

STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CHRISTOPHER ROSS, JR., Minor

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner-Appellee,

Supreme Court
No. 158764

Court of Appeals
No. 331096

-VS-

Oakland Circuit Court
Family Division
No. 2014-826056-DL

CHRISTOPHER ROSS,
Respondent-Appellant.

RESPONDENT-APPELLANT'S SUPPLEMENTAL BRIEF

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Dated: June 22, 2020

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STATEMENT OF JURISDICTION

Christopher Ross adopts his Statement of Jurisdiction from his Application for Leave to Appeal and Rely in Opposition to Plaintiff's Response to Respondent's Application for Leave to Appeal. In Addition, jurisdiction is proper because the Court ordered arguments on the application for leave to appeal and directed the parties to file supplemental briefing on January 29, 2020 pursuant to MCR 7.305(H)(1). See *People v Ross (In re Ross)*, ___Mich___; 937 NW2d 360 (2020).

STATEMENT OF QUESTIONS

PRESENTED BY MICHIGAN SUPREME COURT

- I. Whether appeals from juvenile adjudications for criminal offenses are governed by the time limits for civil cases or by the limits for criminal cases, see MCR 7.305(C)(2)?

Christopher Ross, Jr. answers
Prosecution answers
Court of Appeals
Trial Court

Criminal
Civil
Did not answer
Did not answer

- II. Whether the standard for granting a new trial in a juvenile delinquency case is the same as the standard for granting a new trial in a criminal case, compare MCR 3.992(A) with MCR 6.341(B)?

Christopher Ross, Jr. answers
Prosecution
Court of Appeals
Trial Court

No
Did not answer
Did not answer
Did not answer

- III. Whether juveniles who claim a deprivation of their due process right to counsel must satisfy the two-part test set forth in *Strickland v Washington*, 466 US 668, 687 (1984)?

Christopher Ross, Jr. answers
Prosecution answers
Court of Appeals
Trial Court

Yes
Did not answer
Did not answer
Did not answer

- IV. Whether the Court of Appeals erred in reversing the trial Court's decision to grant the respondent a new trial based on evidence that trial counsel did not obtain or present?

Christopher Ross, Jr. answers
Prosecution answers
Court of Appeals
Trial Court

Yes
No
Did not answer
Did not answer

INTRODUCTION

In this extraordinary case, a young man has been deemed responsible for criminal sexual conduct despite documentary evidence confirming his testimony and destroying the credibility of his accuser, the lone witness against him. The trier of fact itself realized the import of this evidence and ordered a new trial based on counsel's failure to present it at the first one. Yet the Court of Appeals, going out of its way both to explain away counsel's ineffective actions and to forgive the trial court's disregard of its own remand order, has reinstated the adjudication.

Both in Michigan and across the United States, glaring disparities exist between adults and juveniles and their access to post-conviction relief specifically, and justice more broadly. Michigan juveniles are regularly afflicted by the perception that their delinquency matters do not bear the same consequence and thus do not warrant the same constitutional protections as similarly situated adults. Those faced with claims of ineffective assistance of counsel are doubly damned – first with counsel protected by the near impenetrable cape of “trial strategy” and second with confusion as to accelerated appellate timelines and less protective standards for new trials.

The need for examination and clarification of post-conviction remedies for juvenile “defendants” continues to be of pressing importance. Often, the consequences for adult and juvenile defendants are the same. They both face the possibility of probation, incarceration, and the stigma associated with having a criminal conviction on their record. However, juvenile defendants' access to remedies is often unclear, severely limited, or explicitly denied. This case provides the avenue to remedy this broadly felt wrong.

Principally, this ineffective-assistance case raises the question of whether *People v Trakhtenberg*, 493 Mich 38; 826 NW2d 136 (2012) and *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015) continue to set the proper means for interpreting *Strickland v Washington*, 466

US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) as to whether counsel's complete failure to investigate or pursue highly exculpatory evidence may be absolved as "trial strategy." More broadly, this case questions whether the Court of Appeals' highly deferential interpretation of *Strickland* is appropriate, applicable and constitutional when applied to the juvenile-justice system and whether juveniles should be at least as protected as adults, (if not more so), by the court rules governing new trial and appellate deadlines.

Respondent Christopher Ross had sexual contact in a high-school hallway with FJ, a classmate and longtime acquaintance, and was charged as a juvenile with CSC-IV. Since FJ was the only witness who testified about nonconsensual contact, the timeline of events established by her testimony, and thus her credibility, were critical. (App C, App D, p 243a-251a).¹ Pretrial, Christopher and his mother Crystal told his counsel, Attorneys Randazzo and Dobson, about calls placed between FJ's cellphone and Christopher's mother's phone soon after the incident that would have rendered FJ's timeline impossible, and exposed her testimony as false. (App Q, p 656a-657a; App R, p 869a, 871a, 875a, 877a, 881a, 900a, 1001a; App T, p 1395a-1396a, 1420a, 1424a-1426a, 1507a-1521a, 1576a-1615a, p 1576a-1867a); App F, p 259a-261a). But counsel failed to subpoena any phone records or otherwise investigate, and Christopher was adjudicated responsible in a bench trial after the court specifically stated that it believed FJ's version of events about the calls, and disbelieved Christopher. (App S, p 1203a-1204a, 1225a -1226a, 1261a; App T, p 1519a-1521a, 1583a-1589a, 1618a, 1652a-1653a ; App D, p 243a-251a).

At a later *Ginther* hearing where the phone records were obtained and introduced, the same judge decided counsel's failure left her no longer convinced of Christopher's responsibility, and

¹ Citations to the Appendix are referenced by letter (i.e. "App A") and page number. For example, the first day of trial is included as "Appendix C" and will be referred to as "App C".

ordered a new trial. (App O, p 482a-507a; App P, p 509a-530a; App V, p 1895a-1897a) But the Court of Appeals reversed, disregarding this Court’s directive that “a court cannot insulate the review of counsel’s performance by calling it trial strategy,” *Trakhtenberg*, 493 Mich at 52, and its requirement of a more searching inquiry where the supposed “strategy” is settled on “before conducting any reasonable investigation,” *Id* at 52-53 n8; *see also Ackley*, 497 Mich at 388-389. (App X, p 1900a-1912a; App Y, p 1914a-1915a). The Court of Appeals instead relied on *People v Odom*, 276 Mich App 407; 740 NW2d 557 (2007) and its sweeping generalities protecting counsel’s “calculated risks” as “trial strategy.” (App X, 1900a-1912a).

But there were no calculated risks here. Rather, there was an attorney’s complete failure to take the easy step of subpoenaing documents he had been told about, that, *as the trier of fact herself confirmed*, would have vindicated his client’s testimony and fatally undermined that of his accuser. (App V, p 1896a-1897a). This Court should vacate the Court of Appeals order and reinstate the trial court’s ruling, not only to spare Christopher from the stigma of an erroneous sexual-assault conviction, but to protect the continued vitality of *Trakhtenberg* and *Ackley* as the standard for ineffective-assistance claims in Michigan. Moreover, the pressing need to, at a minimum, provide accused juveniles with the same access to justice as their adult counterparts should compel this Court to act to correct the existing disparities in both the court rules and to clarify the standard applicable to ineffective assistance claims.

SUPPLEMENTAL ARGUMENT

In addition to his application and reply, (App AB, p 1953a-2123a; App AC, p 20124a-2137a), which Christopher adopts here by reference, he offers the following argument responsive to the four issues raised in the Court’s January 29, 2020 Order.

I. Appeals from juvenile adjudications for criminal offenses are governed by the time limits for criminal cases and not civil.

A. This Court has previously established that appeals from juvenile adjudications for criminal offenses are governed by the deadlines applicable to criminal appeals, irrespective of MCL 712A.1(2).

Standard of Review: The Court reviews questions of constitutional law de novo. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011), citing *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). Interpretation of a court order presents a legal issue, reviewed de novo. *Silberstein v Pro- Golf of Am, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008), citing *Brown v Loveman*, 260 Mich App 576, 591; 680 NW2d 432 (2004).

As Christopher’s January 8, 2019 Reply explains, *In re Sasak*, 490 Mich 854; 800 NW2d 598 (2011) (Order), conclusively establishes that appeals like this one are governed by criminal, not civil, filing deadlines, regardless of MCL 712A.1(2). (App AC, p 2126a-2128a).

Indeed, the People’s argument against jurisdiction – which fails even to mention *Sasak* – raises serious separation-of-powers issues. The Constitution directs that this Court “shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.” Const 1963, art 6, § 5. This Court has construed that provision as holding that a court rule should yield only if it “contravenes a legislatively declared principle of public policy, having as its basis *something other than court administration....*” *McDougal v Schanz*, 461 Mich 15, 30-31; 597 NW2d 148 (1999), quoting Jones & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 Mich L Rev 623, 650-651 (1957 (emphasis added)). The statute on which the People rely for their jurisdictional argument states that “[e]xcept as otherwise provided, proceedings under this chapter are not criminal proceedings.” MCL 712A.1(2). Because it plainly goes to the heart of “court administration” to dictate how a juvenile proceeding should be categorized for purposes of appellate filing deadlines, the statute must yield. Any other result allows an impermissible trampling of this Court’s authority by the Legislature.

B. Due Process requires that appeals from juvenile adjudications for criminal offenses should be governed by the same time limits set forth for adult criminal defendants.

Consideration of the recognition of juvenile access to justice cases is warranted given the position the People have taken in this matter. In the landmark case of *In re Gault*, 387 US 1, 19; 87 S Ct 1428; 18 L Ed 2d 527 (1967), the US Supreme Court recognized there existed a disparity existent between the constitutional protections afforded to adult and juvenile defendants:

Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure... [t]he absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.

While *Gault* did not address post-conviction relief for juvenile defendants, it did set forth important principles arguably applicable to all stages of juvenile adjudication. Specifically, *Gault* addressed the procedural rights of a juvenile defendant in delinquency proceedings when faced with the possibility of incarceration. In so doing, the Court addressed a novel question, relied on prior decisions regarding the application of due process and fairness to other stages of juvenile adjudication.

Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.

In re Gault, 387 US 1 at 13 citing *Kent v United States*, 383 US 541 (1966).

Gault, following the logic of previous rulings, held that the Due Process Clause of the 14th Amendment applies to juvenile defendants as well as to adult defendants. *Kent*, 387 US at 4. The Court held that juveniles, like adults, have the right to timely notification of charges, the right to confront witnesses, the right against self-incrimination, and the right to counsel. *Id.* As our Court

of Appeals recently recounted, while *Gault* “recognized the underlying general policy in the juvenile system to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past,” it also held that “despite these aims, juveniles were still entitled to the essentials of due process and fair treatment with respect to a juvenile court adjudication.” *People v GR*, __ Mich App __; __ NW2d __ (2020) (Docket No. 346418 (cleaned up), quoting *Gault*, 387 US at 24, 30-31. Applying *Gault*’s logic here, juvenile defendants also should be entitled to the same post-conviction (adjudication) appellate deadlines as are adult defendants.

There are sound policy reasons for *Sasak*’s recognition that the criminal, not civil, appellate deadline applies here. In *Gault*, the Court acknowledged the benevolent motivation of the juvenile court system but noted that its lack of sound constitutional procedure led to disparate access to justice for juvenile defendants. Over time, well-intentioned features of juvenile court have similarly bred a court culture that today discourages and sometimes precludes zealous and adversarial advocacy for juveniles charged with criminal offenses. Tepfer, Joshua A. and Nirider, Laura H., *Adjudicated Juveniles and Post-Conviction Litigation*, Northwestern University School of Law, Faculty Working Paper 222, 4, (2012), citing *McKeiver v Pennsylvania*, 403 U.S. 528, 545; 91 S Ct 1976; 29 L Ed 2d 647 (1971) (noting that juvenile court proceedings lack the “fully adversary” character of adult criminal trials). Juvenile defenders are discouraged from subjecting the State’s claim to a “crucible of meaningful adversarial testing”. Tepfer, Joshua A. and Nirider, Laura H., *Adjudicated Juveniles and Post-Conviction Litigation*, Northwestern University School of Law, Faculty Working Paper 222, 4, (2012). See *United States v Cronin*, 466 US 648, 656 (1984). The rise of ineffective assistance of counsel in juvenile cases correlates with a staggering increased risk of wrongful convictions. Tepfer, Joshua A. and Nirider, Laura H., *Adjudicated Juveniles and Post-Conviction Litigation*, Northwestern University School of Law, Faculty

Working Paper 222, 4, (2012). *See Welch v United States*, 604 F.3d 408, 432 (CA7, 2010) (Posner, J., dissenting) (juvenile adjudications “may well lack the reliability of real convictions in criminal courts”).

This juvenile court culture suffers from a misguided reliance on the failsafe “it’s not a conviction, only an adjudication.” This culture permits defense attorneys to provide the slipshod representation Christopher received. Moreover, an adjudication of delinquency has significant collateral consequences. A juvenile defendant adjudged responsible may lose scholarship opportunities and can be denied federal financial aid. He may bear the lifelong stigma of a sexual offender, be denied the opportunity for military service, or be subject to immigration related penalties.² Such is the reality in which Christopher finds himself. Christopher’s attorney utterly failed to investigate his case, advise his client or prepare for trial. (App H, p292a-303a; App U, p 1870a-1884a). As a result, and as acknowledged by the trial court, he was wrongly convicted of a sexual offense that he carries on his public record. Christopher subsequently lost the possibility of a university football scholarship and possible federal student aid. His family endured substantial financial hardship in their effort to defend Christopher, forcing his siblings to drop out of college. The prosecution now seeks to limit his access to justice by restricting the applicable appellate deadlines. The protections afforded by the Due Process Clause to adult defendants should be applied equally to juvenile defendants. There is no justifiable basis for differential treatment.

² Tepfer & Nirider, *supra* at 5; also *In re JW*, 787 N.E.2d 747 (2003); *See Army Regulations* 601-210, Paragraphs 4-4, 4-32(5) (2007). *See Dept. of Housing v Rucker*, 535 U.S. 125, 133-36; 122 S Ct 1230; 152 L Ed 2d 258 (2002) (upholding the practice of evicting tenants from public housing due to their illegal conduct); *See Wallace v Gonzalez*, 463 F.3d 135 (CA2, 2006) (upholding the Board of Immigration Appeals’ consideration of a prior juvenile adjudication in deciding whether to grant an alien’s application for adjustment of status).

Subjecting juveniles to shorter appellate deadlines than adults could deprive them of important appellate rights that are uniformly afforded to identically situated adults. This strikes at the very heart of fundamental fairness and raises an important issue of Due Process. While the juvenile code “shall be liberally construed so that each juvenile coming within the court’s jurisdiction receives the care, guidance, and control....conducive to the juvenile’s welfare and the best interest of the state,” MCL 712A.1(3), employing a more stringent appellate timeline *deprives* juveniles of important rights. This is especially critical in cases like this, where the trial judge who is intimately familiar with these proceedings has deemed Christopher entitled to a new trial, only to be reversed by a Court of Appeals panel on a cold appellate record. (App V, p 1895a-1897a; App W, p 1899a; App X, p 1900a-1912a; App Y, p 1914a-1915a).

Juveniles can be placed on probation or incarcerated for violating probation. Like adults, a juvenile defendant interacts with the criminal justice system in myriad ways. *People v Anderson*, 298 Mich App 178, 182-183; 825 NW2d 678 (2012) (citations omitted). To deem a child’s case to be non-criminal for purposes of appellate filing deadlines, while they face the same ramifications of penalty, incarceration and stigma as adult defendants, is not constitutionally defensible.

This Court’s Order in *Sasak* controls in this case, and requires rejection of the prosecution’s attempt to impose a shorter appellate deadline on juveniles convicted of CSC than is enjoyed by adults. Indeed this issue emerged on the national stage as early as the 1970’s. “If a State allows appeals of criminal convictions, a juvenile respondent who is not given a statutory right to appeal may be able to contend that this disparate treatment violates the equal protection of the laws.” Hertz, Randy, Guggenheim, Martin & Amsterdam, Anthony G., *Trial Manual for Defense Attorneys in Juvenile Delinquency Cases*, National Juvenile Defender Center, Section 39.02(a)

(2019), <https://njdc.info/trial-manual-for-defense-attorneys-in-juvenile-delinquency-cases-by-randy-herta-martin-guggenheim-anthony-g-amsterdam/> (accessed March 5, 2020); *See, e.g. In re Brown*, 439 F 2d 47 (CA3, 1971); *In the Matter of Arthur N.*, 36 Cal App 3d 935, 112 Cal Rptr 89 (1974).

Adjudication of juvenile defendants can result in a serious loss of liberty and should be considered a “criminal proceeding” for purposes of MCR 7.305(C)(2). To render adjudication of the juvenile pursuant to MCL 712A.1(2) as a “civil proceeding” and subject to the 42-day deadline of MCR 7.305 deprives children of important appellate rights and denies them due process and equal access to justice. Appeals from juvenile adjudications for criminal offenses should be governed by the time limits for criminal cases pursuant to MCR 7.305(C)(2).

II. To avoid injustice and disparate access to post conviction relief, the standard for granting a new trial in juvenile delinquency cases should be the same as the standard granted to adult criminal defendants seeking a new trial.

Standard of Review: The Court reviews questions of constitutional law de novo. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011), *citing People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004).

The standard for granting a new trial in a juvenile delinquency case should be the same as the standard for granting a new trial in a criminal case pursuant to MCR. 6.431 or at least should afford juvenile defendants equal treatment and access to post-conviction relief under the law. Currently, the standards for granting a new trial in a juvenile delinquency case and in a criminal case are not the same. Application of MCR 3.992(A) to juvenile delinquency cases seriously disadvantages the juvenile defendant seeking post-conviction relief.

MCR 6.431 provides criminal defendants with greater access to post-conviction relief. Adult criminal defendants receive the benefit of extended filing deadlines and numerous avenues for pursuing rehearing.

(A) Time for Making Motion.

(1) A motion for a new trial may be filed before the filing of a timely claim of appeal.

(2) If a claim of appeal has been filed, a motion for a new trial may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).

(3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence.

(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

(B) Reasons for Granting. On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

(C) Trial Without Jury. If the court tried the case without a jury, it may, on granting a new trial and with the defendant's consent, vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment.

(D) Inclusion of Motion for Judgment of Acquittal. The court must consider a motion for a new trial challenging the weight or sufficiency of the evidence as including a motion for a directed verdict of acquittal.

In contrast, MCR 3.992 restricts the juvenile defendant's ability to pursue post-conviction relief by imposing accelerated filing deadlines and limited avenues for rehearing.

(A) Time and Grounds. Except for the case of a juvenile tried as an adult in the family division of the circuit court for a criminal offense, and except for a case in which parental rights are terminated, a party may seek a rehearing or new trial by filing a written motion stating the basis for the relief sought within 21 days after the date of the order resulting from the hearing or trial. In a case that involves termination of parental rights, a motion for new trial, rehearing, reconsideration, or other postjudgment relief shall be filed within 14 days after the date of the order terminating parental rights. The court may entertain an untimely motion for good cause shown. A motion will not be considered unless it presents a matter not previously presented to the court, or presented, but not previously considered by the court, which, if true, would cause the court to reconsider the case.

(B) Notice. All parties must be given notice of the motion in accordance with Rule 3.920.

(C) Response by Parties. Any response by parties must be in writing and filed with the court and served on the opposing parties within 7 days after notice of the motion.

(D) Procedure. The judge may affirm, modify, or vacate the decision previously made in whole or in part, on the basis of the record, the memoranda prepared, or a hearing on the motion, whichever the court in its discretion finds appropriate for the case.

(E) Hearings. The court need not hold a hearing before ruling on a motion. Any hearing conducted shall be in accordance with the rules for dispositional hearings and, at the discretion of the court, may be assigned to the person who conducted the hearing. The court shall state the reasons for its decision on the motion on the record or in writing.

(F) Stay. The court may stay any order, or grant bail to a detained juvenile, pending a ruling on the motion.

The application of MCR 3.992 in juvenile delinquency cases ultimately leads to disparate access to post-conviction remedies for juvenile defendants. MCR 3.992(A) requires a juvenile defendant to file a written motion stating the basis for relief sought within 21 days after the date of the order resulting from the hearing or trial. Under MCR 3.992(B), all parties must be given notice of the motion in accordance with MCR 3.920 and the court must state the reasons for its

decision on the record or in writing. MCR 3.992(E). Save the fact that the court may entertain an untimely motion for good cause shown, MCR 3.992(A), little other protection or recourse is available to the juvenile defendant seeking rehearing. The court is not required to hold a hearing before ruling on a motion for new trial and post-conviction relief pursuant to MCR subchapter 6.500 is unavailable to the juvenile defendant. MCR 3.992(E). Additionally, the juvenile's motion for a new hearing will not be considered unless it presents a matter not previously presented to the court, or presented, but not previously considered by the court. MCR 3.992(A).

In contrast, when an adult defendant may only appeal by leave or fails to file a timely claim of appeal, he or she may file a motion for a new trial within six months of entry of judgment of conviction and sentence, provided no timely claim of appeal has been filed. MCR 6.431(A)(3); MCR 6.431(A)(1). Unlike the juvenile defendant, the adult defendant is not required to show good cause for the failure to file a timely appeal. As previously mentioned, MCR subchapter 6.500 allows adult defendants who are no longer entitled to appeal by right or by leave to file a motion seeking post-conviction relief. Additionally, adult defendants are afforded an inclusion of Motion for Judgment of Acquittal. The court must consider a motion for a new trial challenging the weight or sufficiency of the evidence as including a motion for directed verdict of acquittal. MCR 6.431(D). These mechanisms are not afforded to the juvenile defendant.

Other significant differences exist. As it pertains to adult defendants, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(B). The adult defendant is not required to present a matter not previously presented to the court, or presented, but not previously considered by the court. The reasons for granting adult defendants a new trial are more liberally construed than the reasons afforded to juvenile defendants. Further, if the court

tried the adult defendant without a jury, the court may, on granting a new trial and with the defendant's consent, vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment. MCR 6.431(C). While MCR 3.992 allows the court in juvenile delinquency cases to affirm, modify or vacate the decision previously made in whole or in part, on the basis of the record, the memoranda prepared, or a hearing on the motion, it does not require the juvenile defendant's consent nor does it enumerate that additional testimony may be taken.

This is a novel issue before this Court and little or no case law exists. However, the above comparison of MCR 3.992 to MCR 6.431 clearly illustrates a disparity between the standard for new trial afforded to adults as compared to juvenile defendants. Critics and juvenile justice advocates often advance a need for expedient adjudication of juvenile delinquency cases. Butts *et al.*, *Delays in Youth Justice*, University of Chicago 4, (2009). The National Counsel of Juvenile and Family Court Judges cites the importance for timeliness in the Juvenile Justice Court. In its guidelines, the Counsel notes that due to the adolescent's delayed cognitive development, timeliness is critical for two reasons. First, where a significant period of time elapses between offense and consequence, the intended lesson of accountability is lost; and secondly, that prolonged uncertainty and anxiety will lead to distrust in the judicial system and reduced likelihood of rehabilitation. Marsh & Pearce, *Enhanced Juvenile Justice Guidelines*, National Counsel of Juvenile and Family Court Judges 16 (2018).

While an argument can be made for timely juvenile adjudication, the application of abbreviated filing deadlines and stunted post-conviction remedies available to juvenile defendants is not the proper vehicle for achieving timely resolution of these matters. The application of slightly longer filing deadlines and access to comparable post-conviction remedies for juvenile

defendants will not significantly increase the juvenile adjudication timeline. In fact, any slight increase is off set by the increased access to justice for juvenile defendants. The desire for timely juvenile adjudication should not give way to hurried justice. Juvenile defendants should not be afforded reduced access to post-conviction remedy based on public policy aimed at quickly reaching final disposition of juvenile matters.

Indeed, the United States Supreme Court has long recognized that children are in need of greater protection of their constitutional rights due to their vulnerable status. “Children have a very special place in life which law should reflect.” *May v Anderson*, 345 US 528, 536; 735 S Ct 840; 97 L Ed 1221 (1953). It follows that juvenile defendants, solely based upon their minority status, should not receive diminished access to due process or equal protection under the law through the imposition of disparate filing deadlines. While it is true that the juvenile justice system’s focus is on reform and protection of the child, both the adult criminal and juvenile justice systems have the ability to deprive individuals of their liberty. *In re Gault*, 387 US 27. The United States Supreme Court has noted that our Constitution requires “the procedural regularity and the exercise of care implied in the phrase ‘due process’ in juvenile court proceedings.” *Id* at 27-28. Considering the juvenile’s need for heightened protection together with the due process clause’s mandate of procedural regularity, it follows that the standard for granting a new trial in a juvenile delinquency case should be the same as the standard for granting a new trial in an adult criminal case pursuant to MCR 6.431. Preceded by countless juvenile defendants, the application of MCR 3.992 restricted Christopher’s ability to pursue post-conviction relief by imposing accelerated filing deadlines and limited avenues for rehearing. Christopher faced the same consequences as similarly-situated adult criminal defendants. With its broader avenues for relief, the application

of MCR 6.431 to the instant matter may have spared Christopher years of appellate litigation on the issue of ineffective assistance of counsel.

Our Constitution provides that this Court “shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.” Const 1963, art 6, § 5. This Court should exercise its rulemaking authority to eliminate the disparity in new-trial standards between juveniles and adult criminal defendants.

III. Juvenile Defendant’s claiming a deprivation of their Due Process right to counsel should be required to satisfy the two-part test set forth in *Strickland v Washington*, as interpreted by this Court in under the standard set forth respectively in *Trakhtenberg* and *Ackley* respectively.

Standard of Review: “Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law.” *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011), *citing People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). This Court reviews the trial court’s factual findings for clear error, which exists if this Court is left with a definite and firm conviction that the trial court made a mistake. *Id.*

As more fully set forth his Application and Reply the deficiencies in Christopher’s representation at the trial level meet the standard as set forth in *Strickland v Washington* for ineffective assistance warranting a new trial. (App AB, p 1981a-1989a; App AC, p 2129a-2134a). This Court eight years ago revisited *Strickland* and set forth the proper means for determining whether counsel’s complete failure to investigate or pursue highly exculpatory evidence may be absolved as “trial strategy.” *People v Trakhtenberg*, *supra* and *People v Ackley*, *supra*. However, the Court of Appeals ignored this Court’s analysis and instead relied upon its own decision in *People v Odom*, *supra*. Christopher’s case offers a prime opportunity for this Court to clarify that those accused of a crime, adult and juvenile alike, are entitled to counsel who investigate and vigorously pursue the defense as opposed to retrofitting inadequacy as strategy with the benefit of hindsight.

Fundamentally, the guarantee of effective assistance of counsel codified in the Sixth Amendment ensures that all criminal defendants receive a fair trial. *Strickland*, 466 US at 689. However, until this Court revisited the matter in *Trakhtenberg* and *Ackley*, courts applying the *Strickland* test routinely did so in a manner highly, (or wholly), deferential to counsel. This interpretation of *Strickland* allowed the most egregious failures by ineffective counsel to be excused as “trial strategy” and imposed a heavy burden on those seeking relief, insofar as a child was required to overcome the strong presumption that counsel’s decisions were strategic and demonstrate that the record excludes hypotheses consistent with adequate representation. See, *People v Buie*, 491 Mich 294, 311; 817 NW2d 33 (2012) *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). In essence, this Court’s opinions in *Trakhtenberg* and *Ackley* changed the paradigm, but the Court of Appeals’ decision in the instant case has effectively changed it back.

In *Ackley*, this Court set the standard for determining whether a complete failure to investigate or pursue exculpatory evidence may be absolved as “trial strategy.” In this case, the finder of fact recognized that Randazzo’s failure to properly procure and admit the telephone records could not be presumed to be strategy, and that it constituted ineffective assistance of a constitutional dimension. (App V, p 1895a-1897a). A court “cannot insulate the review of counsel’s performance by calling it trial strategy,” *Trakhtenberg*, 497 Mich at 52. “The strategy...in fact must be sound, and counsel’s decisions as to it objectively reasonable,” *People v Douglas*, 496 Mich 557, 602-603; 852 NW2d 587 (2014). Strategic decisions must still be reasonable. Further, a more searching inquiry must occur where the supposed “strategy” is settled on “before conducting any reasonable investigation,” *Trakhtenberg*, 497 Mich at 52-53 n8; *see also Ackley*, 497 Mich at 388-389. Here, those principles mean that Randazzo’s failure to obtain phone records

which would have completely undermined the Complainant’s credibility, and thereafter produce them as required by the discovery order, was constitutionally deficient, and not “trial strategy.”

In this case, the trial court correctly noted that Christopher’s representation was clearly deficient in a way that cannot be characterized as reasonable professional assistance nor disguised as “trial strategy,” however Christopher battled a heavy presumption insulating his trial counsel. (App V, p 1895a-1897a). In a hearing that lasted over a year with hundreds of pages of transcripts and exhibits, Christopher proved that he passed a polygraph, that his trial counsel made no investigation into his claims, and failed to obtain and introduce exculpatory and exonerating phone records. (App C, D; App L, p 333a-3334a; App T, p 1519a-1521a, 1583a-1589a, 1618a, 1652a-1653a; App F, p 259a-263a; App V, p 1895a-1897a). Despite the clarity of the record in this regard, and the trial court’s acknowledgment that the record did not support the conviction, Christopher still is seeking redress before this Court. (App V, p 1895a-1897a).

Christopher’s battle highlights the special considerations necessary for effective representation of juveniles charged with criminal activity. Both the trial court and the Court of Appeals heavily criticized his mother, Crystal, for her involvement in Christopher’s case, even where the evidence corroborated Crystal’s testimony and contradicted Randazzo’s. (App Q, p 574a – 611a, 643a-646a, 648a-651a; App V, 1890-1891a; App X, p 1902a, 1904a-1906a; App Y, p 1914a-1915a). The Court of Appeals’ reliance on *Strickland* and *Odom* gave heavy deference to Randazzo’s ever-shifting and contradictory testimony regarding his failure to obtain and introduce exonerating phone records. (App C, p 028a, 090a-091a, 140a, 156a-157a, 183a-185a, 188a, 189a; App T, p 1395a-1400a, 1420a, 1424a-1426a, 1507a-1521a, 1576a-1615a). The record before the Court is rife with examples of Randazzo funneling through Crystal his responsibilities as Christopher’s counsel. Randazzo failed to regularly communicate with Christopher, opting

instead to communicate with Crystal; he failed to keep Christopher appropriately advised of the status of his pending case; he failed to coordinate communications between himself and potential witnesses, instead requesting that Crystal arrange such communications on his behalf; he failed to investigate the allegation that the Complainant recanted, instead relying on Crystal's conversation with a potential recant witness and relaying same to the prosecution so that they could investigate the allegation for him. (App M, p 456a-463a, 491a-492a, 568a-575a; App N, p 479a; App H, p292a-303a, App Q, p 574a – 611a, 642a-646a, 648a-651a; App R, p 875a-876a, 879a-880a, 891a; App U, p 1871a-1885a; App T, p 1395a-1400a, 1420a, 1424a-1426a, 1507a-1521a, 1576a-1867a).

Both the trial court and the Court of Appeals took great exception to Christopher's mother being involved with his case but given his juvenile status and Randazzo's failures, what alternative did she have? What mother would not step into the breach in that fashion on her child's behalf? The Court of Appeals left Randazzo's failure to investigate squarely at Christopher's mother's feet. While this case exemplifies why the *Strickland* standard must be interpreted through the lens of *Trakhtenberg* and *Ackley*, it also highlights the egregiousness of Randazzo's conduct and demonstrates the error of the Court of Appeals.

Defending juveniles presents unique challenges that are not adequately contemplated by the Court of Appeals' implementation of the *Strickland* standard. The juvenile defendant's developing cognitive ability and lack of financial independence coupled with their reliance upon parents to assist in retaining and contracting for legal services, requires implementation of clearly defined standards of attorney representation. See, e.g., National Juvenile Defender Center, 2012 *National Juvenile Defense Standards* (2012) section 1.2b, available at <<https://www.njc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>> (accessed March 1, 2020). ("Counsel may not substitute a parent's interests or view of the client's best interests for those

expressed by the client”); and § 2.4-2.6, (counsel has an obligation to communicate with the juvenile themselves, and not to substitute communication with the parents for communication with the juvenile).

Notably, a series of important United States Supreme Court decisions have reformed acceptable sentencing for serious crimes committed by juveniles. The Court forbade the death penalty for juvenile offenders in *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005); prohibited the imposition of life without the possibility of parole for nonhomicide juvenile cases in *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010); abolished mandatory life without the possibility of parole in juvenile homicide cases in *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and most recently, in *Montgomery v Louisiana*, 577 US __; 136 S Ct 718; 193 L Ed 2d 599 (2016), the Court ruled that *Miller* must be applied retroactively to many juvenile offenders currently serving mandatory life without parole sentences. *Montgomery*, 577 US at 736. Collectively, these cases illustrate a shift in the Supreme Court’s approach to the treatment of juvenile defendants. Renowned juvenile advocate and psychiatrist Thomas Grisso, in an article for published by the American Psychological Association, stated that “[d]evelopmental psychological and neuroscience research played a significant role in the Court’s decisions in these four cases. Research offered evidence that adolescence is distinguished by developmental immaturity in comparison to adults in ways that offer mitigation for juveniles’ culpability”. Grisso, Thomas and Kavanaugh Antoinette, *Prospects for Development Evidence in Juvenile Sentencing Based on Miller v. Alabama*, Psychology, Public Policy, and Law, Vol. 22, No. 3, 235-249, 235 (2016), available at <<https://www.apa.org/pubs/journals/features/law-law0000090.pdf>> (accessed June 20, 2020).

These cases collectively stand for the proposition that juvenile defendants, due to their continuing cognitive development, should be provided equal if not greater protection under the law and at the least should have access to the same post-conviction relief as adult defendants. Where, as here, trial counsel texts his 16 year old client a couple of times and meets with him twice prior to trial, Christopher’s matter illustrates the need for clarifying the appropriate standard for ineffective assistance of counsel claims.

Criticism of juvenile-court standards, procedures and norms is not a new topic of discussion. A widespread condemnation of the juvenile court’s arbitrariness and absence of constitutional procedure is reflected in the 1967 decision in *Gault*, which held that juvenile defendants in delinquency proceedings are entitled to the assistance of effective counsel.³

It is worth noting that *Gault* premised a juvenile’s right to counsel on the Due Process Clause of the Fourteenth Amendment, while the adult’s right to counsel is premised on the Sixth Amendment. *Gault*, 387 US at 56, 65. Because the juvenile’s right to counsel flows from the Due Process Clause, as opposed to the Sixth Amendment, an acceptable standard to measure ineffective assistance claims should put emphasis on fairness combined with the rehabilitative purpose of the juvenile court. Therefore, the oppressive and highly attorney deferential standard of *Strickland* as

³ The majority’s discussion of effective assistance referenced *Kent v United States*, 54; 86 S Ct 1045; 16 L Ed 2d 84 (1966), and concluded “In *Kent*...we stated that...[w]ith respect to waiver by the Juvenile Court to the adult court of jurisdiction over an offense committed by a youth...’there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.’ We announced with respect to such waiver proceedings that while ‘We do not mean...to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.’ We reiterate this view, here in connection with a juvenile court adjudication of ‘delinquency’..” *In re Gault*, 387 US at 30 (citations omitted) (quoting *Kent*, 383 US at 554, 562).

interpreted by the Court of Appeals below is not appropriate in juvenile ineffective assistance of counsel claims.

Additionally, the majority in *Gault* stressed that without counsel, juvenile defendants could not realize the constitutional protection of due process⁴. A juvenile defendant without effective counsel could not be expected to perform necessary fact investigation, engage in evidentiary objections, or present an adequate defense. *Gault* at 36-40. The extension of this constitutional right to juvenile defendants, previously reserved for adult defendants, was unprecedented and promising. While *Gault* extended the right to counsel to juveniles, it failed to enumerate a clear standard by which effective assistance of counsel could be measured.

Strickland has proved to be a persistent barrier for juvenile defendants pursuing ineffective assistance of counsel claims, however three United States Supreme Court decisions, albeit in adult capital prosecutions, support this Court's determination that *Trakhtenberg* and *Ackley* continue to set the proper means for determining whether counsel's complete failure to investigate or pursue highly exculpatory evidence may be absolved as "trial strategy." In *Williams v Taylor*, *Wiggins v Smith*, and *Rompilla v Beard* the United States Supreme Court reversed death sentences after it found trial counsel ineffective for failing to conduct adequate investigation to prepare for sentencing. See Barbara A. Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of*

⁴ Barbara A. Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, University of North Carolina School of Law, Faculty Publications, (2010); citing *In re Gault*, 387 US at 41. The majority quoted from the Report of the President's Commission on Law Enforcement and the Administration of Justice: "[N]o...action hold more potential for achieving procedural justice for the child in the juvenile court than provision of counsel." *Id* at 38. See, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), available at <http://www.ncjrs.gov/pdffiles1/njj/42.pdf>

Counsel in Juvenile Delinquency Representation, University of North Carolina School of Law, Faculty Publications, (2010), citing *Williams v Taylor*, 529 US 362, 395-96; 120 S Ct 149; 146 L Ed 2d 389 (2000) (counsel failed to prepare for sentencing phase in a timely fashion, failed to discover graphic details of an abusive childhood, failed to introduce evidence of mental deficiencies); *Wiggins v Smith*, 539 US 510, 528, 534; 123 S Ct 2527; 156 L Ed 2d 471 (2003) (trial lawyers failure to investigate mitigating evidence was not “strategic” when unreasonable and a competent attorney would have investigated further); *Rompilla v Beard*, 545 US 374, 377, 383, 385-86, 390; 125 S Ct 2446; 162 L Ed 2d 360 (2005) (counsel’s failure to examine the court file or investigate mitigating evidence was unreasonable even when the defendant and his family suggested no such evidence was available).

These cases elevated the importance of the American Bar Association (“ABA”) Standards for Criminal Justice when deciding ineffective assistance of counsel claims. The Court applied the ABA Standards as a benchmark for assessing whether trial counsel’s failure to conduct a comprehensive sentencing investigation was reasonable. These rulings are of particular significance because in *Strickland*, Justice O’Connor rejected the application of the ABA Standards of Criminal Justice in determining ineffective assistance of counsel. In *Strickland*, Justice O’Connor stated that the ABA Standards for Criminal Justice should not be used to measure an attorney’s performance but rather used as a guide to determine reasonableness. *Strickland*, 466 US at 688-690. In *Wiggins*, the Court effectively shifted its position. 539 US at 522-528. There Justice O’Connor instead referred, *inter alia*, to the ABA Standards as “well-defined norms” in finding that trial counsel’s departure from the standards by failing to investigate constituted

ineffective assistance of counsel. *Wiggins v Smith*, 539 US 510, 524; 123 S Ct 2527; 156 L Ed 2d 471 (2003).⁵

The application of the ABA Standards in *Williams*, *Wiggins*, and *Rompilla* as “well-defined norms” which can be used to measure the reasonableness of an attorney’s performance will reduce ambiguity and provide defense counsel with clear guideposts for providing effective assistance of counsel. “Well-defined norms” would prevent attorneys from hiding behind an ambiguous standard of “objectively reasonable assistance”. It will require attorney representation to adhere to clearly enumerated standards. Critics argue that the “trilogy” of cases is applicable to capital cases only while proponents argue for the application of clearly established professional norms to **all** ineffective assistance of counsel claims. The application of standards is not a novel concept to our justice system. In fact, the application of standards enumerating well-defined norms is

⁵ See Barbara A. Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, University of North Carolina School of Law, Faculty Publications, (2010); *In Bobby v Van Hook*, the US Supreme Court found that the Sixth Circuit had improperly relied on ABA Guidelines in finding the representation of an attorney in the sentencing phase of a capital case ineffective. *Bobby v Van Hook*, 558 US 4; 130 S Ct 13; 175 L Ed 2d 255 (2009) (per curium) (citing ABA Guidelines-American Bar Association, *ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003), available at, <<http://www.americanbar.org>> (accessed February, 2 2020); See also American Bar Association *Guidelines-Federal Capital Habeas Project*, available at, <<http://www.2255.capdefnet.org>> (accessed February 2, 2020). However, this case did not overrule *Wiggins*. It recognized that professional standards can be useful as guides to what reasonableness entails but was overruled because the Sixth Circuit Court ignored a limiting principle by applying ABA guidelines announced eighteen years after Van Hook went to trial. Additionally, the Court found that the Sixth Circuit “focused on the number of aggravating factors instead of their weight”. *Van Hook*, 558 US at 13; see *Van Hook v Anderson*, 560 F.3d 535, 530 (CA6, 2009).

prevalent. The problem lies not in availability but in application and enforcement of these standards.

Nationally, several organizations publish definitive professional standards for attorneys representing juveniles in delinquency proceedings. The Institute of Judicial Administration-American Bar Association's (IJA-ABA) Juvenile Justice Standards, Institute for Judicial Admin. & American Bar Association. "Standards Relating to Counsel for Private Parties." In Juvenile Justice Standards: A Balanced Approach. Cambridge, Massachusetts: Ballinger Publishing, 1980, and the subsequent, The National Juvenile Defense Standards, set forth a comprehensive guide for zealous, competent and diligent defense practice in juvenile court. The aim is to systematically create performance norms which incorporate law, science, and professional codes of responsibility. National Juvenile Defender Center, 2012 *National Juvenile Defense Standards* (2012), available at <<https://www.njdc.info/wp-content/uploads/2013/09/NationalJevenileDefenseStandars2013.pdf>> (accessed March 1, 2020). For example, section 4.1: Investigate Facts of the Case, requires counsel to "conduct a prompt, thorough, and independent investigation of the facts and circumstances of the case". *NJDS*, 2012, 68. National Juvenile Defender Center. "Section 4.1: Investigate Facts of the Case." *National Juvenile Defense Standards (NJDS)*, 2012, p 68. "It is important for counsel to note that courts may consider counsel's failure to examine crime scenes, interview clients and witnesses, probe the government's evidence, or obtain relevant documents as sufficient proof of ineffective assistance of counsel." *NJDS*, 2012, p 69. National Juvenile Defender Center. "Section 4.1: Investigate Facts of the Case." *NJDS*, 2012, p 69. See, also, *Kimmelman v Morrison*, 477 US 365, 384-386; 106 S Ct 2574; 91 L Ed 2d 305 (1986) (trial counsel, who was unaware of the Fourth

Amendment suppression issue because he failed to conduct any pretrial discovery, was constitutionally ineffective).

Generally, Michigan has no statutorily required or recommended training requirements or standards for attorneys representing juveniles in delinquency proceedings. *See*, National Juvenile Defender Center, Washington D.C., available at <<http://www.njdc.info>> (accessed March 1, 2020).. There are a few exceptions. The Michigan Indigent Defense Commission Act (“MIDCA”), MCL 780.981 et seq., created the Michigan Indigent Defense Commission (“MIDC”) within the Department of Licensing and Regulatory Affairs (“LARA”). Its purpose was to establish a system for the appointment of defense counsel for indigent defendants who are charged with felony offenses in traditional waiver, designated, and automatic waiver proceedings. MCL 780.983(a)(ii)(A)-(D). The MDIC is required to “develop []and oversee[]the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state consistent with the safeguards of the United States Constitution, the state constitution of 1963, and [the MIDA].” citing Michigan Judicial Institute, Juvenile Justice Bench book, Delinquency and Criminal Proceedings-Third Edition, February 19, 2020 p. 17.⁶

In establishing minimum standards, rules, and procedures, the MIDC is to adhere to the following principles:

⁶ This benchbook is not intended to be an authoritative statement by the justices of Michigan Supreme Court regarding any of the substantive issues discussed but provides procedural guidelines for juvenile proceedings; see also MCL 780.983(a)(ii) (As used in the MIDCA, “[a]dult” includes “[a]n individual less than 17 years of age at the time of the commission of a felony” who is subject of a traditional waiver, designated, or automatic waiver proceeding). *See* Michigan Judicial Institute, Juvenile Justice Bench book, Delinquency and Criminal Proceedings-Third Edition, February 19, 2020, p.17; See also, MCL 780.989(1)(a).

(a) Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.

(b) Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation must be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.

(c) ***Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.***

(d) The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.

(e) ***Indigent criminal defense systems employ only defense counsel who have attended continuing legal education relevant to counsels' indigent defense clients.***

(f) ***Indigent criminal defense systems systematically review defense counsel at the local level for efficiency and for effective representation according to MIDC standards.***

MCL 780.991(2)(a)-(f) (Emphasis supplied).

These guidelines truly are a minimal standard and seem more aptly geared toward administration of MIDC resources than effective assistance of counsel oversight. They fail to enumerate acceptable norms for attorney representation in juvenile proceedings. While this standard dictates that an attorney representing a juvenile defendant should have the ability, training and experience to match the nature and complexity of the case; that the appointed attorney must attend continuing legal education relevant to counsel's indigent defense clients, and that his or her representation is subject to review, this standard fails to identify specific norms that juvenile defense attorneys must achieve.

In child-welfare cases, a more rigorous standard is applied to the lawyer-guardian ad litem ("LGAL") who is appointed to represent the best interests of child. The federal Child Abuse Prevention and Treatment Act (CAPTA) (1974). 42 USC 5101 requires LGALs in Michigan to

receive trainings before accepting a court appointment in a child protective proceeding. MCL 712A.17d requires LGALs to participate in training in early childhood, and adolescent development as well and clearly sets forth enumerated obligations and norms for LGAL representation. In contrast, Michigan lacks statutorily defined professional norms for non-appointed counsel representing juvenile defendants in delinquency proceedings. State advisory groups such as the Michigan Committee on Juvenile Justice seek to educate juvenile defense attorneys about acceptable professional norms. Without the application of recognized norms, or consistent application of this Court's rulings in *Trahktenberg* and *Ackley*, the fallback position of *Strickland*'s "wide range of reasonable professional assistance" will continue to allow attorneys to pass off their deficient representation as "trial strategy". *Strickland*, 466 US at 689.

While *Strickland* continues to be the standard under which adult and juvenile defendants labor, and while Christopher meets this burden, his case demonstrates the toll, cost and inequity that characterizes his journey to this Court and begs the question as to whether a more appropriate standard for measuring ineffective assistance of counsel would incorporate clearly identifiable standards balanced by the unique characteristics of juvenile defendant's minority status.

IV. The Court of Appeals erred in reversing the trial court's decision to grant the respondent a new trial based on exonerating evidence that trial counsel was aware of but did not obtain or present.

Standard of Review: "Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011), citing *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). This Court reviews the trial court's factual findings for clear error, which exists if this Court is left with a definite and firm conviction that the trial court made a mistake. *Id.* The Court reviews questions of constitutional law de novo. *Id.*

As explained at length in his Application and Reply, this case presents an injustice so significant that the trier of fact, despite a lengthy and contentious hearing, reversed the conviction

once presented with the exculpatory evidence that Christopher's trial counsel failed to produce at trial. (App AB, p 1992a-2000a; App AC, p2132a -2137a). As such, Christopher restates and relies on this discussion as to why the Court of Appeals erred in reversing the trial court's grant of a new trial.

CONCLUSION/RELIEF REQUESTED

For the above reasons and for those set forth in the November 29, 2018 Application for Leave to Appeal and the January 8, 2019 Reply, or on any other basis the Court deems appropriate, Respondent-Appellant Christopher Ross Jr. requests this Court vacate the Court of Appeals August 21, 2018 Opinion and reinstate the trial court's October 10, 2017 order granting him a new trial due to trial counsel's failure to investigate and defend Christopher with exonerating documentary evidence and witness testimony. In the alternative, he asks the Court to recognize the exonerating evidence and witnesses as newly discovered warranting a new trial – or, to the extent trial counsel with reasonable diligence could have obtained them for trial, deem his failure to do so ineffective assistance, warranting a new trial.

Respectfully submitted,

LONG LAW PLLC

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Date: June 22, 2020