

ORIGINAL

**STATE OF MICHIGAN
IN THE SUPREME COURT**

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

LORINDA IRENE SWAIN,
Defendant-Appellant.

Supreme Court No. 150994
Court of Appeals No. 314564
Circuit Court No. 2001-004547-FC

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**PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF APPELLATE JURISDICTION
AND GROUNDS FOR APPEAL

Defendant-Appellant (Swain) applies for leave to appeal from the December 11, 2014 opinion of the Michigan Court of Appeals reversing the trial court's order granting Defendant relief in response to her most-recent successive motion for relief from judgment.¹ See Appendix A: *People v Swain*, unpublished opinion of the Michigan Court of Appeals dated February 5, 2015 (Docket No. 314564). Swain has not set forth sufficient grounds in her application, pursuant to MCR 7.302(B), that the decision of the Michigan Court of Appeals is clearly erroneous or that the decision conflicts with the decisions of the Michigan Court of Appeals, or this Court. Swain's application for leave to appeal, and all requests for alternative or additional relief, should be denied.

¹ The Michigan Court of Appeals vacated its opinion, issuing an opinion on February 5, 2015, omitting language on page 8 from its quote to *People v Swain*, 288 Mich App at 641-642.

COUNTER-STATEMENT OF QUESTIONS

- I. A defendant seeking relief from judgment under MCR 6.500 et. seq. is restricted to filing one motion unless the defendant can establish that she meets one of two specific exceptions to this restriction. Did the Court of Appeals clearly err in its opinion when it determined the trial court abused its discretion in granting Swain's successive motion for relief from judgment where neither exception in MCR 6.502(G) applies?**

The Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

Plaintiff-Appellee answers, "No."

- II. A conviction that is no longer subject to appeal under MCR 7.200 or MCR 7.300 may only be challenged in accordance with the procedure set forth in Subchapter 6.500 of the Michigan Court Rules. Did the Court of Appeals clearly err in its opinion when it determined the trial court abused its discretion when it applied inapplicable law to this matter, inappropriately granting Swain relief from judgment?**

The Court of Appeals answered, "No."

Defendant-Appellant answers, "Yes."

Plaintiff-Appellee answers, "No."

INTRODUCTION

This case is the quintessential example of what lack of finality in criminal judgments looks like. Swain was convicted by jury in 2002 for the acts of criminal sexual conduct she perpetrated on her son that he twice testified under oath about. Swain's convictions were affirmed on direct appeal, and the trial court denied her subsequent motion for new trial and original motion for relief from judgment. However, since that time, this case has been the subject of extensive post-appeal litigation.

Despite the language of the court rules restricting a defendant to one motion for relief from judgment, Swain has filed multiple post-appeal motions, all including significantly similar claims, which, stripped down, revolve around the victim's credibility and the defendant's attempts to discredit his testimony at trial that she molested him when he was a child.

After testifying at the preliminary examination (where special procedures were permitted) R.S. struggled with testifying against his mother at trial. In one of the more recent evidentiary hearings, the assistant prosecutor who tried this case explained that, after R.S. seemed to be struggling, there was a recess and she talked to R.S., telling him if nothing happened to him, he needed to say so now, and that he would not be in trouble if he did so, and further:

Question: And had he maintained the fact that that hadn't happened, if he was adamant that this didn't happen?

Answer: My duty as a prosecutor is to seek justice, and I would have dismissed the case at that point as I have done in other cases.

Question: Did [R.S.] tell you that it didn't happen?

Answer: That is not what he told me . . . When I said [R.S.] you need to tell me if this didn't happen to you, you won't be in trouble, but I need to know

that now. I said, on the other hand, if this did happen to you, this is your opportunity to tell people that your mother did it to you. And I let him make that decision.

Question: Did he make a decision?

Answer: He did.

Question: What was the decision?

Answer: He told me I want to go back in the courtroom and tell about what she did to me, and that's what he did.

(4/26/12 Evid Hr'g Tr, pp 93-95.) The trial prosecutor also said she "asked him did this happen to you, why did you say it didn't happen, he advised me that he said it didn't happen because he wanted them [relatives] to stop bothering him about it." (4/26/12 Evid Hr'g Tr, pp 91-92.)

Over a decade after her jury trial, Swain seeks leave to appeal from the Court of Appeals' reversal of the trial court's grant of relief in response to Swain's most recent successive motion for relief from judgment. The Court should deny the application for leave to appeal, and all related requests for relief.

COUNTER-STATEMENT OF FACTS

In light of the extensive history of this case, the People set forth the following statement of facts and procedural history, summarizing material events and facts, including others within the arguments below as they relate to the issues raised on appeal. See also *People v Swain*, 288 Mich App 609, 612-617; 794 NW2d 92 (outlining the facts and procedural history of the first several years of this case).

Material Case History

In August, 2002, Swain was convicted by jury of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for acts perpetrated on her son, R.S. Her convictions were affirmed on direct appeal. *People v Swain*, 2004 WL 345450, at *1-3 (Mich App 2004) See Appendix B: *People v Swain*, unpublished opinion of the Michigan Court of Appeals dated February 24, 2004 (Docket No. 244804). Years later, and after filing a motion for relief from judgment under MCR 6.500 et. seq., and various other post-appeal motions, Swain filed a successive motion for relief from judgment. Upon order of the trial court, the People filed a response, asking the court to dismiss the successive motion for relief from judgment, as improperly filed under MCR 6.502(G). But the trial court granted Swain relief from judgment, which the Michigan Court of Appeals subsequently determined was an abuse of the trial court's discretion. *People v Swain*, 288 Mich App 609; 794 NW2d 92 (2010). This Court denied Swain's application for leave to appeal, *People v Swain*, 488 Mich 992; 791 NW2d 288 (2010), and motion for reconsideration. *People v Swain*, 489 Mich 902; 796 NW2d 257 (2011).

Most recently (and germane here), Swain supplemented her successive motion for relief from judgment and requested an additional evidentiary hearing. The crux of this matter involved Swain's assertion that there was newly discovered evidence involving her boyfriend at the time of

the crimes and that the prosecution violated *Brady v Maryland*, 373 US 83; 83 S Ct. 1194 (1963) regarding this purported newly discovered evidence.² See Appendix C: *People v Swain*, unpublished opinion of the Michigan Court of Appeals dated October 25, 2011 (Docket No. 304228). The trial court granted Swain's "most recent motion for relief from judgment" on August 21, 2012. (8/21/12 Supplemental Finding on Motion for Relief from J, p 1.) The People sought leave to appeal and the Michigan Court of Appeals reversed. *People v Swain*, 2015 WL 521623, at*1-9 (2015). Swain seeks leave to appeal from that decision.

During the course of these proceedings, the People have sought to revoke Swain's bond, reinstate her convictions, and asked the Court of Appeals to remand this matter before a different circuit court judge. But these requests were denied and Swain remains out on bond.

The Trial

Ronal Swain, Swain's ex-husband, stated that he and Swain adopted two boys: C.S. (four months old) and R.S. (1 ½ years old) before they divorced in the early 1990s. (8/13/02 Trial Tr II, p 141.) The boys stayed with Swain, though Ronal Swain indicated he wanted custody but Swain made threats which apparently made this impossible. (Trial Tr II, 142-143.) Ronal Swain also indicated that his work schedule at the Michigan Department of Corrections would have made it difficult for him to have custody of the boys. Ronal Swain provided child support for the boys on a consistent basis though between 1994 and 1996, Ronal Swain acknowledged he did not see the boys as often. (Trial Tr II, pp 143, 154.) However, Ronal Swain gained full custody of the boys in 2000. (Trial Tr II, 146.) The boys were performing poorly at school at this time. (Trial Tr II, 147.) Ronal Swain's current wife, a teacher, enrolled the boys in special education programs.

² The supplementation of this motion – a motion which was deemed improperly granted – was also the subject of an appeal. *People v Swain*, 2011 WL 5067109, at *1-4 (Mich App 2011).

(Trial Tr II, 148.)

In June of 2001, Ronal Swain learned that R.S., had engaged in sexual activity, and spoke to R.S. about it and searched his bedroom. (Trial Tr II, 148.) R.S. had several pairs of his step-mother's underwear under his bed and in his closet. (Trial Tr II, 148.) At this time, R.S. disclosed to his father what his mother had done to him. (Trial Tr II, 149.) R.S. was also having trouble, fighting at school. Ronal Swain sought out help for R.S. which included counseling, though he continued to find women's underwear in his son's bedroom until the time of trial.

(Trial Tr II, 149-150.)

The sexual abuse and disclosure:

At trial, R.S. described being afraid to tell his father and step-mother about what Swain did to him. R.S. said he did not want his mother to get into trouble. (Trial Tr II, pp 174-175.) R.S. said he was asked about some things he did sexually with his cousin, and he thought he was going to get in trouble for this. (Trial Tr II, pp 181-182.) After this came to light, R.S. disclosed the abuse. (Trial Tr II, p 182.) But R.S. ran away from his father's home shortly before trial and went to his grandparents' home. (Trial Tr II, 194.) R.S. testified that family members were there who talked to R.S. about testifying at trial – telling R.S. to say nothing had happened. (Trial Tr II, 194.)

R.S. was fourteen years old at the time of trial. (Trial Tr II, p 156.) He was five years old when his mother began molesting him, recalling he was in the "young fives" program at school, and that the first time occurred in their living room. (Trial Tr II, 176, 191.) R.S. described the trailer where he lived with his mother and brother, C.S., as having two bedrooms: one the boys shared and slept on bunk beds. (Trial Tr II, p 158.) The boys rode the bus to school, but, sometimes, Swain sent C.S. outside while R.S. waited inside with Swain. (Trial Tr II, p 159.)

Swain helped R.S. get dressed. (Trial Tr II, p 160.) R.S. affirmed something happened with his private part and his mother; but, R.S. said he could not tell what happened. Later, R.S. stated he did not remember anything else. (Trial Tr II, p 161.) After the jury was excused, R.S. admitted he was scared to testify in front of Swain and he could not testify while she sat right there, before him. (Trial Tr II, p 162.)³

After the jury returned, R.S. continued his testimony, stating he did remember what Swain had done to him but he did not want to say it out loud. While his brother was outside, R.S. said Swain would help him change his clothes, putting her mouth on his penis. C.S. would knock on the door when the bus was coming, and Swain would stop abruptly and get R.S. dressed. R.S. testified at trial that this happened every day during the week. Swain told R.S. not to tell anyone about this because she would get into a lot of trouble. (Trial Tr II, pp 167-168, 174.)

Between 1995 and 1996, R.S., C.S. and Swain moved in with Swain's parents where they shared a bedroom. (Trial Tr II, pp 168-169.) There was a queen-size bed and one small bed in the room they shared. C.S. slept alone in the small bed while R.S. and Swain slept in the queen-size bed together. R.S. wore boxer shorts to bed while Swain slept in the nude. (Trial Tr II, 170-171.) But if Swain heard her father coming up the stairs to check on them, she would get dressed. R.S. said while he was sleeping, he would feel spit on his penis, but he could not really describe the things that happened while he was sleeping. At times, R.S. would lie to Swain, telling her that he would be upstairs in a minute, but then wait for her to fall asleep before going to bed. Otherwise, he said he would fall asleep downstairs to avoid sharing a bed with his mother. (Trial Tr II, pp 171-172.)

³ The prosecution filed a motion for special procedures, asking to close the courtroom to the public and Swain's family who were present, but the request was denied, though individuals in the courtroom apparently were making gestures while R.S. testified. (Trial Tr II, pp 163-166.)

When asked at trial whether Swain treated the boys differently, R.S. testified that Swain treated “me like a boyfriend and treat[ed] [C.S.] like a slave.” (Trial Tr II, p 173.) C.S. did the majority of the chores, while R.S. barely did any. Swain gave R.S. more money and let R.S. drive the car, though he was not old enough to drive. Swain kissed C.S. on the forehead or cheek but kissed R.S. on the lips. (Trial Tr II, p 174.)

C.S. was thirteen years old when he testified at trial. (Trial Tr IV, p 12.) C.S. recalled that he would sometimes wait for the school bus outside, alone, and then would yell to his brother when the bus arrived. (Trial Tr IV, p 14.) C.S. also said Swain treated he and his brother differently – C.S. said Swain gave R.S. more money and that she “treat[ed] [R.S.] like a boyfriend.” (Trial Tr IV, 15.) Swain made C.S. do more chores than R.S. She kissed C.S. on the cheek but kissed R.S. on the lips. (Trial Tr IV, p 15.) At their grandparents’ house, C.S. also recalled that he slept in his own bed while his mother and older brother shared a bed. (Trial Tr IV, p 16.) C.S. was mad about the disparate treatment he viewed, feeling that R.S. received special treatment. (Trial Tr IV, p 17.)

Dr. Haugen, Child Protective Services and Investigation:

Dr. Haugen testified during trial as an expert qualified in child sexual abuse and offenders. (Trial Tr III, 16-18.) R.S. was referred to Dr. Haugen in August, 2001, because R.S. was exhibiting inappropriate sexual behavior. (Trial Tr III, 28.) R.S. was exhibiting behavior that some sexually abused children do, including: sexually reactive behavior toward other children, compulsive masturbation, and hoarding. (Trial Tr III, 29.) Although Dr. Haugen agreed there may be other explanations for such behavior, Dr. Haugen stated that if a child were falsely accusing someone of abusing them, it would be unlikely that such behavioral manifestations would be present, behavior such as sexual inappropriateness, aggression, or anxiety. (Trial Tr IV,

p 8.)

Dr. Haugen also spoke to delay in reporting sexual abuse by a child. Several reasons may be attributed to the delay, such as embarrassment, feelings of blame or the consequences; the child may feel they will get in trouble. And in family situations, the child may feel a traumatic event might happen to the perpetrator, depending on the relationship, or the perpetrator may make threats. Dr. Haugen explained these cases can be very emotional such that it is easier to deny or avoid discussing the abuse. (Trial Tr III, 19.) Moreover, if the child and perpetrator share a close relationship, there could be a delay in reporting. Dr. Haugen explained that, in his experience, the perpetrator will typically “groom the victim” by spending extra time with them, nurturing them, give special gifts or privileges. (Trial Tr III, 20.)

Dr. Haugen testified that when the relationship is a parent - child one, the child may delay reporting to maintain the parental relationship, regardless of the abuse. (Trial Tr III, p 21.) However, once a child is removed from this environment, and begins to feel secure in their new environment, the child may disclose the abuse, if they have not blocked the memories. (Trial Tr III, p 22.) Dr. Haugen indicated that children who have been sexually abused may exhibit sexually inappropriate behavior, leading to the discovery of the abuse, though the child will often minimize the abuse. (Trial Tr III, p 26.)

Sarah Bleeker, employed with Sexual Assault Services, interviewed both R.S. and C.S. (Trial Tr IV, 22, 33.) When R.S. first met with a Child Protective Services (CPS) worker, he did not tell them what happened because he was nervous. But the second time, R.S. said he told them about numerous instances of penile - oral contact with his mother. (Trial Tr II, pp 186-187.) R.S. told Bleeker initially that he moved in with his father because Swain was being bad to him and his brother; that Swain was nice to him but not C.S.; that Swain slept in the nude with him even

though he asked her not to; and that when C.S. slept with them on occasion, Swain wore clothes. (Trial Tr II, 195-196.)

After receiving a complaint of criminal sexual conduct from CPS, Detective Guy Picketts was assigned to follow-up in August, 2001. (Trial Tr IV, pp 43-44.) Det. Picketts investigated instances at both 1669 Nine Mile Road and 6504 Oak Grove Road. (Trial Tr IV, p 44.) R.S. indicated that Swain performed oral sex on him when she changed his clothes. After lying him down on the living room floor, Swain would take off R.S.'s clothes and perform oral sex on him. (Trial Tr IV, p 58.) R.S. also indicated that while C.S. was in another room, Swain performed oral sex on him in the big bed in their bedroom. (Trial Tr IV, p 58-59.)

Det. Picketts met with Swain, advising her of his investigation. (Trial Tr IV, pp 45-46.) Swain asked about the type of complaint to which the detective said the complaint involved oral sex, though he did not complete his sentence before he said Swain became vocal and blurted out, "I never sucked my kid's dick." (Trial Tr IV, pp 47, 54.) Det. Picketts was surprised by this statement because he only stated that the complaint involved oral sex, not that she had been accused of performing that act on her son. Det. Picketts asked Swain what she had meant, and she said that is what oral sex was about. Swain also told the detective that her ex-husband and his wife were forcing the boys to make these statements. Swain also indicated that R.S. concocted a big lie, though she also said R.S. was special to her. (Trial Tr IV, pp 47-48.) Swain contradicted herself, telling Det. Picketts that R.S. "never lies." (Trial Tr IV, p 49.) Swain indicated she had slept with R.S. (Trial Tr IV, p 49.) She first told Det. Picketts that she changed R.S.'s clothes when he was little, not when he was eight or nine years old, but later admitted she did change his clothes when he was eight or nine to hurry him up. (Trial Tr IV, p 50.) Swain's inconsistencies struck Det. Picketts as significant because, as he stated, when people are telling the truth they do

not usually change their stories. (Trial Tr IV, pp 50-51.)

Deborah Charles was incarcerated at the time of Swain's trial, and had been for over a year for uttering and publishing. (Trial Tr IV, pp 63-64.) Charles was not promised anything for her testimony. (Trial Tr IV, p 64.) Charles said she had been molested as a child, and was married to an abusive man. (Trial Tr IV, p 66.)

Charles and Swain were incarcerated at the same facility. (Trial Tr IV, p 68-69.) Charles met Swain on their way outside when she gave Swain a pair of gloves. Swain asked Charles to join her outside. (Trial Tr IV, p 70.) Charles described Swain as a fast talker and edgy. Swain asked Charles what she was incarcerated for, so Charles asked Swain the same question. Swain told Charles that: "They're saying that I sucked my son's dick. I didn't suck that little bastard's dick." (Trial Tr IV, p 71.) Charles said Swain mostly talked about her case in her fast and erratic manner, where Swain seemed nervous, frustrated, or in a state of "craziness." (Trial Tr IV, pp 71-74.)

After a time, Charles said Swain changed her initial denials, seemingly wanting to confide in Charles. Swain admitted to Charles that she had slept with her son while she was naked and that she had been prostituting herself to support her crack cocaine addiction. Charles said as Swain grew more comfortable with her, she admitted she did have oral sex with R.S. Swain told Charles it was because she was on crack, and, at times, did not know what she was doing. (Trial Tr IV, pp 75-76.) Charles said it was "quite eerie" how Swain referred to her son's appearance, admitting to Charles that she would kiss R.S. on the lips, but C.S. on the cheek because R.S. was more attractive and she could not help herself. (Trial Tr IV, pp 76-77.)

After learning that Charles was a potential witness in her upcoming trial, Charles said that Swain told her she would be sorry if she testified. Swain also told Charles she did not understand,

that R.S. would change his mind once he became bored of his dad and step-mother and would want to go back to her. (Trial Tr IV, pp 86-87.) Charles said she continued to receive threats from Swain regarding her testifying and other inmates threatened Charles, telling her she had a loyalty to a fellow inmate. (Trial Tr. IV, pp 87-89.) At one point, Swain gave Charles a paper to sign, saying she knew nothing and would not testify, but Charles said she would not sign it. (Trial Tr IV, p 90.) Donna Trapani was present at this time, saw the paper Swain wanted Charles to sign, saying something like “sign this saying I didn’t say that. . .” (Trial Tr VI, pp 93-94.) Trapani said Swain seemed upset and was talking very fast, going on and on. (Trial Tr VI, p 94.)

Swain testifies at trial:

Swain testified on her own behalf at trial. But before she did so, out of the presence of the jury, the prosecution asked the court to inform Swain not to mention the fact that she took a polygraph conducted by the Michigan State Police which she failed, though for some reason Swain “thinks she passed the polygraph” and she “blurted [that] out” during a discussion. Counsel stated Swain was aware that she was not to mention the polygraph. (Trial Tr V, pp 4-5.) On her own behalf, Swain testified that due to her divorce and depression she began using crack. (Trial Tr V, p 22.) After her boyfriend left, Swain said she and her sons lived alone. (Trial Tr V, pp 26-27.) Swain said she stopped taking drugs for a time, but she began using crack cocaine again after another failed relationship. (Trial Tr V, pp 29-30.) When the boys went to school, Swain said that she took them to school, but at times her boyfriend would do so, and other times they rode the bus to school, but it depended on the circumstances of the day. (Trial Tr V, pp 31-32.)

After moving to Kentucky for a few months, Swain and her sons moved back to her parents’ home. (Trial Tr V, pp 37-38.) Although there were other rooms in the house, and she

said she did not want them to sleep in her room, that was often what happened. (Trial Tr Vi, p 39.) Swain began using drugs again and stealing from her parents. (Trial Tr V, pp 41-42.) She was on probation and violated a few times. During this time while she was on and off probation, in and out of treatment programs or jail, R.S. and C.S. stayed with her parents, and then moved in with their father, Ronal Swain, and his wife. (Trial Tr V, 46.) After she fled in the face of another probation violation, Swain was sent to prison. (Trial Tr V, pp 50-51.)

Swain testified she had agreed to waive her Miranda rights and speak to Det. Picketts who told her it was regarding a criminal sexual conduct complaint. (Trial Tr V, p 57.) Swain said Det. Picketts told her that her son was saying she had oral sex with him. Swain denied the allegations, also denying the possibility that she was high on crack and committed these acts, explaining that she only smoked crack in crack houses or other people's homes, not around her children, and that she prostituted herself in the city of Battle Creek. (Trial Tr VI, 6, 8.) Swain denied ever sending C.S. outside to wait for the bus, but that if he ever did go outside it was probably because his friend was out there, but "they didn't ever go before the bus got there . . . they would go together . . ." and her neighbor and the bus driver could verify that. (Trial Tr VI, p 6.) But Swain acknowledged there were times the boys missed school, as children do. (Trial Tr VI 56.)

Swain said that R.S. had ADHD and required more attention than her younger son. (Trial Tr V, p 32.) When asked if R.S. required additional discipline, Swain answered that she "probably loved him too much for his own good and . . . I don't think I disciplined him like I should have." (Trial Tr V, pp 34-35.) Swain read a letter addressed to her, from C.S.: "Stop being a big baby. It makes me mad when you ran around all those nights. I hate when you boss me around and talk bad about my dad. I hate it when you lie to us. Tell everyone to leave us alone until you get out of prison, from [C.S.]". (Trial Tr VI, p 14.)

Additional facts will be set forth below as they relate to the issues raised.

ARGUMENT

- I. The Court of Appeals did not clearly err in determining the trial court abused its discretion in granting Swain's supplemental successive motion for relief from judgment where neither exception set forth in the court rule under MCR 6.502(G) applies. A defendant seeking relief from judgment must adhere to the procedure established by the Court and set forth in the court rules; the trial court abused its discretion in granting Swain relief from judgment.**

Standard of Review:

A trial court's decision to grant a motion for relief from judgment is reviewed for an abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). Such an abuse of discretion occurs when "the court chooses an outcome that falls outside the range of reasonable and principled outcomes[,]" *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008), or an abuse of discretion may occur when the court "makes an error of law." *People v Swain*, 288 Mich App 609, 628-629 (2010). But, "[t]he interpretation of a court rule is a question of law that is reviewed de novo." *Id.* (Citing *People v Hawkins*, 468 Mich 488, 497; 668 NW2d 602 (2003)).

Discussion:

The trial court granted Swain's successive motion for relief from judgment based on three theories: *Brady v Maryland*, MCL 770.1, and actual innocence under *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993) (a habeas corpus case originating out of a capital punishment state). (8/21/12 Supplemental Finding on Motion for Relief from J, p 12.) The Court of Appeals correctly determined that the trial court abused its discretion in doing so and this Court should deny Swain's application for leave to appeal.

- A. The Court of Appeals did not clearly err in determining the trial court abused its discretion in granting Swain relief from judgment where her motion was barred by MCR 6.502(G)**

A defendant seeking relief from judgment under Subchapter 6.500 of the court rules is limited to “one and only one motion[.]” MCR 6.502(G)(1). There are two exceptions to this restriction: (1) the subsequent motion is based on a retroactive change in the law, or (2) on newly discovered evidence. MCR 6.502(G)(2). If neither exception applies, the trial court should take no further action and reject the successive motion. *People v Swain*, 288 Mich App 609, 632-633 (2010); MCR 6.502(G)(1). This the Court of Appeals properly determined the trial court failed to do. The Court of Appeals correctly determined that the evidence at the heart of Swain’s current claims – the potential testimony her then-boyfriend, Dennis Book, who stayed with Swain and her sons at one of the two relevant locations – was not new and the trial court abused its discretion in granting her successive motion for relief from judgment on this basis.

This Court has made the “unremarkable observation” that when a “defendant possesses knowledge of evidence at the time of trial, that evidence cannot be characterized as ‘newly discovered’ under the first part of the *Cress* test.” *People v Rao*, 491 Mich 271, 273; 815 NW2d 105 (2012). Swain testified at trial there was a time that “Dennis Book” lived with her and her sons at the trailer which he ultimately bought from Swain’s parents. (Trial Tr Vol V, pp 29-30).

As Swain was familiar with Book at the time of trial, she could have called him to testify as a trial witness in support of her defense if she chose. However, Swain maintains that the Court of Appeals incorrectly determined Book’s potential testimony to be the evidence in question, as opposed to Swain’s position that Book allegedly told Detective Guy Picketts before trial that he did not witness any abuse and that Book would have testified favorably to the defense, unbeknownst to her at the time. *Swain*, 2015 WL 521623, at *5.

The evidentiary hearing shows that Swain’s trial counsel was aware of Book’s potential to provide testimony as does Swain’s father who testified he also knew Swain and Book lived

together during the time R.S. said she was molesting him, and they discussed whether Book would testify. (Evidentiary Hr'g Tr IV, pp 5, 43-45.) As pointed out by the trial court in its Findings, although Book said he was extremely angry with Swain, he also said he would have testified at trial if served a subpoena. 8/21/12 Supplemental Finding at 4. This finding is incongruous with the trial court's later finding that Swain could not be expected to discover "Book's favorable testimony on her own[.]" in light of their apparently nasty breakup. *Id.* at 6 ("[I]t is difficult to contemplate how she could reasonably have done so considering their acrimonious breakup in 2000 and the evidence of his continued enmity toward her at the time of the trial . . .").

That the trial court equated refusing an ex-girlfriend's communications to a court summons in evaluating whether Book's testimony was evidence available to the defense is an example of the trial court's abuse of discretion. In contrast, the Court of Appeals correctly determined that whether Book was a favorable or unfavorable witness was not evidence, rather, it was his "knowledge of events and the people involved[.]" that was. *Swain*, 2015 WL 521623, at *4 (citing *United States v Turns*, 198 F3d 584, 588 (CA6, 2000)). As succinctly stated below, "That defendant ultimately opted, as a strategic decision, not to call Book because of his hostility toward her does not render his information newly discovered." *Swain*, 2015 WL 521623, at *3 (citing *People v Newhouse*, 104 Mich App 380, 386; 304 NW2d 590 (1981)).

Swain asserts the Court of Appeals incorrectly interpreted MCR 6.502(G) and utilized the factors set forth by the Court in *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003) to "determine whether evidence is newly discovered[.]" *Swain*, 2015 WL 521623, at *1. Swain failed to support her argument below with "any authority for the proposition that the standards for evaluating whether evidence is newly discovered for purposes of MCR 6.502(G)(2)

are in applicable in cases involving constitutional claims[.]” *Swain*, 2015 WL 521623, at *4.

Under these circumstances, where a party fails to support an argument with proper authority or explanation, the argument is deemed abandoned. *Goolsby v City of Detroit*, 419 Mich 651, 656 n.1; 358 NW2d 856 (1984) (citations therein omitted). But, the Court of Appeals did not clearly err in looking to this Court’s precedent for determining what constitutes newly discovered evidence when analyzing whether Swain presented newly discovered evidence.

In any event, and despite failure to support her argument with authority below, the Court of Appeals continued to analyze Swain’s *Brady* claim, finding even if she did not have to satisfy the requirements of establishing newly discovered evidence, as set forth in *Cress*, her claim still failed. *Swain*, 2015 WL 521623, at *4. Although the Court of Appeals did not err in applying this Court’s test for newly discovered evidence, the Court of Appeals did not clearly err in determining Swain’s claim failed under *Brady*.

B. The Court of Appeals did not clearly err in determining Swain’s *Brady v Maryland*, 373 US 83; 83 S Ct 1194 (1963) claim failed – the trial court abused its discretion in granting the successive motion for relief from judgment

Swain also asserts the Court of Appeals erroneously reversed the trial court’s grant based on her claim that the prosecution suppressed exculpatory evidence, contrary to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Swain asserts the Court of Appeals’ reasoning is foreclosed by *Brady*; that it places an improper burden on the defendant to prove her claim and that it leads to absurd results. Contrary to her arguments, the Court of Appeals correctly determined the trial court abused its discretion in finding Swain was entitled to relief from judgment based on her *Brady* claim.

“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of

the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 US at 87. As recently clarified by this Court, “the components of a ‘true *Brady* violation,’” are: (1) the prosecution suppressed evidence; (2) favorable to the accused; when (3) “viewed in its totality, is material.” *People v Chenault*, 495 Mich 142, 150, 156; 845 NW2d 731 (2014). The defendant bears the burden of establishing a *Brady* violation. See *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d (2007).

The trial court improperly granted Swain relief based on her claim that there was an alleged phone call between Detective Guy Picketts and Dennis Book that was withheld from the defense. The only support for the trial court’s finding was from Book – there was no police report indicating that such a phone call was made, and the People averred that this never took place. The assistant prosecuting attorney who tried this case testified at the evidentiary hearing that she and Det. Picketts had a close working relationship and that Det. Picketts would have communicated such an interview with her, and he did not. (4/26/12 Evid. Hr’g Tr, pp 81, 98-99.) Det. Picketts died before Swain raised this claim and was unable to provide testimony on this point. See 8/21/12 Supplemental Finding on Motion for Relief from J, p 2. The People continue to aver that the prosecution did not withhold evidence from the defense and do not concede that the alleged phone call occurred.

But, as discussed above, the defense was aware of Book’s existence. (4/26/12 Evidentiary Hr’g Tr, pp 14-15) (trial counsel affirms he knew Book was present in the home during the time the sexual abuse occurred). And Swain was aware that Book was in the home with her and her sons. In short, Swain was intimately involved with Book and it strains common sense to imply that she would not know how he would have testified if asked whether he witnessed her molesting R.S., begrudgingly or not. In fact, the trial court recognized that the

defense called another of Swain's boyfriends at trial, Steven Way, who lived with Swain during that time period. See 8/21/12 Supplemental Finding on Motion for Relief from J, p 3. And, as even the trial court stated, recognizing the prosecution's position that, "[c]ertainly there are issues concerning [Book's] credibility. . ." 8/21/12 Supplemental Finding on Motion for Relief from J, p 3. In short, the People continue to dispute that evidence favorable to the defense was suppressed. The Court of Appeals properly determined Swain's *Brady* claim failed.

Moreover, the Court of Appeals did not clearly err in finding that a *Brady* violation does not occur when the information is known to the defense. *Swain*, 2015 WL 521623, at *5. Even assuming, for argument sake only, that there was a Picketts - Book telephone conversation that took place – despite the trial prosecutor's evidentiary hearing testimony indicating the contrary – both Swain and the defense were aware of Book and, where “evidence was available to [the defendant] from other sources than the state, and he was aware of the essential facts necessary for him to obtain that evidence, the *Brady* rule does not apply.” *Spirko v Mitchell*, 368 F3d 608, 611 (CA 6, 2004). The fact that Book and Swain broke up by the time of trial and it may have been unpleasant or even difficult for Swain to enlist Book's support does not create a *Brady* claim. See *Swain*, 2015 WL 521623, at *5 (citing *Benge v Johnson*, 474 F3d 236, 244 (CA 6, 2007) (witness's refusal to assist defendant was not the prosecution's doing and did not create a *Brady* violation).

But, and assuming again for argument sake, that such a phone call took place, it would not have been admissible at trial, as Swain appropriately conceded below. *Swain*, 2015 WL 521623, at *3 (As defendant concedes on appeal, given that the statements to Detective Picketts constitute hearsay, they would not be admissible. MRE 802"). As further stated by the Court of Appeals:

Thus, by itself, the conversation would not make a different result probable on retrial. Instead, the only way the conversation with Detective Picketts can be remotely conceived as providing evidence that could potentially affect the outcome of the trial would be if the “evidence” is Book’s personal knowledge of events in the trailer [n. 2]. However, *because, as discussed, defendant already knew of Book’s potential testimony, she cannot claim that the information is newly discovered by virtue of learning about Book’s conversation with Detective Picketts . . .*

Swain, 2015 WL 521623, at *3 (emphasis added).

Moreover, assuming Book were to testify similarly to what he testified to at the evidentiary hearing, his testimony was of nominal value at best, likely cumulative, and would not render a different result probable on retrial. Book acknowledged at the evidentiary hearing that he was not at the trailer every day, though he said he was there as much as possible. (Evidentiary Hr’g Tr III, at 31-33.) Moreover, Steven Way, another former boyfriend, testified on behalf of the defense at trial, testifying that when he was in the home he did not witness any sexual abuse or anything improper. (8/14/02 Trial Tr, pp 156-159.) Evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985). A new trial is not required “whenever ‘a combing of the prosecutors’ files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . .” *Giglio v United States*, 405 U.S. 150, 154 (citation omitted). Swain’s *Brady* claim fails on all counts.

In sum, the trial court abused its discretion in granting Swain’s successive motion for relief from judgment based on her alleged *Brady* violation under MCR 6.502(G). The Court of Appeals did not clearly err when it reversed the trial court, and Swain’s application for leave to appeal should be denied.

ARGUMENT

- II. A conviction that is no longer subject to appeal under MCR 7.200 or MCR 7.300 may only be challenged in accordance with the procedure set forth in Subchapter 6.500 of the Michigan Court Rules. The Court of Appeals did not clearly err in its opinion reversing the trial court because the trial court abused its discretion when it applied inapplicable law to this matter, inappropriately granting Swain relief from judgment.**

Standard of Review:

A trial court's decision to grant a motion for relief from judgment is reviewed for an abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). Such an abuse of discretion occurs when "the court chooses an outcome that falls outside the range of reasonable and principled outcomes[.]" *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008), or an abuse of discretion may occur when the court "makes an error of law." *People v Swain*, 288 Mich App 609, 628-629 (2010). But, "[t]he interpretation of a court rule is a question of law that is reviewed de novo." *Id.* (Citing *People v Hawkins*, 468 Mich 488, 497; 668 NW2d 602 (2003)).

Discussion:

In addition to determining that the trial court abused its discretion in granting Swain's successive motion for relief from judgment under MCR 6.502(G) and *Brady v Maryland*, as discussed above, the Court of Appeals did not clearly err in determining that the trial court abused its discretion in basing its decision to grant relief based on MCL 770.1 and *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993).

- A. The Court of Appeals did not clearly err in determining the trial court abused its discretion in granting a successive motion for relief from judgment based on *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d (1993)**

The trial court's reliance on federal habeas corpus case law in support of its ruling was misplaced. See 8/21/12 Supplemental Finding on Motion for Relief from J, p 11 (trial court recognizing that authority constitutes "a federal habeas corpus action in a death penalty case in the state of Texas.") And this Court should reject Swain's invitation to create law that the Supreme Court has rejected.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which "prevent[s] federal habeas 'retrials'" to ensure state-court convictions are given full effect to the extent possible under the law. *Bell v Cone*, 535 US 685, 693-694 (2002). More recently, the Supreme Court has reemphasized that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v Richter*, 562 US 86; 131 S Ct 770, 786 (2011) (quotation omitted). Although the People contend that trial court's reliance on *Herrera v Collins* was misplaced, it is also clear that the Supreme Court has, to date, not recognized that an independent claim of actual innocence would entitle a petitioner to habeas relief; therefore, the trial court abused its discretion in granting Swain's successive motion for relief from judgment on this basis.

In *Herrera v Collins*, 506 U.S. 390, 399 (1993), the Supreme Court stressed that after a defendant has been convicted at trial, "the presumption of innocence disappears." "Thus, in the eyes of the law, petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted. . ." by law. *Id.* at 399-400. Therefore, claims of "actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation. . ." *Id.* at 400. Accord *Cress v Palmer*, 484 F.3d 844, 854 (quoting *Herrera*, 506 US at 400).

More recently, the Supreme Court granted certiorari to determine whether a petitioner claiming actual innocence was nonetheless barred by AEDPA's statute of limitations, 28 USC § 2244(d). *McQuiggan v Perkins*, ___ US ___; 133 S Ct 1924, 1931; 185 L Ed 2d 1019 (2013). In answering the question, the Supreme Court cited to its former opinion in *Herrera, supra*, (the authority relied on by the trial court), stating that it has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." *McQuiggan*, 133 S Ct at 1931 (citing *Herrera*, 506 US at 404-405).

In short, although this line of precedent pertains to federal habeas corpus law, the Supreme Court has not established that a petitioner may successfully seek habeas relief based on a freestanding claim of actual innocence. The trial court abused its discretion in granting Swain's successive motion for relief from judgment on this basis.

B. The trial court abused its discretion in granting Swain relief from judgment pursuant to MCL 770.1

The Court of Appeals did not clearly err in determining that the trial court improperly granted Swain's successive motion for relief from judgment pursuant to MCL 770.1 because, in short, "the time for filing motions for a new trial under MCL 770.1 had long since passed." *Swain*, 2015 WL 521623, at *6 (citing MCL 770.2(1)) ("in a case appealable by right . . . a motion for a new trial shall be made within 60 days. . ."). As stated at the outset of Subchapter 6.500 of the court rules, "Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court . . . not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter." MCR 6.501 (Scope of subchapter).

In sum, the Court of Appeals did not clearly err in determining that the trial court abused its discretion in granting Swain's most recent successive motion for relief from judgment. All three of the legal theories upon which the trial court based its decision are flawed, and contrary to the court rules pertaining to motions for relief from judgment, set forth in the court rules. The application for leave to appeal should be denied.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Appellee, the People of the State of Michigan, respectfully requests that this Honorable Court deny Defendant-Appellant's application for leave to appeal and all requests for relief, thereby permitting enforcement of her conviction and judgment of sentence.

Respectfully submitted,

David Gilbert (P41934)
Calhoun County Prosecuting Attorney

DATED: February _____, 2015

By: _____
Jennifer K. Clark (P53159)
Assistant Prosecuting Attorney
161 East Michigan Avenue
Battle Creek, MI 49014-4066
(269) 969-6980

APPENDIX A

People v Lorinda Irene Swain
Michigan Court of Appeals Docket No. 314564
Unpublished Opinion dated February 5, 2015

APPENDIX B

People v Lorinda Irene Swain
Michigan Court of Appeals Docket No. 244804
Unpublished Opinion dated February 24, 2004

APPENDIX C

People v Lorinda Irene Swain
Michigan Court of Appeals Docket No. 304228
Unpublished Opinion dated October 25, 2011

**STATE OF MICHIGAN
IN THE SUPREME COURT**

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

LORINDA IRENE SWAIN,
Defendant-Appellant.

**Supreme Court No. 150994
Court of Appeals No. 314564
Circuit Court No. 2001-004547-FC**

DAVID E. GILBERT (P41934)
Calhoun County Prosecuting Attorney
161 East Michigan Avenue
Battle Creek, MI 49014-4066
(269) 969-6980

DAVID A. MORAN (P45353)
Attorney for Defendant-Appellant
701 South State Street
Ann Arbor, MI 48109
(734) 763-9353

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF CALHOUN)

Tina M. Mahoney, being first duly sworn, deposes and states that on **this _____ day of February 2015**, she served a copy of the **Plaintiff-Appellee's Brief in Opposition to Defendant-Appellant's Application for Leave to Appeal and a Proof of Service** upon **Mr. David A. Moran, Attorney for Defendant-Appellant**, by mailing each of the said documents in an envelope bearing first-class postage, fully prepaid, at his address of record, as stated above.

Further, deponent saith not.

Tina M. Mahoney, Deponent

Subscribed and sworn to before me **this _____ day of February 2015.**

Jenny L. Potter - Notary Public
Calhoun County, Michigan
My commission expires: 11-07-2019

February 19, 2015

Clerk of the Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

RE: PEOPLE v LORINDA IRENE SWAIN
Supreme Court No. 150994
Court of Appeals No. 314564
37th Circuit Court No. 2001-004547-FC

Dear Clerk:

Enclosed for filing with the Court is the original and seven (7) copies of the Plaintiff-Appellee's Brief in Opposition to Defendant-Appellant's Application for Leave to Appeal and a Proof of Service regarding the above-captioned case. A copy of each document has been mailed under copy of this letter to Mr. David A. Moran, Attorney for Defendant-Appellant, pursuant to the terms of the Proof of Service.

Please do not hesitate to contact me if you have any questions or concerns regarding this matter. Thank you for your time and consideration.

Sincerely,

Tina M. Mahoney
Appellate Paralegal

Enclosures

cc: Mr. David A. Moran, Attorney for Defendant-Appellant

STATE OF MICHIGAN
IN THE SUPREME COURT

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DAVID E. GILBERT (P41934)
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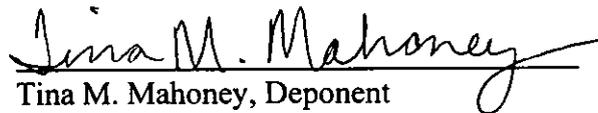
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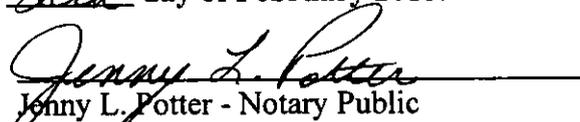
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Calhoun County, Michigan
My commission expires: 11-07-2019





THE OFFICE OF
DAVID E. GILBERT
PROSECUTING ATTORNEY
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DANIEL R. BUSCHER
CHIEF ASSISTANT
PROSECUTING ATTORNEY

February 19, 2015

Clerk of the Michigan Supreme Court
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

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Supreme Court No. 150994
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Sincerely,

Tina M. Mahoney

Tina M. Mahoney
Appellate Paralegal

Enclosures

cc: Mr. David A. Moran, Attorney for Defendant-Appellant

