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# TOUCHING TENNIS TALES

## STATE V. MILLER

### Negotiation

[CRIMINAL PLEA BARGAINING]

#### Confidential information for the Prosecution

You are the Assistant District Attorney (ADA) assigned to handle a case against Matthew Miller, a former teacher and tennis coach at the local high school.

You've learned from police investigative reports that Mr. Miller taught Spanish at the school for a few years, then quit to take a white-collar job at a local company. A tennis enthusiast, he continued to coach the high school's tennis team. It became clear that a number of women on the team found him attractive and in several cases the feeling was mutual. Mr. Miller apparently knew that under state law teachers are not allowed to engage in sexual conduct with a student, whether or not that student is in one of their classes, and regardless of whether they have passed the legal age of consent, 16. He claims he did not know the law applies to school team coaches whether or not they are teachers.

Mr. Miller has said that he had never pursued a relationship with a student while teaching at the school. He did begin a relationship with one of the tennis players a few years ago but says he did not ask her out until the year after she graduated. They then began a relationship that included sex. Mr. Miller says they had broken up a few months before the incident that rise to this prosecution.

At the start of the tennis season, Mr. Miller – then age 24 - told some female team members it was okay to text with him because he was no longer their teacher. That's when the flirting, texting, snapchatting, and twittering began in earnest.

Tennis team member Jane Dowd, age 17, rather clearly developed a strong crush on Mr. Miller. They began flirting with each other during and after the tennis team. [Copies of the text messages, obtained by the police from Jane Dowd's phone, and provided to the defense, are included later in this document.] The snap chats do not remain present on Ms. Dowd's phone. Either you or the defense attorney could subpoena them from Snap Chat, but it always takes a while to get these.

At some point, Mr. Miller let it be known that he would offer private lessons for team members seeking to improve their performance. Mr. Miller is adamant that he made this offer to all players.

Ms. Dowd asked her parents if she could take private lessons with Mr. Miller and they agreed, provided the price was reasonable. They set the date for the first lesson the following Saturday morning.

During the lesson, Mr. Miller touched Ms. Dowd, rubbing the back of her neck after moving her arm in a tennis swing, "correcting" her posture, and so on. Afterward, he offered to drive her home and she accepted.

When they drove up to her house, Ms. Dowd asked if Mr. Miller if he would like to have soda or a beer and "hang out." She explained that her mother was working a Saturday shift, and her Dad was traveling. Mr. Miller accepted. They started with friendly banter in the kitchen. Eventually, the



conversation turned to the idea of "fooling around." They went up to Ms. Miller's bedroom, turned on some music, and began to kiss. Sitting on the bed, Mr. Miller took off his shirt and placed his hand on Ms. Dowd's thigh, but they were otherwise still clothed when they heard the garage door open! Mrs. Dowd – the mother – had come home from work early. Shirt in hand, Mr. Miller ran past Mrs. Dowd and drove away.

That evening, Ms. Dowd's parents contacted Mr. Miller and demanded an explanation. Mr. Miller and his parents came to the Dowd house immediately. After an unconvincing attempt to concoct a story (some juice spilled on my shirt), Mr. Miller eventually admitted to being in Ms. Dowd's bedroom. Mr. Miller said he was very sorry and embarrassed and asked them not to tell anyone else. Mr. Miller's mother pleaded with the Dowds, asking them not to ruin her son's life and asking: "What it would take to let it go" and "How could we help your daughter?" The Dowds interpreted this as an offer of compensation, and the police later saw it as an attempted bribe. Mr. Miller's parents say they just wanted to help the Dowds get counseling for Jane.

The Dowds did contact the police, who charged Mr. Miller with one count of Attempted Sexual Battery, a third-degree felony under state statute. Even though Jane Dowd appears to have consented if there was "sexual conduct" (involving penetration), that would constitute a crime under the statute because Mr. Miller was a coach at the victim's school. On the current evidence, the police charged it as an attempt, rather than an actual Sexual Battery.

As an attempt, the charge carries only an 18-month prison term and is presumptively and usually punished with probation instead of prison time, but it still carries lifetime registration as a sex offender. [More detail as to these statutes under Ohio Law is contained in an appendix.]

While not initially charged, you could theoretically charge the defendant with Sexual Battery, which carries the possibility of five years in prison and requires a lifetime sex offender registration. [Additional discussion of potential charges, potential compromises, and sentencing recommendations are included at the end of this document.]

### **Evidentiary/Witness Issues**

- Jane Dowd readily acknowledges that everything was entirely consensual. She was interested in a romantic relationship with Mr. Miller. She says she would be willing to testify to what happened, but she cried when talking about it with the police and said she would feel humiliated repeating it in a public courtroom. She appears to be acting under parental pressure and you are concerned that her willingness to testify will not hold up, especially if she realizes the effect of a conviction on Mr. Miller.
- Mr. Miller appears to have "confessed" to the parents, but it is not clear that what he said is specific enough to support the charge of Attempted Sexual Battery, especially if jurors felt sympathetic toward him. Mr. Miller doesn't present like a sexual predator. He's a likable, young-looking 24-year-old with no criminal record. Ms. Dowd also seems to be an unsophisticated and normal teenager, but she clearly had a crush on Mr. Miller and was interested in a relationship.

### **Text Messages and Snap Chats**

The text messages exchanged between Mr. Miller and Ms. Dowd are below. In your view, they can be read as suggestive. However, it's true that many of the words used are also legitimate tennis terms.

Text messages found on Jane Dowd's phone  
(would also be on Mr. Miller's phone)



You have no idea what might be in any snap chats, as these are designed to disappear. Ms. Dowd said there was some active snap chatting involving Mr. Miller but that it was just fun, and all the team members were snapchatting about tennis outfits, that sort of thing. You haven't had a chance to subpoena the snap chat records. Even if you did all the paperwork tomorrow, the records might not be here before the scheduled trial date. The bottom line is that you won't have the snap chat records to use in your negotiations; you may or may not have them before trial.

### Concerns and Constituencies



As an ADA, you have an obligation to the community, to crime victims, and to the law. You work frequently with the police and want them to know you are “on their side.” But you also suspect that the officers may feel some conflict over this case. At least one of the police officers has a son in his mid-twenties and pointed out that Ms. Dowd was “of legal age.” He seemed to think it was more about breaking a “school rule” rather than anything more serious. It’s the law, but he may have a point. Your boss, the District Attorney, would agree that ADAs are obligated to treat all defendants and all victims fairly, notwithstanding politics. You also know the defense attorney in the case.

This case has garnered some local press attention, in part because it follows several other instances of teacher misconduct that have been publicized in the local media. In a recent case, a junior high teacher impregnated a 15-year-old, who then refused to testify against him. Shortly after that, a gym teacher was charged with unlawful touching of students going back a decade. It’s fair to say people in the district are concerned about teachers’ sexual misconduct and alleged cover-ups.

Nevertheless, you are concerned about Jane Dowd if this case goes to trial. She obviously feels guilty and torn. While her parents seem hell-bent on punishment for Mr. Miller but seem unaware of how all of this is distressing to their daughter.

### **Statutory Constraints and Negotiating Flexibility**

Normally plea negotiations revolve around the crime(s) charged, the terms of the sentence, and the facts that will be stipulated.

#### *With respect to the charge(s)*

There are several possible charges, including:

- Attempted Sexual Battery (the current charge), which carries a penalty of 6 to 18 months in prison and up to a \$5,000 fine, up to 5 years probation, and lifetime registration as a sex offender.
- Sexual Battery carries 1 to 5 years in prison and up to a \$10,000 fine; up to 5 years probation, and lifetime registration as a sex offender.
- For these offenses, “battery” includes “any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.”
- Conviction of Sexual Battery requires the defendant to register as a sex offender for life. Registration is a public record and must be renewed annually. People living within 1200 feet of the convicted offender are notified by mail of his presence in the neighborhood.
- Attempted Sexual Battery also requires lifetime public registration, but neighbors are not notified that an offender is living nearby.
- Penalties for either crime are increased if the victim is younger than 16.
- To avoid registering as a sex offender Mr. Miller would have to plead to something that is not a sex offense. This would probably require agreeing to a description of the incident that omits some facts, which probably would not please the parents. Possibilities include:
  - Trespass: Being in the house without permission from the parents.
  - Burglary: Being in the house without permission from the parents, for the purpose of committing a criminal offense.

*With respect to the terms of the sentence:* The parties can negotiate the length of a sentence and probation time within any statutory minimum/maximum limits. More important than the length of



a sentence is how much will be served in prison versus suspended or treated as “time served.” If a defendant is sentenced to longer probation, he has to report in and is exposed to being charged with a probation violation for a longer time period.

The judge is not obligated to accept your or a joint prosecution/defense plea recommendation. While you are well-respected in the court, the judge is elected and may care about public perception. He may also feel sympathetic either to Mr. Miller or Ms. Dowd and may decide to impose a lighter or heavier sentence.

### **Stated Positions and Interests for Negotiation**

- Some community members and a local radio personality have pushed the idea that “predators like this should spend some time in a prison cell.”
- Jane Dowd is just plain tearful, feels guilty about all of this, and is confused about what should be done. She feels sorry for Mr. Miller and for her parents.
- Jane Dowd’s parents want Mr. Miller to be forced to register as a sex offender so that he never coaches youth again. They are not adamant that he serve prison time. However, they think five years of probation is not enough and want to ensure that people are warned about this defendant for as long as possible. They are also concerned about paying for some counseling for Jane. (Frankly, you think family counseling might be a good idea.)
- While her parents might not see it, the more this case is publicized, the more it harms Jane too. And Jane might suffer even more if the consequences are harsh for Mr. Miller.
- You anticipate that Mr. Miller will want to avoid prison at all costs and will not want to register as a sex offender. However, you suspect he may be willing to be on probation or do community service or some such, and that he would agree not to coach through any school.

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## Appendix

### Relevant Ohio Laws for Sex Offences

The referenced and potentially relevant statutes from the Ohio Revised Code (O.R.C.) relating to "Sex Offences" are attached to this document and merit careful review.

This section attempts to simplify and clarify how these might apply in this case.

O.R.C. §2907.01 contains general definitions and elements of "Sex Offences." Relevant to this case are:

- 2907.01 (A)'s definition of "sexual conduct" as vaginal intercourse between a male and a female, without privilege, and a statement that any penetration is sufficient to constitute intercourse.
- 2907.01 (B)'s definition of "Sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."
- 2007 (C)'s definition of "Sexual activity" is "sexual conduct or sexual contact, or both."

O.R.C. §2907.03 generally sets out the elements of Sexual Battery as unlawful sexual conduct (which must include penetration) and makes consent *irrelevant when the offender and the other person are of certain ages and in certain types of relationships with each other.*

Important for this case O.R.C. §2907(8), which includes under Sexual Battery, sexual conduct where: "The other person is a minor, the offender is a teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education, and the other person is enrolled in or attends that institution."

[Note that if the "other person" is younger than 16, the classification of the crime is more serious, and penalties harsher if there is more than a 4-year age difference between the offender and the victim, or if the victim is younger than 13 years old. In this case, Mr. Miller is 7 years older than Ms. Dowd, but she was 17. Thus, even if there had been a penetration, they are just outside of the boundaries for harsher punishment.]

SEXUAL BATTERY IS CLASSIFIED AS A THIRD-DEGREE FELONY AND, UNDER THESE CIRCUMSTANCES WOULD CARRY A SENTENCE OF A MINIMUM OF ONE YEAR AND UP FIVE YEARS AND UP TO A \$10,000 FINE.

Also important, a plea or conviction for Sexual Battery would require Tier III lifetime sexual offender registration (described more fully on the next page).

### Attempted Sexual Battery

The police apparently decided to charge Mr. Miller with "Attempted Sexual Battery" because there is no evidence of penetration. Their theory seems to be that was Mr. Miller's intent, thwarted by the



arrival of Jane Dowd's mother. Attempted Sexual<sup>1</sup> The battery carries a prison term of 6-18 months and up to a \$5,000 fine and is presumptively and usually punished with probation instead of prison time.

A plea or conviction of Attempted Sexual Battery would still make Mr. Miller a Tier III sexual offender (described more fully on the next page).

### **Sexual Imposition O.R.C. §2907.06**

Ohio's statute on Sexual Imposition does not require penetration. It prohibits a wider range of non-consensual sexual activity and makes consent irrelevant only if the sexual activity involves someone younger than 16. However, it does not contain a blanket prohibition against a coach or teacher's sexual activity with students, if consensual.

Sexual imposition is classified as a 3<sup>rd</sup>-degree misdemeanor, punishable by up to 60 days in jail and up to a \$500 fine.

Attempted Sexual Imposition is classified as a 4<sup>th</sup>-degree misdemeanor, punishable by up to 30 days in jail, and up to a \$250 fine.

Both Sexual Imposition and Attempted Sexual Imposition require Sex Offender registration. At the Tier I level, Mr. Miller would have to register annually for the next 15 years. However, he could petition to have the registration requirement removed after 10 years. [See the next section for a somewhat more complete description of Sex Offender registration in Ohio.]

### **Megan's Law – Sex Offender Registration**

Under O.R.C. §2950 [et. seq.]: SEXUAL PREDATORS, HABITUAL SEX OFFENDERS, SEXUALLY ORIENTED OFFENDERS, known as Megan's Law, conviction or plea to various types of Sex Offences requires registration as a sex offender. The law creates three "Tiers" of sexual offenders, with different consequences and duration.

Adult sex offender registries are public records, accessible to the public through local sheriff's offices and online through Ohio's ESORN (Electronic Sex Offender Registration and Notification) Internet database.

Conviction or plea to Sexual Battery under O.R.C. §2907.03 is categorized as a Tier III offender.

- Tier III offenders must register their address with the local sheriff and renew that registration every 90 days. People living within 1200 feet of that address receive a "community notice card" by mail that includes the offender's photo, address, and other identifying information, as well as instructions on safety and how to report suspicious activity.
- Tier II offenders must register their address and renew every 180 days for 25 years.

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<sup>1</sup> Under Ohio law, for most categorized felonies, an unsuccessful attempt downgrades the felony degree by one stop. Since sexual battery is a third-degree felony, attempted sexual battery becomes a fourth-degree felony. See O.R.C. §2903.





- Tier I offenders must register their address and renew annually for 15 years. After 10 years, Tier I offenders may petition to be removed from the registry.
- “Community notice” cards are not sent for Tier II and I offenders.

## Other Potentially Relevant Statutory Offenses

### Simple Assault

Under O.R.C. §2903.13, simple assault is classified as a first-degree misdemeanor and carries a sentence of up to 6 months in jail and a \$1000 fine. Simple assault involves *recklessly* causing a serious physical injury or *knowingly* causing or attempting to cause physical harm to another or another unborn child.

A negligent assault charge under O.R.C. §2903.14 involves a dangerous weapon or "ordnance" and negligently causing serious harm. It is a third-degree misdemeanor, which carries a sentence of up to 60 days in jail and up to a \$500 fine.

### Criminal Trespassing, O.R.C. §2911.21.

In relevant part, Ohio’s criminal trespassing statute provides that “No person, without privilege to do so, shall ...(1) Knowingly enter or remain on the land or premises of another; or (2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard.”

(Note that a creative defense attorney might argue that, absent sexual intercourse, and given that Ms. Dowd was 17, Mr. Miller was merely trespassing. He knew that she didn’t own the house, and knew or should have known her parents, the owners, wouldn’t have given him permission to be there with her.)

Violation of §2911.21 is a fourth-degree misdemeanor, carrying a maximum sentence of 30 days in jail and a fine of not more than \$250 (unless certain types of vehicles were involved, not applicable here). It's highly unusual for a first-time criminal trespassing offense to result in prison time.

### Aggravated Trespass O.R.C §2911.211

Similar, but with a statutory title that might sound better to Ms. Dowd’s parents is a charge of “Aggravated Trespass.” The statute provides under subpart A:

“No person shall enter or remain on the land or premises of another with purpose to commit on that land or those premises a misdemeanor, the elements of which involve causing physical harm to another person or causing another person to believe that the offender will cause physical harm to him.”

It’s also a first-degree misdemeanor, with a potential sentence of 180 days in jail and a fine of up to \$1,000.



## **Burglary O.R.C. §2911.12**

As defined in Ohio, and relevant to this case, burglary involves trespassing by “force stealth or deception” in the home of “any person” (“habitation”) with the purpose of committing a crime there or when “any person” is present or likely to be present. Depending on the particulars, it is categorized as a third or fourth-degree felony.