STATE OF MICHIGAN

IN THE SUPREME COURT

IN THE MATTER OF
CHRISTOPHER ROSS, JR.,
/

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

-vs-

CHRISTOPHER ROSS, JR.,

Respondent-Appellant.
/

Supreme Court
No. 158764

Court of Appeals
No. 331096

Family Court
No. 2014-826056-DL

PETITIONER'S SUPPLEMENTAL BRIEF

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JURISDICTIONAL STATEMENT AND RELIEF SOUGHT

Respondent was adjudicated delinquent of criminal sexual conduct fourth degree contrary to MCL 750.520e on June 30, 2015. Respondent sexually assaulted the minor victim in the hallway of a high school. At trial, the prosecution also introduced evidence that respondent sexually assaulted another minor while at school. After disposition, respondent appealed his adjudication. The Court of Appeals remanded for an evidentiary hearing concerning respondent's claim that his attorney represented him ineffectively. After the hearing, though the trial court found that respondent should receive a new trial, the Court of Appeals reinstated respondent's adjudication.[1] *In re Ross,* unpublished per curiam opinion of the Court of Appeals, issued August 21, 2018 (Docket No. 331096); 1901a-1916a. Respondent filed an application for leave to appeal to this Court after the Court of Appeals denied his motion for reconsideration.[2] At all times, respondent argued that the result of his motion was governed by the standard expressed by the United States Supreme Court in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984) and adopted in Michigan for assessing counsel's performance in criminal proceedings.

On January 29, 2020, this Court issued an order asking the parties to address the following questions:

> (1) whether appeals from juvenile adjudications for criminal offenses are governed by the time limits for civil cases or by the time limits for criminal cases, see MCR 7.305(C)(2); (2) 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 6.431(B); (3) whether juveniles who claim a deprivation of their due process right to counsel must satisfy the two-

[1] The Court of Appeals found that the trial court complied with its order of remand. *In re Ross,* unpub op at 12-13; 1944a-1945a.

[2] Respondent is also suing trial counsels civilly and that proceeding is stayed pending respondent's appeal. *Ross v Randazzo,* Oakland County Circuit Court, 2016-152520-NM.

> part test set forth in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); and (4) 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.

In re Ross, ___Mich ___; 937 NW2d 360 (2020).

Respondent's application from the Court of Appeals' opinion issued on August 21, 2018 was untimely. Juvenile delinquency proceedings are civil proceedings (MCL 712A.1(2)) and respondent's application was filed after the 42-day filing deadline listed in MCR 7.305(C)(2) for civil cases. Clearly there is a reason for treating proceedings regarding juveniles in an expedited fashion. Respondent is almost 23 years old (d.o.b. __/__/97[3]). If respondent were granted a new trial, the family court would lack jurisdiction to re-try him since the family court only possesses jurisdiction over respondent until age 19. MCL 712A.2(a); MCL 712A.2a(1).[4] The alternative would be a request for waiver to general circuit court, potential conviction as an adult, and sex offender registration. This case also concerns a victim of the sexual assault who was a minor at the time who deserves finality. See: Const 1963, art 1, §24.

The People are requesting that this Court ultimately dismiss the application. However, if this Court does not reject the application as untimely, this Court should affirm the opinion of the Court of Appeals. The Court of Appeals, which applied the standard advocated by respondent, that articulated in *Strickland v Washington* which the People agree is the correct standard, found that respondent failed to meet both prongs of the *Strickland* test. That decision was supported by the record and respondent has failed to show that the Court of Appeals clearly erred.

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[3] Petitioner is solely including the year of birth.

[4] MCL 712A.2a states the following in pertinent part:

> (1) Except as otherwise provided in this section, if the court has exercised jurisdiction over a juvenile under section 2(a) or (b) of this chapter, jurisdiction shall continue for a period of 2 years beyond the maximum age of jurisdiction conferred under section 2 of this chapter, unless the juvenile is released sooner by court order.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER APPEALS FROM JUVENILE ADJUDICATIONS FOR CRIMINAL OFFENSES ARE GOVERNED BY THE TIME LIMITS FOR CIVIL CASES OR BY THE TIME LIMITS FOR CRIMINAL CASES?

Respondent contends the answer should be, "criminal cases."

The People submit the answer is, "civil cases."

The family court was not asked to address the question.

The Court of Appeals was not asked to address the question.

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?

Respondent contends the answer should be, "yes."

The People submit that the answer in this case is, "yes."

The family court was not asked to answer the question but evaluated the case under the same standard as in a criminal case.

The Court of Appeals was not asked to answer the question but evaluated the case under the same standard as in a criminal case.

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; 104 S Ct 2052; 80 L Ed 2d 674 (1984)?

Respondent contends the answer should be, "yes."

The People submit the answer is, "yes."

The family court was not asked to answer the question but evaluated the case under the test in *Strickland* as advocated by respondent.

The Court of Appeals was not asked to answer the question but evaluated the case under the test in *Strickland* as advocated by respondent.

IV. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S DECISION TO GRANT THE RESPONDENT A NEW TRIAL BASED ON THE EVIDENCE THAT TRIAL COUNSEL DID NOT OBTAIN OR PRESENT?

Respondent contends the answer should be, "yes."

The People submit the answer is, "no."

The trial court granted respondent a new trial.

The Court of Appeals reinstated respondent's adjudication.

SUMMARY OF THE ARGUMENTS

Since the end of the nineteenth century, courts across the nation have historically treated juvenile delinquency proceedings as civil and without the formalities of adult criminal proceedings. The Michigan Legislature has likewise established that juvenile delinquency proceedings are civil in nature. Both the United States Supreme Court and Michigan courts have found that this type of treatment enables the family courts to intervene and rehabilitate the offenders before they reach adulthood. Respondent's application, filed outside the time limitations established by this Court for civil cases, was untimely and should be dismissed.

Moreover, the claim that any other standard but *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) should govern respondent's motion for new trial is waived since, at every stage including in this Court, respondent has advocated that *Strickland* applied. But, in the event that respondent's application is not dismissed, and this Court finds that the issue is not waived, Michigan should join the overwhelming majority of states that have considered the issue and apply *Strickland* to evaluate respondent's claims. The *Strickland* standard is consistent with the standard articulated by this Court in MCR 3.902(A).

The Court of Appeals also did not clearly err when determining that respondent failed to meet the standard established in *Strickland.*[5] After an evidentiary hearing that elapsed over the course of almost a year and a half, the judge found that respondent should be entitled to a new trial for failure to obtain phone records which revealed a call after the incident from the victim's

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[5] Respondent argues that the Court of Appeals disregarded this Court's opinion in *People v Trakhtenberg,* 493 Mich 38; 826 NW2d 136 (2012) and *People v Ackley,* 497 Mich 381; 870 NW2d 858 (2015). However, the Court of Appeals referenced *People v Grant,* 470 Mich 477, 485; 684 NW2d 686 (2004) which, along with *Trakhtenberg* and *Ackley,* relied on the same reasoning from *Strickland v Washington* regarding the duty to investigate. *Trakhtenberg,* 493 Mich at 52; *Ackley,* 497 Mich at 388-389. Instead, this case involves the application of the duty to investigate as discussed in *Strickland*.

phone to respondent's mother's phone. 490a-495a. At trial, the victim did not recollect loaning her phone to respondent to call his mother. 90a-91a. However, she testified that she was in shock after the assault (63a) and the judge found she was distraught after the assault. 245a-256a. Respondent's attorneys stated at the hearing that her testimony could have been explained by her distressed mental state at the time (1330a, 1544a, 1599a-1600a) as well as the fact that the phone call occurred sometime after the incident. 15921, 1598a. The judge had previously found that any phone calls wouldn't have made a difference in the outcome of the trial. 271a-272a.

The Court of Appeals found that counsel's "decision not to undertake any additional investigation was a reasonable professional judgment considering the specific facts and circumstances at the time he made the decision." *Ross,* unpub op at 6; 1906a. The Court found, primarily, that because respondent's mother gave respondent's attorneys phone records ***which did not reveal the disputed phone call,*** the attorneys involved in the case couldn't be faulted for limiting their investigation. *Id.* at 5-6; 1905a-1906a. Respondent does not dispute that the records that he claimed to have provided to his attorneys did not reveal the phone call. The Court also noted other circumstances that caused the attorneys to be suspicious regarding respondent's claims and the fact that the trial attorney testified that he believed that there were also disadvantages regarding going down this line of inquiry. *Id.* The Court of Appeals emphasized that the attorneys' conduct could not be assessed with the benefit of hindsight and found that respondent failed to overcome the strong presumption that counsel's actions were based on reasonable strategy. *Id.* at 2; 1902a. The record supports the Court of Appeals' conclusion.

COUNTERSTATEMENT OF FACTS

Introduction

Respondent, who was on the track and football team, sexually assaulted two high school students at Rochester High School in the fall of 2014 on school grounds. One of the students testified as an other-acts witness at trial. Respondent admitted to the police that he would take girls down the hallway where he knew there were no surveillance cameras. Respondent made a number of false statements during his interview with the police before he finally acknowledged that he took his penis out of his pants and rubbed it against the victim. On June 30, 2015, at a bench trial, respondent was adjudicated delinquent of one count of criminal sexual conduct fourth degree contrary to MCL 750.520e(1)(b)(*i*),(*v*).

Trial

The victim, sixteen-year-old Faith Johnson, ran track with respondent at Rochester High School. 49a. He followed her on Instagram, and they were "friends" on social media but not good friends.[6] 49a-50a, 81a. On Thursday, November 20, 2014, Faith saw respondent, who was with some friends at school, around 3:00 p.m. while she was running for track inside. 51a, 52a. (She said that she wasn't lifting weights that day. 52a, 80a). Later, after respondent's friends left, he stopped her (53a), they engaged in a friendly conversation, and he asked her to walk

[6] The victim testified that months before the incident, she had exchanged innocuous short texts with respondent concerning sports (82a-83a) but did not send him photos or videos (225a) through Kik, Instagram, or Snapchat. 226a. Respondent's mother requested that the police conduct a phone analysis of respondent's phone close to the date of the incident (134a-135a, 1441a-145a, 148a, 1661a) since respondent had insisted his phone would contain a video sent by the victim that he had saved as well as sexually explicit texts she sent. 153a-154a, 936a, 1766a**.** The police consequently discovered thousands of images, many of which were pornographic in nature, but none of Faith. 145a, 84b. Though respondent was sexting with at least two other female schoolmates (88b), and there were thousands of texts on his phone (86b), there were no texts at all from Faith. Her name was not even saved as a "contact" on his phone. 85b.

down the hall with him. 53a. Faith testified that a teacher walked by when they were still engaged in conversation.[7] 66a.

Robert Byrd, a teacher at Rochester High School (211a), testified that he left his classroom in the late afternoon and encountered respondent and a girl. 211a-212a. The students were walking about four feet away from each other. 216a.

Deputy John Ashley later reviewed a 54-second surveillance video from 3:59 p.m. on November 20, 2014, which showed respondent and Faith walking down the main hallway and then making a left turn down another side hallway. 34a, 38a. Respondent was the first individual who went down the side hall leading Faith. 34a-35a, 37a. The surveillance tapes did not cover the side hallway. 44a.

Faith testified that sometime after they turned the corner, respondent grabbed her forearm and touched her butt, saying that she had a nice ass. 54a-55a. Similar incidents had happened before, when he would try to kiss her or grab her, but she had been able to walk away. 55a. Faith told him "no," but he pushed her up against the wall face first, touched her butt, her "boobs," and her vagina. 56a, 60a. After he pulled her pants and underwear down, he touched her vagina with his erect penis. 61a-62a. He kept making comments about her butt and was groaning. 68a. She was in shock. 63a Respondent told her that he thought his penis "went in," and she snapped out of it and elbowed him off and ran away. 64a.

Faith went to her locker, called her uncle, and went outside to wait for him. 65a. She testified that she did not let respondent use her phone. 90a-91a. She saw him again—though during testimony she initially forgot she had done so—when he returned to school with his

[7] Faith did not testify that Mr. Byrd interrupted the sexual assault, instead that she saw him beforehand when they were just walking down the hall. Her testimony was supported by Mr. Byrd.

mother while she was still waiting for her uncle.[8] 90a. After her uncle picked her up and she got home, she took a shower because she felt "gross and icky." 67a.

That weekend, Faith disclosed what had occurred to her sister and her aunt (68a-69a) who revealed the information to a teacher who informed the police. 71a, 72a. Officer Ashley and Detective Jason Gruda both interviewed Faith who they both described as "distraught." 32a; 141a-142. Faith also disclosed to her friend Zaynab. 72a-73a. Zaynab told Faith that she also had had an incident with respondent. 74a.

Sixteen-year-old Zaynab Rasheed testified that she also knew respondent from track (104a-105a) and one day, in the fall of 2014, while she was in a front vestibule, respondent blocked the exit doors (107a-108a), put her against a wall, held her arms, and went underneath her shirt and her bra (108a, 113a, 115a), and tried to go down the front of her pants. 117a. After a few minutes, he let go of her. 103a. Zaynab testified that a similar incident had occurred the year before, but respondent was not as aggressive, so she just let it go. 122a.

Faith testified that, in the days following the sexual assault, a fellow classmate by the name of Ariel texted her and spoke to her trying to find out information. Faith testified that they were not close friends (96a) and she wouldn't speak to Ariel about the assault. 97a. Though Ariel told Faith that she didn't really believe respondent, his mother was trying to get her to come over and write a letter for him. 96a. (Respondent later testified that he knew Ariel

[8] The victim did not testify that she left the school immediately, but instead went to her locker, called her uncle, and then went to wait for her ride. She later saw respondent coming back into the school. 65a, 90a. Ms. Ross said that this was around 5:00 p.m.. 548a.

Crumes, but claimed he wasn't very close with her and neither was his girlfriend Ayanna.[9] 185a)

When Detective Gruda interviewed respondent in front of his parents a couple days after the assault (135a), respondent was very "casual" (136a) and told the detective that he had "fooled around" with Faith and touched her breasts, buttocks, and vagina. He first claimed that he had ***never*** exposed his penis but then admitted to exposing his penis and rubbing it against her vagina when her pants were down. 136a-137a. He knew that there were no surveillance cameras down that hallway and said that was where he takes "the girl***s.***" 138a. Respondent also acknowledged "fooling around" with Zaynab Rasheed in the past. 138a.

Respondent, who played football and ran track[10] at Rochester High School, testified that on November 20, 2014, he was at school weightlifting with Cobe Bryant, Britton Williams, and Trevor Muir. 152a. When they started running in the school, he saw Faith. 152a, 168a. After his friends had left, he stopped Faith (153a, 171a) and told her he was single (171a)—which he admitted at trial was a lie since he had been dating Ayanna Wyatt. 165a, 185a, 188a. He also admitted he later falsely told the detective that he never wanted to date Faith. 173a. Respondent claimed that Faith had previously sent him sexually explicit texts and videos[11] and that day told him she liked him. 153a-154a. Respondent kissed her and grabbed her butt and he claimed that she then started "grinding on" him. He asserted that they stopped and waited for Mr. Byrd to

[9] Ariel Crumes later testified at the evidentiary hearing that she was friends with respondent (349a), Ms. Ross testified that Ariel had dated respondent's brother, Conner (712a), and Trevor Muir testified that Ariel was one of respondent's closest friends. 194b.

[10] Respondent's best friend, Chandler Ellis, was called by respondent and opined that Faith would flirt with respondent during track practice. 199a-201a, 205a-206a. The judge found he exaggerated his testimony which was inconsistent with respondent's. 250a.

[11] Nothing was found on his phone when the police evaluated it. 140a, 145a.

walk by.[12] Respondent admitted that he exposed his penis (though he had at first denied it to the detective), pulled down her pants, and rubbed his penis in between her pants and her vagina. 155a, 174a. He claimed that she took her pants off and he took his own off. 155a. (Respondent admitted that he at first told the detective that his pants never came down. 174a.) At another point during the interview, he admitted that ***he*** pulled down her pants. He said that he pulled down her pants a couple of inches and then asked if it was okay, then he pulled them down a little more and asked if it was okay again. He claimed he did the same when he was pulling down his pants. 186a. He claimed he did that with every girl he was with—though he was only sixteen years old. 187a. He testified that he just decided to end the incident because he had to call his mother, though his penis had been hard, and he didn't ejaculate or have sex with Faith. 180a-182a.

He said that after the assault, he and Faith continued walking and talking. When he was getting ready to leave, he asked to use Faith's phone, and he called his mother from her phone three times.[13] 156a. He said, when specifically questioned by the judge, that he used Faith's phone because his phone was dead, though he had previously testified that he had just received a text from his girlfriend.[14] 165a-166a, 188a-189a. After he made the phone call, he said that Faith continued running. 183a.

Respondent testified that he left school and came back to bring his sisters food. 157a, 183a. He said he saw Faith and had a short cordial conversation with her. 158a.

[12] His testimony was not supported by Mr. Byrd.
[13] The AT&T records that counsel later produced at the evidentiary hearing were inconsistent with respondent's testimony—the records revealed only one call. 490a-493a.
[14] This claim was not supported by the forensic evaluation of defendant's phone. 92b-93b.

He claimed that he had consensual sexual interaction with Zaynab Rasheed at school (178a) where he had kissed her and touched her buttocks (189a) but he denied that he attempted to go up her shirt. 190a.

The judge found respondent responsible for criminal sexual conduct, fourth degree. The judge wanted "***to compliment both attorneys on their preparedness, on their sticking to the issues in the case and not taking us on journeys that we didn't have to do in this challenging situation. Their preparedness and their professionalism is appreciated.***" 242a-243a.

The judge found that Faith testified credibly. The court pointed out that she was distraught after the incident as well as when revealing what had occurred to both the deputy and detective. 243a, 245a-247a. The judge found that her testimony was supported by the video which revealed that respondent and Faith were having a normal conversation and were not really close together when walking down the hall (244a) as well as the testimony of Zaynab Rasheed. 246a. The judge pointed out that all that Faith would get from reporting the incident was social grief. 246a. The court came to its conclusions after reviewing the tape and going over "every word of testimony." 242a.

The judge also observed that the detective said that respondent was very casual during the interview and not upset (247a) and the judge pointed out that respondent lied to the police during the interview about never exposing his penis and about not being interested in Faith. 278a-249a. The judge did not believe his account regarding how the incident ended, that he had his erect penis out and there was consensual grinding going on, but he looked at the clock and decided he had to call his mother. 250a.

The judge noted that there was no substantiation to respondent's claim that Faith sent him inappropriate videos. His phone was evaluated and there was nothing to support his

allegation, though there were other pornographic images recovered from the phone. 247a. The judge found his testimony about his phone usage was also not credible. He testified he used Faith's phone because his had died but also testified that he had just received a text message from his girlfriend about a sketchbook and that was why he encountered the victim. 248a.[15] The judge found that respondent contradicted himself and lacked credibility in key areas and that he was more concerned with everyone understanding that "he's got game" than behaving appropriately. The judge indicated that respondent's statement, that he knew where the cameras were because that was where he took "the girls", plural, was very telling, that he specifically took time to evaluate the security system. 247a. The judge believed that respondent convicted himself due to his inconsistencies and lack of credibility. 250a. The judge told respondent, "You picked the wrong girl." 251a.

The judge held, "***[t]here's not a question in my mind that the contact was forced, was coerced, and the prosecution has proved it beyond a reasonable . . . doubt . . . I am finding that he is absolutely beyond a reasonable doubt responsible for criminal sexual conduct in the fourth degree.***" 251a. Respondent's disposition included probation as well as individual, family and sex offender counseling.[16] 16b-17b. The judge said, "there's no way that this young man is ever going to curb his behavior if his attitude continues to be . . . he's the victim. . ." 10b. The judge also noted that the psychologist who evaluated respondent said that he had problems with boundaries, and it appeared that sexualized and sexual behaviors had become the norm for socialization for respondent and his peer group. 13b. The victim's family wanted respondent to be rehabilitated and stated that the only way that this could happen is if respondent were honest.

[15] It was later verified that defendant's phone was not dead and he didn't receive a text from his girlfriend**.** 38b, 47b, 48b-49b, 89b, 91b-92b.

[16] The court noted that respondent was ineligible for consent calendar and consideration under H.Y.T.A.. 326a.

10b-12b. Again at disposition the judge found that "[t]his case was proven beyond a reasonable doubt . . . I am very comfortable with the conviction. . ." 14b-15b.

Motions for New Trial

After adjudication, trial counsel moved for a new trial asserting, among other grounds, that the court should have let respondent's counsel continue in his cross-examination of the victim with documentary evidence concerning phone calls from her phone. Counsel did not attach any phone records or screen shots of any phone records to the motion. 259a-263a. The court denied respondent's motion and specifically commented in the following manner:

> The Court also notes that when the Court found Respondent guilty, ***that the Court indicated on the record that the verdict was not based on the line of questioning regarding the alleged phone calls made following the incident, but on the evidence presented as a whole*** . . .

270a-271a. Current counsel filed a second motion for new trial which was denied. 324a-330a. Though counsel claimed that trial counsel should have procured phone records, no phone records or screen shots of phone records were attached to the second motion for new trial. 273a-320a.

Evidentiary Hearing[17]

Another new attorney filed a motion to remand. Respondent's claim was primarily that counsel was ineffective for failing to call certain lay witnesses as well as failing to introduce certain phone records from respondent's mother's phone. Counsel did not attach any phone records or screen shots of any phone records to the motion to remand. She admitted she did not have any records **(**Respondent's Brief Supporting Remand, pg. 15**).** The Court of Appeals granted the motion for an evidentiary hearing.

[17] The hearing was extensive, over 1,500 pages of transcript.

At the conclusion of the hearing held in the family court, the judge found all issues meritless except the claim that counsel should have obtained and used phone records. At the hearing, respondent called friends of respondent to attempt to support his claims.

He called Ariel Crumes, who asserted that that she had worked out with Faith Johnson in the weight room on November 20. She said that in the middle of their workout Faith went running in the hallways and then returned to continue lifting.[18] She testified that Faith said nothing about any incident with respondent and Ariel didn't notice anything significant about her demeanor. 382a-383a, 450a.

During the hearing, however, Ariel did not have a good recollection of events. She couldn't remember the particulars of workouts before the 20th. 454a. She said that she knew what they did because that's what they "always do." 447a, 448a. She said, "I'm not sure what the time frame of anything that happened. . ." 449a. She testified she remembered what happened on the 20th after Ms. Ross and friends of respondent were "explaining it to me." 380a, 450a, 454a, 455a. She said that she then remembered being with Faith but was not sure if anything had happened. 454a-455a. Also, though she said that she and Faith had been working out in the weight room, neither respondent, Cobe Bryant, nor Trevor Muir testified that they saw them working out in the weight room though they testified that they had been in the weight room that afternoon. 152a, 166a,168a, 188b, 190b, 233b, 237b. Though Ariel said that she had been running with Faith around 4:00 p.m. and then weight-lifted after that (382a), Attorney Randazzo, respondent's trial counsel, when he testified at the hearing noted that her information conflicted with the surveillance tape which showed respondent and Faith walking the halls at

[18] In the statement that Ariel wrote before trial and gave to Ms. Ross, it appeared that she was saying that the sexual assault could never have occurred because she was with Faith the whole time. 479a.

3:59 p.m. (38a) as well as respondent's statement that he saw Faith after the incident. 1540a, 1542, 1543.

Though Attorney Randazzo testified that Ms. Ross told him before trial that Ariel would reveal that the victim had recanted to her, Ariel testified at the hearing that Faith never told her that the incident did not occur, and Faith never said that she wanted to change her account. 421a-422a. Ariel also told Faith that she was getting pressure from Ms. Ross to ask her questions and she felt intimidated (423a-424a) which she also acknowledged at the hearing was true. 420a, 423a, 424a. Attorney Randazzo testified that Ariel told him when he questioned her before trial that Faith had never recanted to her (1738a) and said that she was forced to write a statement by Ms. Ross. 1530a. Attorney Randazzo testified that he wasn't going to put Ariel on the stand if she were going to deny the recantation. Instead, he used the information to confront the victim at trial. 1739a.

Also, in Ariel's statement in support of respondent that she had given to Ms. Ross which was provided to Attorney Randazzo before trial, she wrote that she did not believe respondent participated in the act being accused against him. 453a-454a. Attorneys Dobson and Randazzo (attorneys for respondent) testified at the hearing that the written statement that Ariel had provided to respondent's mother was inconsistent with the evidence (1309a, 1450a) because respondent admitted to the police that he had participated in a sex act. 453a-454a.

Ariel also revealed that she was close with respondent. Ariel Crumes testified that she was friends with respondent and his brother, Conner (389a), Ms. Ross later testified that Ariel had dated Conner (712a), and Trevor Muir testified that Ariel was one of respondent's closest friends. 194b. After Ariel heard about the incident, she first went to talk, not to Faith (452a), but to friends of respondent as well as respondent's mother, Ms. Ross. 379a. She was "gung ho" to

write a statement to support respondent because he was a "sweetheart" and didn't have "*any* flaws" in his character. 379a, 450a-451a. She did not want anything bad to happen to respondent and wanted to help out. 379a. (She said that either Ms. Ross or the "football boys" had told her that "everyone" was going to respondent's house to write statements supporting respondent. 463a.)

Ariel came to court the day of trial after being subpoenaed (460a), was questioned by Attorney Randazzo, but was not called to testify. 407a-408a, 461a-462a.

At the conclusion of her testimony, the judge found that Ariel did not testify credibly. 1892a.

Trevor Muir and Cobe Bryant testified at the hearing that on November 20, 2014, they were running in the halls with respondent and were only separated from him for a matter of seconds. 174b-178b, 218b-219b, 226b. This testimony would have lent support for the proposition that ***no*** sexual act occurred. However, respondent admitted that the sexual act occurred but claimed it was consensual. 155a.

Trevor Muir testified that he had very little recollection of November 20. 171b. Attorney Daniel Randazzo said that he spoke to Trevor Muir and Muir didn't have any information regarding the contact between respondent and Faith, he was not responsive to his questions, he had a demonstrated bias, and his timeline conflicted with that of respondent. 1772a-1773a. Respondent's mother admitted that respondent's attorney spoke to Trevor Muir, said that he was not a good witness, sent her a text indicating this as well (675a, 677a) and that she texted Attorney Randazzo that he shouldn't use Trevor if he was afraid of using him. 345b-346b.

Though Ms. Ross had told Attorney Randazzo that Cobe Bryant would confirm that the victim had recanted to Ariel Crumes, Mr. Bryant did not testify at the hearing that he had heard

anything about a recantation. Cobe Bryant instead testified that Ms. Ross, respondent's mother, threatened that if he didn't fill out a statement, he would be arrested. 227b.

Conner Ross, respondent's older brother, testified concerning a prior incident which respondent claimed resulted in a false rape accusation by the victim. Conner testified that he came up behind Faith at a track meet in the past and gave her a hug. 255b, 256b, 269b. Conner later apologized to Faith indicating that he did not intend to make her feel uncomfortable. 263b. After he apologized, Faith said that she was fine, and they didn't have any more problems. 264b. Faith never told Conner that she had been lying. 281b. The court found that Conner's testimony did not reveal that there was a prior false rape accusation. " . . . Conner Ross ended up describing it as a big misunderstanding. So I—I didn't—I didn't see that as a prior false claim . . . he said they—they cleared the air, it was a misunderstanding, that he did have physical contact with her, she took it one way, he meant it another way, and I—I wouldn't characterize it as a prior false claim."[19] 1844a.

The second issue at the hearing concerned phone records. Respondent made a number of claims at trial regarding his phone:

> 1) He asserted that the victim had previously sent a sexually explicit video which he had downloaded and sexually explicit texts to him on his phone. 153a-154a. See also: 936a-937a.
>
> 2) He claimed that he encountered the victim for the second time when he was on an errand for his girlfriend to get her sketchbook from her locker after his girlfriend, Ayanna, had texted him to do so. 165a-166a, 169a, 188a-189a.
>
> 3) He then testified that, sometime after the sexual conduct, he asked to borrow the victim's phone because his was dead. 188a-189a, 979a.

[19] Attorney Randazzo testified that he had intended to file a witness list but did not. He did not have a definitive list before trial since he was not able to interview some witnesses until June 29, 2015. 1634a-1635a. On the date of trial, Attorney Randazzo had subpoenaed witnesses and spoke to respondent regarding his decision not to call some of the witnesses. 1805a. No witness that he wanted to call was precluded from testifying.

4) He then claimed he called his mother from the victim's phone three times.[20] 156a; 977a-978a.

Testimony at trial and at the hearing revealed that all four of the claims were unsupported:

1) The forensic evaluation of respondent's phone conducted before trial (140a, 145a; 27b) revealed that there were no explicit videos or texts sent by Faith on his phone. Instead, the evaluation revealed thousands of images, many of which were pornographic in nature, but none of Faith.[21] 84b. It revealed that respondent was sexting with at least two other female students (88b), and there were thousands of texts on his phone (86b), but there were no texts at all from Faith. Her name was not even saved as a contact on his phone.[22] 85b.

2) The forensic evaluation revealed that there was no text to his cell phone from his girlfriend, Ayanna, at all from 12:40 p.m. until after 5:10 p.m. that afternoon, much less a request for him to get her sketchbook. 92b-93b, 313b.

3) Both the forensic evaluation as well as AT&T records revealed that respondent's phone was not dead around the time of the incident but instead was receiving calls. 497a-498a, 38b, 47b, 48b-49b, 89b, 91b-92b.

4) Respondent's mother was communicating with respondent with her work phone [(Verizon), phone number (248) 303-8283] the afternoon of the incident. She called him at 4:29 p.m. (296b) and texted him at 4:35 p.m.. 305b. However, there were no phone calls on her work phone to the victim's phone or vice versa. 296b-297b.

5) AT&T records revealed that there was a call from the victim's phone to respondent's mother's personal cell phone [phone number (313) 618-1776] at 4:24 p.m. that afternoon and, at 4:31 p.m., three phone calls from Ms. Ross's personal cell phone to the victim's phone. 490a-495a.

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[20] Ms. Ross also testified at the hearing that while she was en route to pick respondent up at school respondent left her a voice mail message (542a) (which she did not preserve (720a)) and she called the unknown number back multiple times. 542a. She claimed that the last time spoke to a young lady who said that respondent was on his way out. 545a. She never mentioned this allegation before the evidentiary hearing even in her affidavit filed in support of respondent's second motion for new trial. 716a-719a.

[21] Ariel made an allegation that the victim had asked *respondent's own girlfriend* to send a photo of Faith to respondent. 369a-371a. However, again, there was nothing on his phone and the judge ultimately found Ariel did not testify credibly.

[22] His phone was seized shortly after the incident. Both Attorney Randazzo and Detective Gruda testified that Kik, a Canadian company, would not release records. 1398a; 112b-113b.

The disputed issue at the hearing concerned the provision of information concerning the phone call from the victim's phone to respondent's mother's phone after the incident. Respondent's mother did not claim that she showed the trial attorneys copies of either her Verizon or AT&T records; she instead testified that she provided screen shots of phone records in a binder for the attorneys at the inception of the representation. These screen shots did ***not*** reveal a phone call from the victim's phone to her phone, but instead solely revealed three phone calls from Ms. Ross's personal phone to the victim's phone (248) 766-1059, the afternoon of the incident.[23] 299b-300b; 592a, 832a. The judge, however, found her "completely untruthful" when she testified about the documentation that she provided respondent's trial attorneys. 1893a.

Ryan Dobson, an attorney who worked for Dan Randazzo, testified that at the inception of the case, Ms. Ross provided a binder of information to Attorney Dobson.[24] 1040a. However, the binder did ***not*** contain any photographs of phone records. 1201a-1202a. Attorney Dobson said that at some point he heard the claim that there had been a phone call from the victim's phone after the incident (1329a), but was not presented with screen shots of phone records from the Ross family (1328a), and didn't see the phone records that Ms. Ross said she gave them in the binder until discovery in the malpractice case after trial. 1201a. Respondent had included his written statement in the binder (1194a) and in neither respondent's statement nor in his police report did he reference using Faith's phone. 1336a. (Respondent also admitted during the hearing that, though he told the police on at least three occasions that Faith had her cell phone

[23] The records did not include the outgoing call from the victim's number at 4:24 p.m., which was included in the AT&T records later produced at the evidentiary hearing.

[24] Attorney Dobson was extremely confident that the binder that he reviewed was in its original condition. 1059a. Attorney Dobson said he also had almost a photographic memory (1060a) and said he used the binder on a frequent basis while the case was pending. 1059a.

with her at the time of the incident, he also did not mention to the police that he had used Faith's phone. 928a, 934a-936a.)

Attorney Dan Randazzo[25] represented respondent and testified that he was provided with the police report, a statement from respondent, and statements from some of respondent's friends which were provided by the Rosses. 1411a-1412a. While the case was pending, Ms. Ross told him that she had phone records that supported the assertion that respondent borrowed Faith's phone after the incident, but the records she provided later in the representation at Attorney Randazzo's request did ***not*** confirm that a call was made. 1577a-1578a, 1605a. He did not conduct further investigation because the records she showed him didn't support her assertion. 1605a. Attorney Randazzo was not aware until later that Ms. Ross had multiple phones (1586a, 1785a) and believed that after the trial, Ms. Ross said that she gave him the wrong phone records. 1613a. Attorney Randazzo was a little suspect of whether the phone call actually occurred because it wasn't mentioned until late in his representation. 1792a. He also stated that nowhere in the police report, Ms. Ross's email account she provided him, or respondent's statement was there a reference to allowing the victim to use his phone. 1792a-1793a. Detective Jason Gruda testified at the hearing that during his interview of respondent, which was a couple hours long, respondent never mentioned using Faith's phone even though there were multiple conversations about phones throughout the course of the interview. 82b-83b.

Attorney Dobson testified, when questioned about the AT&T phone records produced at the evidentiary hearing which did reveal a phone call from the victim's phone to respondent's

[25] Attorney Dan Randazzo, a general practitioner who had practiced law for about 30 years, testified that about 30 to 40 percent of the cases that he handled were criminal in nature which included criminal sexual conduct cases. 1372a, 1373a, 1379a, 1380a.

mother's phone, that they were helpful but not essential. 1212a. He said that if Faith had allowed respondent to use her phone after the incident it could be viewed as abnormal (1213a), but that trauma could also have impacted the victim's decision. 1330a. Attorney Randazzo also did not find the fact that respondent may have made a phone call from Faith's phone particularly compelling. 1589a, 1786a. He testified that every individual behaves differently to a criminal sexual assault and victims of criminal sexual assault sometimes don't come forward for years. 1544a, 1578a-1579a. He said that if actually confronted with the phone records, Faith could have said that she let him borrow his phone because she was afraid of him (1787a) or that she didn't remember or she was in shock and it escaped her memory.1788a, 1790a. Faith had testified at trial that she was in shock around the time of the incident. 1788a.

Attorney Randazzo also testified that, because there was a lapse in time from the assault until the phone call, he did not believe the fact that Faith allowed him to borrow her phone was determinative:

> . . . the call took place outside while she was waiting to be picked up, and Chris was gonna be picked up or arranged to get food. So, there was a significant, if you will, period of time between the contact and the alleged call. That's why in my theory, that is [sic] really didn't have—whether the phone call was made or not made, didn't necessarily impact the defense that much because she might have let him use the phone 'cause she was afraid of him. She might have let him use the phone for any number of different reasons. He may have grabbed the phone.[26]

1598a.

Attorney Randazzo said that he hoped to surprise the victim and tried to (with other phone records in his hands) get Faith to acknowledge that the phone call was actually made. 1601a-1602a, 1604a, 1791a.

[26] Respondent also testified at trial that he *did not* use the victim's phone right after the incident but later on when he was getting ready to leave. 156a.

At the conclusion of the hearing, the court found that, though trial counsel had failed to timely file a witness list, that error was harmless because no witness was prevented from testifying. 1891a. The judge found "all of Respondent's witnesses, especially Ms. Crumes, Mr. Muir, and Mr. Bryant offered testimony that even with the benefit of post-trial hindsight were witnesses who Mr. Randazzo asserts were not called to testify as sound trial strategy." 1892a. The court found that each of the witnesses had credibility issues and "offered cumulative, irrelevant, unhelpful, and redundant testimony." *Id.* The court found that Ms. Crumes "was not an actual eyewitness to the evidence underlying the case, as Respondent had attempted to proffer." 1892a. The Court said that the witnesses instead ended up "portraying Respondent in a light the opposite of the desired effect." 1893a. The court also rejected the claim that the attorney did not adequately investigate these witnesses and found that he in fact called the witnesses who were pertinent to the case. 1894a. The court found, for similar reasons, that, if called, their testimony would not have changed the outcome of the trial. 1894a.

The court did find that counsel rendered ineffective assistance of counsel by failing to obtain phone records which would have impeached the victim. 1896a-1897a. However, though the court found no other error on the part of Attorney Randazzo, the court opined, "[o]n remand, this Court is to question whether certain alleged failure***s*** of Mr. Randazzo's trial performance culminates in this Court questioning the fairness and soundness of its verdict." 1897a. The court found that it no longer "has a record before it indicating Respondent's culpability beyond a reasonable doubt." 1898a.

The Court of Appeals, which had retained jurisdiction, reversed the lower court's decision and reinstated respondent's adjudication. The Court emphasized that it must "evaluate defense counsel's performance from counsel's perspective at the time of the alleged error and in

light of the circumstances." *In re Ross,* unpub op at 4, citing *People v Grant,* 470 Mich 477, 487; 684 NW2d 686 (2004), quoting *Strickland,* 466 US at 690-691; 1904a-1905a. The Court found that respondent's claim that his attorney was ineffective failed for three reasons:

1) The attorney testified that he was given records by respondent's mother which did not support the claim that there had been a phone call from the victim's phone to respondent's mother's phone. The Court noted that the screen shots that respondent's mother said she gave him from her own phone records did not reveal the call and the records appeared complete.

2) The attorney also explained that there was no mention of the call in the police reports or other statements provided to him by respondent and his mother.

3) The attorney did not view the call, even if it had been made, as particularly important because he was fearful that the victim would testify that he took her phone by force or without her consent. The attorney believed that there were downsides to further pursuing this claim.

Id. at 5-6; 1905a-1906a. The appellate court found that the family court judge absolutely failed to address the attorney's strategic reasons for proceeding as he did and did not acknowledge that the records that respondent said the attorney had in his possession did not reveal a phone call from the victim's phone to respondent's mother's phone. 1906a. The Court of Appeals ultimately found that the decision was a reasonable exercise of professional judgment and therefore was not objectively unreasonable. 1906a.

The concurrence noted that respondent's mother had two mobile phones, a personal one through AT&T and a work one through Verizon, and counsel testified that he believed that she had given him the wrong phone records possibly from a different phone number, reasonably the Verizon records. These records did not support respondent's position at all. *Id.* at 2-3 (SWARTZLE, concurring); 1915a-1916a. "Thus, if trial counsel did not, in fact, have the AT&T screenshots showing respondent's mother's three calls to the complainant's phone at the time in question, then he could not be faulted for not researching the matter further." *Id.* at 3; 1916a.

Judge Swartzle noted that the court made a credibility finding regarding the provision of the records. The court found that respondent's mother had been untruthful about the contents of the binder (which she asserted contained the phone records). 1916a. Therefore, the record did not support the claim that counsel was put on notice to investigate the matter further. The judge found that for this reason the lower court erred in its conclusion. 1916a.

The Court of Appeals rejected respondent's other claims. *In re Ross,* unpub op at 6-13; 1906a-1913a. Respondent has now appealed to this Court.

ARGUMENT

I-III. RESPONDENT'S APPLICATION IS UNTIMELY. MOREOVER, RESPONDENT'S CLAIM THAT ANY OTHER STANDARD BUT *STRICKLAND* SHOULD GOVERN HIS MOTION FOR NEW TRIAL IS WAIVED. BUT IN ANY EVENT, MICHIGAN SHOULD JOIN ALMOST ALL STATES THAT HAVE CONSIDERED THE ISSUE AND APPLY *STRICKLAND* TO EVALUATE RESPONDENT'S CLAIMS, AN ANALYSIS WHICH IS CONSISTENT WITH THE STANDARD EXPRESSED IN MCR 3.902(A).

Issue Preservation and Standard of Review:

Questions concerning interpretation of the court rules are reviewed de novo. *People v Comer,* 500 Mich 278, 287; 901 NW2d 553 (2017). Respondent asserts that his application was timely filed.

Since 2016 and currently, respondent advocates that the claim that entitled respondent to a new trial was ineffective assistance of counsel[27] which respondent asserts should be evaluated under the standard established in *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct

[27] The court also conducted an evidentiary hearing which took place over the course of ten days where the only standard which was proposed was that announced in *Strickland* and the court applied that standard. 1890a.

2052; 80 L Ed 2d 674 (1984).[28] See: 9/22/15 Motion for New Trial (282a, 286a); 6/15/16 Motion for Remand (335b); 6/15/16 Brief on Appeal (357b); 8/3/16 Motion for New Trial (After Remand) (359b, 360b); 8/21/17 Post-Hearing Memorandum (362b, 363b); 11/29/17 Supplemental Brief in the Court of Appeals (366b-367b); 11/29/18 Application for Leave to Appeal (pg. 20-21). Any claim that, instead, another test should have been used sua sponte by the family court is waived. *People v Shami,* 501 Mich 243, 257 n 34; 912 NW2d 525 (2018). One who "waives his rights" may not then "seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter,* 462 Mich 206, 215; 612 NW2d 144 (2000)(citation omitted). Moreover, as stated recently by the United States Supreme Court, "In our adversarial system of adjudication, we follow the principle of party presentation . . . 'and assign to courts the role of neutral arbiter of matters the parties present'. . .They 'do not, or should not, sally forth each day looking for wrongs to right.'" *United States v Sineneng-Smith,* 590 US___,___; ___ S Ct ___; ___ L Ed 2d ___(2020)(citation omitted). See also *People v Jemison,* ___Mich___ n 4;___NW2d___(2020) slip op at 6 (indicating that consideration of an issue not raised by the prosecution in the Court of Appeals would not be considered in this Court.)[29]

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[28] When a defendant complains of the ineffectiveness of counsel's assistance, the United States Supreme Court has established that "the defendant must show that counsel's representation fell below an objective standard of reasonableness . . . The defendant must [also] show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 US at 687-688, 694. Michigan has adopted this standard for criminal defendants. *People v Pickens,* 446 Mich 298, 326; 521 NW2d 797 (1994).

[29] As Justice Clement likewise observed, citing Justice Scalia, "appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Mich Gun Owners Inc. v Ann Arbor Public Sch.,* 502 Mich 695, 723-724; 918 NW2d 756 (2018)(CLEMENT J., concurring) citing *Jefferson v*

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Discussion:

IA. Juvenile delinquency proceedings have historically been treated as civil in nature.

Early in this Nation's history, at common law, a child over the age of fourteen was presumed to have the mental capacity required for specific intent crimes. These minors could, therefore, be charged as adults and, if convicted, receive the same penalties as adult criminals including the death penalty. *People v Hana,* 443 Mich 202, 210; 504 NW2d 166 (1993). However, "near the end of the Nineteenth century, this country experienced a radical change in attitude regarding the treatment of children generally and in particular those caught up in the juvenile justice system." *Id.* at 211. The focus of the juvenile justice system changed to that of rehabilitation rather than that of retribution. *Id.* The court was viewed to stand in a "parens patriae" capacity and was concerned with broader issues than the guilt of the juvenile.[30] *Kent v United States,* 383 US 541, 554-557; 86 S Ct 1045; 16 L Ed 2d 84 (1966); *Hana,* 443 Mich at 210. The emphasis of the juvenile justice system became, not the ascertainment of guilt or innocence of the juvenile offender but instead, "how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." *In re Gault,* 387 US 1, 15; 87 S Ct 1428; 18 L Ed 2d 527 (1967); *Kent,* 383 US at 555; *People v GR,* ___Mich App___;___NW2d___ (2020)(Docket Nos. No. 346418, No. 347023); slip op at

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Upton, 560 US 284, 301; 130 S Ct 2217; 176 L Ed 2d 1032 (2010)(SCALIA, J., dissenting)). See also: *Id.* at 709, 710 n 9 (MCCORMACK, J.)(finding that Plaintiffs abandoned the issue by failing to state it in their application for leave to appeal and indicating "If *ever* we 'take rules regarding issue preservation and abandonment very seriously,' it should be here."); *People v Worthington,* 503 Mich 863 (2018)(VIVIANO J., concurring)(indicating, "it is not our role to find and develop unpreserved arguments on behalf of litigants.")

[30] The theory was, "if his parents default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene. In so doing, it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled." *Gault,* 387 US at 17.

8. Michigan's history regarding juvenile justice procedures paralleled national trends. *Hana,* 443 Mich 213.

With the change in focus to that of rehabilitation, "the apparent rigidities, technicalities, and harshness" in both substantive and procedural criminal law were by and large discarded. *Gault,* 387 US at 14; *People v GR,* ___Mich App at __; slip op at 8. To that end, courts also did not require the full panoply of constitutional rights because that inhibited "both the child's and society's welfare." *Hana,* 443 Mich at 226. For instance, the United States Supreme Court concluded that a jury trial was not constitutionally required (*Id.*), nor was a juvenile in a federal case entitled to indictment by a grand jury or to bail (*Kent,* 383 US at 555), and determined that the school setting required some easing of the restrictions to which searches by public authorities are ordinarily subject. See *New Jersey v TLO,* 469 US 325, 340-342; 105 S Ct 733; 83 L Ed 2d 720 (1985). The United States Supreme Court noted that, "[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence." *McKeiver v Pennsylvania,* 403 US 528, 551; 91 S Ct 1976; 29 L Ed 2d 647 (1971). The benefit that the juvenile received from this separate system was that he was classed as a "delinquent" as opposed to a "criminal" and the proceedings were accorded much more confidentiality. *Gault,* 387 US at 23-25. As stated by the United States Supreme Court, "[i]t is implicit in [the Juvenile Court] scheme that non-criminal treatment is to be the rule." *Kent,* 383 US at 560-561.

The emphasis of the juvenile justice system turned to that of treatment and rehabilitation as well as hiding "youthful errors from the full gaze of the public" and burying them "in the

graveyard of the forgotten past."[31] *Gault,* 387 US at 24. (quotation marks and citation omitted). The goal in the juvenile system was to correct the juvenile and to give him services to alleviate the problems that brought him before the court, before he became an adult and he either committed crimes that became a part of his permanent record or he became a menace either to other victims or the general public.

IB. Because juvenile delinquency proceedings are civil in nature, the appellate rules governing civil cases apply.

The Legislature has pronounced, "[e]xcept as otherwise provided, proceedings under this chapter are not criminal proceedings." MCL 712A.1(2); See also 1939 PA 288 ("Proceedings under this act shall not be deemed to be criminal proceedings.") Although there are specific mechanisms which allow certain juveniles to be charged criminally, the proceedings are otherwise deemed civil in nature.[32]

Moreover, juveniles who are adjudicated responsible in Michigan courts are not "sentenced" but instead, "[a] dispositional hearing is conducted to determined what measures the court will take with respect to a juvenile. . ." and the court enters "an order of disposition." MCR 3.943(A)(E); MCL 712A.18. After disposition, though there is no constitutional right to appeal (Const 1963, art 1, §20), rather, the court rules accord a juvenile respondent the ability to appeal as of right "an order of disposition placing a minor under the supervision of the court in a delinquency proceeding." MCR 3.993(A)(3).

In the Court of Appeals, a final judgment in a ***criminal*** case includes an order of dismissal, or a "sentence" but does not include a disposition. MCR 7.202(6)(b). A final judgment in a civil case is the "first judgment or order that disposes of all the claims and

[31] When asked about prior convictions, for instance, an individual does not have to list juvenile adjudications because they do not constitute criminal convictions.
[32] See: MCL 712A.2(a)(1); MCL 712A.2d(1),(2); MCL 712A.4; MCL 600.606.

adjudicates the rights or liabilities of all the parties. . .” MCR 7.202(6)(a)(*i*). When discussing the time limits for appeals in the Court of Appeals for ***criminal*** cases after motions for new trial (which was how this case originated), this Court indicated that the appeal must be filed within 42 days, “after the entry of an order denying a motion for new trial, for directed verdict of acquittal, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.419(B), 6.429(C), or 6.431(A), as the case may be.” MCR 7.204(2)(d). The court rules referenced govern proceedings in circuit court, not appeals after a family court’s decision concerning a new trial under MCR 3.992.

MCR 7.305(C)(2) indicates that an application after a decision from the Court of Appeals “must be filed within 28 days in termination of parental rights cases, ***within 42 days in other civil cases***, or within 56 days in criminal cases. . .” (emphasis provided). In this case, since it concerns an appeal from a juvenile delinquency disposition which is not a criminal proceeding (MCL 712A.1(2)), respondent was required to file an application in this Court within 42 days. Respondent did not file an application until the 56th day after the Court of Appeals’ order denying respondent’s motion for reconsideration; therefore the application was untimely.[33] See also MSC IOP 7.305(C)(5)(indicating that time limitations are strictly enforced)

Respondent cites *In re Sasak,* 490 Mich 854, 855 (2011) to support the proposition that the Legislature’s designation of juvenile proceedings as non-criminal could be disregarded. However, *In re Sasak* is not binding precedent. It contains no statement of applicable facts or the reason for the decision. See *DeFrain v State Farm Mut. Auto. Ins. Co,* 491 Mich 359, 369; 817 NW2d 504 (2012)(indicating, “An order of this Court is binding precedent ***if*** it constitutes a

[33]One of the grounds of malpractice in the pending civil case current counsel filed against respondent’s trial attorneys concerns a failure of trial counsel to follow the time requirements in the court rules concerning filing a witness list. *Randazzo v Ross, supra.*

final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision. These requirements derive from article 6, § 6, of our 1963 Constitution."(emphasis provided))[34] In that case, where the Court of Appeals dismissed respondent's claim as untimely, this Court merely remanded to the Court of Appeals to consider, giving no reasons for this Court's order of remand.

Though respondent argues that the statute conflicts with a court rule, there is no conflict. The court rule merely states that applications must be filed within a certain number of days for criminal cases and a certain number of days for civil cases and the statute states that juvenile delinquency proceedings are not criminal proceedings. See also MCR 7.212(J)(1)(stating, when discussing appendix requirements in the Court of Appeals, that they apply to " . . .***all civil cases*** (***except those pertaining to*** child protection proceedings, including termination of parental rights, and ***non-criminal delinquency proceedings under chapter XIIA of the Probate Code***.")(emphasis provided)). Therefore, there is no conflict between a court rule and statute for this Court to resolve.

Respondent argues that respondent has a due process right to file an application in this Court within 56 days. However, the United States Supreme Court has not held that due process affords a right of appeal in criminal proceedings much less in juvenile proceedings. *Gault,* 387 US at 58; *Griffin v Illinois*, 351 US 12, 18; 76 S Ct 585; 100 L Ed 901 (1956). Michigan's Constitution only provides appeals as of right after criminal prosecutions (See: Const 1963, art 1, §20) and then only to the Court of Appeals. Const 1963, art 6, §4; MCR 7.303. Cf: *Ross v Moffitt,* 417 US 600, 610-612; 94 S Ct 2437; 41 L Ed 2d 341 (1974). Here, the right at issue is

[34] The dissent appeared to acknowledge that the Court's order was not binding precedent. *In re Sasak,* 490 Mich at 855 (KELLY, J., dissenting).

not the entitlement to file an application for this Court to review, because Michigan accords juveniles that privilege through a court rule, but the right to file an application in this Court within 56 days as opposed to 42 days. Respondent has failed to support his assertion that, when there is no due process right to appeal at all, there is a due process right to file an application in the State's highest Court, a Court of discretionary review, within a certain number of days.

Respondent next argues in his supplemental brief (as well as his reply to the application), that if there are different time limitations, the limits ***set by this Court*** violate equal protection, in other words that it violates equal protection to have an accelerated appellate time period for juvenile delinquents as opposed to criminal defendants. Both the United States and the Michigan Constitutions guarantee equal protection of the law, and Michigan Courts have held the two provisions to be coextensive. US Const, Am XIV; Const 1963, art 1, §2; *Shepherd Montessori Ctr. Milan v Ann Arbor Charter Twp.,* 486 Mich 311, 318; 783 NW2d 695 (2010). The threshold inquiry is whether the individual was treated differently from a similarly situated person. *Id.* "While the Equal Protection Clause 'ensure[s] that people similarly situated will be treated alike,' it 'does not guarantee that people in different circumstances will be treated the same.'" *Berrien County Prosecutor v Hill (In re Parole of Hill),* 298 Mich App 404, 420; 827 NW2d 407 (2012)(evaluating challenge to a court rule on equal protection grounds). If similarly situated individuals are treated disparately, the inquiry then is whether the difference involves a suspect class or is due to the exercise of a fundamental right. If not, the inquiry under the Equal Protection Clause is whether the classification is rationally related to a legitimate governmental purpose. *Id.*

Under the rational basis test, the court rule is "'presumed to be constitutional and the party challenging it bears a heavy burden of rebutting that presumption.'" To prevail under this

highly deferential standard of review, a challenger must show that the court rule is "'arbitrary and wholly unrelated in a rational way to the objective of the statute.'" *In re Parole of Hill,* 298 Mich App at 421-422 (citation omitted). A classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v Doe,* 509 US 312, 320-321; 113 S Ct 2637; 125 L Ed 2d 257 (1993)(citation omitted). The burden is on the challenger to "negative every conceivable basis which might support it." *Id.* at 320 (citation omitted). In fact, parties challenging state action reviewed under the rational basis test must advance an argument ***precluding debate***. Such challenges "cannot prevail so long as 'it is evident from all the considerations presented . . . that the question is at least debatable.'" *Minnesota v Clover Leaf Creamery Co*, 449 US 456, 464; 101 S Ct 715; 66 L Ed 2d 659 (1981) (citation omitted). "It is the very admission that the facts are arguable" that immunizes the rule from constitutional attack. *Vance v Bradley,* 440 US 93, 112; 99 S Ct 939; 59 L Ed 2d 171 (1979).

But criminal defendants and juvenile respondents are not similarly situated. "That the law has long treated the classes as distinct, however, suggests that there is a commonsense distinction between [them]." *Heller v Doe,* 509 US at 326-327. The State has "'a *parens patriae* interest in preserving and promoting the welfare of the child' which makes a juvenile proceeding fundamentally different from an adult criminal trial." *Schall v Martin,* 467 US 253, 263; 104 S Ct 2403; 81 L Ed 2d 207 (1984)(citation omitted). As the United States Supreme Court emphasized recently in *Miller v Alabama,* 567 US 460, 471; 132 S Ct 2455; 183 L Ed 2d 407 (2012), in the context of sentencing, "children are constitutionally different from adults." Respondent appears to concede this point. See: Respondent's Brief at 14.

Moreover, juveniles are not an inherently suspect class. A "suspect class" is defined as "one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Massachusetts Bd. of Retirement v Murgia*, 427 US 307, 313; 96 S Ct 2562; 49 L Ed 2d 520 (1976), quoting *San Antonio Indep School Dist v Rodriguez*, 411 US 1, 28: 93 S Ct 1278; 36 L Ed 2d 16 (1973). These classes must be based on "***immutable*** characteristics determined solely by accident of birth." *Frontiero v Richardson,* 411 US 677, 685; 93 S Ct 1764; 36 L Ed 2d 5522 (2000)(emphasis provided). Both the United States Supreme Court and this Court have noted that "age is not a suspect classification under the Equal Protection Clause." *Kimel v Fla Bd of Regents,* 528 US 62, 84; 120 S Ct 631; 145 L Ed 2d 5522 (2000); See also: *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38,* 490 Mich 295, 328; 806 NW2d 683 (2011).[35]

Neither does this case involve a fundamental right, as stated *supra,* since there is no constitutional right to appeal at all.[36] Several of our sister states have rejected challenges to

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[35] See also: *Hutchins v District of Columbia,* 338 US App DC 11; 188 F3d 531, 536 n 1 (1999); *State v Aalim,* 150 Ohio St 3d 489, 500; 2017-Ohio-2956, ¶33; 83 NE2d 883 (2017); *State v Hezzie R. (in Re Hezzie R),* 219 Wis 2d 848, 894; 580 NW2d 660 (1998); *State v Smith,* 117 Wash 2d 263, 278; 814 P2d 652 (1991); *People v MA,* 124 Ill 2d 135, 140; 529 NE2d 492 (1988); *In re Welfare of KAA,* 410 NW2d 836, 841 (Minn, 1987); *Ballard v Commonwealth,* 228 Va 213, 216; 321 SE2d 284 (1984); *In re HY,* 512 SW3d 467, 478 (Tex App 2016); *Perkins v Commonwealth,* 511 SW3d 380, 390 (Ky App, 2016); *Hicks v Superior Court,* 36 Cal App 4th 1649, 1657; 47 Cal Rptr 2d 269 (1995) (indicating that juveniles are not treated as a suspect class)

[36] Not every limitation or incidental burden even on a fundamental right is subject to the strict scrutiny standard. When the regulation merely has an incidental effect on the exercise of protected rights, strict scrutiny is not applied. (e.g., *Zablocki* v *Redhail,* 434 US 374, 386; 98 S Ct 673; 54 L Ed 2d 618 (1978)[regulations affecting the right to marry]; *Califano* v *Jobst,* 434 US 47, 49, 53, 55-58; 98 S Ct 95; 54 L Ed 2d 228 (1977) [same]; *Bullock v Carter,* 405 US

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different appellate rights accorded to juveniles based on Equal Protection grounds. See *In re Maricopa County,* 18 Ariz App 560; 504 P2d 401 (1972); *In re Davis G.,* 93 Cal App 3d 247; 155 Cal Rptr 500 (Cal App, 1979); *People v Michael D. (In re Michael D.,)* 2015 IL 119178 ¶20-22 ¶27; 69 NE3d 822 (2015).[37] In this case, as stated *supra,* juveniles are not similarly

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134, 142-143; 92 S Ct 949; 31 L Ed 2d 92 (1972) [regulations affecting exercise of voting rights]; *Burdick v Takushi,* 504 US 428, 433-434; 112 S Ct 2059; 119 L Ed 245 (1992)[same]. It is only when there exists a real and appreciable impact on, or a significant interference with the exercise of the fundamental right that the strict scrutiny doctrine will be applied. *Zablocki* v *Redhail,* 434 US at 386; *Burdick v Takushi,* 504 US at 434. Here, respondents have been accorded the right to request review from this Court. The question solely concerns whether a 42-day time limit to file an application as opposed to 56 days that a criminal defendant receives violates the Constitution. Even if there had been a fundamental right involved, the two-week time difference does not involve significant interference with the ability of respondent to appeal especially when the issues are ordinarily developed already in the Court of Appeals. The dissenting opinion by Former-Justice Kelly that respondent alludes to, indicates that the question is "whether the classification of juveniles and adults on the basis of age for purposes of appellate jurisdiction is *rationally related* to a legitimate governmental interest." *In re Sasak,* 490 Mich 854, 855 (2011)(KELLY, J, dissenting)(emphasis supplied). In fact, in this case respondent had 86 days to file his application after the Court of Appeals' opinion since he had filed a motion for reconsideration.

[37] In *In re Maricopa County,* 18 Ariz App 560; 504 P2d 401 (1972), though a juvenile claimed that the shorter time for appeal for juveniles as opposed to adults violated equal protection, the Court rejected respondent's claim finding that the "Equal Protection Clause of the 14th Amendment to the U.S. Constitution does not require that all persons be treated alike, only that individuals within a certain class be treated equally and that there exist reasonable grounds for the classification." The Court found that there were reasonable grounds for treating juvenile offenders in a different classification than adults and that a legitimate purpose of the juvenile appellate rules is to expedite and facilitate the handling of juvenile appeals. *Id.* at 565.

In *In re Davis G.,* 93 Cal App 3d 247; 155 Cal Rptr 500 (Cal App, 1979), a case arising out of the California appellate courts, the Court also rejected an Equal Protection challenge to different appellate rights accorded juveniles as opposed to adults. The Court found that respondent's claim did not "'directly' affect a fundamental right" and concluded that the Constitution also did not require that the procedures in juvenile proceedings be identical to the procedures employed in criminal prosecutions against adults. Ultimately, the Court determined that "the legislative classification is rationally related to the purpose of the statute . . . [t]here is a rational basis for the disparity in appellate rights between juveniles and adults." *Id.* at 252-255. See also: *People v Michael D. (In re Michael D.,)* 2015 IL 119178 ¶20-22 ¶27; 69 NE3d 822 (2015)(upholding against an equal protection claim different appellate rights for juveniles

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situated to adults. The goal of the juvenile system differs from that of the adult system—that of rehabilitation before the juvenile becomes an adult. In many cases, the reason to accelerate the appellate period is to allow the juvenile justice system the ability to take rehabilitative action before the juvenile reaches the age of adulthood or at least allow the court to take this action closer to the time of the offense rather than years later. And, if the juvenile should not have been found responsible for the alleged act, then any stigma should be removed as soon as possible. The United States Supreme Court found that the virtue of the juvenile system is expedition rather than the many delays that can be part of the adult system. *McKeiver,* 403 US at 550. See also: *In re Michael D.* 2015 IL at 119178 ¶25 (indicating, "Respondent also notes that this court has zealously guarded the appellate rights of juveniles by providing for expedited appeals in delinquent minor proceedings.") Respondent agrees that these are valid policy reasons. See Respondent's Brief at 13 (indicating, "Critics and juvenile justice advocates often advance a need for expedient adjudication of juvenile delinquency cases . . . The National Counsel of Juvenile and Family Court Judges cites the importance of 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 likeliness of rehabilitation.") Therefore, respondent appears to concede that at least a rational basis for the time limits in the court rule exist.

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as opposed to adults indicating that "juveniles are simply not similarly situated to adults" and that "juveniles proceedings are 'fundamentally different from criminal proceedings.'" (citation omitted)).

This case also shows reasons why a more expedited appellate period is called for concerning juvenile respondents. If a new trial were eventually declared, respondent would be an adult, 23 years old, and the family court lack jurisdiction over him. The family court only possesses jurisdiction over a respondent until age 19.[38] MCL 712A.2(a); MCL 712A.2a(1). The court would have two alternatives, one, dismissal—where respondent would not have learned to take responsibility for his conduct and address his problems with sexual aggression towards girls[39] and the victim would not have received justice—or two, potential waiver (MCL 712A.4; *People v Schneider,* 119 Mich App 480, 487; 326 NW2d 416 (1982)) where the then-defendant would face conviction of a sex offense as an adult and potential sex offender registration consequences. MCL 28.722(u)(*x*); MCL 28.723(1)(a). Moreover, minor victims, such as in this case, also deserve a more expedited consideration. The Crime Victims Rights Amendment to the Michigan Constitution provides that victims of crime "shall have * * * ***[t]he right to timely disposition of the case following arrest of the accused.***"[40] Const 1963, art 1, § 24(1) (emphasis added). In other words: ***closure***. Respondent has failed to show that this Court's rule is unconstitutional.

II. The standard to declare a new trial after a juvenile adjudication in this case is the same as that applied after a criminal conviction.

The circuit court and the family court both have different court rules governing requests for a new trial. MCR 6.431 states the following are grounds for a new trial:

> (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***

[38] In 2021, the age will change to under 20. See: 2019 PA 113.
[39] As the judge stated in this case, "there's no way that this young man is ever going to curb his behavior if his attitude continues to be . . . he's the victim. . . ." 10b.
[40] The victim's family wanted respondent to be rehabilitated but noted that unless he is honest about what occurred, that won't take place. 10b-12b.

> ***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.

(emphasis provided) MCR 3.992 states the following are grounds for a new trial:

> (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.

(emphasis provided) Though MCR 3.992 doesn't specifically articulate a standard for granting a new trial, MCR 3.902(A) states, "Limitations on corrections of error are governed by MCR 2.613." And, MCR 2.613 states the following:

> (A) Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or ***an error or defect in anything done or omitted*** by the court or ***by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.***

(emphasis provided).

It is true that the standard in MCR 6.431(B) for a new trial cannot be imported into a juvenile delinquency case. See MCR 3.901(A)(1),(2)[41]; MCR 6.001.[42] In accord: *In re Carey,*

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[41] This Court stated in MCR 3.901:

> (A) Scope.
>
> (1) The rules in this subchapter, in subchapter 1.100, and in subchapter 8.100 govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.

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241 Mich App 222, 231; 615 NW2d 742 (2000).[43] MCR 2.613(A) is akin to the "miscarriage of justice" standard referenced in MCR 6.431(B) as well as MCL 769.26, however. *People v Lukity,* 460 Mich 484, 491; 596 NW2d 607 (1999)(indicating, "In Michigan, the harmless-error rule is primarily embodied in statute [MCL 769.26; MSA 28.1096], with additional statements of the doctrine in our court rule [MCR 2.613(A)] and evidentiary rule [MRE 103].") And, MCL 769.26 would also be applicable under MCR 3.901(A)(1) which references MCR 1.104 which states, "Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court." [44]

Therefore, guidance concerning what constitutes an omission by counsel which was "inconsistent with substantial justice" can be supplied by case law concerning new trials in adult

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> (2) Other Michigan Court Rules apply to juvenile cases in the family division of the circuit court *only when this subchapter specifically provides*.

(emphasis provided)

[42] MCR 6.001 when discussing the applicability of its rules to juvenile cases specifically stated the following:

> (C) Juvenile Cases. The rules in subchapter 6.900 govern matters of procedure in the district courts and in circuit courts and courts of equivalent criminal jurisdiction in cases involving juveniles *against whom the prosecutor has authorized the filing of a criminal complaint as provided in MCL 764.1f.*

(emphasis provided)

[43] Therefore, respondent's claim that the time limitations in the circuit court for motions for new trial, can be grafted onto family court proceedings is without merit. The time limitations to file a motion for new trial in the family court aren't at issue in this case, in any event, solely the *standard* for granting a new trial. See *In re Ross,* ___Mich at___ (indicating that the issue is "(2) 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 6.431*(B)*.")(emphasis provided).

[44] MCL 769.26 states:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

proceedings. A juvenile is adjudicated of an "act that violates a criminal statute" (MCR 3.903)(B)(3)) or a "violation. . . of a penal law of this state . . ." MCL 712A.30(1)(a). See also MCL 712A.2(a)(1). Although delinquency cases are civil in nature, courts have many times found substantive criminal law helpful to judge the conduct of the trial in such proceedings, "because the critical issue is whether the juvenile violated the law." *In re Alton,* 203 Mich App 405, 407; 513 NW2d 162 (1994).[45] The case law in this case which should govern both adults and juveniles is that established by *Strickland.*

III. Juveniles are entitled to effective assistance of counsel and Michigan, like almost all jurisdictions that have considered the issue, should judge the effectiveness of counsel by the standard established in *Strickland*, which this Court has already adopted for adult defendants, and a standard which is also consistent with MCR 3.902(A).

Respondent maintains that the test for ineffective assistance of counsel is *Strickland.*[46] The People agree that this is the correct standard to evaluate this case. *Strickland* determined that its standard guarantees that proceedings are fundamentally fair. *Strickland,* 466 US at 696, 697.

Although Courts have applied fewer substantive and procedural rules to the juvenile system, the United States Supreme Court has stated that "[s]ome of the constitutional requirements attendant upon the state criminal trials have equal application to that part of the

[45] Also see: *In re Kerr,* 323 Mich App 407, 414; 917 NW2d 408 (2018); *In re Killich,* 319 Mich App 331, 336-337; 900 NW2d 692 (2017); *In re McDaniel,* 186 Mich App 696, 698-500; 465 NW2d 51 (1991).

[46] Though in passing respondent advocates that there should be specific requirements, such as that proposed by the American Bar Association, respondent does not reference which specific guideline adopted by the ABA is pertinent to this case and which would entitle respondent to a new trial when the standard established in *Strickland* would not. As "*Strickland* stressed, however, that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition. 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674. We have since regarded them as such." *Bobby v Van Hook,* 558 US 4, 8; 130 S Ct 13; 175 L Ed 2d 255 (2009).

state juvenile proceeding that is adjudicative in nature." *McKeiver,* 403 US at 533. The Court stated that, despite the focus of the juvenile system, "a degree of procedural regularity . . . that comports with 'the basic requirements of due process and fairness' . . . is required" and the applicable due process standard is "fundamental fairness." *Id.* at 531, 543. It further held that juveniles were still entitled to "the essentials of due process and fair treatment" and found that the right to counsel as well as to appointed counsel at the adjudicative phase of the juvenile delinquency proceedings is part of due process. *Gault,* 387 US at 12, 30-31, 36, 39, 41; *Hana,* 443 Mich at 211. This right was accorded through the Due Process Clause because the Sixth Amendment applies solely to criminal proceedings.[47] Michigan, through both statute and court rule, provides a juvenile the right to counsel at trial. See MCL 712A.17c; MCR 3.915(A); MCR 3.942(B)(1),(3). The United States Supreme Court has also held that the right to counsel includes the right to ***effective*** counsel. *Kimmelman v Morrison,* 477 US 365, 377; 106 S Ct 2574; 91 L Ed 2d 305 (1986); *Evitts v Lucy,* 469 US 387, 395-397; 105 S Ct 830; 83 L Ed 2d 821 (1985); *Strickland,* 466 US at 686; *Kent,* 383 US at 554.

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[47] The Sixth Amendment (US Const, Am VI) itself does not apply by its terms:

> *In all criminal prosecutions*, *the accused shall* enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to *have the Assistance of Counsel for his defence.*

(emphasis provided) In contrast, the Fourteenth Amendment (US Const, Am XIV) states in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States**;** *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

(emphasis provided) See Const 1963, art 1. § 17 (indicating, "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.)

When a defendant complains of the ineffectiveness of counsel's assistance, the United States Supreme Court has established that "the defendant must show that counsel's representation fell below an objective standard of reasonableness . . . The defendant must [also] show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 US at 687-688, 694. Michigan has adopted this standard for criminal defendants. *People v Pickens,* 446 Mich 298, 326; 521 NW2d 797 (1994).

This Court has not yet formally adopted *Strickland* as the standard to evaluate ineffective assistance of counsel claims for juvenile respondents. See *In re Whittaker,* 239 Mich App 26, 30; 607 NW2d 387 (1999). Past history, if anything, supports a standard which is more stringent for the juvenile to meet.[48] See Argument IA. As stated by the California Supreme Court for instance, "[t]he right of counsel in juvenile proceedings is predicated on due process concepts of fairness and is not necessarily as broad as the right to counsel in criminal

[48] Compare *Betts* v *Brady*, 316 US 455, 462, 471-473; 62 S Ct 1252; 86 L Ed 1595 (1942) (holding that the right to counsel was not required under the Due Process Clause of the Fourteenth Amendment for criminal charges and recognizing due process as a "concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights"), and *Bute v Illinois,* 333 US 640, 644, 649-650, 653-670, 676-677; 68 S Ct 763; 92 L Ed 986 (1948)(same), *Turner v Rogers,* 564 US 431, 435; 181 S Ct 2507; 180 L Ed 2d 452 (2011)(indicating that parent in a civil contempt proceeding concerning failure to provide child support was not automatically entitled to counsel under the Due Process Clause, which provides fewer procedural protections than in criminal cases), *Lassiter v Dep't of Social Services,* 452 US 18, 32; 101 S Ct 2153; 68 L Ed 2d 640 (1981)(indicating that parent in a termination of parental rights case not automatically entitled to counsel under the Due Process Clause), *Vitek* v *Jones,* 445 US 480, 499-500; 100 S Ct 1254; 63 L Ed 2d 552 (1980)(POWELL, J., concurring in part) (the controlling opinion finding that the Due Process Clause of the Fourteenth Amendment does not require representation by counsel in a proceeding to transfer a prison inmate to a state hospital for the mentally ill) with *Gideon* v *Wainwright*, 372 US 335, 339-340; 83 S Ct 792; 9 L Ed 799 (1963)(holding that the Sixth Amendment requires counsel in all state felony prosecutions.)

proceedings." *In re Kevin S,* 113 Cal App 4th 97, 109; 6 Cal Rptr 3d 178 (2003) citing *In re William F.* 11 Cal 3d 249, 254; 520 P2d 986 (1974).

However, "[a]lthough juvenile proceedings are not considered adversarial in nature, they are closely analogous to the adversary criminal process." *In re Carey,* 241 Mich App at 227; *Turner v Rogers,* 564 US 431, 443; 131 S Ct 2507; 180 L Ed 2d 452 (2011). Almost all states which have considered the question have applied *Strickland* to evaluate claims of ineffective assistance to adjudications in juvenile delinquency cases.[49] Under the Due Process Clause an

[49] *WBS v State,* 244 So 3d 133, 144-145 (Ala Crim App, 2017); *In re Appeal Juvenile Action No. JV-515576,* 186 Ariz App 604, 606; 925 P2d 745 (1996); *Walker v State,* 323 Ark 361, 363; 955 SW2d 906 (1997); *In re Edward S.,* 173 Cal App 4th 387, 406-407; 92 Cal Rptr 3d 725 (2009); *In the Interest of CS,* 275 Ga App 562, 562-563; 621 SE2d 483 (2005); *State v Doe (In re Doe),* 136 Idaho 427, 433; 34 P3d 1110 (Idaho App, 2001); *In re DC,* 244 Ill App 3d 55, 65; 613 NE2d 1139 (1992); *S.T. v State,* 764 NE2d 632, 634-635 (Ind, 2002); *In re ML,* 868 NW2d 456, 459-460 (Iowa App, 2015); *In re DA,* 40 Kan App 2d 878, 883-884; 197 P3d 849 (2008); *State in Interest of D McK,* 589 So 2d 1139, 1142-1143 (La App, 1991); *In re Parris W.,* 363 Md 717, 724-726; 770 A2d 202 (2001); *In re Welfare of LB,* 404 NW2d 341, 345 (Minn App, 1987); *In the Interest of KG,* 957 So2d 1050, 1054-155 (Miss App, 2007); *Hall v State,* unpublished order of the Nevada Supreme Court entered May 12, 2014 (Docket No. 64257)[2014 Nev Unpub LEXIS 714] (369b-370b); *State in Interest of CK,* 233 NJ 44, 55; 182 A3d 917 (2018); *State v Ernesto M. (In re Ernesto M.),* 121 NM 562, 568-569; 1996-NMCA-039; 915 P2d 818 (NM App, 1996)(citing *State v Scott,* 113 NM 525, 531; 828 P3d 958 (NM App, 1991) which quoted *Strickland*); *Matter of Will V.,* 111 App Div 3d 425, 425-426; 974 NYS2d 390 (2013); *In re Clapp,* 137 NC App 13, 23; 526 SE2d 689 (2000); *In re MB,* 2018-Ohio-4334, ¶54; __NE2d___(Ohio App, 2018); *State ex rel Juvenile Dept v Jones (In re Jones),* 191 Or App 17, 23; 80 P3d 147 (2003); *In re KJO,* 27 SW3d 340, 342-343 (Tex App, 2000); *VLV-G v State (In re VLV-G),*362 P3d 733, 735; 2015 UT App 247 (2015); *In re JB,* 159 Vt 321, 325; 618 A2d 1329 (1992); *State v ANJ,* 168 Wash 2d 91, 109; 225 P3d 956 (2010); *State v Megan S.,* 222 W Va 729, 734; 671 SE2d 734 (2008); *State v Mack S. (In re Mack S.),* 312 Wis 2d 479; 2008 WI App 833; 751 NW2d 902 (2008)[unpublished](382b-383b); *In re LDO v States,* 858 P2d, 553, 556-557 (Wy, 1993).

In *White v State,* 457 P2d 650, 652-653 (Alas, 1969), *Commonwealth v Bart B.,* 424 Mass 911, 914; 679 NE2d 531 (1997), *Commonwealth v Ogden O.,* 448 Mass 798, 806; 684 NE2d 13 (2007), and *In re Smith,* 393 Pa Super 39, 47-48; 573 A2d 1077 (1990), the Courts found that the standard should be the same for juveniles as adults. In *In re Interest of Doe,* 107 Hawaii 12, 16; 108 P3d 966 (2005), the Court determined that a juvenile had a right to effective assistance in juvenile proceedings but did not establish the standard though it cited *In re Jones,* 191 Or App at 17 which applied federal and state constitutional standards for ineffective

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individual is guaranteed "fundamental fairness" (*McKeiver,* 403 US at 531, 533, 543) and the United States Supreme Court found that its test in *Strickland* was geared to uphold the "fundamental fairness" of the proceeding. *Strickland,* 466 US at 696, 697.

As one of our sister states stated, though the right to counsel is based on the Due Process Clause and therefore the standard could be different, "given the near-identity of interests of a defendant in a criminal case and a juvenile in delinquency proceedings, the same standard for both sorts of matters should be applied." *In re Smith,* 393 Pa Super 39, 47-48; 573 A2d 1077 (1990). The appellate courts in California also ultimately determined, "As the law relating to the right to effective representation by counsel has developed, however, the distinction as to the source of the right to effective counsel has become 'a distinction without a difference.'" *In re Kevin S.* 113 Cal App 4th at 115.

The People agree with the States that have applied *Strickland.* As stated by this Court when discussing the right grounded in the Sixth Amendment, "Michigan does not have a unique history with regard to the origin of the right to counsel." *Pickens,* 446 Mich at 318. There is also no history in Michigan regarding adoption of a different standard for ineffective assistance of counsel claims for juveniles. Michigan's procedures in the juvenile justice system have paralleled national trends which have provided ***less*** as opposed to more protection for juveniles. *Hana,* 443 Mich 213. Therefore, there is no support for the proposition that "fundamental fairness" would require a less stringent standard for the juvenile to meet than *Strickland.*

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assistance of counsel used in adult criminal cases to juvenile delinquency cases. Missouri has not yet adopted a standard but respondent urged the court to adopt *Strickland. In the Interest of DCM v Pemiscot Cty Juvenile Office,* 578 SW3d 776, 784, 789 (Mo, 2019)(POWELL, J., dissenting) In Montana, the Court indicated that it was disinclined to adopt *Strickland* but concluded that it hadn't resolved on a standard for juvenile delinquency proceedings. *In re KJR,* 386 Mont 381, 388-390; 2017 MT 45; 391 P3d 71 (2017).

Adopting another standard would also leave an incalculable number of issues yet to be litigated,[50] whereas *Strickland* is a well-developed standard with 35 years of jurisprudence well understood by the bench and bar. Moreover, review of the specific court rule involved in the juvenile proceedings advocates adoption of the *Strickland* test because respondent must establish that the result "appears to the court inconsistent with substantial justice."[51] MCR 3.902(A); MCR 2.613(A). See also MCL 769.26.[52] If both prongs of the *Strickland* test are met, the proceeding comports with the principles of fundamental fairness and, therefore, the proceeding also would be consistent with substantial justice.

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[50] As stated by this Court in *Pickens,* 446 Mich at 325-326 when rejecting a less exacting alternative to *Strickland*:

> Furthermore, almost all criminal convictions would come under appellate and subsequent civil scrutiny, not only for fundamental deprivations of constitutional rights, but also because of the judicial imposition of an amorphous standard untested by our courts. Not only is such a result an unjustified departure in Michigan constitutional law, but it would engage Michigan courts in an endless quagmire of determining just what is meant by the standard. Instead of relying upon the well-established precedent developed under *Strickland,* our courts would be forced to struggle to craft appropriate rulings under a novel standard never evaluated by Michigan courts. As Judge Learned Hand warned, judgments would come under constant attack, and courts "would become Penelopes, forever engaged in unravelling the webs they wove." *Jorgensen* v *York Ice Machinery Corp,* 160 F2d 432, 435 (CA 2, 1947).

[51] And, even when alleging claims under the Due Process Clause, defendants routinely have to demonstrate that there was error *and* that the error was outcome-determinative. See *United States* v *Valenzuela-Bernal*, 458 US 858, 872, 874; 102 S Ct 3440; 73 L Ed 2d 1193 (1982)(Deportation of potential defense witnesses does not violate due process unless "there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact."); *United States* v *Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d (1985)(indicating that failure of the prosecution to disclose allegedly exculpatory evidence to the defense violates due process "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."); *United States v Lovasco,* 431 US 783, 790; 97 S Ct 2044; 52 L Ed 2d 752(1977)(indicating that when the claim that due process was violated due to pre-indictment delay, " . . . proof of prejudice is generally a necessary but not sufficient element of a due process claim . . .")

[52] For instance, to establish the requirements in MCL 769.26 are met, respondent would have to demonstrate that it is more probable than not that the error was outcome determinative. *Lukity,* 460 Mich at 496.

Respondent's application is untimely. Moreover, any claim that any other standard but *Strickland* should govern his motion for new trial is waived. But, in any event, Michigan should join the overwhelming majority of states that have considered the issue and apply *Strickland* to evaluate respondent's claims.

ARGUMENT

IVA. THE COURT OF APPEALS DID NOT CLEARLY ERR IN FINDING THAT RESPONDENT'S COUNSEL ACTED STRATEGICALLY CONCERNING HIS INVESTIGATION; HE WAS GIVEN PHONE RECORDS BY RESPONDENT'S MOTHER WHICH DID NOT SUPPORT RESPONDENT'S CLAIM, HE HAD OTHER REASONS TO BE SUSPICIOUS OF THE INFORMATION SUPPLIED BY RESPONDENT, AND THERE WERE DISADVANTAGES TO USING THE RECORDS. RESPONDENT ALSO CANNOT SHOW THAT HE WAS PREJUDICED.

Issue Preservation and Standard of Review

The People contested the claim that respondent was entitled to a new trial in the lower court. Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first ***must*** find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The appellate court reviews the trial court's factual findings for clear error and reviews de novo questions of constitutional law. *People v Dendel,* 481 Mich 114, 124; 748 NW2d 859 (2008). Respondent must overcome the strong presumption that counsel's decisions were strategical (*People v Buie,* 491 Mich 294, 311; 817 NW2d 33 (2012)) and must prove his claim of inadequate representation by demonstrating that the record excludes hypotheses consistent with adequate representation. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Respondent must ***also*** demonstrate that even if counsel's decisions had been deficient, there is a substantial, not just conceivable, likelihood that the outcome of the proceeding would

have changed if he had acted differently. *Harrington v Richter,* 562 US 86, 11-112; 131 S Ct 770; 178 L Ed 2d 624 (2011). The reviewing court examines de novo the trial court's finding on the second prong of the ineffective assistance of counsel test. "We underscore that the test for prejudice is an objective test and that appellate courts should not simply defer to the trial court's judgment regarding prejudice, even if the trial court was the fact-finder at the original trial, as in this case." *Dendel,* 481 Mich at 132, n 17.

Respondent has failed to show that the Court of Appeals clearly erred much less that its opinion caused material injustice. MCR 7.305(B)(5)(a).

Discussion:

The Court of Appeals did not clearly err in finding that respondent's counsel made strategic decisions concerning the investigation; he was given records by respondent's mother which did not support respondent's claim, there were other reasons to be suspicious of respondent's claims, and the attorney believed there would be disadvantages to using the records. Respondent also cannot show prejudice.

As stated by the United States Supreme Court, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 US at 689. These same principles apply to an attorney's decisions regarding the investigation he conducted. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation . . . In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland,* 466

US at 690-691. The United States Supreme Court also emphasized that, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."[53] *Id.* at 691.

Counsel gave four primary reasons why he did not further follow up on the claim that respondent had used the victim's phone. 1) The attorney saw phone records prior to trial which did not reveal the phone call, 2) he was skeptical regarding the claim because respondent's previous statements did not reference the phone call, 3) other information provided by respondent and his mother turned out to be incorrect, and 4) the attorney believed it was a minor issue with considerable downsides. The judge found that Attorney Randazzo erred by failing to obtain the records. However, the Court then conflated the two prongs of the *Strickland* test. The court found because the phone records would have been helpful, therefore, counsel was ineffective. 1897a. But, even if counsel's decision, through the information available to him, turned out to be wrong with the benefit of hindsight, doesn't mean that counsel's decision was objectively unreasonable.[54] *Richter,* 562 US at 107. As stated by the United States Supreme

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[53] Again, respondent argues that the Court of Appeals disregarded this Court's opinion in *People v Trakhtenberg* and *People v Ackley*. However, as stated *supra,* the Court of Appeals referenced *People v Grant,* 470 Mich 477, 485; 684 NW2d 686 (2004) which, along with *Trakhtenberg* and *Ackley,* relied on this same reasoning from *Strickland v Washington* regarding the duty to investigate. *Trakhtenberg,* 493 Mich at 52; *Ackley,* 497 Mich at 388-389.

[54] This case can be contrasted to *People v Armstrong,* 490 Mich 281; 800 NW2d 676 (2011) cited by respondent. In *Armstrong,* the victim testified that defendant forcibly sexually assaulted her on two occasions as well as choked her, slapped her, and made threats against her life. *Id.* at 284. Though the victim denied any communication with defendant after the rape, at trial defense counsel unsuccessfully sought to impeach this testimony with phone records which he asserted revealed *hundreds of incoming calls on defendant's phone from the victim's phone* after the date of the claimed rapes. *Id.* at 286-287. In that case, this Court found counsel ineffective for failing to introduce the victim's phone records. During the hearing, counsel had admitted that his failure to admit the records was not a strategic decision. *Id.* at 288. This Court also found

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Court, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v Kemp,* 483 US 776, 7694; 107 S Ct 3114; 97 L Ed 2d 638 (1987). See also: *White v Singletary,* 972 F2d 1218, 1220 (CA 11, 1992)(indicating, "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial."). Also, as stated by both this Court and the United States Supreme Court, counsel can reasonably limit his investigation based on the information that he was provided by his client. *Strickland,* 466 US at 691; *People v Grant,* 470 Mich 477, 485; 684 NW2d 686 (2004).

Both Attorneys Randazzo and Dobson said that they never saw records showing a call from the victim's phone to respondent's mother's phone prior to trial. 1201a-1202a, 1328a, 1577a-1578a, 1605a. Respondent did not dispute this claim. Respondent only asserted that his mother provided screen shots showing three calls from Ms. Ross' phone to the victim's phone in the binder given to the attorneys at the inception of the representation. The Court of Appeals stated that because those screen shots of the records did not contain a phone call from the victim's phone to respondent's mother's phone and appeared to be complete, counsel

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that the records showing "frequent communication with defendant following the alleged rapes" demonstrated that the victim had lied. *Id.* at 293. In that case, this Court found that defendant also demonstrated prejudice noting that, at trial, members of the victim's family had testified that the victim had made a false rape accusation in the past and that she habitually lied. *Id.* at 286, 291. In this case, there were strategical reasons for counsel to have acted in the manner he did, and respondent cannot demonstrate prejudice.

legitimately did not further investigate.[55] *In re Ross,* unpub op at 5-6; 1905a-1906a.

However, Attorney Dobson testified that the binder of information which respondent's mother claimed contained these screen shots, did ***not*** contain such records. 1202a. He said that he had almost a photographic memory. 1060a. Attorney Randazzo testified that he was shown phone records late in the case after he requested that respondent's mother provide them, which did ***not*** reveal the claimed phone call. 1577a-1578a, 1580a-1582a, 1605a, 1785a. Attorney Randazzo, when responding to counsel's question why he did not subpoena records, stated "***I didn't subpoena them because the client provided them to me, and they did not reflect what the client had indicated***."[56] 1605a. He said that Ms. Ross had access to the records and there would be no reason to subpoena the records when he had already seen them and they did not assist respondent.[57] 1578a, 1579a, 1585a. Ms. Ross had two cell phones, one she used for work (Verizon) and a personal cell phone (AT&T), and Attorney Randazzo believed that after the trial she said that she showed him the wrong records. 1613a, 1785a-1786a. It wouldn't have seemed reasonable for an individual to be using two different cell phones at the same time. The records he was shown by Ms. Ross [presumably the Verizon records from her other phone] did not reveal the call but did reveal calls to respondent's phone around the time of the disputed

[55] The attorney could also reasonably believe that respondent's mother independently possessed the victim's phone number since the victim and respondent were both on track and had communicated regarding sports previously (82a-83a) and Ms. Ross was very involved with the students at respondent's school.

[56] When he later asked the prosecutor for the victim's phone records, this was after he received the download of respondent's phone which had revealed no sexually explicit texts/videos of the victim as respondent claimed there would be. 1652a-1653a, 1801a, 1838. This request did not concern the purported phone call made by respondent from the victim's phone.

[57] The attorneys had to rely on Ms. Ross, as opposed to respondent, for provision of these records because they were from her phone.

phone call. This was corroborated by the forensic analysis of respondent's phone.[58] She also told the attorney that the records she showed him should have revealed the call. 1600a. If Attorney Randazzo was shown phone records which did not reveal the phone call but did reveal that Ms. Ross was communicating with respondent around the time of the incident, Attorney Randazzo could not be faulted for declining to further investigate this claim. *In re Ross,* unpub op at 2-3 (SWARTZLE, concurring); 1915a-1916a. The concurrence in the Court of Appeals stated, "Thus, if trial counsel did not, in fact, have the AT&T screenshots showing respondent's mother's three calls to the complainant's phone at the time in question, then he could not be faulted for not researching the matter further." *Id.* at 3; 1916a.

Though Ms. Ross said she provided the screen shots of the phone records in the binder, the judge found after the evidentiary hearing:

> ***As it related to Ms. Ross's testimony, the Court found her testimony not credible: in fact completely untruthful, as it related to the line of questioning about the state of bind-binder*** [sic] ***which Mrs. Ross claims to have provided to Mr. Randazzo and his associate Mr. Dobson, in connection with their representation of her son.***[59]

1893a. Deference is given to the court's fact-finding (MCR 2.613(C)) and respondent ultimately has the burden to demonstrate that the record supports his position. *Hoag,* 460 Mich at 6 (indicating, "it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately.")

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[58] The Verizon records concerning respondent's mother's work phone—which did not reveal any calls between the victim's and Ms. Ross's number—showed that Ms. Ross had called respondent's cell phone at 4:29 p.m. from her work phone. 296b. There was also a text from Ms. Ross's work phone to respondent's phone revealed on the forensic analysis of respondent's phone listed as coming in at 4:35 p.m. 305b.

[59] The People note that the record from the evidentiary hearing also revealed that Ms. Ross pressured and threatened juvenile witnesses. 423a, 424a, 1530a, 227b.

(citation omitted). Because the trial judge found that respondent's mother had been untruthful about the contents of the binder (which she asserted contained the screen shots), the record did not support the claim that counsel was put on notice to investigate the matter further. *In re Ross,* unpub op at 3 (SWARTZLE, concurring); 1916a.[60]

And, neither Attorney Randazzo when he filed the first motion for new trial (259a-263a),[61] nor Attorney Long who filed the second motion for new trial (273a-320a), attached the screen shots much less any other phone records.[62] Attorney Frankel filed a motion to remand in the Court of Appeals and did not attach any screen shots or phone records. She acknowledged she did not have ***any*** phone records.[63] (Respondent's Motion to Remand, pg. 15). The first time that the AT&T records and a screen shot of a portion of those records were produced to the family court was during the post-trial evidentiary hearing. This lends support for Attorney Randazzo's testimony at the hearing that he did not have any phone records in any form that supported respondent's claim. Moreover, the family court judge, when presented with the factual issue of whether trial counsel was in fact in possession of the requisite phone records, found that he didn't have them. The judge stated that "Mrs. Ross's cell phone records, ***could have been obtained prior to trial*** through discovery. . ." ***not that he had them and didn't use them***. 1897a.

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[60] Respondent asserts that his oral representations should have been enough to prompt further investigation. However, Attorney Randazzo was shown records that did not support what the Rosses had told him. The screen shots revealed no call from the victim's phone to Ms. Ross's phone and they appeared complete. And, the Verizon records didn't reveal any calls. He reasonably concluded that there was no need to conduct further investigation after reviewing the records.

[61] The assistant prosecutor in her answer also said that she had never seen phone records. 351b.

[62] In fact, in the supporting affidavits filed by Ms. Ross and respondent, they never even referenced the content or supposed pertinence of phone records Ms. Ross said she supplied to Mr. Dobson. Nor did she discuss any phone calls after the incident whatsoever. 292a-303a.

[63] So, not only did three attorneys not have the phone records but didn't feel the need to support their claims by obtaining these records at that point.

Though respondent and Ms. Ross testified that they told Attorney Randazzo about the phone call before trial, Attorney Randazzo also testified that he was suspicious of these claims especially because they were made late during the representation of respondent. 1792a. The attorneys had particular reasons to be skeptical of respondent's claims because as both Attorney Randazzo and Attorney Dobson testified, nowhere in respondent's statements to the police, or his notarized statement (332b-335b), or in Ms. Ross's email account of what had transpired in this case (336b-344b) did anyone mention respondent using the victim's phone. 1336a, 1578a, 1605a. The Court of Appeals pointed out that the attorney also explained that there was no mention of the call in the police reports or other statements provided to him by respondent and his mother. 1905a.

Moreover, other information given by the Rosses turned out not to be correct. When respondent and Ms. Ross asserted that the victim had sent a sexually explicit video or texts to respondent's phone (1319a, 1396a, 1398a, 1761a), this turned out not to be the case. 1267a-1268a, 1334a-1335a, 1692a, 1702a, 1757a-1758a, 1813a, 83b-85b. (Also, there was no recantation by the victim as had been alleged by Ms. Ross (1738a) and there was no false rape accusation made by the victim as alleged by Ms. Ross (1780a, 1783a)). Attorney Randazzo could reasonably conclude that the Rosses were not reliable sources of information. If the judge found that Ms. Ross wasn't credible regarding the information she provided to the attorneys, then the attorneys reasonably were also skeptical of the information that she provided. "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Richter,* 562 US at 110.

Mr. Randazzo testified that he ***did*** cross-examine the victim at trial regarding loaning her phone to respondent, but she denied that she had done so. 1601a-1602a, 1604a. He tried to get Faith to acknowledge that the phone call was actually made. 1601a-1602a. He possessed other phone records[64] and hoped Faith would think he had phone records which showed that she allowed respondent to make the call. 1601a-1602a, 1604a. Attorney Randazzo was able to surprise Faith during cross-examination (1791a) which allowed counsel to argue in closing that she lied. He compared her testimony to that of respondent who testified that he used the victim's phone, and was able to highlight specific times he did so. 156a, 184a-185a, 238a. Given this rationale, the record does not exclude hypotheses consistent with adequate representation. *Hoag,* 460 Mich at 6.

Also, as found by the Court of Appeals, there were downsides to presenting the records. Attorney Randazzo said that if he actually had confronted her with the phone records, Faith very well could have said that she felt forced to let him borrow her phone, which would not put respondent in a favorable light. 1787a. Moreover, there were serious drawbacks with an approach which concentrated on the timeline of events as established by the phone records. Though respondent argues that the phone records would show that he had been truthful about his phone usage, this is not correct. He was not accurate when he testified at trial that he used the victim's phone three times. 156a, 977a-978a. The AT&T phone records only show one call from the victim's phone to Ms. Ross' phone at 4:24 p.m.. 490a. Respondent was not correct when he told the judge two times that he used the victim's phone because his was dead. 188a-189a, 979a. In fact, his phone was sending and receiving phone calls throughout the relevant time span. 487a-498a, 38b, 47b, 48b-49b, 89b, 296b-297b, 304b. He was not accurate when he

[64] Mr. Randazzo asked the victim about texts to respondent that occurred previously which Mr. Randazzo indicated he would be able to show her. 82a, 225a.

claimed at trial that he just ran into the victim for the second time while on an errand for his girlfriend, Ayanna. He testified at trial that Ayanna had texted him to obtain her sketchbook and that was when he ran into the victim. 165a-166a, 169a, 188a-189a. However, there were no texts from Ayanna from 12:40 p.m. and 5:10 p.m., much less any referencing a sketchbook.[65] 92b-93b, 313b. Therefore, respondent did not have an innocuous reason for running into Faith for the second time, but instead he sought her out for a specific purpose, that is—as the evidence revealed—to have a sexual encounter with her. Therefore, when an approach concentrating on the timeline of the phone call would highlight inconsistencies with respondent's own testimony, respondent has failed to show that objectively, a strategy which stayed away from the phone records was unreasonable.

Moreover, Attorney Randazzo did not find the fact that respondent may have made a phone call from Faith's phone particularly compelling.[66] 1598a, 1786a. These records revealed one phone call from the victim's phone to respondent's mother's phone the afternoon of the assault. 490a-495a. At trial, the victim did not recollect loaning her phone to respondent (90a-91a) though she testified that she was in shock after the assault. 63a. Respondent's attorneys testified at the hearing that they believed she could have easily been rehabilitated by the prosecution and asserted that she had been in shock and had forgotten she made the phone call. 1330a, 1599a-1600a, 1787a-1790a. When the judge rendered her verdict she noted that the victim was distraught. 243a, 245a-247a. Moreover, both respondent and the victim were waiting for their respective rides in the same area after the assault and when the phone call would have

[65] There was a text to Ayanna at 7:56 p.m., indicating, "You're the only girl im focused on." (311b) another lie by respondent.

[66] Though Attorney Randazzo's client's position was that the phone call showed that the victim lied (1610a) and he filed a motion for new trial advocating his client's position, this was not Mr. Randazzo's personal opinion. He gave multiple reasons at the hearing why he believed that this was a collateral issue at best and that questioning could be detrimental to his client.

occurred. 1598a. Attorney Randazzo testified that because there was a lapse in time from the assault until the phone call, he did not believe that the fact that Faith allowed him to borrow her phone was that determinative.[67] *Id.* The judge initially found that the issue concerning the phone calls was a collateral issue and wouldn't change the results at trial. 270a-271a. If the judge, herself, came to this conclusion, counsel did not fall below a constitutional level by concluding similarly.

Respondent failed to show that if the records had been produced, there was a substantial likelihood that the outcome of the proceeding would have changed. This Court reviews the record de novo. *Dendel,* 481 Mich at 132, n 17. The victim's recollection that she did not allow respondent to use her phone did not establish that she lied (much less that the outcome of the entire proceeding would have changed). It was reasonable that the victim was in shock.[68] 63a, 243a, 245a-247a, 1330a, 1599a-1600a, 1787-1790a. Respondent himself did not mention the phone call in the written notarized statement he composed after the incident (927a; 332b-335b) or during his police interview. 928a, 934a-936a. Crystal Ross acknowledged that she had never mentioned the claim that she had spoken to a young lady on the phone before the date of the evidentiary hearing. 716a-719a. Therefore, if respondent and respondent's mother had forgotten about the phone call or details regarding the phone call, respondent clearly cannot show that any inconsistency in the victim's recollections was "fatal".

At trial, the victim testified that she was in the presence of respondent later that day and subsequent days and just tried to ignore him. 90a-91a. So, the victim's loaning her phone to

[67] Respondent also testified at trial that he *did not* use the victim's phone right after the incident but later on when he was getting ready to leave. 156a.

[68] Respondent introduced an email at the hearing of respondent's therapist opining that many times for victims of sexual assault, "the mind does not know how to cope with severe trauma and subsequently fragments memory . . ." 347b-348b.

respondent was not inconsistent with her general demeanor in his presence. The judge gave no reason why the victim's inconsistency would have been "fatal" (1898a) when she also acknowledged that the victim could just have been uncertain about the phone call (1897a) and the attorneys testified that the inconsistency could be innocuous.

In any event, in response to the first request for a new trial, the judge found that her ultimate decision regarding respondent's guilt was ***not*** based on this line of questioning regarding the cell phone calls:

> The Court also notes that when the Court found Respondent guilty, ***that the Court indicated on the record that the verdict was not based on the line of questioning regarding the alleged phone calls made following the incident, but on the evidence presented as a whole*** . . .

270a-271a. The court also denied a second motion for new trial when defense counsel made similar allegations. 327a-330a. The judge determined when finding respondent responsible, "***[t]here's not a question in my mind that the contact was forced, was coerced, and the prosecution has proved it beyond a reasonable . . . doubt. Her testimony was consistent and credible, and his was not. So I am finding that he is absolutely beyond a reasonable doubt responsible for criminal sexual conduct in the fourth degree.***" 251a. At disposition the judge found "[t]his case was proven beyond a reasonable doubt . . . I am very comfortable with the conviction. . ." 14b-15b.

The judge found that respondent's own testimony convicted himself. The judge noted a number of problems with respondent's testimony, that apparently he had a pattern of taking girls down this hallway which had no surveillance camera, that he lied during the course of his interview,[69] that he seemed nonplused during his interview with the police (compared with the

[69] Respondent at first lied about not exposing his penis (136a) and not taking his pants down.
(FOOTNOTE CONT'D NEXT PAGE)

victim's highly distraught demeanor during the interviews), that there was no sexually charged video on his phone from the victim contrary to his testimony, and that his testimony regarding how the incident ended was not believable. 247a-248a. The victim testified that the incident ended when she pushed respondent off (64a), and respondent claimed that, even though his penis was erect and he didn't ejaculate or have sex with Faith, the incident ended when he remembered he had to call his mother. 180a-182a Also, respondent's claim that the victim just happened to initiate sexual conduct in an area where respondent admitted he took girls in the past where there were no surveillance cameras strains credulity. The judge also noted that the victim had no motive to falsely accuse respondent. "What does Faith Johnson get out of all of this? What Faith Johnson gets out of all of this is a lot of social grief, high school grief . . ." 246a. Also, this was a case where the prosecution called an other-acts witness who corroborated the victim's testimony that respondent was forceful and did not respect boundaries. 106a-117a. The surveillance tape and Mr. Byrd's testimony also supported the victim's account. 34a-38a, 211a-212a, 216a. (Also, even further inconsistencies by respondent were brought out at the hearing and the judge found that the witnesses respondent called did not place him in a favorable light. 1893a)

Respondent did not show a reasonable probability that the outcome of the proceeding would have changed. The family court erred in its conclusion. The Court of Appeals, following *Strickland,* reasonably found that respondent's counsel made strategic decisions concerning the investigation; he was given records by respondent's mother which did not support respondent's

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(FOOTNOTE CONT'D FROM PREVIOUS PAGE)
174a. He at first claimed that the victim removed her pants and then admitted that he did. 155a, 186a. He admitted he lied to the detective about his interest in Faith (173a) and lied to the victim about being single. 188a.

claim, there were other reasons to be suspicious of respondent's claims, and there would be disadvantages to using the records.[70]

ARGUMENT

IVB. THE COURT OF APPEALS CORRECTLY AGREED WITH THE TRIAL COURT THAT COUNSEL'S DECISIONS NOT TO CALL CERTAIN LAY WITNESSES WERE NOT INEFFECTIVE.

Standard of Review and Issue Preservation: See Issue IVA.

Discussion:

The Court of Appeals correctly agreed with the trial court that counsel's decision not to call certain lay witnesses was not ineffective.

Respondent also asserts that counsel was ineffective when he failed to call Ariel Crumes who "provided a witness statement that the complainant was happy and engaged in a workout immediately after the alleged assault." However, the judge reasonably found both that there were strategic reasons Attorney Randazzo did not call her and that her testimony would not have changed the outcome of the proceeding. The judge found she was not credible. 1892a. Ariel had problems with her memory (447a-450a, 454a, 455a,), had a clear bias in favor of respondent (349a, 445a-447a, 712a), she would have testified that people close to respondent were putting pressure on witnesses (389a, 420a, 432a, 424a, 456a), and her testimony conflicted with the surveillance tape, other witnesses' testimony, and respondent's own testimony. 34a, 38a, 152a, 168a, 383a, 453a-454a, 189b, 161b, 233b, 237b, 1540a-1543a. See Statement of Facts pgs. 11-13.

[70] Though respondent also argues that he is entitled to relief based on the theory of newly discovered evidence, that issue is beyond this Court's order granting supplemental briefing and was not considered by the Court of Appeals. *Shami,* 501 Mich at 257 n 34.

Respondent also asserts that counsel was ineffective when he did not call Trevor Muir to establish that respondent did not see the victim multiple times, but instead that he fortuitously came upon her on one occasion. Respondent himself, however, testified that he saw the victim multiple times. 153a, 168a, 171a. See also: Statement of Facts pp. 13.

Though respondent argues in passing that counsel was ineffective for not investigating a supposed recantation by the victim and a previous alleged false rape accusation, the records at the evidentiary hearing made clear that there was no recantation by the victim (See Statement of Facts pg. 12, 13) nor was there a previous false rape accusation made by the victim. See Statement of Facts pg. 14. Though counsel references a private polygraph, the private polygraph also did not even occur until after the trial and was not "evidence" that could be admitted at trial. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

The judge found that the witnesses that respondent called at the hearing "presented underwhelming, self-serving testimony that they would have offered at trial. The Court found all of Respondent's witnesses, ***especially Ms. Crumes, Mr. Muir,*** and Mr. Bryant**,** offered testimony that even with the benefit of post-trial hindsight were witnesses who Mr. Randazzo asserts were not called to testify as sound trial strategy." 1895a. The judge agreed that it was reasonable trial strategy not to call Ms. Crumes and Mr. Muir because they had credibility issues, were unhelpful, and did not provide assistance as to respondent's time line. The judge, for the same reasons, also found that their testimony would not have changed the result at trial. *Id.*

The Court of Appeals agreed with the trial court (*In re Ross,* unpub op at 8; 1908a) and respondent has failed to show that the Court of Appeals clearly erred.

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Danielle Walton, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court DISMISS, or in the alternative DENY defendant's application for leave to appeal.

Respectfully Submitted,

JESSICA R. COOPER
PROSECUTING ATTORNEY
OAKLAND COUNTY

THOMAS R. GRDEN
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