NORTHERN MICHIGAN CASE No. 271366

State of Michigan
In the Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

GARY DAVENPORT,

Defendant-Appellant

ON APPEAL FROM THE PRESQUE ISLE COUNTY CIRCUIT
Trial Court No. 05-092269-FC
Hon. Scott L. Pavlich

DEFENDANT-APPELLANT'S BRIEF ON APPEAL
****ORAL ARGUMENTS REQUESTED*****

KIRSCH & SATAWA, PC
By: Mark A. Satawa (P47021)
Stuart G. Friedman (P46039)
Lisa B. Kirsch Satawa (P52675)
Attorneys for Defendant-Appellant
3000 Town Center, Suite 1700
Southfield, MI 48075
(248) 356-8320

Presque Isle County Prosecutor
Attorney for Plaintiff-Appellee
151 East Huron Avenue
Courthouse
Rogers City, MI 49779
(989) 734-4709

Michigan Attorney General's Office
By: Eric Restuccia (P49550)
Criminal Appellate Division
525 West Ottawa
Post Office Box 30217
Lansing, MI 48909
(517) 373-4875

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ATTORNEYS AT LAW
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STATEMENT OF QUESTIONS PRESENTED

I. WAS THE DEFENDANT DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO ADEQUATELY PREPARE FOR THE CASE, FAILED TO INSURE THAT ADEQUATE PROTECTIVE MEASURES WERE IN PLACE AT THE PRESQUE ISLE PROSECUTOR'S OFFICE WHERE PREDECESSOR COUNSEL SWITCHED SIDES IN THE MIDDLE OF THE CASE, AND LABORED UNDER A CONFLICT OF INTEREST WHEN SHE REPRESENTED THE DEFENDANT COUNSEL'S LAW LICENSE WAS SET TO BE SUSPENDED ON JUNE 1ST FOR NEGLECT OF ANOTHER CASE AND IF SHE DID NOT BRING THIS CASE TO A CLOSE BY THEN, COUNSEL WOULD HAVE HAD TO RETURN A RETAINER FEE AND DISCLOSE HER SUSPENSION TO THE DEFENDANT?

Defendant-Appellant answers "Yes."

The Plaintiff-Appellee answers "No"

The Trial Court answers "Yes"

II. DID THE TRIAL COURT INCORRECTLY SCORED OV4 WHERE THE COMPLAINANT DID NOT "REQUIRE" MENTAL HEALTH TREATMENT WITHIN THE MEANING OF OV4 AS THE EVIDENCE SHOWED THAT THE COMPLAINANT WAS FUNCTIONING WITHOUT SUCH TREATMENT AND WAS QUICKLY PLACED INTO TREATMENT ON THE EVE OF THE DEFENDANT'S SENTENCING?

Defendant-Appellant answers "Yes."

The Plaintiff-Appellee answers "No"

The Trial Court answers "Yes"

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TABLE OF AUTHORITIES

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JURISDICTION

Mr. Davenport was convicted after a bench trial held in the Presque Isle Circuit Court of six counts of Criminal Sexual Conduct in the first degree contrary to MCL 750.520B. He was subsequently sentenced to a term of twelve to thirty years incarceration. Defendant is currently serving the sentence imposed. His Michigan Department of Corrections number is 604590.

The date of the offense was May 1, 2002 through September 1, 2004. The date of sentence was May 19, 2006. A Claim of Appeal was docketed with this Court on June 28, 2006.

This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2). The Defendant is being represented by retained counsel.

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STATEMENT OF FACTS

Gary Davenport was convicted in a bench trial held in the Presque Isle Circuit Court of six counts of Criminal Sexual Conduct in the first degree contrary to MCL 750.520B. He was subsequently sentenced to a term of twelve to thirty years incarceration. Defendant is currently serving the sentence imposed. His earliest release date is February 6, 2018.

Mr. Davenport was a schoolteacher at the Seventh Day Adventists School in Onaway Michigan. In addition to his teaching duties, he ran the "Pathfinder" program. Pathfinder is a program which is similar to Boy Scouts, but with a heavier emphasis on religion. Complainant Travis Johnson was a student at the school and a participant in the Pathfinder program. Mr. Davenport denied the allegations of sexually assaulting the complainant. After a bench trial, the trial judge rejected this denial and convicted the Defendant. This is the Defendant's appeal.

A. *Pretrial Proceedings.*

A preliminary examination was held on November 22, 2005, in the 89th District Court for the County of Presque Isle before the Honorable Harold A. Johnson. The Preliminary Examination was conducted by Attorney Richard Steiger.

After the preliminary examination, Mr. Steiger went to work for the Presque Isle County Prosecutor's office. Mr. Davenport was subsequently represented by Attorney Janet Frederick-Wilson. No pretrial motions were filed

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and counsel waived trial by jury. Mr. Davenport's bench trial began on April 19, 2006, before the Honorable Scott L. Pavlich.

B. *The People's Case in Chief.*

During opening statement the prosecutor explained that Travis Johnson attended the Seventh Day Adventist school in Onaway, Michigan. (TT, 4/19/06, p4). A new teacher came to the school in August, 2001. At the same time Travis entered fifth grade. Mr. Davenport came to the school and served as the sole teacher for all of the grades in the school. (TT, 4/19/06, p5). During this time Travis was going through a difficult transition at home. His mother was in the process of divorcing her husband, a man named Doug Ellenberger, who Travis knew as his father. (TT, 4/19/06, p5). In September 2001 a verbal altercation took place outside of the school during which time Mr. Ellenberger yelled at Travis and told him that he was not even his real son. (TT, 4/19/06, p5). Shortly thereafter Mr. Davenport began spending a lot of time with Travis and filled the role of mentor and friend. Travis's mother welcomed Mr. Davenport's relationship with her son and thought he was a good role model for Travis. (TT, 4/19/06, p5).

Over the next several years Mr. Davenport and Travis spent a lot of time together. (TT, 4/19/06, p6). During that time Mr. Davenport also gave Travis various gifts including a digital camera, a cell phone and an ATM card. (TT, 4/19/06, p6). At some point Mr. Davenport was told to stop seeing Travis. But in February of 2005, Mr. Davenport sent Travis a box for Valentine's Day. The arrival of the box at Travis's father's home coincided with a recent conversation

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Travis's father had with a local woman who saw Mr. Davenport kiss Travis on the lips. (TT, 4/19/06, p7). Travis's father then called the police and Trooper Jermeay responded to the complaint. (TT, 4/19/06, p7). When interviewed by Trooper Jermeay, Travis disclosed that over the last few years Mr. Davenport performed oral sex on him about ten different times. (TT, 4/19/06, p8). Travis alleged no other misconduct to the police. However, during the preliminary exam on November 22, 2005, Travis revealed additional allegations of sexual abuse. (TT, 4/19/06, p8).

The prosecutor gave an opening statement, and the defense waived her opening statement. (TT, 4/19/06, p8).

The prosecution called Herbert William Minier, the chairman of the Seventh Day Adventist (SDA) school board. (TT, 4/19/06, p10). Mr. Miner testified that Mr. Davenport started teaching at the school in the fall of 2001; that he was responsible for teaching all of the school's fifteen students and that Mr. Davenport resigned in June 2004. (TT, 4/19/06, p11). Minier never investigated any allegations against Mr. Davenport while he taught at the school. (TT, 4/19/06, p13).

Travis's mother, Rhonda Ruth Ellenberger testified that Travis started going to the SDA school when he was in first grade. (TT, 4/19/06, p18). Mr. Davenport taught Travis for three years, starting in August 2001. (TT, 4/19/06, p18, 20). In August of 2004, Mrs. Ellenberger removed Travis from the school because she was uncomfortable with the relationship Travis had with Mr. Davenport. (TT, 4/19/06, p21). Initially Mrs. Ellenberger enjoyed the relationship

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Mr. Davenport had with Travis because he was a positive role model and was able to act as a substitute father figure for Travis. (TT, 4/19/06, p22). Travis's biological father did not have much to do with him because she had separated from him before Travis was born. (TT, 4/19/06, p17). In September or October of 2001 there was an episode in the parking lot of the school during which Mr. Ellenberger called Travis a lying bastard and told Travis he was not even his real child. (TT, 4/19/06, p24). Travis was devastated and shortly thereafter Mr. Davenport became his mentor. (TT, 4/19/06, p25).

Mr. Davenport and Travis spent a lot of time together including time spent together after school. (TT, 4/19/06, p25). Eventually though Mrs. Ellenberger felt that Mr. Davenport became too possessive over Travis.[1] (TT, 4/19/06, p26). In December of Travis's seventh grade year, Mrs. Ellenberger moved the family to Alpena but Travis remained in the SDA school. (TT, 4/19/06, p26). Mrs. Ellenberger thought the move would bring about the end of the excessive interaction between Travis and Mr. Davenport but she saw Mr. Davenport several times in Alpena after they moved.[2] (TT, 4/19/06, p32). Mr. Davenport offered to drive Travis back to Alpena after school and he always brought him back very late. (TT, 4/19/06, p37). After a few times of being late Mrs. Ellenberger stopped letting Mr. Davenport drive Travis back to Alpena. (TT, 4/19/06, p37). When she came to the school to take Travis back to Alpena, Mr. Davenport would become

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[2] Mrs. Ellenberger saw the defendant in Alpena on Mother's Day of 2005, in Alpena and her other son Taylor noticed Mr. Davenport on another occasion as well. (TT, 4/19/06, p35).

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upset and ask that Travis stay with him. (TT, 4/19/06, p27). At one point Mr. Davenport threatened suicide.[3] (TT, 4/19/06, p27).

Around the time, that Travis graduated from seventh grade Mr. Davenport suggested that Travis be baptized. (TT, 4/19/06, p39). Mrs. Ellenberger did not agree with the baptism so she went to the church to stop Travis and take him to her parents' home. On their way Mr. Davenport tried to run them off the road, twice. (TT, 4/19/06, p40). Mrs. Ellenberger called the police who eventually arrived at her parents' home and then Mr. Davenport left the premises.[4] (TT, 4/19/06, p40).

In December of 2005, Travis moved in with his biological father.[5] (TT, 4/19/06, p42). He moved because of behavioral problems and because he was scared that Mr. Davenport knew where he lived in Alpena. (TT, 4/19/06, p42). Mrs. Ellenberger first found out about the sexual nature of Travis's and Mr. Davenport's relationship from Travis's father. (TT, 4/19/06, p43). She confronted Travis. (TT, 4/19/06, p43).

Often times, sue to Mrs. Ellenberger's work schedule, Travis and his older brother stayed after school to attend an after school program led by Mr. Davenport. (TT, 4/19/06, p56). Travis was in the program in 2001 and 2002. (TT,

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[3] Defense counsel objected to the statement as hearsay. (TT, 4/19/06, p28).
[4] During this episode there was an allegation that Rhonda kidnapped her son. (TT, 4/19/06, p49). She did not understand where that allegation came from and explained that it was possible that Travis called the police and told them she kidnapped him while they were in the car. (TT, 4/19/06, p51-52).
[5] Travis began having a relationship with his biological father when he was four years old. (TT, 4/19/06, p42). Over time it improved and he spent increasing amounts of time with his father. (TT, 4/19/06, p42).

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4/19/06, p57). Occasionally, Mr. Davenport would ask for Travis to stay late. (TT, 4/19/06, p58). There was often another girl, Meagan Amsted, who stayed late as well. (TT, 4/19/06, p59). Travis stayed late some afternoons to help Mr. Davenport repair cell phones. (TT, 4/19/06, p63).

Mrs. Ellenberger worked at the school as a janitor after school. (TT, 4/19/06, p64). From 2001-2003 she cleaned the school everyday. (TT, 4/19/06, p64). She would arrive at the school around 4:15 p.m. and then work for about forty-five minutes. (TT, 4/19/06, p65). She cleaned every room except for the room that Mr. Davenport kept locked. (TT, 4/19/06, p66). That room was located between the kitchen and the office. (TT, 4/19/06, p66). Travis often ran errands with Mr. Davenport while his mother worked at the school. (TT, 4/19/06, p73).

Mrs. Ellenberger witnessed one occasion when Mr. Davenport told Travis that he needed to go into the locked room for a minute. (TT, 4/19/06, p76). She did not notice anything suspicious while they were in the room but Travis seemed very upset when he came out of the room. (TT, 4/19/06, p77). When she asked him what was wrong he said that he and Mr. Davenport had a disagreement. (TT, 4/19/06, p77). Travis's shirt was un-tucked from his pants when he came out of the room.[6] (TT, 4/19/06, p78).

Mrs. Ellenberger was aware of several gifts that Mr. Davenport gave Travis including a snowmobile, a camera, a paintball gun and a camcorder. (TT, 4/19/06, p84-5). Mr. Davenport also took Travis shopping to Wal-Mart and

[6] At trial, Travis insisted that none of the incidents happened when he stayed after school. Nothing happened when his mother was at the school cleaning. (TT, 4/19/06, p181).

bought clothes for him prior to his family vacation to Arizona. (TT, 4/19/06, p94). When they returned home, Mrs. Ellenberger told him that she could not afford the clothing. Mr. Davenport told her they were gifts and she need not worry about paying him back. (TT, 4/19/06, p94). Mrs. Ellenberger did not know that Mr. Davenport gave Travis an ATM card however she observed him take money out of an ATM when they were in Alpena. (TT, 4/19/06, p99). She asked him where he got the card and Travis told her his father gave it to him. (TT, 4/19/06, p99). His father denied this. (TT, 4/19/06, p99).

Travis testified that at the time of trial Travis was fifteen years old. (TT, 4/19/06, p103). Mr. Davenport was his teacher from fifth through seventh grade. (TT, 4/19/06, p107). He enjoyed his relationship with Mr. Davenport until their trip to Gaylord. (TT, 4/19/06, p108). Mr. Davenport and Travis were in the van together on their way back from Gaylord and Travis fell asleep. When he woke up Mr. Davenport's hands were inside Travis's pants and he was touching Travis's penis. (TT, 4/19/06, p114). Mr. Davenport explained to Travis that he was trying to show Travis how much he loved him. (TT, 4/19/06, p116). Travis never told his mother because he was scared. At that point though Mr. Davenport was not violent with him. (TT, 4/19/06, p116).

Travis asserted that Mr. Davenport continued to touch his penis in the office during lunch at school, at least five to six times a week. (TT, 4/19/06, p118). About a week after the trip to Gaylord the assaults escalated and Mr. Davenport began placing Travis's penis in his mouth. (TT, 4/19/06, p119). Mr.

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Davenport would then force his penis into Travis's mouth.[7] (TT, 4/19/06, p119). During one of the alleged assaults Mr. Davenport climaxed and ejaculated in Travis's mouth. This upset Travis and Mr. Davenport promised that it would never happen again. (TT, 4/19/06, p120-121).

Travis remembered that Mr. Davenport did not want him to go on vacation with his family to Arizona. (TT, 4/19/06, p124). After the family moved to Alpena he saw Mr. Davenport a few times at the Corner Depot. (TT, 4/19/06, p125). Mr. Davenport would call him and tell him he was in town and they would arrange to meet. (TT, 4/19/06, p125).

Travis felt that Mr. Davenport treated him differently than the other kids. (TT, 4/19/06, p126). He favored him and treated him as though he could do nothing wrong. (TT, 4/19/06, p126). Mr. Davenport gave him a long list of gifts including a paintball gun, paintballs, a four-wheeler, a snow mobile and digital camera.[8] (TT, 4/19/06, p126-130). Travis explained that many of the things Mr. Davenport bought him were kept in a shed behind the school. (TT, 4/19/06, p135). In the shed there were articles of clothing that Mr. Davenport bought him and a money box. (TT, 4/19/06, p135). At the end of seventh grade Travis went to the shed with his father and brother to retrieve some items. (TT, 4/19/06, p139). There was roughly $400 in the money box that belonged to Mr.

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[7] Travis testified that the first time Mr. Davenport performed oral sex on him was around Christmas time. (TT, 4/19/06, p119).

[8] The four-wheeler broke down after the first time Travis's brother Lance rode it. Mr. Davenport then gave Travis $450 to repair the four wheeler. (TT, 4/19/06, p153). At a later date he gave Travis's father a check for an additional $650 to finish the repairs on the four-wheeler. (TT, 4/19/06, p154).

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Davenport. (TT, 4/19/06, p141). Mr. Davenport gave all of the money to Travis because he wanted to make sure Travis had money. (TT, 4/19/06, p141). Mr. Davenport also placed money inside bibles in order to encourage Travis to read it. (TT, 4/19/06, p142). Mr. Davenport would often give Travis extra money to buy chips and pop. (TT, 4/19/06, p144). He would also sell chips to the other kids with Travis. (TT, 4/19/06, p144). Mr. Davenport paid the bill for Travis's cell phone as well and eventually traded him up to a nicer phone. (TT, 4/19/06, p148).

Mr. Davenport also gave Travis a cell phone when he was in sixth grade. (TT, 4/19/06, p197). Mr. Davenport then gave him a new phone before Travis entered seventh grade. (TT, 4/19/06, p199). Mr. Davenport also paid Travis's and his bother Lance's cell phone bills.[9] (TT, 4/19/06, p199). During the summer that Mr. Davenport left Onaway he called Travis and offered him his snow mobile. (TT, 4/19/06, p204). Travis's father picked up the snowmobile for him. (TT, 4/19/06, p205).

Travis asserted that when Mr. Davenport took him shopping to Wal-Mart before the family trip to Arizona, Mr. Davenport only bought clothing for Travis. (TT, 4/19/06, p206). But he then quickly changed his testimony that Mr. Davenport in fact bought various items for both his brother and sister. (TT, 4/19/06, p206). While Travis was on vacation he called Mr. Davenport whenever he was bored. He called Mr. Davenport more often than Mr. Davenport called him. (TT, 4/19/06, p207).

[9] Travis did not recall any agreement that his mother would pay Mr. Davenport back for the cell phones. (TT, 4/19/06, p208).

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Travis admitted to lying to Trooper Jermeay that he never used the ATM card. (TT, 4/19/06, p210). Travis also admitted to stealing four hundred dollars from his mother. (TT, 4/19/06, p212). Whenever Travis needed money he would call Mr. Davenport. Mr. Davenport would then transfer money into the account and Travis would withdraw it with the ATM card. (TT, 4/19/06, p213). Travis explained that sometimes the money was a gift and other times it was a loan. (TT, 4/19/06, p213).

The first person Travis spoke to about the allegations was Trooper Jermeay. (TT, 4/19/06, p150). Trooper Jermeay asked him to write out a statement. Travis wrote out a statement for the trooper but did not include all of the relevant details and did not disclose all of the sexual assaults that allegedly took place. (TT, 4/19/06, p150).

Travis acknowledged that his testimony changed since the investigation began. He insisted that his testimony changed because in the beginning it was too difficult for him to talk about all of the alleged assaults. (TT, 4/19/06, p163). He told Trooper Jermeay that the assaults started when Mr. Davenport touched his penis on top of his clothing on their way back from Gaylord. (TT, 4/19/06, p166). Travis originally told Trooper Jermeay that Mr. Davenport assaulted him a total of ten times. (TT, 4/19/06, p168). However, at the preliminary exam Travis testified that Mr. Davenport assaulted him three or four times a week for three years. (TT, 4/19/06, p168). He also testified that when Mr. Davenport touched him at school it was always during lunch and that he and Mr. Davenport would

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spend almost the entire lunch hour in the locked storage room. (TT, 4/19/06, p178).

Travis explained that when Mr. Davenport performed oral sex on him and that he sometimes had clothing on and other times he did not. (TT, 4/19/06, p183). Sometimes Mr. Davenport would remove Travis's underwear but he never screamed because he was scared. (TT, 4/19/06, p184). After Mr. Davenport performed oral sex on Travis, Travis would then perform oral sex on Mr. Davenport. (TT, 4/19/06, p188).

After Travis testified, testimony was taken from Vicki Moulder who testified over a speakerphone from her home. (TT, 4/19/06, p225). Ms. Moulder explained that she knew Travis as a kid from the neighborhood. (TT, 4/19/06, p226). She worked in the Alverno Grocery. (TT, 4/19/06, p227). Several weeks prior to trial she spoke with Trooper Jermeay and wrote out a statement for him. (TT, 4/19/06, p227). Ms. Moulder recalled an incident that took place during Christmas break of the 2005 school year. (TT, 4/19/06, p228). Travis came into the store with Mr. Davenport. She spoke with Travis for a few minutes and Mr. Davenport seemed very agitated and jealous.[10] (TT, 4/19/06, p230). At the time she did not know Mr. Davenport's name but recognized his face. (TT, 4/19/06, p231). She watched Travis and Mr. Davenport leave the store through the window and she saw Mr. Davenport open the car door, of a small green truck, for Travis. (TT, 4/19/06, p232, 237). She continued to watch them and after Mr.

[10] Her observation that Mr. Davenport appeared jealous was stricken from the record. (TT, 4/19/06, p231).

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Davenport got into the car she saw Mr. Davenport and Travis kiss each other on the mouth. (TT. 4/19/06, p233).

Next, the People called Lance Johnson Jr., Travis's older brother. At the time of the trial he was seventeen years old. (TT, 4/19/06, p245). Lance attended the SDA school and Mr. Davenport was his teacher for eighth grade. (TT, 4/19/06, p246). Lance remembered that Mr. Davenport favored Travis by taking him to Pizza Hut and other places. (TT, 4/19/06, p247). Further, Lance stated that Mr. Davenport took Travis into the locked office everyday. They would say they were going in there to get chips. (TT, 4/19/06, p248).

When Lance was in ninth grade he lived with his biological father. Travis would stay with them during the summer. (TT, 4/19/06, p251). Mr. Davenport frequently visited their father's home to visit Travis. Mr. Davenport would come to the home and then he and Travis would leave for hours at a time. (TT, 4/19/06, p252).

Lance conceded that the only time he ever saw any potentially inappropriate physical contact between Mr. Davenport and Travis was when they wrestled together. He thought the way Mr. Davenport put his hands on Travis's waist was odd but he admitted he did not know if it was a valid wrestling move. (TT, 4/19/06, p259).

Travis's father, Lance Gregory Johnson, came to know Mr. Davenport when he came to pick up Travis from school on Fridays. (TT, 4/19/06, p268). Mr. Johnson called the police after Travis received the Valentine's Day box from Mr. Davenport. (TT, 4/19/06, p269). He phoned Detective Nightingale and took the

box with him to meet with the detective. (TT, 4/19/06, p270). Mr. Johnson disapproved of the relationship between Travis and Mr. Davenport. Mr. Johnson's suspicions led him to ask his daughter to print out all of the emails she could find between Travis and Mr. Davenport. (TT, 4/19/06, p272). She printed emails from July 2003 through December 2003. Several of the emails made Mr. Johnson uncomfortable because they contained "I love you" and "I miss you." (TT, 4/19/06, p273). The emails were admitted as exhibit four. (TT, 4/19/06, p 272) Mr. Johnson was at Mr. Davenport's when he gave Travis a four-wheeler. (TT, 4/19/06, p274). Mr. Davenport told Mr. Johnson he paid $1200 for it because he thought Travis would like it. (TT, 4/19/06, p274). After the four wheeler broke Mr. Davenport told Mr. Johnson to find someone to fix it and he would pay for the repairs. (TT, 4/19/06, p275). Mr. Johnson told Mr. Davenport it would cost about $1000 to fix it and Mr. Davenport gave Travis $400 for the repairs. (TT, 4/19/06, p275). Later, Mr. Davenport gave Mr. Johnson a check for the remaining $600.[11] (TT, 4/19/06, p275).

After the Valentine's Day incident Mr. Johnson only saw Mr. Davenport one time, in Cheboygan. (TT, 4/19/06, p276). Mr. Davenport showed up at Travis's friend's house. (TT, 4/19/06, p277). Mr. Johnson first stated that the visit occurred around fall of the previous year but after having his memory refreshed with a police report he stated that it really happened in April. (TT, 4/19/06, p278).

[11] Ultimately, the four-wheeler was never repaired because Lance wanted nothing to do with Mr. Davenport after the investigation started. (TT, 4/19/06, p276).

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Michael Todd Jermeay was the investigating officer in Mr. Davenport's case. (TT, 4/19/06, p296). Trooper Jermeay contacted Travis's father during the third week of March of 2005. (TT, 4/19/06, p298). After speaking with Mr. Johnson he spoke with Mr. Minier and then eventually spoke to Travis four months later. (TT, 4/19/06, p298). Travis also provided him with a written statement on that day. (TT, 4/19/06, p301). Trooper Jermeay did not think Travis's trial testimony was accurate when compared to the interview he conducted on July 5, 2005. (TT, 4/19/06, p301-302).

After speaking with Travis, Troopers Trooper Jermeay and Nightingale set up a pretext phone call between Travis and Mr. Davenport.[12] (TT, 4/19/06, p300). The phone call took place on July 6, 2005. (TT, 4/19/06, p302). Both Trooper Jermeay and Nightingale were present. (TT, 4/19/06, p302). The pretext phone call was recorded and when the prosecutor moved for admission defense counsel objected arguing that the tape was not properly authenticated and the person who made the tape was not in court to do so. (TT, 4/19/06, p303). She also argued that admission of the tapes violated Mr. Davenport's constitutional right to privacy. (TT, 4/19/06, p303). The prosecutor then asked additional questions of Trooper Jermeay in order to lay a proper foundation. Trooper Jermeay stated that neither Travis nor his father objected to the making of the tape. (TT, 4/19/06, p305). The judge then asked if there was an affirmative consent from them or just a lack of an objection. (TT, 4/19/06, p306). Trooper Jermeay explained that department protocol required them to get consent from

[12] A pretext phone call is when a victim calls the suspect on the phone in order to see if any incriminating statements are made. (TT, 4/19/06, p301).

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Travis's father and they complied with protocol.[13] (TT, 4/19/06, p307). Both Travis and his father consented to the call. (TT, 4/19/06, p308). The judge then overruled defense counsel's objection and admitted the phone call. (TT, 4/19/06, p308). The prosecutor stated that he had a transcript of the phone call but that it was not certified. (TT, 4/19/06, p308). Defense counsel objected to the transcript and the tape was played for the judge. (TT, 4/19/06, p309)

At the beginning of the tape there is an introduction by Nightingale. (TT, 4/19/06, p309-310). Travis then started to talk to Mr. Davenport and told him that he went to church the other day and the pastor talked about sex. (TT, 4/19/06, p311). Defense counsel then objected because there was no authentication as to whom Travis spoke to on the tape. (TT, 4/19/06, p311). Trooper Jermeay then testified that he recognized Mr. Davenport's voice on the tape. (TT, 4/19/06, p312). The tape then continued and Travis stated to Mr. Davenport that he is troubled by what Mr. Davenport did to him. (TT, 4/19/06, p313). Mr. Davenport asked Travis if he spoke to someone about it. (TT, 4/19/06, p313). Travis then asked Mr. Davenport what he can do to get past it. (TT, 4/19/06, p313). Mr. Davenport told Travis that he would pray with him and God would erase it. (TT, 4/19/06, p314). Travis told Mr. Davenport that he did not think what Mr. Davenport did to him was right and Mr. Davenport agreed. (TT, 4/19/06, p314). Travis told him that he did not think what Mr. Davenport did was normal. (TT, 4/19/06, p314). Trooper Jermeay explained that Nightingale wrote some things

[13] On or about November 8, 2006 the undersigned counsel spoke to Officer Jermeay and was told that no such protocol exits.

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out on a paper for Travis prior to calling Mr. Davenport. Travis then read off of the provided statements. (TT, 4/19/06, p317).

When Trooper Jermeay interviewed Travis on July 5, 2005, Travis told him that Mr. Davenport would take him into the office and perform oral sex on him and that it happened about ten times.[14] (TT, 4/19/06, p319). Trooper Jermeay testified that Travis told him that Mr. Davenport did not ejaculate. (TT, 4/20/06, p320). Travis also told Trooper Jermeay it happened around 4:30 p.m. after school and that Mr. Davenport never forced him to perform oral sex on Mr. Davenport. (TT, 4/20/06, p320). Travis explained to Trooper Jermeay that he would walk into the office at school and Mr. Davenport would knock him down and then the assault would occur. (TT, 4/20/06, p320). Travis insisted that he tried to get away from Mr. Davenport. (TT, 4/20/06, p321). Travis also told Trooper Jermeay that Mr. Davenport never gave him an ATM card and that he never used one to get money. (TT, 4/20/06, p322). Travis then changed his statement about the ATM card around November of 2005. He admitted that he originally lied because he did not want to get into trouble. (TT, 4/20/06, p322). Travis also told Trooper Jermeay that when Mr. Davenport touched him in the van during the Gaylord trip he touched him on top of his clothing. (TT, 4/20/06, p322).

Trooper Jermeay agreed that Travis's testimony was different from his earlier statements. (TT, 4/20/06, p323). There were also changes in Travis's story from the time he spoke to Trooper Jermeay and his testimony at the

[14] Travis did not use the term "oral sex." Rather he stated that Mr. Davenport put his mouth on his "pee pee." (TT, 4/19/06, p319).

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preliminary exam. (TT, 4/20/06, p329). At the preliminary exam Travis expanded the number of incidents and as a result more charges were added. (TT, 4/20/06, p329). Additionally there was an obvious contradiction in Travis's testimony as to the time of day the assaults occurred. (TT, 4/20/06, p331). Trooper Jermeay explained that many victims of sexual assault do not reveal all of the abuse they suffered right from the beginning. They generally reveal more as the investigation progresses. (TT, 4/20/06, p331). Trooper Jermeay was the final witness for the prosecution.

C. *The Defense*

The defense then presented several witnesses including several of Mr. Davenport's former students and their parents. Defense counsel waived opening statement. The defense witnesses were former students and their parents who cumulatively testified that all the students ate lunch at the same time; that some were in the classroom and some in the kitchen; that Mr. Davenport made them lunch and supervised lunch and recess; that at times he would go into a closet/office but only for short periods of time. Additionally, the students and parents testified to observations of unusual or inappropriate behavior between Mr. Davenport and Travis. (TT 4/20/2006 p335-494).

More specifically, the witnesses additionally stated, Tierra Lynn Tucker DeYoung, age 17; (TT, 4/20/06, p335) attended the SDA school beginning in seventh grade (1999) for three years. (TT, 4/20/06, p335). She did not recall Travis sitting next to Mr. Davenport during class. (TT, 4/20/06, p343). Tierra remembered that there was a snowmobile at the school but the students were

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not allowed to use it. (TT, 4/20/06, p343). Mr. Davenport often pulled the students though on a sled behind it. (TT, 4/20/06, p343). Tierra did not stay after school generally however she did participate in Pathfinders in 2000 along with Travis.(TT, 4/20/06, p346). She never observed anything inappropriate between Mr. Davenport and Travis in school, after school or during Pathfinders. (TT, 4/20/06, p345-347). Tierra remembered that she occasionally bought chips from Travis. (TT, 4/20/06, p355). The chips were stored in the office off from the kitchen but she never saw Travis go into the locked office with Mr. Davenport. (TT, 4/20/06, p356).

Daniel William Nessel went to the SDA school for grades one through eight. Mr. Davenport was his eighth grade teacher. (TT, 4/20/06, p359). He and Travis were friends while at the school. (TT, 4/20/06, p359). He recalled a few occasions when Travis and Mr. Davenport went into the office together but he did not remember them being in for very long. (TT, 4/20/06, p366). Daniel never saw Mr. Davenport touch Travis inappropriately and Mr. Davenport never touched him inappropriately either. (TT, 4/20/06, p367). Travis never told Daniel that Mr. Davenport assaulted him. (TT, 4/20/06, p369).

John Musselman, another student , testified that he did not think that Mr. Davenport played favorites but that Mr. Davenport gave Travis extra attention because Travis had problems and required extra help. (TT, 4/20/06, p386). He added that Mr. Davenport went the extra mile for a lot of kids who he felt needed extra help. (TT, 4/20/06, p389). He never saw Mr. Davenport be inappropriate with Travis. (TT, 4/20/06, p386). John was shown pictures of the storage room,

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which he recognized, but he stated that the room in the picture was a lot less cluttered than the room he remembered (TT, 4/20/06, p393). He also remembered being in the office with Mr. Davenport a few times a week and Mr. Davenport never touched him. (TT, 4/20/06, p391).

Meagan Amber Amsden attended the SDA school for grades one through eight. (TT, 4/20/06, p 396). Mr. Davenport was her teacher in sixth, seventh and eighth grade. (TT, 4/20/06, p396). She could only remember a few times when Mr. Davenport and Travis were in the office together but the office was not locked at those times. (TT, 4/20/06, p401). Occasionally Travis would go into the room to get some chips, but he was always alone. (TT, 4/20/06, p402). Meagan never saw any inappropriate behavior between Mr. Davenport and Travis. However, she did comment that Mr. Davenport favored Travis by helping him with his work a lot during the day. (TT, 4/20/06, p402). Meagan stayed after school most days and Travis would be there as well. (TT, 4/20/06, p403). She accompanied Mr. Davenport and Travis when they went on errands after school. (TT, 4/20/06, p403

Dustin Hussenback testified that he stayed after school once a week on Tuesdays for the Pathfinders program. (TT, 4/20/06, p427). He would also occasionally ride bikes with Travis after school or go with Travis and Mr. Davenport to run an errand. (TT, 4/20/06, p428). Dustin never saw Mr. Davenport show favoritism to anyone. (TT, 4/20/06, p429). Nor did he ever see

any inappropriate behavior between Mr. Davenport and Travis.[15] (TT, 4/20/06, p430). Travis never told Dustin that Mr. Davenport touched him inappropriately either. (TT, 4/20/06, p430).

Lynn Hayner was an elder of the church when Mr. Davenport came to teach at the SDA school. (TT, 4/20/06, p436). He also knew Travis and went blueberry picking with Travis and Mr. Davenport on one occasion. (TT, 4/20/06, p437). He never saw anything inappropriate between the two of them. (TT, 4/20/06, p22). He expressed his opinion that Mr. Davenport is a kind and godly man and there were no complaints from any of the parents while Mr. Davenport taught at the school. (TT, 4/20/06, p439).

Trace Moore was a student of Mr. Davenport's for four years when Mr. Davenport taught in Champaign, Illinois. (TT, 4/20/06, p 443). He also went to church with Mr. Davenport and spent time with his kids. (TT, 4/20/06, p444). Mr. Davenport was very generous with him and other students. He bought them ice cream and also gave Trace money to buy items for his bike. (TT, 4/20/06, p444).

Nathaniel White Beedle was a classmate of Trace Moore's and a student of Mr. Davenport's from 1992 until 1997. (TT, 4/20/06, p 447-8). Nathaniel had several problems while in school such as ADD and dyslexia and Mr. Davenport was very good at calming him down and helping him through school. (TT, 4/20/06, p448). Mr. Davenport was never inappropriate with him and never solicited any questionable behavior from him. (TT, 4/20/06, p450).

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[15] Dustin saw Travis hug Mr. Davenport on several occasions but all of the kids hugged Mr. Davenport. It was nothing out of the ordinary. (TT, 4/20/06, 434).

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Kelly Rae Miller is Trace Moore's mother. She had two children who were students of Mr. Davenport. (TT, 4/20/06, p452). She never had any concerns about Mr. Davenport's relationship with her children. (TT, 4/20/06, p452). She has known Mr. Davenport since 1994 and considers him to be a kind and loving person who is very dedicated to his children. (TT, 4/20/06, p453).

Loretta Lynn Duman worked as a teacher's aide at the SDA school as a part time employee for four years prior to the trial. (TT, 4/20/06, p455). She worked with Mr. Davenport for two years and also knew Travis. (TT, 4/20/06, p455). She generally worked from 8 a.m. until noon, four days a week. (TT, 4/20/06, p456). During those hours she stayed in the classroom with Mr. Davenport. (TT, 4/20/06, p457). Mr. Davenport gave students extra attention if they needed it and Travis was one of the kids who needed the extra attention. (TT, 4/20/06, p460). She never saw any affection that she deemed inappropriate. (TT, 4/20/06, p462).

Mr. Davenport's wife, Della Louise Davenport, testified that she and Mr. Davenport have been married for 27 years; they have three children, Shawna, Danny and John (TT, 4/20/06, p479); that she helped out at the SDA; (TT, 4/20/06, p480) that she co-led the Pathfinders program; (TT, 4/20/06, p480) and that she visited the school two to three times a week during lunch. (TT, 4/20/06, p486). While there she never saw anything inappropriate behavior between Mr. Davenport and the students (TT, 4/20/06, p485). Nor did she see Mr. Davenport and Travis go into the office alone during lunch. (TT, 4/20/06, p487). She characterized her husband as an excellent father and very devoted husband.

(TT, 4/20/06, p487). Occasionally Della felt that Mr. Davenport dedicated too much time to his students. (TT, 4/20/06, p494).

Mrs. Davenport testified that her husband has a scar in his groin area from a surgery he had when he was a baby. (TT, 4/20/06, p488). He also has scars from when a tractor fell on him in that area. The accident occurred some time in December of 2001. (TT, 4/20/06, p489, 492). His penis was deformed as a result of the accident. (TT, 4/20/06, p489). Della explained that when Mr. Davenport becomes erect his penis loops back onto itself so that it almost forms a perfect circle. (TT, 4/20/06, p490).

Before the Davenports came to the SDA school they lived in Rockford, Illinois for one year.[16] (TT, 4/20/06, p 298,TT, 4/20/06, p 500). Mrs. Davenport stated that Mr. Davenport voluntarily resigned from the SDA school in Onaway and she had no knowledge of the school contacting him and telling him it was time to move on., (TT, 4/20/06, p501). However, she was aware that the school informed Mr. Davenport that he could stay at the school if he was willing to limit his time with Travis, (TT, 4/20/06, p503). The Davenports moved to accept a teaching position in Wisconsin and then Berrien Springs. (TT, 4/20/06, p507).

Urias Betoel Escobar was the head deacon of the Seventh Day Adventist Church in Champaign, Illinois. (TT, 4/20/06, p533). He has known Gary since the early 1990s. (TT, 4/20/06, p533). He characterized Gary as a good man who worked very hard for the school. (TT, 4/20/06, p534). Urias spent a lot of time

[16] Della denied that the family left Rockford because Mr. Davenport was dismissed from there for having too much contact with the students. (TT, 4/20/06, 501).

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with Gary's family and his children participated in Pathfinders. (TT, 4/20/06, p534). To his knowledge, Gary has always been appropriate with the children. (TT, 4/20/06, p535).

Tammy Lou Welch's son, Dustin, was a student of Mr. Davenport's. (TT, 4/20/06, p 418, TT, 4/20/06, p 538). He had some behavioral problems in school and Mr. Davenport was very supportive of the family. He spent time with her son to help him and she never saw anything inappropriate between them. (TT, 4/20/06, p538-539). She believed that Mr. Davenport was responsible for much of her son's behavioral improvements. (TT, 4/20/06, p540).

After Tammy Lou's testimony the defense rested. The judge explained to Gary on the record that he had an absolute right to testify and Gary responded that after speaking with his attorney he chose not to testify. (TT, 4/20/06, p541).

D. *Rebuttal.*

A conference then took place in chambers and the judge expressed concern that there was no expert testimony as to Mr. Davenport's physical impairment. (TT, 4/20/06, p 541). The prosecutor had an expert witness in the courtroom that had examined Mr. Davenport and was prepared to testify. (TT, 4/20/06, p541-542). Defense counsel stated that she had no idea what the expert intended on testifying to and wished to have some time to explore his findings. (TT, 4/20/06, p542). The prosecutor responded that he too had no indication as to what the doctor would testify to because the examination had just taken place. (TT, 4/20/06, p542). The attorneys agreed to speak with the doctor together prior to placing him on stand. (TT, 4/20/06, p542). After speaking with

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the doctor defense counsel again stated that she wanted more time to prepare but the judge denied her request, stating that she is the one who introduced the issue at trial. (TT, 4/20/06, p543).

Dr. Thomas Allum evaluated Mr. Davenport's penis for any abnormalities.[17] (TT, 4/20/06, p545). He found scar tissue on the penis along the lateral margin of his penis. (TT, 4/20/06, p545). In that area the scar tissue is very thick, rope like, and hard. However, the scar tissue is not visible because it is under the skin. (TT, 4/20/06, p 548). When Mr. Davenport's penis is flaccid it turns to the left. That condition is exaggerated when he is erect. (TT, 4/20/06, p545). Therefore, his penis would curve much like a banana when erect. (TT, 4/20/06, p 546). The condition can become so advanced that the penis would curve into a more circular shape. (TT, 4/20/06, p 549). The condition is known as Peyronie's Disease and trauma could cause the condition. (TT, 4/20/06, p546). There is no way for him to determine how long he has had the condition. (TT, 4/20/06, p546). He refuted Della's claim that Mr. Davenport's penis could eventually be straightened out with an extended period of stroking and caressing. (TT, 4/20/06, p547). The doctor showed the judge a picture of a penis with the condition. Neither attorney saw the picture prior to its admission. (TT, 4/20/06, p551). The Judge found Mr. Davenport guilty as charged. (TT, 4/21/06, p609)

[17] Dr. Allum did not examine Mr. Davenport while he had an erection. (TT, 4/20/06, 547).

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E. Sentencing.

Mr. Davenport was sentenced on May 19, 2006. On the same day his attorney also motioned for a new trial and reconsideration. Defense counsel argued that the verdict was against the great weight of the evidence. (ST, 5/19/06, p3). Travis's testimony varied greatly throughout the initial investigation, the preliminary exam and the trial. Additionally, there were no witnesses to corroborate Travis's claim that five times a week he and Mr. Davenport spent long periods of time locked in a school office. (ST, 5/19/06, p4). Counsel also argued that Vicki Moulder's testimony was not reliable because she was not in court to identify Mr. Davenport and did not even know him by name. (ST, 5/19/06, p7). Finally, counsel argued that Travis's description of Mr. Davenport's penis was not accurate due to his condition and that fact alone raised serious doubts as to the truth of his allegations. (ST, 5/19/06, p6).

The prosecutor argued that the evidence was overwhelming. (ST, 5/19/06, p9). He stressed that victims of sexual abuse regularly reveal the details of their allegations piecemeal. (ST, 5/19/06, p9). Additionally, Vicki Moulder had seen Mr. Davenport numerous times and her identification was solid. (ST, 5/19/06, p12). There was also testimony that Mr. Davenport favored Travis and gave him massages. (ST, 5/19/06, p12). All of the gifts that Mr. Davenport gave Travis were also persuasive of Mr. Davenport's intention to groom Travis. (ST, 5/19/06, p12).

The judge conceded that there were inconsistencies in Travis's testimony, but found Mr. Davenport's actions in threatening suicide, insisting on Travis's

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assurances that he loved him, and in chasing after Travis evidence of the correctness of the verdict. (ST, 5/19/06, p15-16).

Ultimately, he did not completely believe the testimony provided by Della Davenport. (ST, 5/19/06, p18). The judge indicated that after the doctor testified he asked both attorneys if they wished to have more time to gather additional medical evidence and neither side requested additional time. (ST, 5/19/06, p18). For all of the above reasons the judge denied the motion.

Defense Counsel objected to several of the Offense Variable (OV) scores including but not limited to OV 4. She argued that there was no testimony about any psychological injury or about Travis's psychological well-being. (ST, 5/19/06, p22). According to the report Travis attended three therapy sessions and his father stated that he was back to normal. (ST, 5/19/06, p22). The presentence report indicated that Travis attended three therapy sessions because his parents were having trouble with him running away and being assaultive towards his mother. Additionally, the report indicated that Travis was better since completing the three therapy sessions. (ST, 5/19/06, p22-23).

The prosecutor informed the judge that Travis began receiving counseling two days prior to sentencing (on Wednesday, May 17, 2006) at Catholic Human Services.[18] (ST, 5/19/06, p23). He explained that the therapy Travis received required him to go to counseling for four consecutive Wednesdays and then every other Wednesday until the counselor felt he was ready to be discharged.(ST, 5/19/06, p23). The judge allowed the score to stand because

[18] He provided the judge with a receipt for Travis's first appointment. (ST, 5/19/06, p23).

Travis did seek treatment and the nature of the offense is one where there is likely to be psychological injury. (ST, 5/19/06, p24).[19]

The guideline range limited by the Court was 108 to 180 months. (ST, 5/19/06, p26). Defense counsel spoke allocated that Mr. Davenport had no prior record, was a dedicated family man, a wonderful teacher, a deeply religious and caring man,. (ST 5/19/2006, p27-28). Mr. Davenport did not speak at his sentencing. Travis's mother spoke very briefly. The prosecutor then argued that the guidelines do not adequately deal with a man like Mr. Davenport. He characterized Mr. Davenport as a "wolf in sheep's" clothing who violated an entire community. (ST, 5/19/06, p28).

The judge ultimately sentenced Mr. Davenport to no less than 12 years and no more than 30 years on each count with credit for 101 days served. (ST, 5/19/06, p30).

This appeal follows. A motion to remand is being filed simultaneously based on the ineffective assistance of trial counsel. Facts related to that issue are presented within Issue I.

[19] Defense counsel also objected to the scoring of OV 10. (ST, 5/19/06, p 24). The prosecutor agreed with defense counsel that the appropriate score was ten points. (ST, 5/19/06, p 25). Defendant's final objection was to OV 13. (ST, 5/19/06, p 25). Defendant did not prevail on this objection.

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I. THE DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO ADEQUATELY PREPARE FOR THE CASE, FAILED TO INSURE THAT ADEQUATE PROTECTIVE MEASURES WERE IN PLACE AT THE PRESQUE ISLE PROSECUTOR'S OFFICE WHERE PREDECESSOR COUNSEL SWITCHED SIDES IN THE MIDDLE OF THE CASE, AND LABORED UNDER A CONFLICT OF INTEREST WHEN SHE REPRESENTED THE DEFENDANT. COUNSEL'S LAW LICENSE WAS SET TO BE SUSPENDED ON JUNE 1ST FOR NEGLECT OF ANOTHER CASE AND IF SHE DID NOT BRING THIS CASE TO A CLOSE BY THEN, COUNSEL WOULD HAVE HAD TO RETURN A RETAINER FEE AND DISCLOSE HER SUSPENSION TO THE DEFENDANT.

Standard of Review. Ineffective assistance of counsel is reviewed de novo in the absence of a *Ginther* hearing. A *Ginther* hearing raises the standard to a clearly erroneous standard. MCR 2.613(C) It is not necessary that the issue be preserved in trial court. *People v Patterson*, 428 Mich 502, __ NW2d __ (1987).

Defendant submits that trial counsel was ineffective. At the time she represented Gary Davenport she was under investigation by the attorney discipline board after a formal complaint had been filed by the Attorney Grievance Commission. The Complaint stems from this trial attorneys misconduct in representing a defendant facing charges mirroring the instant Case. This Court affirmed the lower court's finding that Trial Counsel in the instant case was in effective in the prior case just months prior to the trial in this

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Case.[20]Trial Counsel was suspended from the practice of law shortly after the conclusion of this Trial for trying another criminal case while not prepared. *Grievance Administrator v Wilson*, ADB No. 05-123-GA.[21]

The notice of suspension was released on May 16, 2006 with the forty-five day suspension commencing on June 1, 2006. The trial in this case took place from April 19 through April 21, 2006. The sentencing took place on May 19, 2006. In sum, Ms. Frederick-Wilson concluded this case just prior to her suspension taking place and just prior to her duty to disclose her suspension to this client.

Ms. Frederick-Wilson explained that her decision to recommend the jury waiver was because as soon as the jury heard the complainant use words describing sexual acts, that they would ignore any other evidence and just convict Mr. Davenport. It should be noted that Travis was fifteen at the time of trial.

At a *Ginther* hearing, Mr. Davenport would testify that the bench trial was Ms. Frederick-Wilson's idea, and that she strongly suggested and recommended even insisted, on a bench trial. Interestingly, Ms. Frederick-Wilson also told Mr. Davenport that it would save a day of trial. Mr. Davenport did not understand why she told him this or what importance, if any, this had in her recommendation.

No pretrial motions were filed in this case. No experts were called by the defense in this case, regardless of the Defendant paying her over Eight

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[20] People v. Timothy William Ryan, COA docket number 247002, Unpublished, January 13, 2004. See Attached.
[21] The notice of suspension is attached.

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Thousand ($8000.00) Dollars to retain same.[22] Trial Counsel failed to explore and expert to assist the trier of fact about anatomical abnormalities of the Defendant's penis even though a major portion of his defense relied on this principle and that if Travis had really seen the Defendant's penis in an erect formation, he could not help but know this. In fact, the judge expressed concern that there was no expert testimony as to Mr. Davenport's physical impairment. TT, 4/20/06, p541). The prosecutor had an expert witness in the courtroom who had examined Mr. Davenport and he was prepared to testify. TT, 4/20/06, p541-542). The People's expert was actually Mr. Davenport's doctor—a witness readily available to the Defense. Trial Counsel had requested permission to reopen the issue at Sentencing, but did not present an offer of proof or other evidence that she had secured the testimony of the needed expert.

Additionally, upon information and belief, Ms. Frederick-Wilson did not interview any witnesses prior to trial, including but not limited to a possible "alibi" witness. She failed to file the required notice, failed to investigate the defense and failed to present the issue. The defense in this case was essentially a character defense pointing out that this Defendant was a good teacher, had many satisfied students and parents, and most people who saw the interactions between the Complainant and the Defendant did not see anything out of the ordinary or unusual. While not dispositive, it is also worth noting that counsel

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[22] As an offer of proof. Ms. Frederick-Wilson never interviewed or hired any experts. She justified this with an explanation that their testimony would not be admissible. She represented to the defendant that she would be employing a private investigator and a psychologist to assist her with preparation of this Case.

opted for a bench trial in this case. While the decision to hold a bench trial is not ineffective, it is easier to try a case before a judge than a jury and would be the path of least resistance for a trial attorney who was not prepared for trial and needed to complete the proceedings before the Attorney Discipline Board issued its opinion. Counsel strongly suspects that Ms. Frederick-Wilson raced the case through the system so that she could close the file and keep her retainer.

Also troubling in this case is the fact that the Defendant's original attorney, Richard Steiger (P60238), switched sides and went to work for the prosecuting attorney. No motion to disqualify the prosecutor's office was filed and the defense counsel's file contains no indication that she took actions to insure that a proper "Chinese Wall" was in place.[23] It goes without saying that Mr. Steiger could not have represented the People.[24] In the context of a conflict of interest, based on the duty owed to a former client, there are three recognized policy considerations: fairness to the accused (preserving confidences and secrets), preservation of the public confidence (the appearance of impropriety), and loyalty to former clients.[25] Absent appropriate protective measures, this rule of

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[23]By offer of proof, Defendant would state that Attorney Steiger in his final meeting with the Defendant assured him that he would not be involved in the prosecution, but did not make any statement concerning the existence or non-existence of a Chinese Wall.

[24] Both the ethical rules and federal case law prohibit such representation. *See Gajewski v United States*, 321 F2d 261, 267 (CA 8, 1963), cert den 375 US 968; 84 S Ct 486; 11 L Ed 2d 416 (1964); *Havens v State of Indiana*, 793 F2d 143, 144 (CA 7, 1986), cert den 479 US 935; 107 S Ct 411; 93 L Ed 2d 363 (1986); *United States v Bolton*, 905 F 2d 319, 321 (CA 10, 1990).

[25]*People v Doyle*, 159 Mich App 632, 641; 406 NW2d 893 (1987), *mod'f on other* grounds 161 Mich App 743; 411 NW2d 730 (1987); *Koch v Koch Industries*, 798 F Supp 1525 (D Kan, 1992).

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disqualification would vicariously extend to the entire office, especially in a smaller jurisdiction where each attorney is more familiar with the whole docket.

The Sixth Circuit has held that there is a presumption that confidential information has been passed where no protective mechanism has been put in place. *Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222, 225 (CA 6. 1988). The burden of proving that effective non-disclosure mechanisms were in place rests with the firm with the conflict. *Id.* Moreover, it should be noted that the Chinese Wall would only act as effective alternative to disqualification where disqualification would not work an affirmative hardship to the other side. In this case, there is an express statute which would have permitted the appointment of a special prosecutor.[26] Therefore, it is questionable whether the People of the State of Michigan would have suffered any hardship. Here, the Defendant shared the standard confidences that would be expected to be shared with his attorney, only to see his counsel working in the offices of his opponent.

A motion to remand is being filed contemporaneously with that brief. In that brief, the Defendant is requesting permission to develop a testimonial record. In the event that the motion is granted, this Court will have the benefit of a supplemental brief which will further expound on the claims being made here. In the event that the motion is denied, the Defendant prays this Court consider remanding this matter for a *Ginther* hearing.

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[26] Upon information and belief, the Office of the Attorney General is representing the People on this Appeal as a special prosecutor for this reason.

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The failure to present this evidence constitutes ineffective assistance of counsel.[27] Moreover, the United States Supreme Court has made abundantly clear, an attorney is presumptively ineffective when he or she labors under an actual conflict of interest.[28] So important is such a right that a court is not required to accept a waiver of that right and this concern can override a defendant's constitutionally protected right to be represented by retained counsel of his/her choosing.[29]

A number of federal courts have ruled that a Sixth Amendment conflict of interest takes place where the attorney acts to protect him or herself from adverse personal consequences, rather than out of concern for the client.[30] In this case, Defendant is prepared to show that defense counsel faced a significant

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[27] *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 LEd2d 674 (1984); *Evitts v Lucey*, 469 US 387, 105 S Ct 830, 83 L Ed 2d 821 (1985); *People v Wolfe*, 156 Mich App 225, 401 NW2d 283 (1986).

[28] *Cuyler v Sullivan*, 446 US 335, 345-350; 100 SCt 1708; 64 LEd2d 333 (1980); *see also* Strickland, 466 US at 692 ("prejudice is presumed when counsel is burdened by an actual conflict of interest"); *Mintzes v Wilson*, 761 F2d 275, 286 (CA 6. 1985); People v Bentley, 402 Mich 121, 124; 261 NW2d 716 (1978) (unconstitutional multiple representation "is so offensive to the maintenance of a sound judicial process that is cannot be regarded as harmless error").

[29] *See Serra v Michigan Dept. of Corrections*, 4 F.3d 1348 (CA 6. 1993), cert. denied, 510 U.S. 1201, 114 S.Ct. 1317, 127 L.Ed.2d 666 (1994) (habeas corpus); *Wheat v United States*, 486 US 153, 159, 108 S Ct. 1692, 1697, 100 L Ed 2d 140 (1988).

[30] *See, e.g. Hollis v Davis*, 941 F2d 1471, 1478-79 (CA 11, 1991)("if a lawyer acts "out of fear for his own practice and reputation" behavior constitutes ineffective assistance of counsel);*Hopskin v Shillinger*, 866 F2d 1185, 1203-04 n.12 (CA 10. 1989) cert denied 497 US 101 (1990) (fact that trial counsel represented petitioner at trial and on direct appeal created a conflict where counsel failed to challenge his own ineffectiveness at trial); *Riner v Owens*, 764 F2d 1253 (CA 7, 1985) cert denied 475 US 1055 (1986) (same); *Alston v Garrison*, 720 F2d 812, 816 (CA 4. 1983).

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financial loss (and loss to reputation) if this case was not concluded prior to her forthcoming suspension. Ms. Frederick-Wilson operated under a clear conflict of interest when she opted to waive a jury and resolve this matter with a quick bench trial. Because a conflict existed, Defendant is entitled to a new trial.

In the non-conflict setting, *Strickland* defines standards for determining ineffective assistance of counsel. Under *Strickland,* to establish ineffective assistance of counsel the Defendant must show: (1) counsel's performance was deficient (this requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment); and (2) the deficient performance prejudiced their defense. A defendant is required to demonstrate a violation of both prongs in order to prevail. *Strickland,* 466 US at 687. No specific standards were given under the first prong of the *Strickland* test, and each analysis depends on a case-by-case analysis. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 US at 688. These professional norms do, however, encompass a duty on the part of counsel to investigate potentially meritorious defenses. While counsel is normally presumed competent, this presumption does not apply to counsel who does not adequately investigate the facts surrounding his client's case. The Court expressly noted:

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitation on investigation. In

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> other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, apply a heavy measure of defense to counsel's judgment.

Id. Counsel has an ethical duty to investigate and present potentially meritorious defenses when they exist.[31]

The Michigan Supreme Court recently recognized that inadequate investigation claims must be judged on a case-by-case basis. *People v Grant*, 470 Mich 477, 684 NW2d 686 (2004) in a criminal sexual conduct case where counsel did in fact conduct significant investigation of the defense case, and mounted a real defense. Defense counsel, however, failed to interview crucial witnesses and missed several key points in the defense. A four justice majority of the Court held that this constituted ineffective assistance of counsel. In this Case, the defense presented a parade of cumulative character witnesses and Mr. Davenport's wife. Counsel was unprepared to challenge the prosecution's case-in-chief; and more unprepared to meet the State's rebuttal expert. She failed to adequately cross-examine said expert due to her apparent lack of knowledge and/or research about the Defendant's anatomically altering medical condition. Trial Counsel relied on Mr. Davenport's wife's observations of a true

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[31]. *People v Tumpkin*, 49 Mich App 262, 212 NW2d 38 (1973).' *People v McDonnel*, 91 Mich App 458, 283 NW2d 773 (1979); *People v Snyder*, 108 Mich App 754, 310 NW2d 868 (1981); *People v McVay*, 135 Mich App 617, 354 NW2d 281 (1984).

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medical diagnosis, instead of even contacting his own doctor whom the People relied upon.

The undersigned appellate counsel arranged for a board certified urologist to examine Mr. Davenport while imprisoned. Dr. Toren Rosenberg opines that the Defendant's penis hooks while erect and that there are other deformities to Mr. Davenport's organ. There is simply no excuse for Trial Counsel's failure to at a minimum explore or investigate a medical expert and present some testimony to this effect at trial.

In reversing, the *Grant* Court first recognized that a trial attorney's strategy must constitute "sound trial strategy" to qualify. "A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable judgment." The Court further stated that: "Counsel must make `an independent examination of the facts, circumstances pleadings and law involved."[32] The Court also stated that "[M]erely labeling [counsel's] errors 'strategy' does not shield his performance from Sixth Amendment scrutiny." (quoting *Henry v Scully*, 918 F Supp 693, 715 (SDNY 1996), aff'd 78 F3d 51).33 The *Grant* Court also stressed that in evaluating claims of trial strategy, a court

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[32] *Grant*, (Kelly, J.) at 487 (quoting *Von Moltke v Gillies*, 332 U.S. 708, 721, 68 S Ct 316, 92 Led 309 (1948)). *See also Grant* at 498-499 (Taylor, J. concurring) ("to fail to [conduct reasonable investigation] is not a reasonable professional judgment").

[33] *See also Cave v Singletary*, 971 F2d 1513 (CA 11, 1992). Counsel has a duty to pursue "all leads relevant to the merits of the case." *Grant* at 487 (Kelly, J.) (quoting *Blackburn v Foltz*, 828 F.2d 1177, 1183 (CA 6, 1987)). *See also Johnson v Baldwin*, 114 F3d 835, 839-840 (CA 9, 1997) (reversed for failure to investigate alibi witnesses); *Lewis v Alexander*, 11 F3d 1349, 1352 (CA 6, 1993).

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should look first and foremost at trial counsel's actions and words at the time of the trial. The principle that a court should not evaluate the strategy with the benefit of hindsight is a two way street. The fact that strategy failed does not make it unsound. Conversely, counsel should not be allowed to utilize post hoc hypothesis to create a strategy where none existed. *Id.*

Harmonizing the opinions in *Grant*, it is clear that four Justices agreed on the following points:

- Strickland's presumption of deference is not applicable where counsel fails to conduct requisite investigation, *Grant*, at 487 (Kelly, J.); *Grant* at 498-499 (Taylor, J. concurring) ("to fail to [conduct reasonable investigation] is not a reasonable professional judgment");
- Counsel has a duty to investigate potential defenses, Id.
- Counsel has a duty to pursue exculpatory physical evidence;
- Counsel has a duty to apprise himself with the state's case and prepare to meet the same; and
- Merely mechanically investigating a case without the foregoing does not protect counsel from an ineffective assistance of counsel challenge.

It seems clear that the *Grant* Court did find that the asserted behavior fell below the Sixth Amendment floor in that case. It is also important to stress that in *People v Havens*, 2004 WL 1882883 (Mich App 2004), one Court of Appeals cited to the Kelly opinion in *Grant* for the proposition that counsel is not entitled to deference for not calling witnesses that he never learned of do to his/her failure to investigate the case.

At the *Ginther* hearing, the Defense intends to show that that counsel did not return phone calls, made false assurance of being prepared, failed to retain

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experts, failed to investigate and file an alibi notice for a possible defense and simply did not do the case justice. Counsel also intends to show that counsel rushed this case through to finalize the same before her suspension took place.[34] Lastly, counsel intends to show that counsel was negligent in not taking actions to insure that adequate protective mechanisms were in place at the Presque Isle County Prosecutor's Office.

No justice was served in this Case. Gary Davenport was uninformed and unreasonably defended. He currently is serving a long sentence. Trial Counsel was unprepared and unable to adequately defend Mr. Davenport. Her performance falls below all reasonable standards set by the bar of adequate representation. Mr. Davenport was denied effective assistance of counsel and is entitled to a new trial. This case must be remanded for a Ginther Hearing and a new trial.

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[34] This Court held in an Unpublished Opinion, People v. Timothy William Ryan, docket no. 247002, on January 13, 2004 that this Attorney's performance, in a similar case of six counts of criminal sexual conduct in the first degree, "fell below an objective standard of reasonableness and this performance prejudiced his case.

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II. THE TRIAL COURT INCORRECTLY SCORED OV4. THE COMPLAINANT DID NOT "REQUIRE" MENTAL HEALTH TREATMENT WITHIN THE MEANING OF OV4 WHERE THE EVIDENCE SHOWED THAT THE COMPLAINANT WAS FUNCTIONING WITHOUT SUCH TREATMENT AND WAS QUICKLY PLACED INTO TREATMENT ON THE EVE OF THE DEFENDANT'S SENTENCING.

Standard of Review Mr. Davenport preserved review of this issue by objecting to the scoring of 10 points for OV 4 at sentencing. MCR 6.429(C). This case concerns the proper interpretation and application of the legislative sentencing guidelines, which is a legal question reviewed de novo. *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003).

A sentencing court has discretion to assign scores when there is evidence on the record to support the score. *People v Cain*, 238 Mich App 95, 605 NW2d 28 (1999), lv den 463 Mich 853, 617 NW2d 335 (2000). Statutory interpretation of sentencing guidelines is a question of law, reviewed de novo by the Court of Appeals. *People v Kimble*, 470 Mich 305, 684 MW2d 669 (2004).

MCL 777.34 provides:

> (1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim 10 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim 0 points

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> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive. Id.

In this case, the complainant voluntarily ended psychological treatment and his grades and performance in school were normal. On the eve of sentencing, the Complainant was placed back in treatment and quickly completed three sessions. The prosecution used this sudden rekindled interest in therapy to escalate the Defendant's guideline scores.

The instructions in the Michigan Sentencing Guidelines state, that the fact that treatment has not been sought is not determinative. Additionally, case law bears out this instruction. *See People v Elliott*, 215 Mich App 259, 544 NW2d 748 (1996). However, case law does also support the opposite, that where no treatment was sought or treatment was sought for an injury not directly related to the offense no points were assessed. *Cf. People v Moseler*, 202 Mich App 296, 508 NW2d 192 (1993). In sum, the guidelines require a look at the real need of the complainant for psychological treatment.

Under the reading of the record below, in cases any case involving a crime against a person, the prosecution or a vengeful complainant, could automatically escalate the Defendant's guideline scores simply by visiting a psychological counselor once or twice. This was not the intent of the drafter's of the guidelines. Commentators have negatively noted this practice of guideline manipulation. In the current American system of mandatory, or at least semi-mandatory, sentencing, prosecutors and defense counsel often rely upon fact

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bargaining and guideline factor bargaining in plea negotiations.[35] Further, a study from 1992, found evidence of prosecutorial manipulation of the Sentencing Guidelines in eleven to twenty-five percent of cases.[36] More recently another analysis suggests that this number has only increased.[37]

The Sentencing Guidelines do not say and should not be construed that any time a Complainant in a violent crime situation sees a counselor, the Defendant's guidelines should be increased by ten points. Instead, the guidelines say when the injury "requires" such treatment. In *Indenbaum v. Michigan Bd. of Medicine*, 213 Mich App 263, 272, 539 N.W.2d 574, 579 (1995), this Court said that the word "requiring" means "calls for mandatory or compulsory action in the nature of a command or order."

By analogy, the Defendant would refer this Court to the provisions of MCL 330.1401 which define the phrase "requiring treatment" as meaning a person, who as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure [an individual],"

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[35] *See, e.g.* David Yellen, *Probation Officers Look at Plea Bargaining, and Do Not Like What They See*, 8 Fed. Sent'g Rep. 339, 339-341 (1996); Ronald Wright & Rodney Engen, *The Effects Of Depth And Distance In A Criminal Code On Charging, Sentencing, And Prosecutor Power*. 84 NC L Rev 1935 (2006). *See also* Daniel Richman, *Institutional Coordination And Sentencing Reform*, 84 Tx L Rev 2055, 2063 (2006) ("Wright tells how, in response to an increase in mandatory minimum statutes that it (understandably) [saw as increasing the risk of prosecutorial manipulation of sentencing outcomes").

[36] Ilene H . Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 526-34 (1992).

[37] *See* Joseph S. Hall, *Rule 11(e)(1)(C) and the Sentencing Guidelines: Bargaining Outside the Heartland?*, 87 Iowa L. Rev. 587, 609 (2002).

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"who as a result of that mental illness is unable to attend to those of his or her basic physical needs" "has mental illness, whose judgment is so impaired that he or she is unable to understand his or her need for treatment and whose continued behavior as the result of this mental illness can reasonably be expected, on the basis of competent clinical opinion, to result in significant physical harm to [an individual]," "who has mental illness, whose understanding of the need for treatment is impaired to the point that he or she is unlikely to participate in treatment voluntarily, who is currently noncompliant with treatment that has been recommended by a mental health professional, and that has been determined to be necessary to prevent a relapse or harmful deterioration of his or her condition," or "whose mental processes have been weakened or impaired by a dementia, an individual with a primary diagnosis of epilepsy, or an individual with alcoholism or other drug dependence is not a person requiring treatment under this chapter unless the individual also meets the criteria specified in subsection" Plainly none of these conditions are present. Travis Johnson was a fully functioning individual. At sentencing, both sides agreed that the complainant had resumed his "normal" life.

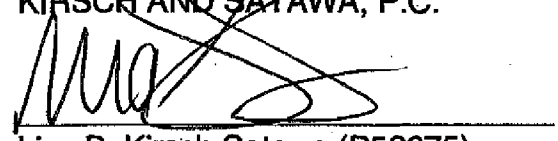
Any victim to a crime could probably *benefit* from counseling, but they do not *require* it. This variable is mis-scored. The Defendant urges this Court to reverse the Defendant's sentencing and remand this matter for resentencing.

RELIEF

WHEREFORE, Defendant asks this Court to REVERSE his conviction and remand this matter for a new trial. At minimum, the Defendant requests this Court to remand this matter for an evidentiary hearing.

Respectfully submitted,

KIRSCH AND SATAWA, P.C.



By: Lisa B. Kirsch Satawa (P52675)
Mark A. Satawa (P47021)
Stuart G. Friedman (P46039)
Attorneys for Defendant-Appellant
3000 Town Center; #1700
Southfield, MI 48075
(248) 356-8320

DATED: January 12, 2007

KIRSCH & SATAWA ATTORNEYS AT LAW
A Professional Corporation • 3000 Town Center • Suite 1700 • Southfield, MI 48075 • Office 248.356.8320 • Fax 248.213.3830

KIRSCH & SATAWA ATTORNEYS AT LAW
A Professional Corporation • 3000 Town Center • Suite 1700 • Southfield, MI 48075 • Office 248.356.8320 • Fax 248.213.3830

REQUEST FOR ORAL ARGUMENTS

Mr. Davenport submits that oral argument should be granted because this Brief on Appeal was timely filed thus preserving his qualified right to oral argument under MCR 7.214(A). Furthermore, the exceptions under MCR 7.214(E) are not applicable because, (a) this appeal has merit, (b) the Court's deliberations would be significantly aided by oral argument because the briefs may not adequately represent all of the legal arguments by the time that this case is reviewed by the Court, due to the substantial passage of time between the filing of a brief on appeal and review by this Court, and (c) there is no way for counsel to predict whether a decision will be released between the time of filing and the time of review which would aid the Court in reviewing this case. See MCR 7.214(E).

Respectfully submitted,

KIRSCH AND SATAWA, P.C.

By: Lisa B. Kirsch Satawa (P52675)
Mark A. Satawa (P47021)
Stuart G. Friedman (P46039)
Attorneys for Defendant-Appellant
3000 Town Center; #1700
Southfield, MI 48075
(248) 356-8320

DATED: January 12, 2007

KIRSCH & SATAWA ATTORNEYS AT LAW
A Professional Corporation • 3000 Town Center • Suite 1700 • Southfield, MI 48075 • Office 248.356.8320 • Fax 248.213.3830

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

The undersigned declarant being first duly sworn, deposes and says that on January 12, 2007, (s)he did mail a copy of the attached DEFENDANT-APPELLANT'S BRIEF ON APPEAL, to:

Eric B. Restuccia
525 West Ottawa Street
PO Box 30217
Lansing, Michigan 48909

Donald McLennan
151 East Huron Avenue
Rogers City, Michigan 49779

Declaration in Lieu of Notarization. I declare that the foregoing is true and correct to the best of my information, knowledge, and belief.

Respectfully submitted,

KIRSCH & SATAWA, PC

Lisa B. Kirsch Satawa (P52675)
Mark A. Satawa (P47021)
Attorney for Defendant-Appellant
3000 Town Center Ste 1700
Southfield, MI 48075
Phone: (248) 356-8320

DATED: January 12, 2007

KIRSCH & SATAWA
ATTORNEYS AT LAW
A Professional Corporation • 3000 Town Center • Suite 1700 • Southfield, MI 48075 • Office 248.356.8320 • Fax 248.213.3830

APPENDIX

State Of Michigan

Attorney Discipline Board

Grievance Administrator,
Attorney Grievance Commission,
State of Michigan,

Petitioner,

v

Case No. 05-123-GA

Janet M. Frederick-Wilson, P-53072,

Respondent.
_____/

Formal Complaint

Petitioner, upon information and belief, states the following:

1. Respondent, Janet M. Frederick-Wilson, P-53072, was licensed to practice law in Michigan in 1995, and by virtue of her law license is a member of the State Bar of Michigan who is subject to the jurisdiction of the Michigan Supreme Court and the Attorney Discipline Board in matters of discipline for professional misconduct.

2. Respondent last maintained an office for the practice of law in the County of Wayne, State of Michigan.

3. As an attorney subject to the rules and regulations of the Michigan Supreme Court, Respondent is subject to the grounds for discipline set forth in MCR 9.104(A).

Count One

4. On or about September 30, 2000, Timothy W. Ryan retained Respondent and paid a retainer of $2,500 for representation in a child abuse/custody matter in the Washtenaw Circuit Court.

5. Thereafter, Respondent represented Mr. Ryan in a criminal matter in the Macomb Circuit Court, *People v Timothy William Ryan*, docket no. 01-000636-FC.

6. Following a jury trial in the Macomb Circuit Court, the jury convicted Mr. Ryan on June 25, 2002, of six counts of first-degree criminal sexual conduct, one count of second-degree criminal sexual conduct, and one count of furnishing alcohol to a minor.

7. On or about August 30, 2002, Attorney Albert Markowski moved for a new trial on the basis of ineffective assistance of counsel on behalf of Mr. Ryan.

8. On or about November 19, 2002, a hearing was held regarding the motion for new trial.

9. At the conclusion of the hearing, the trial court found that Mr. Ryan was denied adequate counsel and granted the motion for a new trial.

10. The prosecution moved for reconsideration of the trial court's ruling on December 13, 2002.

11. The trial court denied the motion for reconsideration in an order entered on February 13, 2003.

12. The prosecution filed an application for leave to appeal to the Court of Appeals, which was granted by order entered on June 18, 2003.

13. The Court of Appeals issued its opinion on January 13, 2004, affirming the trial court's decision to grant a new trial on the basis of ineffective assistance of counsel, specifically holding that Respondent's performance at trial fell below an objective standard of reasonableness and prejudiced the case because the opening statement was insufficient, cross-examination of the victim was ineffective, and Respondent failed to present a defense.

14. A new trial was held, following which the trial court granted a motion for directed verdict on one charge and the jury acquitted Mr. Ryan of the remaining seven charges on July 2, 2004.

15. By reason of the conduct described above, Respondent has violated MCR 9.104(A)(4) by engaging in the following professional misconduct:

a) handling a legal matter without preparation adequate in the circumstances, in violation of MRPC 1.1(b);

b) failing to seek the lawful objectives of her client through reasonably available means permitted by law, in violation of MRPC 1.2(a);

c) engaging in conduct prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(A)(1);

d) engaging in conduct that exposes the legal profession or courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(A)(2);

e) engaging in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(A)(3); and,

f) violating or attempting to violate the Rules of Professional Conduct, in violation of MRPC 8.4(a).

Count Two

16. Petitioner realleges and incorporates herein the factual allegations set forth in Count One of this Complaint.

17. On October 1, 2004, Respondent's Answer to the Grievance Administrator's Request for Investigation under AGC File No. 1754/04 was received at Petitioner's office.

18. In her Answer to the Request for Investigation, Respondent stated that her client, Mr. Ryan, demanded that Respondent "shut down" the defense and not present a defense on his behalf.

19. Mr. Ryan did not request or demand that no defense be presented on his behalf.

20. Respondent made the decision to not present a defense on behalf of Mr. Ryan.

21. By reason of the conduct described in Count Two of this Complaint, Respondent has violated MCR 9.104(A)(4) by engaging in the following professional misconduct:

a) making a knowing misrepresentation in the Answer to the Request for Investigation, in violation of MCR 9.104(A)(6) and MCR 9.113(A);

b) knowingly making a false statement of material fact in connection with a disciplinary matter, in violation of MRPC 8.1(a)(1);

c) engaging in conduct that involves, fraud, dishonesty, deceit, or misrepresentation, in violation of MRPC 8.4(b);

d) failing to fully and fairly disclose all the facts and circumstances pertaining to the alleged misconduct, in violation of MCR 9.113(A);

e) engaging in conduct prejudicial to the administration of justice, in violation of MRPC 8.4(c) and MCR 9.104(A)(1);

f) engaging in conduct that exposes the legal profession or courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(A)(2);

g) engaging in conduct that is contrary to justice, ethics, honesty, or good morals, in violation of MCR 9.104(A)(3); and,

h) violating or attempting to violate the Rules of Professional Conduct, in violation of MRPC 8.4(a).

Count Three

22. A Request for Investigation filed by Patricia Comparin in AGC File No. 3168/04 was served on Respondent at her address of record with the State Bar of Michigan on December 17, 2004, in accordance with MCR 9.112(C)(1)(b).

23. Respondent did not answer the Request for Investigation within twenty-one days of service as required by MCR 9.113(A).

24. A final notice, with a copy of the Request for Investigation enclosed, was mailed to Respondent at her address of record with the State Bar of Michigan by certified mail, return receipt requested on January 18, 2005.

25. On February 22, 2005, associate counsel for the Grievance Administrator sent a letter to Respondent stating that telephone messages had been left at her office on February 14 and 16, 2005, which had not been returned. Respondent was reminded that her answer to the Request for Investigation was due and she was asked to provide copies of all billing statements relative to her representation of her client in the matter. Respondent was warned that if no response was received within fifteen days of the date of the letter, a subpoena would be issued requiring her presence at the office of the Attorney Grievance Commission to take her sworn statement under oath.

26. Because Respondent did not respond to the February 22, 2005 correspondence, a subpoena was issued on March 24, 2005, requiring Respondent to appear at the office of the Attorney Grievance Commission to take her sworn statement on April 12, 2005, at 9:00 a.m.

27. Respondent did not appear for the sworn statement on April 12, 2005.

28. A subpoena was issued on April 14, 2005, requiring Respondent to appear at the office of the Attorney Grievance Commission to take her sworn statement on May 18, 2005, at 11:00 a.m.

29. Respondent's answer to the Request for Investigation in AGC File No. was filed on May 16, 2005.

30. In her answer to the Request for Investigation, Respondent asserted that she advised Ms. Comparin on July 31, 2003, to complete

the trial transcripts by Labor Day weekend of 2003, that Respondent personally spoke with Ms. Comparin immediately before Labor Day of 2003, and that Respondent attempted to pick up the transcripts from a male clerk on October 17, 2003.

31. Respondent did not advise Ms. Comparin that the transcripts were needed by Labor Day of 2003; Respondent did not meet with Ms. Comparin immediately before Labor Day of 2003 or at any other time after July 31, 2003; Respondent did not attempt to pick up the transcripts on October 17, 2003.

32. Respondent appeared for her sworn statement at the Office of the Attorney Grievance Commission on May 18, 2005.

33. By reason of the conduct described in Count Three of this Complaint, Respondent has violated MCR 9.104(A)(4) by engaging in the following professional misconduct:

a) knowingly failing to respond to lawful demands for information from the Grievance Administrator, in violation of MRPC 8.1(a)(2);

b) failing to timely file an answer to the Request for Investigation, in violation of MCR 9.104(A)(7), MCR 9.113(A), (B)(2);

c) making knowing misrepresentations in the answer to the Request for

Investigation, in violation of MCR 9.104(A)(6) and MCR 9.113(A);

d) knowingly making a false statement of material fact in connection with a disciplinary matter, in violation of MRPC 8.1(a)(1);

e) engaging in conduct that involves, fraud, dishonesty, deceit, or misrepresentation, in violation of MRPC 8.4(b);

f) failing to fully and fairly disclose all the facts and circumstances pertaining to the alleged misconduct, in violation of MCR 9.113(A);

g) engaging in conduct prejudicial to the administration of justice, in violation of MCR 9.104(A)(1) and MRPC 8.4(c);

h) engaging in conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(A)(2);

i) engaging in conduct that is contrary to justice, ethics, honesty, or good

morals, in violation of MCR 9.104(A)(3); and,

j) violating or attempting to violate the Rules of Professional Conduct, in violation of MRPC 8.4(a).

Petitioner respectfully requests that Respondent should be subjected to such discipline as may be warranted by the facts and circumstances of such misconduct.

Dated: October 11, 2005

Robert L. Agacinski, P-10065
Grievance Administrator
Attorney Grievance Commission
243 West Congress, Suite 256
Detroit, Michigan 48226
(313) 961-6585

NOTICE OF SUSPENSION WITH CONDITIONS
(By Consent)

Case No. 05-123-GA

Notice Issued: May 16, 2006

Janet M. Frederick-Wilson, P 53072, Dearborn, Michigan, by the Attorney Discipline Board Tri-County Hearing Panel #23.

1. Suspension - 45 Days

2. Effective June 1, 2006

The respondent and the Grievance Administrator filed a stipulation for a consent order of discipline containing respondent's plea of nolo contendere to the allegations that she handled a legal matter without preparation adequate in the circumstances; violated or attempted to violate the Rules of Professional Conduct; failed to fully and fairly disclose all the facts and circumstances pertaining to the alleged misconduct in her answer to the request for investigation; engaged in conduct prejudicial to the administration of justice, knowingly failed to respond to lawful demands for information from the Grievance Administrator; and failed to timely file an answer to the request for investigation.

Respondent was charged with violations of MCR 9.104(A)(1) and (7); MCR 9.113(A) and (B)(2); and Michigan Rules of Professional Conduct 1.1(b); 8.1(a)(2); and 8.4(a) and (c).

The parties agreed that respondent should be suspended for 45 days, effective June 1, 2006, and that respondent shall be subject to conditions relevant to the alleged misconduct. Costs were assessed in the amount of $873.81.

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NOTICE OF AUTOMATIC REINSTATEMENT

Case No. 05-68-GA
Case No. 05-86-GA

Notice Issued: May 22, 2006

Harry R. Boffman, III, P 55052, Detroit, Michigan

Effective May 22, 2006

Respondent was suspended from the practice of law in Michigan for 120 days effective August 25,

NOTICE OF AUTOMATIC REINSTATEMENT

Case No. 05-123-GA

Notice Issued: July 19, 2006

Janet M. Frederick-Wilson, P 53072, Dearborn, Michigan

Effective July 17, 2006

Respondent was suspended from the practice of law in Michigan for 45 days effective June 1, 2006. In accordance with MCR 9.123(A), the suspension was terminated with the respondent's filing of an affidavit of compliance with the clerk of the Michigan Supreme Court on July 17, 2006.

[RETURN TO TOP OF PAGE]

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TIMOTHY WILLIAM RYAN,

Defendant-Appellee.

UNPUBLISHED
January 13, 2004

No. 247002
Macomb Circuit Court
LC No. 01-000636-FC

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant was charged with and convicted in a jury trial of six counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b), one count of second-degree CSC, MCL 750.520c(1)(b), and one count of furnishing alcohol to a minor, MCL 436.1701(1). Defendant was sentenced to twenty-five to fifty years' imprisonment for each first-degree CSC conviction, ten to fifteen years' imprisonment for his second-degree CSC conviction, and forty-four days' imprisonment for his furnishing alcohol to a minor conviction. Defendant filed a motion for new trial on the grounds that his conviction was against the great weight of the evidence and ineffective assistance of counsel. The trial court denied this motion, but granted defendant's motion to reconsider as defendant required a *Ginther* hearing to preserve his claims for appellate review.[1] After an evidentiary hearing, the trial court granted defendant's motion for new trial. The trial court denied the prosecution's motion to reconsider this order. The prosecution now appeals by leave granted. We affirm.

The prosecution contends that the trial court abused its discretion in granting defendant's motion for new trial as defendant received effective assistance of counsel and the court's decision was based on bias against the prosecution's case and on its opinion of the victim's credibility, the prosecution's key witness. We disagree. This Court reviews a trial court's decision regarding a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A mere difference in judicial opinion does not establish an abuse of discretion." *Id.* Effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

court's findings of fact are reviewed by this Court for clear error, and issues of constitutional law are reviewed de novo. *Id.*

In *People v Carbin,* 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag,* 460 Mich 1, 6; 594 NW2d 57 (1999).

We find that the trial court did not abuse its discretion in granting defendant a new trial as defendant presented sufficient evidence and met his burden at the *Ginther* hearing by showing that his counsel's performance fell below an objective standard of reasonableness and that this performance prejudiced his case. For example, the opening statement lasted only one minute and twenty seconds, did not include the necessary fundamental principles of law and raised a possible inference that defendant would be presenting a defense that did not occur. Upon a motion for reconsideration of the grant of a new trial, the lower court determined that the failure to present a defense was not trial strategy as the trial court had been "informed" that the victim's testimony was fabricated, and yet defense counsel did not fully develop this point on cross examination and did not present a defense. Defendant also presented a compelling argument to the trial court that his counsel's performance during cross-examination of the victim, the prosecution's key witness upon whose testimony defendant's conviction was based, fell below an objective standard of reasonableness and prejudiced his case. We cannot conclude that the decision to grant a new trial was an abuse of discretion in light of these considerations.

We further find that the prosecution's contention that the trial court's decision to grant a new trial was based on bias against the prosecution's case or its opinion of the victim's credibility is without merit as we have found that defendant met his burden with regard to ineffective assistance of counsel. We note that the prosecution contends that the trial judge did not grant defendant's motion for a new trial for legally recognized reasons, as she admitted that she was prejudiced by her opinion of the prosecution's case when she disqualified herself. The prosecutor argues that the trial judge sat as "the thirteenth juror" by granting a new trial based on a disagreement with the jury's assessment of witness credibility. See *People v Lemmon,* 456 Mich 625, 627; 576 NW2d 129 (1998). These contentions are without merit as the trial court's

order granting a new trial on the ground of ineffective assistance of counsel was supported by the record, and the substituted judge who heard the prosecutor's motion to reconsider the new trial order equally found that defense counsel was ineffective.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ Richard A. Bandstra

Janet Frederick-Wilson

Family Law & Civil Rights Attorney — Parental and Family Rights Advocate

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Author of *THE FIA GAME*

930 Mason, Dearborn, MI 48124 Office: (313) 724-9815 Fax: (313) 724-9821 E-mail: janfrederick8825@aol.com

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CANDIDATES LINE UP FOR PROSECUTOR'S POST

by Joyce Bonesteel

LAPEER - A family rights advocate wants to give prosecutor candidate Byron Konschuh a run for his money in next year's election.

Janet Frederick, a Republican attorney for parents whose children have been taken away by the courts, said her goal is to preserve family integrity. That's why she's moving here from Westland and throwing her hat in the ring.

Frederick's plans were announced at a prayer ceremony Thursday on the historic courthouse lawn. She chose National Prayer Day as a gesture for spiritual guidance, a supporter said.

Prosecutor Justus Scott said Konschuh, his chief assistant, will run for his spot in 2000. Scott is after a judge's seat on the probate bench, and hopes his colleague is successful.

Local parents seeking to regain custody of their children have turned to Frederick and Dan Wilson of Frasier for help. Wilson is state chairman and co-founder of 'Parents For Children Political Action Committee'.

Meanwhile, the pair is pushing county commissioners to appoint a 12-member citizens advisory committee to the Friend of the Courts Office. Last December they led a peaceful demonstration at the county complex on Clay street.

The committee, designed to review cases and hear appeals, has been required by state law since Jan. 1, 1998. But county officials, like many others across the state, say they can't act until the state provides the funding. They also say the law conflicts with families' rights to privacy.

In a county board meeting in February, Frederick and Wilson also pressed for an advisory board to the Family Independence Agency. They said the FIA and FOC are too powerful and removing too many children from their homes. FIA director Thomas Dillion and FOC Joseph Emil refuted those claims.

Local Membership in 'Parents for Children and Family Action Concerning Today's Society (FACTS) is growing, said one of Fredericks supporters, because the abuse of family rights appears to be 'worse in Lapeer'.

Wilson said Frederick is supported by both groups, and can better advance their

cause by sitting in the prosecutor's seat.

'She believes in fighting crime, real cases of crime including real incidents of abuse and neglect against children,' said Wilson. 'She will focus on prosecuting real crimes, not frivolous charges to be investigated to find criminal acts.'

Konschuh wasn't available for comment because he was tied up in court with the Timothy Spencer murder trial. But Scott spoke for him and the entire prosecutor's office. 'We look forward to any competition,' he said. 'That's what makes the system work. We feel we're doing a good job and we defend our position.'

The County Press - May 19, 1999

930 Mason, Dearborn, MI 48124 Office: (313) 724-9815 Fax: (313) 724-9821 E-mail: janfrederick8825@aol.com

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PARENTS, CHURCH FIGHTING FOR RETURN OF CHILDREN

By Cheryl Mendham

Dorothy Hicks and Bruce Parrott of Roscommon are receiving support from their church and a parent's advocacy group in an effort to regain custody of their three children.

Hicks and Parrott, accompanied by attorney Janet Frederick Wilson of the Dearborn-based "Parents for Children" political action committee, attended a review hearing in Roscommon Tuesday before Judge Eugene I. Turkelson, the probate/family judge assigned to the case. The couple's three children were placed into Family Independence Agency care last year after numerous referrals were made to the agency by caseworkers.

Parrott conceded that he and Hicks (who are not married, but are the biological parents) were guilty of neglect "to a certain extent," but said they have made repairs to their home and attended parenting classes and counseling. 'Now I figure we can meet (the children's) needs,' Hicks said. Parrott, who was not employed at the time the children were placed, is working at Charlie's Country Corner. Hicks said she receives Social Security because her father died and she has a learning disability.

Parrott believes the parenting classes have helped. 'Some things I didn't understand. Now I understand them,' he said.

The parents have tried to meet their agreement with Roscommon Family Independence Agency. However, they do harbor negative feelings toward the agency.

Their youngest child, 13-month old Melvia Dean Parrott, died June 29, 1999, while in the care of a foster parent in Hersey. Diagnosed with asthma, the baby died of a viral infection just days after Hicks had visited her. Hicks said the baby looked 'swelled,' but that nothing was done for her at the time. 'We've already lost one and I ain't gonna lose my other three,' Hicks said.

Hicks and Parrott have been attending Grace Covenant Fellowship, Higgins Lake, for about six to eight months. Pastor Al Bell rallied church members to picket outside the Roscommon County Building Tuesday and attended the hearing. The church learned about 'Parents for Children' on the internet.

Bell said he is convinced Hicks and Parrott are good enough parents to have the children back. 'I would do battle to get'em back,' he said, adding that the FIA must be made accountable to someone. The parents hired Wilson when members of the church decided to pay her retainer. Bell said he had learned some things about the family during Tuesday's hearing he was not aware of, but will continue to support the parents.

The purpose of the hearing was to update the parties involved on the status of the children and the parents. The future of the surviving children, Margerat,7, Bruce Jr. 'Buddy', 5, and Pam, 4, all of whom have special needs, is in the hands of the court.

Turkelson heard witness testimony Tuesday and reviewed the case orally. He recognized that the parents have made progress, as have the children, but said he wanted to ensure the children's safety. Roscommon County Prosecutor Daniel Sutton, representing the FIA, said the agency and the children's court appointed guardian, Troy Daniels, want to make sure the parents have assimilated the knowledge they have gained.

The judge ordered that the children will remain in FIA custody and be psychologically evaluated before a Permanency Planning Review April 22 or 23. The parent's visitation time was extended to two hours of unsupervised time. The judge said the parent's neglect was not deliberate, but was based on a lack of knowledge or ability. He said the court must 'know that the children are safe.'

The Houghton Lake Resorter - Thursday, April 6, 2000

930 Mason, Dearborn, MI 48124 Office: (313) 724-9815 Fax: (313) 724-9821 E-mail: janfrederick8825@aol.com

CURRICULUM VITAE

Name: Matt Toren Rosenberg

Address: 5712 Browns Lake Road
Jackson, MI 49203

Office: Mid-Michigan Health Centers
214 N.West Ave.
Jackson, MI 49201

Phone: 517-782-4797

Office: 517-784-9189
Fax: 517-784-9657
E-mail: matttoren@yahoo.com

Education:

1981 - 1985	B.A.	Pomona College, Claremont, California
1983 - 1984		Oxford University, Oxford, England
1985 - 1989	M.D.	University of California, Irvine, California

Postdoctoral Training:

Internship and Residencies:

1989 - 1991	Resident in Surgery, University of California, Irvine
1991 - 1994	Resident in Urology, Longwood Program in Urology Harvard University, Boston
1994	Chief Resident in Urology, Longwood Program in Urology Harvard University, Boston

Licensure and Certification:

1990	Diplomat of the National Board of Medical Examiners (373451)
1995	Michigan Medical License (4301065227)

Memberships:

1997 - present	Michigan State Medical Society
1997 - present	Jackson County Medical Society
2004 - present	Society for Infection and Inflammation, American Urologic Association
2004 - present	GAG Society
2005 - present	Sexual Medicine Society of North America

20. Rosenberg MT, Macleod SR, Loughlin KR, Kavoussi LR. Laparoscopic bladder neck suspension. Video Urology Times. 1994.

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1. Rosenberg MT. Incontinence Management Strategies for Primary Care Physicians. PDR Incontinence Management Guide. Accepted, in press.

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1. Rosenberg MT, Macleod SR, Loughlin KR, Kavoussi LR. Laparoscopic Bladder Neck Suspension. 10th World Conference on Endourology, Singapore, 1992.
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2. Rosenberg MT, Hazzard MA, Tallman CT, Sailor NC, Ohl DA. Prevalence and impact of premature ejaculation and patient treatment goals in a community-based general practice. European Society for Sexual Medicine, Copenhagen, Denmark. December 2005.

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10. Rosenberg MT, Page S, Roth L, Areaux D, Thallman C, Kval T. Tolerability of the potassium sensitivity test for interstitial cystitis. NIH/FAES Research Insights Into Interstitial Cystitis Symposium, Washington DC. October 2003.

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Employment:

1997 - present	Medical Director, Mid-Michigan Center for Continence, Jackson, MI
1996 - present	Medical Director, Mid-Michigan Health Centers, Jackson, MI
1996 - present	Medical Director, Mid-Michigan Center for Men's Health, Jackson, MI
1995	Coastal Physician Placement, Cleveland, OH
1995	Quest Physician Placement , Atlanta, GA
1995	CompHealth Locum Tenens, Salt Lake City, UT
1995	Daniel and Yeager Physician Placement, Huntsville, SC
1994 - 1995	The Diagnostic Center for Men, Olathe, Kansas

Medical Staff Positions:

1996 - present	W.A. Foote Memorial Hospital, Jackson, MI
1996 - 2003	Doctor's Hospital, Jackson, MI
1996	Defiance Hospital, Defiance, Ohio
1996	Holy Cross Hospital, Detroit, MI
1996	Knox Community Hospital, Mt. Vernon, Ohio
1996	Oak Hill Community Hospital, Oak Hill, Ohio
1995 - 1996	Medcenter Hospital, Marion, Ohio
1995	Kiowa County Memorial Hospital, Greensburg, KS
1995	Arkansas Valley Hospital, La Junta, CO
1995	Paulding County Hospital, Paulding, Ohio

Appointments:

2004 - present	Family Practice Physician Advisor, Jackson County Community Breast Feeding Coalition, Jackson, Michigan
2003 - present	Chief, Family Medicine, Foote Health Systems, Jackson, Michigan
2002 - present	Clinical Faculty Member, Michigan State University, Lansing, Michigan
2002 - 2003	Council Member, Governance Committee, Foote Health Systems, Jackson, Michigan
2001 - 2002	Vice Chairman, Family Medicine, Foote Health Systems, Jackson, Michigan

2000 - present	Credentialing Committee, Physician Health Plan of Southern Michigan
1999 - present	Board of Directors, Health Plan of Michigan
1999 - present	Regional Medical Director, Health Plan of Michigan
1998 - 2001	Regional Medical Director, Blue Care Network
1998 - present	Chairman, Pharmacy and Therapeutics, Health Plan of Michigan
1997 - 1998	Medical Director, Countryside Nursing Home, Jackson, MI
1997 - present	Medical Director, Great Lakes Orthopedic Rehab, Sterling Heights, MI

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2. Urology
3. International Journal of Clinical Practice
4. Expert Opinion on Pharmacotherapy
5. American Family Physician
6. Clinical Therapeutics

Lectureships:

(Available upon request)

Original - Court
1st co - Corrections
2nd co - Corrections (for return)
3rd copy - Michigan State Police CJIC
4th co - Defendant
5th c - Prosecutor

Approved, SCAO

PAGES 1

STATE OF MICHIGAN 3RD JUDICIAL CIRCUIT PRESQUE ISLE	JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS	CASE NO. 05-092269-FC-P

O [Court Address 151 EAST HURON AVE. P.O. BOX 110 ROGERS CITY, MI 49779 Court Telephone no. 989-734-3288

M 710025J

Police Report No.

THE PEOPLE OF THE STATE OF MICHIGAN	V	Defendant's name, address, and telephone no. GARY EDWARD DAVENPORT 1088 TUDOR RD/P.O. BOX 105 BERRIEN SPRINGS, MI 49103

CTN/TCN	SID	DOB
710500029301		6/30/57

Prosecuting attorney name	Bar no.
LENNAN, DONALD J.,	28115

Defendant attorney name	Bar no.
FREDERICK-WILSON, JANET M.,	53072

THE COURT FINDS:

1. The defendant was found guilty on 4/21/06 (Date) of the crime(s) stated below:

Count	CONVICTED BY Plea*	Court	Jury	DISMISSED BY*	CRIME	CHARGE CODE(S) MCL citation/PACC code
1		X			CSC 1ST DEGR MULTIPLE VAR	750.520B
2		X			CSC 1ST DEGR MULTIPLE VAR	750.520B
3		X			CSC 1ST DEGR MULTIPLE VAR	750.520B
4		X			CSC 1ST DEGR MULTIPLE VAR	750.520B
5		X			CSC 1ST DEGR MULTIPLE VAR	750.520B
6		X			CSC 1ST DEGR MULTIPLE VAR	750.520B

*For plea: insert G for guilty plea, NC for nolo contendere, or MI for guilty but mentally ill. For dismissal: insert D for dismissed by court or NP for dismissed by prosecutor/plaintiff.

☒ . The defendant has been fingerprinted according to MCL 28.243.

IT IS ORDERED:

7. Defendant is sentenced to custody of Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM Years	Mos.	Days	MAXIMUM Years	Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
1	5/19/06	12			30		5/19/06		101	
2	5/19/06	12			30		5/19/06		101	
3	5/19/06	12			30		5/19/06		101	
4	5/19/06	12			30		5/19/06		101	
5	5/19/06	12			30		5/19/06		101	
6	5/19/06	12			30		5/19/06		101	

☐ 8. Sentence(s) to be served consecutively to: (if this item is not checked, the sentence is concurrent)
☐ each other. ☐ case numbers _____.

9. Defendant shall pay as follows: $60.00 CRIME VICTIM RIGHTS $360.00 STATE MINIMUM COSTS
$275.00 RESTITUTION $695.00 TOTAL

FILED
53RD JUDICIAL CIRCUIT COURT
MAY 19 2006
BY _____

MCL 769.1(2), MCL 769.16a, MCL 775.22, MCL 780.766, MCR 6.427(A)

SEE NEXT PAGE

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STATE OF MICHIGAN 53RD JUDICIAL CIRCUIT PRESQUE ISLE	JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS	CASE NO. 05-092269-FC-P

The due date for payment is 5/19/06. Fine, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed.

5.19.06
Date

Judge SCOTT L. PAVLICH

28593
Bar no.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Deputy court clerk

MCL 769.15(2), MCL 769.16a, MCL 775.22, MCL 780.766; MCR 6.427(A)

LAST PAGE

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY DANIEL REEDER,

Defendant-Appellant.

UNPUBLISHED
November 12, 1999

No. 207497
Monroe Circuit Court
LC No. 97-028261 FH

Before: Whitbeck, P.J., and Gribbs and White, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of breaking and entering a motor vehicle with intent to steal property worth $5.00 or more, MCL 750.356a; MSA 28.588(1). He was subsequently convicted of being a third habitual offender, MCL 769.11; MSA 28.1083, and was sentenced to two to ten years' imprisonment. Defendant moved for a new trial on grounds of ineffective assistance of counsel, but the trial court denied his motion for a new trial as well as his request for an evidentiary hearing under *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973). On appeal, defendant challenges only the court's denial of his post-trial motion. We reverse the trial court's denial of defendant's motion for a *Ginther* hearing and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court abused its discretion by denying his request for a *Ginther* hearing to develop a record in order to test the validity of his ineffective assistance of counsel claims. We agree. Ordinarily, when a claim of ineffective assistance of counsel is based upon counsel's failure to interview and call witnesses, it is essential to receive testimony from the allegedly ineffective counsel at a *Ginther* hearing in order to assess the claim. *People v Bass (On Rehearing)*, 223 Mich App 241, 255; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). The trial court abused its discretion by deciding defendant's motion for new trial without first conducting a *Ginther* hearing.

We reverse the trial court's denial of defendant's motion for a *Ginther* hearing and remand to the trial court, which shall reconsider defendant's motion for new trial after conducting an

evidentiary hearing on defendant's claims of ineffective assistance of counsel. We do not retain jurisdiction. Defendant shall have 21 days after the trial court's entry of an order disposing of the motion for new trial in which to file a claim of appeal from that ruling.

/s/ William C. Whitbeck
/s/ Roman S. Gribbs
/s/ Helene N. White