG, J., dissenting) (explaining why *Johnson* should be overruled).

of any part of a person's body or of any object into the genital or anal openings of another person's body . . . .” The statute unambiguously defines “fellatio” as a type of “sexual penetration.” The term “fellatio” means “oral stimulation of the penis.”<sup>2</sup> “The clear definition of the word ‘fellatio’ encompasses any penile stimulation accomplished using the mouth.”<sup>3</sup> Kissing, as allegedly occurred in this case, in *Conway*,<sup>4</sup> and in *Johnson*,<sup>5</sup> therefore fits within the statutory definition of fellatio.

However, under *Johnson*, proof of “fellatio” constituting “sexual penetration” under MCL 750.520b requires proof of “intrusion.”<sup>6</sup> This additional “intrusion” requirement is incompatible with the statutory language, as explained above, and places inconsistent constructions on the expressly listed parallel crimes of “fellatio” and “cunnilingus.”<sup>7</sup> Instead, in this case, the relevant inquiry to determine whether the prosecution has demonstrated “sexual penetration” under MCL 750.520b(1)(c) is not whether there has been “intrusion,” but whether there was “fellatio.”

I continue to believe that *Johnson* is wrong and should be overruled. At the very least, this issue should be given this Court's full attention and resolved by a reasoned opinion, rather than a peremptory order.<sup>8</sup> I would grant leave to appeal.

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<sup>2</sup> *Merriam-Webster's Collegiate Dictionary* (11th ed). See also *Conway*, 469 Mich at 857 (YOUNG, J., dissenting) (“The term fellatio is defined as ‘oral stimulation of the penis.’”), quoting *Random House Webster's College Dictionary* (2001).

<sup>3</sup> *Conway*, 469 Mich at 857 (YOUNG, J., dissenting).

<sup>4</sup> *Id.*

<sup>5</sup> *People v Johnson*, 164 Mich App 634, 647 (1987) (KELLY, J., dissenting).

<sup>6</sup> See *Johnson*, 432 Mich at 931; *Johnson*, 164 Mich App at 647-648 (KELLY, J., dissenting).

<sup>7</sup> MCL 750.520a(r). See also *Conway*, 469 Mich at 857-858 (YOUNG, J., dissenting) (“I believe that the Legislature clearly defined fellatio as a *type* of intrusion that establishes sexual penetration. This is certainly consistent with this Court's approach to oral contact with female genitalia, where we have stated that penetration into the vagina is not necessary to establish CSC-I.”).

<sup>8</sup> Compare *Johnson*, 432 Mich at 931.



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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.

November 23, 2016

Clerk