

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE  
OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS LEE TOMASIK,

Defendant-Appellant.

Michigan Supreme Court  
No. 140636

Court of Appeals  
No. 279161

Kent County Circuit Court  
No. 06-03485-FC

149372 ✓  
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**PLAINTIFF-APPELLEE'S ANSWER IN OPPOSITION TO DEFENDANT-  
APPELLANT'S APPLICATION FOR LEAVE TO APPEAL TO THE  
MICHIGAN SUPREME COURT**

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Now comes the Plaintiff, the People of the State of Michigan, by Assistant Prosecuting Attorney Kimberly M. Manns, and in opposition to the Defendant-Appellant's Application for Leave to Appeal, which appears to contain the same arguments presented to the Court of Appeals, hereby incorporates the arguments set forth in Plaintiff-Appellee's four briefs submitted to the Court of Appeals, the latest of which is attached. In particular, the attached brief addresses the four issues noted in this Court's November 6, 2013, Order remanding this case back to the Court of Appeals for reconsideration in light of *People v Musser*, 494 Mich 337; 835 NW2d 319 (2013), *People v Kowalski*, 492 Mich 106; 821 NW2d 14 (2012), and *People v Grissom*, 492 Mich 296; 821 NW2d 50 (2012).

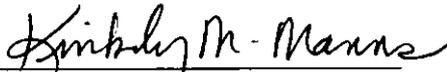
For the reasons stated in the attached brief and those previously filed, the People respectfully request that Defendant's application for leave to appeal be DENIED.

Respectfully submitted,

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Dated: July 3, 2014

By:   
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**PLAINTIFF-APPELLEE'S RESPONSE TO APPELLANT'S  
SUPPLEMENTAL BRIEF AFTER REMAND**

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## STATEMENT OF PROCEDURAL HISTORY AND JURISDICTION

This case has a relatively long procedural history, having been before this Court two times and now returning on remand from the Supreme Court for a third review. Following a jury trial, defendant Dennis Lee Tomasik, was found guilty of two counts of 1<sup>st</sup> degree Criminal Sexual Conduct (CSC), MCL 750.520b(1), for the sexual penetration of victim Theo Jensen, who was then under the age of thirteen. Defendant appealed his convictions and filed his original brief on appeal in October 2007. Defendant's original appellate counsel, Christopher Yates, was appointed to the Circuit Court bench, and subsequent appellate counsel filed supplemental briefs and a motion to remand, which was granted in part by this Court in November 2008. Specifically, the Order dated November 6, 2008, remanded the case to the trial court for a *Ginther*<sup>1</sup> evidentiary hearing regarding particular instances of ineffective assistance of counsel claimed by the defendant and, further, allowed defendant to move for an in camera review of the victim's counseling records pursuant to *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

Pursuant to the November remand order, the trial court heard additional evidence on December 18, 2008, and February 12, 2009, concerning defendant's claim of ineffective assistance of counsel and ultimately denied his motion for a new trial based upon the same. Regarding defendant's motion for an in camera review of the Theo's counseling records, the trial court recalled that it had conducted an in camera review of records before trial and that nothing was discovered within the files of value to either party; however, because the reviewed records were not kept at that time out of concern for the victim's privacy, the trial court agreed to conduct

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

another in camera review and make the reviewed records available to the Court of Appeals (GH Tr II, 50-51, 65).

In a July 6, 2009 Order Following Court's In Camera *Stanaway* Review, the trial court stated that it had conducted a second in camera review of the documents provided to it prior to the trial and, again, found nothing within the reviewed records of relevance to the defendant; therefore, the trial court affirmed its prior decision denying the disclosure of the documents. The trial court further noted a February 11, 2009, letter from appellant counsel that suggested additional documents to be reviewed by the trial court; however, the court found that counsel had failed to demonstrate a good faith belief grounded in articulable fact that there is a reasonable probability that the suggested records are likely to contain material necessary to the defense, and found that review of the additional documents would simply be a fishing expedition, which is prohibited by *Stanaway* (July 6, 2009 Order, located in the lower court file).

This Court affirmed defendant's convictions in an opinion issued January 26, 2010. Concerning the issues at issue in this current review, this Court found the following:

1. Detective Martin's comments during defendant's interview were not admitted for the truth of the matter asserted but "were necessary to provide the full context of defendant's statements." *People v Tomasik*, unpublished opinion per curiam of the Court of Appeals, decided January 26, 2010 (Docket No. 279161) (Slip Op, 7).
2. Pursuant to *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), Thomas Cottrell's expert testimony concerning delayed reporting of child sexual abuse and consistencies between the behavior of Theo and that of other victims was properly admitted following defendant's attack on Theo's credibility and, specifically, his post-incident behavior. *Tomasik, supra*, at 3-4.

3. Pursuant to *Stanaway, supra*, the trial court's decision that defendant's broadened request – for a review of all of the Theo's counseling records for any evidence that could possibly suggest a false allegation – was simply a "fishing expedition" was within the range of reasonable and principled outcomes and, therefore, not an abuse of discretion. *Tomasik, supra*, at 14-15.

4. Defense counsel's belief that a defense expert on child sexual abuse could benefit the prosecution was not unfounded where proposed expert Dr. Jeffrey Kieliszewski agreed that victims often delay reporting the abuse, that boys often take longer than girls to disclose sexual abuse, that children who fear negative consequences delay reporting, and that victims can engage in destructive behavior and act out sexually on other children.<sup>2</sup> *Tomasik, supra*, at 10. Also, defense counsel was not ineffective for deciding not to object to the introduction of defendant's complete interview. *Tomasik, supra*, at 13.

Defendant then applied for leave to appeal that decision in February 2010. In a March 9, 2011 Order, the Michigan Supreme Court vacated this Court's judgment, remanded the case back to the trial court and ordered that two specific documents be disclosed to defendant – a March 26, 2003 report authored by Timothy Zwart of Pine Rest Christian Mental Health Services and a March 1, 2003 form authored by Denise Joseph-Enders. The Order also indicated that, after disclosure of the documents, the trial court was to permit defendant to argue again that a new trial should be granted. *Tomasik, supra*, 488 Mich 1053. The trial court disclosed the referenced documents to

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<sup>2</sup> It does not appear that defendant argued that his trial counsel was ineffective for not objecting to the admission of Thomas Cottrell's expert testimony. Regardless, this Court found that the testimony was admissible pursuant to *Peterson, supra*, therefore, it would have been futile for defense counsel to object. Defense counsel is not ineffective for failing to make a futile objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502, lv den 463 Mich 855 (2000).

both defendant's appellate counsel and the People on March 18, 2011. Defendant's subsequent Motion for New Trial was heard by the trial court on July 29, 2011, and was denied by an Order entered August 10, 2011 (August 10, 2011 Order, located in lower court file).

This Court again affirmed defendant's convictions in an opinion issued November 29, 2011. In discussing whether the trial court erred in denying defendant's motion for a new trial based upon newly disclosed evidence, this Court cited *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998), and found that the evidence would have been cumulative to the evidence already admitted concerning the victim's credibility – specifically that Theo was a troubled young man known to lie – and that “there is not a reasonable probability of a different result if the documents would have been disclosed to the defendant during trial.” *People v Tomasik, After Remand*, unpublished opinion per curiam of the Court of Appeals, decided November 29, 2011 (Docket No. 279161). In all other issues, this Court adopted its reasoning set forth in the initial opinion. *Id.*

Defendant again applied for leave to appeal the decision to the Supreme Court and, as noted by defendant, the Supreme Court held this case in abeyance pending its decision in *People v Musser*, 494 Mich 337; 835 NW2d 319 (2013). In an Order dated November 6, 2013, the Supreme Court vacated in part this Court's judgment in this case and remanded it back to this Court for reconsideration of four issues in light of *Musser, supra*, *People v Kowalski*, 492 Mich 106; 821 NW2d 14 (2012), and *People v Grissom*, 492<sup>3</sup> Mich 296; 821 NW2d 50 (2012). In an Order dated December 13, 2013, this Court directed the parties to file supplemental briefing addressing those four issues, specifically:

1. Whether the Kent Circuit Court erred by admitting the entire recording of the defendant's interrogation;

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<sup>3</sup> The correct citation for *Grissom* is in volume 492; both orders incorrectly note it as being 491.

2. Whether the circuit court erred in admitting Thomas Cottrell's expert testimony regarding Child Sexually Abusive Accommodation Syndrome under current MRE 702, and if so, whether the error was harmless;
3. Whether the circuit court erred in denying the defendant's motion for a new trial based on the newly disclosed impeachment evidence of the March 26, 2003 report authored by Timothy Zwart and the March 1, 2003 form completed by Denise Joseph-Enders;
4. Whether the defendant's trial counsel was ineffective by failing to object to the admission of the defendant's entire interrogation, by failing to object to Thomas Cottrell's testimony, and by failing to procure the expert testimony of Jeffrey Kieliszewski to challenge the testimony of Thomas Cottrell.

Within this brief, the People will address these four specific issues; however, the People also incorporate and rely on the arguments set forth in Plaintiff-Appellee's three briefs previously submitted to this Court.

### **COUNTER-STATEMENT OF FACTS**

The basic facts of this case has been set forth in this Court's initial unpublished opinion. Any additional facts concerning the four specific issues to be reconsidered or any corrections to defendant's statement of facts will be addressed within the argument sections.

## ARGUMENT

- I. **THE TRIAL COURT DID NOT PLAINLY ERR BY ADMITTING DEFENDANT'S ENTIRE INTERVIEW WHERE BOTH THE PROSECUTION AND DEFENSE REQUIRED THE ENTIRETY OF THE INTERVIEW IN ORDER TO MAKE THEIR RESPECTIVE ARGUMENTS. IT IS THE BUILD-UP OF THE STATEMENTS AND QUESTIONS THAT PROVIDED PROPER CONTEXT FOR BOTH DEFENDANT'S ULTIMATE SUGGESTION THAT HE WAS BEING ACCUSED OF CHILD MOLESTATION AND DEFENSE COUNSEL'S ARGUMENT THAT DEFENDANT WAS LED TO THAT CONCLUSION BY DETECTIVE MARTIN'S STATEMENTS.**

**Standard of Review:** Generally, the decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, because no objection was made to the admission of the challenged testimony below, this issue is unpreserved and appellate review is for plain error affecting substantial rights. Under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings, and it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.*

Moreover, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L.Ed.2d 508 (1993).

**Discussion:** Defendant argues that the trial court erred in admitting the entirety of defendant's interview with Detective Heather Martin. This Court has previously concluded that the trial court did not plainly error in admitting the interview and that Detective Martin's comments were necessary to provide the full context of defendant's statements. On remand, this Court is to reconsider that determination in light of the Supreme Court's decision in *Musser, supra*. The People maintain that the present case is distinguishable from *Musser* and defendant has not demonstrated that the trial court plainly erred in admitting the entire interview where there was no objection and where the arguments of both sides required the complete interview.

During defendant's trial, his recorded interview with Detective Martin was introduced into evidence and played for the jury without objection from his trial counsel (Tr V, 34). Obviously, defendant's statements are admissible as admissions by a party-opponent. MRE 801(d)(2)(A). At issue on remand is whether or not the trial court erred in admitting the entire interview, including all of Detective Martin's statements, in light of the Supreme Court's recent decision in *Musser, supra*.

Martin testified that defendant was very cooperative when she called him to come in for an interview, that he never asked why he was being asked in, and that she purposefully does not tell an individual the reason if not asked (Tr V, 31-32). Martin explained that she does not share information because she wants the person to be surprised with it when they come in for the interview (Tr V, 32). During cross-examination, Martin confirmed that she spent a great deal of time chatting with defendant and building a rapport (Tr V, 45). She agreed that her statements about investigating the heck out of the case already was a figure of speech used when talking to an alleged suspect (Tr V, 60). In response to questioning by defendant's trial counsel, Martin admitted that she had already told defendant that he was there to discuss something that happened

between Theo and himself when Theo was young before defendant, in response to repeated declarations by Martin that he already knew why he was there finally answered, "Child molestation or something?" (Tr V, 46-48). As noted above, defendant's own statements are admissible against him including the fact that he brought up the allegation of molestation before Detective Martin told him the nature of the accusations against him. Without Detective Martin's statements, that fact is lost. In contrast, the inclusion of Martin's statements and her multiple attempts to get defendant to admit his guilt by claiming to already know what happened, offered defense counsel the opportunity to point out how defendant continued to vehemently proclaim his innocence despite her efforts (Tr V, 46-48). Defendant has not demonstrated that the trial court plainly erred in the admission of his complete interview.

The Supreme Court's decision in *Musser* is factually distinguishable from the present case in several ways. First, defense counsel did not object to the interview being played in its entirety and so, on appeal, this issue is reviewed for plain error affecting substantial rights and not as a preserved evidentiary issue. As noted above, it was important for defense counsel's argument to be able to point to that interview, including the techniques used by Martin and the pressure she put on defendant, to emphasize that no matter how much pressure she placed on defendant, he never admitted any wrong-doing.

Second, in *Musser, supra*, 494 Mich at 345-346, one of the interviewing detectives testified before the playing of the interview that he had received special training in forensic interview techniques used when interviewing children to ensure they understand the difference between a lie and the truth and that children such as the victim in that case, given her age, did understand the difference. During the interview itself, the detective talked about the forensic interview protocol, and noted repeatedly that 'kids don't lie about this stuff.' *Musser, supra*, at 343-345. In the present

case, while Detective Martin told the defendant that she had “investigated the heck out of” the case and did repeatedly state that she knew what happened (Interview Transcript, 20, 22-23, attached to defendant’s supplemental brief as Appendix A), there was no testimony before the playing of the interview regarding any special interview skills concerning children and, further, Martin does not claim ‘kids don’t lie about this stuff’ as in *Musser*.

Third, there was discussion before and after the interview being played about the techniques used by Detective Martin, including that she purposefully did not inform the defendant about the nature of her questions, either on the phone when setting up the interview or during the initial portion of the interview when building a rapport with defendant (Tr V, 31-32, 45-46). During cross-examination, when asked about ‘investigating the heck out’ of her cases when there was information she admitted she did not have, Detective Martin testified, “And when I indicate that I investigate the heck out of cases, that’s pretty much a figure of speech, obviously I investigate my cases thoroughly, however a figure of speech when you talk to an alleged suspect in an interview” (Tr V, 60). In contrast, the defendant in *Musser* was apparently informed of the allegations against him when he arrived for his interview and any interview techniques discussed concerned the forensic protocol used when interviewing children. *Musser, supra*, at 342-346. The jury in the present case was well aware through her testimony that Detective Martin was using interview techniques when speaking with defendant. Furthermore, the jury was instructed that in determining what weight to give a defendant’s purported statements, they should consider how and when the statements were made (Tr V, 181); therefore, they knew to consider the methods and statements used by Martin during the interview in assessing defendant’s responses.

In applying the rules of evidence to the present case as the Supreme Court did in *Musser*, it is important to remember the distinctions between the two. The entirety of defendant’s interview

in the present case was relevant, MRE 401-402, to provide the proper context to his statements. Defendant did not inquire as to why he was being asked down to speak with a detective, which is a question Detective Martin testified was very common in such circumstances (Tr V, 31-32). Throughout the beginning of defendant's interview, during which they discussed his background, work, pursuits, and family, and even after Detective Martin specifically brought up Theo's family as neighbors, defendant did not ask why he was being interviewed (Interview Transcript, 1-20). Instead, when Theo's family was discussed as being a basis for the interview in some way, defendant laughed and noted that he doesn't actually know the family all that well (*Id.* at 20-21). After Detective Martin states that she knows what happened and only wants to know why, defendant responds that he does not know what she is talking about (*Id.* at 23). As Martin starts to give more facts, starts to talk about Theo coming over to play, that she knows things happened between the two of them, defendant repeated that he did not know what she was talking about (*Id.* at 23-25). Defendant starts to get irritated, angry, stating, "Ya know, I know no clue what your [sic] talking about. No clue ..." (*Id.* at 27). Martin later states, "It's not ridiculous, it's not far fetched, it's not ridiculous, you know exactly what this is about ..." to which defendant responds adamantly, "NO I DON'T!" (*Id.* at 28).

All of the now challenged statements are included in this initial build-up between pages 17 and 25. Yet, without the challenged statements, the jury would not have the full understanding of how long it took and under what circumstances defendant finally suggested he was being accused of child molestation because they would not have the full context of the discussion. Conversely, without the entirety of the interview, including the now challenged statements, defense counsel could not point to that same interview and 1) highlight the language 'investigate the heck out of this' while then poking holes in that same investigation; 2) argue the high level of defendant's

cooperation in coming in to speak with Detective Martin at such length; and 3) point specifically to the now challenged statement about knowing that things happened between the two of them ten years ago in order to explain why defendant brought up child molestation as the possible accusation (Tr V, 158, 160-162).

Furthermore, under MRE 403, the probative value of Detective Martin's statements when taken as a whole exceed any danger of unfair prejudice. The entire interview, including the challenged statements, show the complete circumstances under which defendant failed to ask – of what am I being accused? – and, ultimately, made the 'child molestation' suggestion himself. Yet, as explained above, the entirety of that interview was highly relevant to defendant's argument as well because, without it, if the jury heard a shortened interview with gaps and without the extensive interplay between Detective Martin's cryptic/or not so cryptic suggestions and defendant's increasing frustration, the fact that defendant never admitted any wrongdoing loses a great deal of power. Defendant certainly isn't the first accused to deny wrongdoing during an interview; however, given a chance to listen to the entire interview including the veiled accusations made by Detective Martin, repeated affirmative statements that she knew what happened, then defendant's continued denial in the face of that interview means more. And defense counsel used it.

Any danger of unfair prejudice was further minimized by Detective Martin's testimony in which she talks of the techniques she used in purposefully not telling defendant the nature of the accusations – or even if he was being accused of something – and that she tells suspects that she investigates the heck out of her cases as a figure of speech. The jury was thus informed that the detective said that as an interview technique and, further, they were instructed to consider the circumstances under which defendant made any statement in order to properly evaluate it. This is not the case in *Musser* in which the detective testified as to his special training in interviewing

children before repeatedly speaking of the credibility of the victim when interviewing the defendant and, further, the build-up of the interview was less necessary in *Musser* where the defendant was told early on of the accusations than in the present interview where that build-up is what makes the interview so probative and valuable to both sides. Under the unique circumstances of this case, the trial court did not plainly err in admitting the complete interview. Regardless, given the use that defense counsel made of the interview along with the victim's clear testimony and the physical evidence that, in part, corroborated that testimony, defendant is unable to demonstrate that he was prejudiced by including all portions of the interview.

Finally, defendant makes much of the fact that there was not a specific limiting instruction given in this case; however, no limiting instruction was requested and even the *Musser* court did not suggest that a trial court must sua sponte provide such an instruction. *Musser, supra*, at 358. Although no such instruction was requested or given, as noted above, it was evident in Detective Martin's testimony that she spoke a certain way to suspects before and during interviews and the jury was instructed that when evaluating the defendant's statements, they should consider the circumstances under which the statements were made. While this instruction certainly does not reach the magnitude of defendant's proposed 'pay absolutely no attention whatsoever to the Man behind the curtain' instruction (Defendant's Supplemental Brief, 14), defendant's extreme version of limiting instruction is also not required nor suggested under *Musser*.

**II. THE TRIAL COURT PROPERLY ADMITTED THOMAS COTTRELL'S EXPERT TESTIMONY THAT THE VICTIM'S BEHAVIOR WAS CONSISTENT WITH OTHER CHILDREN SUFFERING SEXUAL ABUSE WHERE THE DEFENSE ATTACKED THE VICTIM'S CREDIBILITY AND, SPECIFICALLY, HIS ACTIONS AFTER THE ABUSE.**

**Standard of Review:** In order to preserve the issue of the improper admission of evidence for appeal, a party generally must object at the time of admission. Defendant did not object to the admission of the expert testimony of Thomas Cottrell; therefore, he must demonstrate plain error affecting his substantial rights, and then that he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence. *Carines, supra*, 460 Mich at 763-764.

**Discussion:** This Court previously found that the admission of Thomas Cottrell's testimony regarding delayed reporting amongst child sexual abuse victims and the consistency of certain behaviors of Theo with that of child sexual abuse victims was properly admitted pursuant to the Supreme Court's decision in *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995). *Tomasik, supra*. Now the Supreme Court asks that this Court reconsider that determination in light of their recent decision in *Kowalski, supra*. Just as the challenged testimony was admissible under *Peterson*, it is also admissible under *Kowalski* and MRE 702.

In *Peterson, supra*, our Michigan Supreme Court reaffirmed its decision in *People v Beckley*, 434 Mich 691, 727, 734; 456 NW2d 391 (1990), that an expert may not testify that the sexual abuse occurred, may not vouch for the victim's veracity, and may not testify that a defendant is guilty. The Court found, however, that an expert may testify regarding typical and relevant symptoms of child sexual abuse to explain a victim's behavior that may be construed by a jury as being inconsistent with that of a sexual abuse victim, and may also testify regarding consistencies between the victim and other victims to rebut an attack on the victim's credibility. *Peterson, supra*

at 352-353. The purpose of such testimony is “to provide the jury with background information that it could not otherwise bring to its evaluation of the child’s credibility.” *Id.* at 365.

Beginning in his opening statement, defense counsel told the jury that the evidence would show that Theo Jensen, the victim in this case, continued to ride his bike and play in front of defendant’s house even after the “alleged allegations” (Tr III, 27), noted Theo’s admitted theft of money from students to help a friend with a drug debt, as well as a rumor about another teen who had spent time as a child at defendant’s home, and then explained to the jury that, ultimately, the case is “a false allegation about a desperate young man attempting to get out of trouble” (Tr III, 29-31). Thereafter, during his cross examination of Theo, defense counsel asked him to explain why he continued to go back over and over again to defendant’s house if he was being sexually assaulted, asked about his numerous counselors, asked about him going out and playing after the abuse occurred as if nothing had happened and how he could ride a bike directly after being anally assaulted, and then asked about whether the school had lifted his suspension for stealing after he “came out with this incident,” this “revelation” about defendant (Tr III, 72-75, 81-83, 95-96, 98). Defendant argued that Theo was a troubled youth making up stories about defendant in order to get out of trouble. The strategy was one of attacking Theo’s credibility by noting his current troubles as well as his behavior of returning to defendant’s house repeatedly and/or continuing to play and ride bike in front of his house after the sexual abuse. Therefore, the expert testimony explaining his behavior as consistent with children who had suffered sexual abuse directly responded to such attacks and is permissible under *Peterson, supra*, 450 Mich at 352-353, 373.

Specifically, Cottrell testified that delay in disclosure is very common in child victims of sexual abuse and explained several reasons why such delay occurs (Tr IV, 8-10). Cottrell further explained why a victim might continue to return to the home of the offender or return to play soon

after an offense (Tr IV, 12-13). Cottrell also explained that Theo's self-destructive behavior was not inconsistent with victims of child sexual abuse (Tr IV, 12, 14). Such testimony is proper pursuant to *Peterson, supra*, 434 Mich at 352-353, in light of the defense's attack on Theo's credibility and post-abuse actions.

Although defendant notes that this Court must reconsider this issue in light of the Supreme Court's decision in *Kowalski, supra*, he makes no analysis between the *Kowalski* and the present case (Defendant's Supplemental Brief, 16). *Kowalski* concerned the possible admission of expert testimony regarding false confessions under MRE 702 and MRE 403. The issue was preserved in that case and an evidentiary hearing held. *Kowalski, supra*, at 111-115. In the present case, the issue is unpreserved because defendant did not object to the now challenged testimony, likely because such testimony has previously been found to be admissible pursuant to *Peterson, supra*.

In *Kowalski, supra*, at 120-121, the Supreme Court noted that, pursuant to MRE 702, a court evaluating expert testimony must ensure that the testimony "(1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case." The analysis begins with a determination of whether the type of expert testimony is "beyond the ken of common knowledge" so that the testimony will assist the trier of fact to understand a fact in issue. *Kowalski, supra*, at 121-123. This initial question is easily answered by the Court's analysis in *Kowalski* in which it cites to *Peterson, supra*, as an example of the type of expert testimony that deals with behavior beyond the understanding of many jurors, *Id.* at 123-124; therefore, the expert testimony at issue in the present case meets that initial hurdle.

The next inquiry is whether Thomas Cottrell is qualified as an expert by knowledge, skill, experience, training, or education. *Kowalski, supra*, at 131, citing MRE 702. During trial, Cottrell

testified that he is vice president of counseling services at the YWCA counseling center and has been with the YWCA since 1983 in positions ranging from a therapist in the child sexual abuse treatment program to the clinical director to program manager and now as vice-president of all the counseling services provided there (Tr IV, 4). Cottrell has a Bachelor's degree in child development from the University of Michigan and a Master's degree in social work, also from the University of Michigan, specializing in interpersonal practice (Tr IV, 4-5). Cottrell has provided direct services to approximately 300 families in which he provided services to children (Tr IV, 5). Cottrell has particular expertise in offender dynamics and child victim dynamics and has provided group therapy work at the YWCA since 1983, just ending in 2006; he explained that part of providing good therapy services to offenders is understanding the dynamics that impact a child victim (Tr IV, 5). Cottrell has been qualified as an expert in the field of child sexual abuse multiple times in the past (Tr IV, 5). Given this history, the trial court accepted him as an expert in the field without objection (Tr IV, 6). In light of Cottrell's education, experience, and practice, the trial court did not err in finding him to be an expert in child sexual abuse. Cottrell has counseled hundreds of children as well as offenders and thereby can provide insight to a child victim's behavior that might be otherwise confusing to a jury.

The next inquiry is whether Cottrell's testimony in this case was based upon sufficient facts or data. *Kowalski, supra*. Cottrell's testimony came after Theo had testified as to the sexual abuse and his behavior in the years following including the fact that he did not immediately disclose the abuse, continued to play at defendant's house for a period of time following the abuse, that he was consistently in trouble over the years, that he lied, and was caught stealing (Tr III, 38-47). These are examples of the facts provided by the prosecutor as ones for Cottrell to assume for the sake of her hypothetical questions (Tr IV, 7-8), so the facts were ones already in evidence.

Finally, the question is whether the testimony is the product of reliable principles and methods. *Kowalski, supra*. Again, there was no evidentiary hearing held in the present case concerning the “principles and methods” of child sexually abusive accommodation syndrome (CSAAS) or whether the theory has been or can be tested, has been published and peer-reviewed, etc., likely because this type of evidence was found to be admissible in *Peterson, supra*. Further, defendant has made no analysis or argument that Cottrell’s testimony is inadmissible pursuant to *Kowalski* other than to say that it was inadmissible pursuant to *Peterson* so it must also be inadmissible under *Kowalski* (Defendant’s brief, 16). However, in *Beckley, supra*, 434 Mich at 718-719, our Supreme Court considered a similar argument concerning this type of testimony and whether it must first pass the *Davis/Frye*<sup>4</sup> test and demonstrate that “the scientific principle or technique has gained such general acceptance within the scientific community as to render the technique or principle reliable. Further, general scientific acceptability must be established by disinterested scientists.” In finding that such a test is difficult to apply to the area of behavioral sciences, the Court stated:

The ultimate testimony received on syndrome evidence is really only an opinion of the expert based on collective clinical observations of a class of victims. Further, the issues and the testimony solicited from experts is not so complicated that jurors will not be able to understand the “technical” details. The experts in each case are merely outlining probable responses to a traumatic event. It is clearly within the realm of all human experience to expect that a person would react to a traumatic event and that such reactions would not be consistent or predictable in all persons. Finally, there is a fundamental difference between techniques and procedures based on chemical, biological, or other physical sciences as contrasted with theories and assumptions that are based on the behavioral sciences.

We would hold that so long as the purpose of the evidence is merely to offer an explanation for certain behavior, the *Davis/Frye* test is inapplicable. [*Beckley, supra*, at 721.]

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<sup>4</sup> *People v Davis*, 343 Mich 348, 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

That same reasoning would seem to hold true concerning the scientific testing in *Daubert v Merrell Dow Pharm., Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and other states and federal courts have agreed. See *United States v Bighead*, 128 F 3d 1329 (9th Cir 1997) (per curiam ) (*Daubert* standard is inapplicable to expert testimony regarding CSAAS because such testimony requires “specialized knowledge,” but not “scientific knowledge” based on the “scientific method.”); *Lyons v State*, 976 NE 2d 137, 141-143 (Ind App) (2012) (*Daubert* did not apply to “specialized knowledge” in the area of child sexual abuse); *People v Spicola*, 16 NY 3d 441, 465; 947 NE2d 620 (2011) (majority of states “permit expert testimony to explain delayed reporting, recantation, and inconsistency,” as well as “to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear ‘emotionally flat’ following sexual assault, why a child might run away from home, and for other purposes”).

In short, because defense counsel did not object to Cottrell’s testimony and because such testimony has been routinely admitted pursuant to *Peterson, supra*, where a victim’s credibility is attacked based upon a delay in disclosure or other behaviors, no *Daubert* hearing was held. Furthermore, it is unclear whether *Daubert* would apply to CSAAS testimony when *Davis/Frye* did not apply. *Beckley, supra*. Other states and federal courts have found that the *Daubert* standard does not apply to “specialized knowledge” as opposed to “scientific knowledge.” In the present case, Cottrell’s testimony merely explained that delayed reporting and some of Theo’s other behaviors were not inconsistent with victims of sexual abuse and the testimony was in response to defense counsel’s argument that Theo was lying based on that delayed reporting, his actions of continuing to play at defendant’s house after the abuse, and his overall destructive behavior. Such

testimony was proper pursuant to *Peterson, supra*, and, for the reasons stated above, the decision in *Kowalski* does not appear to require reversal in the present case.

Finally, even if this Court disagrees and finds that the trial court plainly erred in allowing Cottrell's testimony, defendant is not entitled to a new trial where he is unable to demonstrate that it affected his substantial rights. Defense counsel was well prepared to cross-examine Cottrell and prompted him to agree that there are cases in which sexually abused children go through life without any problems, as "A" students, with regular appearing relationships with their parents, that they do not all steal, use drugs, commit suicide, etc. (Tr IV, 17-18). Defense counsel clarified that Cottrell had never counseled or spoke with Theo, had not reviewed any of his counseling records, spoke with his therapists or medical doctors, etc. (Tr IV, 19-20). Defense counsel emphasized that not all kids who use drugs, steal from other people, attempt suicide, or fear repercussions of being kicked out of school or going to jail are sex abuse victims (Tr IV, 21-22). Essentially, the defense counsel pointed out that just because a behavior is consistent with the behavior of victims of child sexual abuse, it doesn't mean that behavior isn't also consistent with the behavior of children who have not suffered sexual abuse, thereby minimizing the impact of Cottrell's testimony. Given the plain error review, the evidence admitted in the case including Theo's testimony and the physical evidence that in part corroborated his testimony, defendant is unable to prove that the admission of Cottrell's testimony affected his substantial rights and resulted in the conviction of an innocent man.

**III. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BASED UPON NEWLY DISCLOSED IMPEACHMENT EVIDENCE WHERE, GIVEN THE EVIDENCE ADMITTED AT TRIAL HIGHLIGHTING THE VICTIM'S BAD BEHAVIOR AND LIES, THE PROPOSED CHARACTER TESTIMONY OF TWO OF THE VICTIM'S TEACHERS CONCERNING HIS TRUTHFULNESS YEARS BEFORE HIS DISCLOSURE OF SEXUAL ABUSE DOES NOT MAKE A DIFFERENT RESULT PROBABLE ON RETRIAL.**

**Standard of Review:** A trial court's decision following a motion for a new trial is reviewed for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008), citing *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *Id.*

**Discussion:** Defendant argues that he is entitled to a new trial based upon the late disclosure of two documents written three years before the victim Theo disclosed his sexual abuse. This argument lacks merit. Although the documents include statements concerning Theo's bad behavior, including the belief of a teacher and guidance counselor that he would tell lies, Theo's bad behavior and lies to others came out during the trial through Theo's testimony as well as the testimony of other witnesses and the defense was able to argue based on that admitted evidence that Theo was a troubled teen who was telling a lie. This Court previously held that this evidence was cumulative to that which was already introduced during defendant's trial and there is not a reasonable probability that the result of the trial would have been different had the documents been disclosed earlier. The Supreme Court's recent decision in *Grissom, supra*, should not affect this Court's previous holding whatsoever.

Pursuant to MCR 6.431(B), a trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." When this issue was first presented to this Court as a violation of due process based upon the trial court's failure to disclose these privileged documents, the analysis

was based upon the Michigan Supreme Court's similar case in *People v Fink*, 456 Mich 449; 574 NW2d 28 (1998). In *Fink, supra*, at 450-451, the defendant was convicted of first and second degree criminal sexual conduct involving a 13 year old resident of a home for children with severe behavior problems; the sexual assaults occurred when he was a staff worker at the facility. Before trial, the defendant in *Fink* requested access to the records from the facility and another agency concerning two boys – the victim and another witness. *Id.* at 451. The trial court found that the files were privileged under Michigan law and refused to order their disclosure. *Id.* The Court of Appeals affirmed the defendant's convictions and, following his application to the Supreme Court, the Court remanded the case to the trial court for an in camera review of the documents and further instructed the trial court to grant the defendant a new trial if any of the documents were favorable to the defendant and material to the case. *Id.* at 451-452. On remand, the trial court found nothing fitting that description yet, curiously, decided to turn over several documents to the defense that "might be helpful," although the trial court indicated that they would not have changed the outcome. *Id.* at 452. Based on the disclosure, the defendant obtained the testimony of the authors of the documents; however, the trial court denied his amended motion for a new trial, finding that the evidence was not material, as defined *Pennsylvania v Ritchie*,<sup>5</sup> 480 US 39, 56; 107 S Ct 989; 94 L Ed 2d 40 (1987). *Id.* at 453.

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<sup>5</sup> In *Ritchie, supra*, at 43, the defendant was convicted of the rape of his 13 year old daughter and, before trial, he requested access to the investigative records concerning his daughter kept by the Children and Youth Services (CYS), an agency charged with the investigation of such abuse. Under Pennsylvania law, the files were privileged and the trial court refused to order their disclosure. *Ritchie, supra*, at 43-44. Ultimately, the Supreme Court remanded the case with instructions for the lower court to conduct an in camera review of the requested files to determine whether they contained evidence *material* to the case. *Id.* at 57-61.

In *Fink*, the Supreme Court held that the proper analysis for this issue is under the Due Process Clause of the Fourteenth Amendment. *Fink, supra*, 456 Mich at 453-454, citing *Ritchie*, 480 US at 56. Due process requires that the prosecution turn over evidence that is “both favorable to the defendant and *material* to the determination of guilt or punishment.”<sup>6</sup> *Fink, supra*; emphasis added. The *Fink* court, citing *Kyles v Whitley*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995), noted the four aspects of “materiality” as follows:

First, the touchstone of materiality is a “reasonable probability” of a different result. The question is not whether the defendant would have been more likely than not to have received a different verdict, but whether he received a fair trial in the absence of the evidence, i.e., a trial resulting in a verdict worthy of confidence. A reasonable probability of a difference result exists where suppression of the evidence undermines confidence in the outcome of the trial.

Second, the *Kyles* Court said that the inquiry into materiality does not test the sufficiency of evidence. Rather, one claiming a violation must show that the favorable evidence could reasonably be taken to put the whole case in such a different light so as to undermine confidence in the verdict.

Third, if there is a finding of constitutional error, it cannot be considered harmless.

Fourth, the suppressed evidence must be considered collectively, not item by item. [*Fink, supra*, 456 Mich at 454; emphasis added.]

Therefore, in the present case, to prove that the trial court’s decision not to disclose any documents following its in camera review of Theo’s counseling records violated his due process rights, it was defendant’s burden to demonstrate that the disclosed documents contain evidence material to his case, i.e., evidence that could reasonably be taken to put the whole case in such a different light so as to undermine confidence in the verdict. He failed to make such a showing.

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<sup>6</sup> Likewise, in *Stanaway, supra*, the Michigan Supreme Court held that evidence protected by privilege should be provided to defense counsel only if the court finds that the evidence is essential to the defense. *Fink, supra*, at 455.

The Supreme Court has now ordered this Court to reconsider this case in light of *Grissom, supra*. In *Grissom*, the Court considered newly discovered impeachment evidence and whether such evidence could ever be the basis for a new trial. The Court affirmed that, in order to grant a new trial based upon newly discovered evidence, a defendant must demonstrate 1) the evidence itself, not merely its materiality, is newly discovered, 2) the newly discovered evidence is not cumulative, 3) using reasonable diligence, the party could not have discovered and produced the evidence at trial, and 4) the new evidence makes a different result probable on retrial. *Grissom, supra*, 492 Mich at 320. While the point in *Grissom* was undeniably that the fact that newly discovered evidence is impeachment evidence does not foreclose the possibility that a defendant can meet this burden, the Court further remarked:

It bears emphasizing that, as this Court recognized more than a century ago, newly discovered impeachment evidence ordinarily will not justify the grant of a new trial. Our decision today, therefore, does not disturb this unremarkable statement. It will be the rare case in which (1) the necessary exculpatory connection exists between the heart of the witness's testimony at trial and the new impeachment evidence and (2) a different result is probable on retrial. [*Grissom, supra*, at 317-318.]

With this background, the People agree with defendant that the tests in *Fink* and *Grissom*, still hinge in large part on what the parties have previously argued – whether this evidence makes a different result probable on retrial (Defendant's brief, 22). This Court has already answered that question in the negative when previously considering this issue. Specifically, this Court found the disclosed documents to contain cumulative evidence and there is no reasonable probability that their earlier disclosure would have affected the result of the trial. *Tomasik, After Remand, supra*, at 5.

The report from Pine Rest, authored by Timothy Zwart, is based in large part on the forms filled out by Nancy Jansen, Theo's 6<sup>th</sup> grade guidance counselor, and Denise Joseph-Enders, one

of his teachers at that time.<sup>7</sup> Both Jansen and Joseph-Enders state that Theo has lied in the past and generally describe a troubled teenager with low self-esteem and an accompanying learning disability. In contrast, Jansen also noted that Theo is respectful and generally honest with his school principal. Nothing in the report or forms suggests that Theo had made sexual allegations in the past or had anything against the defendant in this case that would support a finding that he would make a false allegation against him. Furthermore, nothing in Zwart's summary and recommendations suggests anything but that Theo was a troubled young man with low self-esteem, a learning disability, and depression.

At trial, Theo explained that before he began being sexually abused by the defendant, he was a carefree kid, good kid, but after the abuse occurred, he was "messed up" and "so angry inside" (Tr III, 42). He spoke of keeping weapons around and described himself as kind of a demon child (Tr III, 43). Theo talked about wanting to kill himself, about the evaluation at Pine Rest, and that he did not disclose the abuse at that time because he did not know the people there (Tr III, 45-46). Theo talked about getting into trouble at school, fighting with kids, bringing drugs, knives, back talking to teachers, etc. (Tr III, 46). Theo talked about getting in trouble for stealing at school and that he initially did not admit to what he did – that he only admitted to it once he knew that they had him on tape (Tr III, 47-48). Theo also explained that although it was at this time that he disclosed the abuse to his counselor, he had already pled guilty to the theft and knew what his sentence would be before he disclosed (Tr III, 49-50). During cross-examination, Theo admitted that he had been asked in the past whether he had ever been sexually abused but had

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<sup>7</sup> The report and form are both dated March 2003, indicating that they were completed roughly three years before Theo disclosed his sexual abuse to his counselor.

answered, "No" (Tr III, 62-63). Theo admitted to using drugs, particularly marijuana (Tr III, 106). Theo admitted that he knew that stealing was wrong and was dishonest (Tr III, 94).

Theo's mother, Susan Jensen, also testified that as a young child, Theo was happy but by June – after school was finished – when he was six years old, Theo changed (Tr IV, 29-30). She noticed his anger, finding knives in his room, finding him sleeping under his bed or in his closet, and testified that she and her husband thought it was related to Theo's grandfather dying the previous March (Tr IV, 30-32). Ted Jensen, Theo's father, also described the change in Theo's behavior before the age of six and then after the age of six as being between black and white (Tr IV, 73). Susan added that Theo had told her in the past that he had a secret – that he had done horrible things and no one could love him (Tr IV, 32-33). Susan added that since the disclosure, Theo's behavior had changed again – he is not angry, he is loving (Tr IV, 42). During cross-examination, Susan testified that Theo had lied about sexually touching a younger cousin one time when he was ten years old (Tr IV, 47-48).<sup>8</sup> Susan further testified that Theo had lied in the past about smoking marijuana (Tr IV, 64-65). Ted also testified as to Theo's drug use and trouble in the past, including the police coming to the house two times concerning Theo – one time for a prank call and another time to speak about the stealing incident at school (Tr IV, 103). Julie Anna Schaefer-Space, Theo's counselor, testified as well about Theo's history of getting in trouble and the change that occurred after his disclosure of the sexual abuse (Tr IV, 120-122). Ethan Tomasik

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<sup>8</sup> In fact, defendant's trial counsel first requested access to Theo's counseling records based upon his preliminary testimony that he had never before disclosed the sexual abuse to his prior counselors and his mother's information that he had sexually acted out around the age of 10-11 (Defendant's December 1, 2006, Motion to Disclose Complainant's Counseling Records, ¶¶ 2, 5-7, 9, 12). It was counsel's belief that a prior therapist would have asked about any sexual abuse and it was for this review that the original *Stanaway* Motion was granted and in camera review conducted.

testified that he stopped hanging out with Theo at about age 8 because Theo “got into a lot of trouble and I just don’t like getting’ in trouble” (Tr IV, 143). Ethan added that Theo was always getting into trouble; he would hear about it at school from other people (Tr IV, 144). Ethan further testified that Theo’s reputation in the area was not good because people talk about him getting in trouble and Ethan has seen the police at Theo’s house before (Tr IV, 144-145). Amantha Engleman, another classmate, also testified that Theo got into trouble a lot when they were younger (Tr IV, 10-11).

Defense counsel’s argument at trial was that Theo Jensen was a troubled teenager who had gotten in trouble for stealing and had made a false allegation of sexual abuse in order to get out of that trouble. Counsel’s cross-examination of Theo was extensive and highlighted his stealing along with the argument that his disclosure was of convenient timing given that offense. Defense counsel noted the Theo’s statements about the frequency and nature of the abuse – happened every time he went over, he was raped 50-60 times, each time took anywhere from 15 minutes to an hour, etc. (Tr III, 60, 66, 79-80), and used those to impeach Theo’s credibility. Counsel also elicited the fact that Theo originally told Detective Martin that the penetration occurred twice and then later changed his story stating 10 to 20 times (Tr V, 63-64). Defense counsel also questioned Theo about the fact that he brought in a Batman doll to court during a prior proceeding; Theo agreed that he identified with Batman because Batman has “deep dark secrets” (Tr III, 56-57). In response to defense counsel’s question about whether Batman is real or not, Theo answered, “To me in my heart, yes, he is real” (Tr III, 57). Over several pages, defense counsel questioned Theo about his affinity for Batman and how “real” Batman is to him (Tr III, 56-60).

Thus, through Theo’s testimony and that of other witnesses, defense counsel noted not only many differences between Theo’s initial disclosure and his testimony at trial, but also his lying,

trouble-making at school, drug use, and his stated belief that Batman is real. The jury was able to hear these witnesses and judge their credibility. Based on the evidence admitted at trial, one of the first and last things that defense counsel argued to the jury was, "Batman is real to him. What does that tell you? He still cannot decipher between fiction and reality" (Tr V, 155, 169). Defense counsel noted the inconsistencies in Theo's testimony during his closing argument, highlighting Theo's initial statement to the Detective that the penetration occurred two times then the story grew to 10 to 20 times and, during cross-examination at trial, to 50-60 times (Tr V, 163). Counsel pointed out the inconsistencies in Theo's testimony, focused on why people lie, and argued that Theo reported the abuse as a means of getting out of trouble when he got caught stealing at school (Tr V, 162-168). Nothing in the disclosed documents can be said then to reasonably put this whole case in such a different light so as to undermine confidence in the jury verdict.

Furthermore, defendant's argument continues to appear to be based on a mistaken belief that these disclosed documents would themselves be admissible at trial but he failed to explain the basis for the admission to the trial court and does not appear to have done so in either of his supplemental briefs to this Court. The reports are inadmissible hearsay documents. MRE 801; MRE 802. At most, had these documents been disclosed to defense counsel before trial, they could have identified Theo's past teacher and guidance counselor as potential character witnesses. The trial court agreed, stating:

I agree with the prosecutor that the reports themselves would not have been admissible, and presumably their authors would not have been able to testify, except in a certain very limited area. The value of the reports, I suppose, is that they might have brought forth witnesses who could have been offered by way of impeachment of the credibility of the witness, admittedly on a collateral point. [July 29, 2011, Motion for a New Trial, 26-27.]

No testimony was taken at the motion hearing as was done in the *Fink* case following the disclosure of documents, *Fink, supra*, 456 Mich at 453, and so we do not know what testimony

would have been admitted. Furthermore, whatever testimony that the teacher and guidance counselor could have given as to Theo's character for truthfulness would have been tempered by the fact that the basis for their opinions stemmed from their contact with Theo at school roughly three years before he made the disclosure of sexual abuse. Given the testimony that came out at trial regarding instances of Theo telling lies, such additional witnesses giving cumulative character testimony would not make a different result probable on retrial. Defendant received a fair trial in which he continually highlighted Theo's wrong-doing and demonstrated ability to lie when in trouble; quite simply, the information in these documents adds little to what was already known by the jury. This analysis is unchanged by the Supreme Court's opinion in *Grissom* and should not affect this Court's previous decision on this issue.

**IV. DEFENDANT'S TRIAL COUNSEL HAD A STRATEGIC REASON FOR NOT OBJECTING TO THE INTRODUCTION OF HIS COMPLETE INTERVIEW, AND WAS WELL PREPARED TO COUNTER THOMAS COTTRELL'S EXPERT TESTIMONY. FURTHERMORE, DURING THE EARLIER GINTHER HEARING, PROPOSED EXPERT JEFFREY KIELISZEWSKI ADMITTED HE WOULD AGREE WITH MUCH OF COTTRELL'S TRIAL TESTIMONY AND FAILED TO EXPLAIN WHAT ADMISSIBLE TESTIMONY HE WOULD BE ABLE TO PROVIDE THAT WOULD MAKE A DIFFERENT RESULT REASONABLY PROBABLE ON RETRIAL.**

**Standard of Review:** A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, and its constitutional determinations are reviewed de novo. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* at 578.

This Court granted, in part, defendant's request for remand to the trial court in order to conduct an evidentiary hearing regarding his claim that his trial counsel was ineffective for not calling a psychological expert to rebut the prosecution's experts and for not calling defendant to testify on his own behalf; therefore, the record on appeal is expanded to include the testimony and evidence received during the subsequent hearings on December 18, 2008, and February 12, 2009, relevant to the issues identified by this Court in its November 6, 2008 remand order.

**Discussion:** The Supreme Court has asked this Court to address whether defense counsel was ineffective for choosing not to object to the admission of defendant's entire interrogation, for not objecting to Thomas Cottrell's testimony, and for failing to procure the expert testimony of Jeffrey Kieliszewski to challenge the testimony of Thomas Cottrell. Defense counsel had a strategic reason to want the entire interview entered into evidence, and, given Kieliszewski's testimony at the *Ginther* hearing, which conceded and agreed with many of the points made by Cottrell during trial, counsel's decision not to bring in Kieliszewski to challenge Cottrell's testimony was reasonable professional judgment. Finally, Thomas Cottrell's testimony was admissible pursuant to *Peterson, supra*, and had been admitted multiple times in other cases; therefore, counsel's decision to address the testimony during cross-examination rather than make a futile objection was not unreasonable.

Effective assistance is presumed and defendant has the burden to prove both an error outside of reasonable professional judgment as well as prejudice, i.e., a reasonable probability that but for that error, the result of defendant's trial would have been different. In *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court set forth the following test for determining whether a defendant was deprived of the effective assistance of counsel under the Sixth Amendment:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

The Court further held that an error by counsel, "even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Thus, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 692. The Court said that "every effort [must] be made to eliminate the distorting effects of hindsight," and that "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689. Ultimately, the defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In Michigan, to establish ineffective assistance of counsel, a defendant must show: (1) "that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms"; (2) that there is "a reasonable probability that, but for counsel's error, the result of the proceedings would have been different"; and (3) that the resultant "proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001), lv den 467 Mich 852 (2002) (internal citations omitted). Furthermore, a defendant "must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant argued that his trial counsel was ineffective for failing to object to the introduction of his recorded interview into evidence. For the reasons stated *supra* during the discussion of issue I, the trial court properly admitted the recording of defendant's interview. In the present case, the jury heard defendant's interview. Defendant was the first person to use the word "molestation" as opposed to assault or providing a minor with drugs/alcohol or a myriad of other possible crimes of which he could be accused involving a minor. Defense counsel was free to argue, and did argue, that the detective had insinuated enough about the allegation to give defendant a reasonable idea that it was about sexual abuse, and he could not have done that without some of the now challenged statements made by Detective Martin during the interview. Furthermore, it is only with the admission of the entire interview that defense counsel could demonstrate how well defendant held up against the declarations of Martin and increasing pressure to just admit that he *knew* what she was talking about. Not only did the initial interview portions allow defendant to introduce himself as an individual to the jury – a working family man – but it was only through listening to Martin's accusations and defendant's repeated statements that he did not know what she was talking about that defendant could argue that he continued to deny any wrongdoing despite the pressure placed on him and that his ultimate suggestion that he was being accused of molestation was reasonable based upon Martin's statements during the interview. There was a strategic reason that defense counsel wanted the entirety of the interview introduced; as such, it is not an appropriate basis for a finding of ineffective assistance of counsel.

Defendant's trial counsel explained that he did not contact a psychological expert because he is familiar with the prosecution's expert, Dr. Thomas Cottrell, and his likely testimony having cross-examined him more than a dozen times and having consulted with him on a number of cases (*Id.* at 107). Trial counsel explained that he is familiar with testimony concerning victim dynamics,

delayed reporting, and offender dynamics, and that getting an expert, based on his experience, would have benefited the prosecution as such a psychologist would agree with the offender dynamic and delayed reporting testimony provided by Cottrell (*Id.* at 107). Given the multiple times that Cottrell had been accepted to testify as an expert in such areas and the admissibility of such testimony pursuant to *Peterson, supra*, it was not an unreasonable professional decision to simply address the testimony during cross-examination.<sup>9</sup>

Defendant argued that defense counsel was ineffective for not securing his own psychological expert to challenge Cottrell's testimony. The decisions regarding what evidence or witnesses to present are presumed to be matters of trial strategy, which this Court has declined to "second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Furthermore, the failure to call a witness only constitutes ineffective assistance of counsel if the failure deprived the defendant of a substantial defense. *Id.*

In this case, trial counsel's opinion concerning securing a psychological expert for the defense proved true at the *Ginther* hearing. Defendant's proposed expert witness, Dr. Jeffrey Kieliszewski, agreed that children who are victims of sexual abuse can often delay reporting and agreed that this is consistent with Dr. Cottrell's trial testimony (GH Tr I, 77-78). When asked if a child acting out on another child is consistent with a child who has been sexually abused, Kieliszewski answered, "That is not inconsistent" (GH Tr I, 78). Kieliszewski further agreed that children who have been sexually abused can engage in destructive behavior and can have suicidal

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<sup>9</sup> The People have addressed this issue as instructed in this Court's December 13, 2013 Order; however, it is important to note that while defendant argued that the trial court erred in admitting Cottrell's testimony, it does not appear that the decision of his trial counsel to not object to that testimony was ever presented to this Court as a basis for his ineffective assistance of counsel claim.

ideation (GH Tr I, 78-79). Such testimony is consistent with that of Dr. Cottrell at trial (Tr IV, 8-12).

When asked about the issues of clinician illusions and confirmatory bias on the part of the therapist, trial counsel noted the problem with the physical evidence in the case – the rectal bleeding – which is why he consulted with Dr. Guertin, cross-examined Dr. Clark accordingly, and brought out the victim’s later episode of rectal bleeding (GH Tr I, 108-109). Trial counsel also noted he saw no evidence of coaching, bias, or disclosure between 1996 and 2006 when the victim made his disclosure to his therapist (GH Tr I, 109). The therapist, Julie Schaefer-Space, was important to the defense because she filed the 3200 form – the first notification of the victim being sexually abused – and the notification makes no mention of the penetration alleged at the trial (GH Tr I, 110; Tr IV, 119). Trial counsel testified that he was the party who wanted the therapist to testify<sup>10</sup> – she was not qualified as an expert and her notification on the 3200 form impeached the victim’s statement about multiple penetrations and oral sex (GH Tr I, 129). In reiterating why he did not call a psychological expert, trial counsel again noted that a defense expert would have been subject to cross-examination by the prosecutor with respect to offender dynamics, victim dynamics, and delayed reporting allowing then the prosecutor in closing to argue, “Even the defense expert agrees with Dr. Cottrell ...,” and this was also the reason he did not call his medical expert, Dr. Guertin to the stand (GH Tr I, 111).

During the *Ginther* hearing as well, the prosecutor, who was the trial prosecutor in this case, elicited the proposed expert’s admission that he is unaware of the forensic protocol used by

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<sup>10</sup> Trial counsel testified that he had informed the prosecutor before trial that he was going to call the therapist and agreed that it is common for prosecutors in Kent County to then call the witness themselves instead (GH Tr I, 134-135).

law enforcement in Kent County or the fact that officers must be trained in that protocol before they are allowed to interview children of sexual abuse (GH Tr I, 69). Kieliszewski also agreed that the protocols are in place to keep young children from being improperly influenced by the questioning but that the victim in the present case was 15 or 16 years old when first interviewed and was old enough to understand what is real or not real (GH Tr I, 70-71). When Kieliszewski testified that some of Dr. Cottrell's statements were not necessarily supported in empirical literature, the prosecutor asked for examples – Kieliszewski answered that he might be able to find some citations if he left and went to the library (GH Tr I, 76). As noted above, Kieliszewski agreed with several of the key statements made by Cottrell at trial regarding delayed reporting and behaviors that are seen in children who have been sexually abused (GH Tr I, 77-79). Kieliszewski was disturbed by what he said was a lack of an "examination" as to whether the victim was making a false allegation; however, when the prosecutor explained that examinations for the sake of determining truthfulness are not admissible and asked the expert to explain exactly what he could offer on defendant's behalf that was not already brought out at trial, Kieliszewski again testified that he could educate the jury about the idea that there are occasions where false allegations of sexual abuse occur, and that the way to assess whether or not it is false is through a variety of factors and approaches, one being a forensic evaluation (GH Tr I, 79-82). The People note that absent the continued mention of an "evaluation," this sounds remarkably like informing the jury of the factors to be used in determining the credibility of a witness, the instructions on which are given to every jury before deliberations begin.

The trial court noted that "it would be a peculiar proposition to assert that, in any situation of this sort, an attorney must bring forward a rebuttal expert or be automatically deemed deficient" (GH Tr II, 62). The trial court found that such a decision depends on the case, and stated, "in this

case, I don't see that there is clear evidence that the failure of Mr. Nunzio to do so falls below objective standards of performance by counsel of this community or others with which I'm familiar" (GH Tr II, 62). The trial court then found that even had counsel's performance been deemed deficient, it would then be difficult to find that "but for" that deficiency a different outcome would have been probable for the reasons suggested by the prosecutor (GH Tr II, 62). In short, the trial court appropriately considered the testimony and evidence, made credibility determinations, and found trial counsel's explanations of his decisions reasonable rather than ineffective.

#### **RELIEF REQUESTED**

WHEREFORE, for the reasons stated herein, the People respectfully pray that the conviction and sentence entered in this cause by the Circuit Court for the County of Kent be **AFFIRMED**.

Respectfully submitted,

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Kent County Prosecuting Attorney

Timothy K. McMorrow (P 25386)  
Chief Appellate Attorney

Dated: December 27, 2013

By: /s/ Kimberly M. Manns

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Kimberly M. Manns (P 67127)  
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