

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

FOR PUBLICATION  
April 5, 2011

v

JEFFREY PAUL GIOGLIO,  
  
Defendant-Appellant.

No. 293629  
Kalamazoo Circuit Court  
LC No. 2008-001640-FH

Advance Sheets Version

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Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

K. F. KELLY, J. (*dissenting*).

I respectfully dissent from the majority’s conclusion that defendant was denied his Sixth Amendment right to counsel pursuant to *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). The majority completely misreads and misapplies *Cronic* and its progeny. In so doing, the majority reversibly errs. In my view, *Cronic* does not apply to the facts of this case, and the trial court properly applied the performance and prejudice test for claims of ineffective assistance of counsel as articulated in *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Moreover, the majority oversteps its authority by refusing to defer to the credibility determinations of the trial court and instead wrongfully substitutes its own preferred version of events to reach an outcome not warranted by either the facts or law. As the trial court properly determined, defendant failed to demonstrate that counsel’s performance was deficient or that he suffered prejudice as a result of her alleged errors. I would affirm.

I. BASIC FACTS

Defendant, the victim’s uncle, was charged with two counts of criminal sexual conduct in the second degree (CSC II) and one count of attempted CSC II. MCL 750.520c(1)(a) (victim under 13); MCL 750.520g(2). He was also subject to an enhanced sentence as a second habitual offender, MCL 769.10, having previously been convicted of assault with a dangerous weapon, MCL 750.82.

The events giving rise to the CSC II charges stem from sexual assaults committed by defendant against the victim when she was five years old and living with her grandmother. The first assault started when the victim went to wake up defendant so that he could mow the lawn. Defendant “French-kissed” her on the mouth as well as kissing her arms, legs, and neck. The

assault ended when her mother called out to her and she left defendant's room. The second assault occurred later that same day. Defendant took the victim behind the air conditioning unit, unzipped his pants, stuck his "private" through the zipper and made her touch his penis for 10 to 20 seconds. Thereafter, he made her lick his penis while he stated, "[Y]ou're doing it." The following day, defendant took the victim behind the couch, pulled down her pants and underwear and kissed her "private" area. The fourth assault occurred in the victim's bedroom. Defendant sat on a desk chair and told the victim to get on his lap and she did so facing him with her legs spread apart. He then folded down his pants and boxers and was trying to "stick up" his penis when her mother walked in. Both the defendant and victim jumped, and the victim's mother ordered defendant out of the house. While defendant was leaving the bedroom, the victim's mother saw that defendant's penis was erect.

At defendant's arraignment on the charges, he requested a court-appointed attorney. Counsel, Susan Prentice-Sao, was appointed to represent him. Before trial, counsel met with defendant on numerous occasions and spoke with him by telephone. She successfully moved for a forensic examination and a competency hearing. She engaged in extensive discussions with members of defendant's family and defendant's mental-health-care providers. She consulted with other attorneys on trial strategy both before and during the trial and reviewed testimony previously given by the prosecution's expert witness. She successfully persuaded the prosecution to offer defendant a plea deal in which defendant would receive a sentence of five years' tethered probation with no jail or prison time. Defendant rejected the offer, as was his right, because he did not want to register as a sex offender. During the trial, defense counsel conducted voir dire and excused more than one juror. She cross-examined witnesses, made objections, requested and received a cautionary instruction, and argued in closing that there were inconsistencies in the trial testimony and that the victim's version of the assaults was not worthy of belief.

The jury found defendant guilty on all three counts. The trial court sentenced him as a second habitual offender to serve 80 to 270 months in prison for his first CSC II conviction, to serve 60 to 270 months in prison for his second CSC II conviction, and to serve 18 to 90 months in prison for his conviction of attempted CSC II.

Two months after sentencing, the assistant prosecuting attorney assigned to the case wrote to the court administrator, expressing "concerns" about defendant's representation. Defense counsel rejected the assistant prosecuting attorney's "concerns." No further action was taken by the court administrator or the office of the prosecuting attorney, and the assistant prosecuting attorney apparently did not share her "concerns" with the Attorney Grievance Commission.

Defendant requested and received appellate counsel. Appellate counsel moved for a new trial based on ineffective assistance of counsel. In support of the motion, defendant relied upon the representations from the assistant prosecuting attorney's letter to the court administrator. The office of the prosecuting attorney repudiated the assistant prosecuting attorney's position and vigorously opposed the motion.

At the evidentiary hearing on the motion for a new trial, both the assistant prosecuting attorney and defense counsel testified and had sharply divergent memories of events and the conduct of the trial. In a written opinion, the trial court denied the motion:

Following a Jury Trial, the Defendant was convicted of two counts of Criminal Sexual Conduct-2<sup>nd</sup> Degree and one count of Attempted Criminal Sexual Conduct-2<sup>nd</sup> Degree. After the Trial, Assistant Prosecuting Attorney Christine Bourgeois wrote a Memorandum to the Court Administrator regarding the representation provided by the defense attorney. Defendant filed a Motion for New Trial. The Court heard arguments and testimony on February 26, 2010.

Defendant argues that his Sixth Amendment Rights were violated in this case as defense counsel failed to subject the prosecution's case to meaningful adversarial testing. In *United States v. Cronin*, 466 US 648, 658 (1984), the U.S. Supreme Court stated there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Such circumstances would arise "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing [and] that makes the adversary process itself presumptively unreliable. No specific showing of prejudice [would then be required]." (citation omitted) *Id.* at 659. Additionally, there may be an occasion when circumstances of such magnitude are present wherein, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." (citation omitted) *Id.* at 659 - 660.

The instant case does not contain the type of circumstances which call for an analysis under *Cronin*, supra. Rather, the Court looks to the test outlined in *Strickland v. Washington*, 466 US 668 (1984). First, a Defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Second, a reasonable probability must exist that, in the absence of counsel's errors, the outcome of the proceeding would have been different.

In this case, Defendant argues that defense counsel was ineffective in (1) failing to give an opening statement, (2) failing to cross-examine the minor victim, and (3) disclosing client confidences. Defendant outlined in detail various issues addressed by Assistant Prosecuting Attorney Christine Bourgeois in the Memorandum written by her after the Trial.

The Court sat through the trial, reviewed the parties' briefs and considered the arguments set forth by counsel. In determining whether there was ineffective assistance of counsel, a Defendant must overcome a strong presumption that the counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600 (2001). At the hearing on February 26, 2010, defense counsel outlined her background and experience as an attorney. She testified that she spoke with three other experienced attorneys, reviewed trial strategy books and

reviewed expert testimony in preparation for Defendant's Trial. She also testified as to her involvement/handling of child witnesses in other cases.

The Court concludes that it was reasonable for defense counsel to waive an opening statement. Since the Defendant did not testify, it would seem odd to give an opening statement, then rest and immediately proceed with closing arguments. Furthermore, it was reasonable for defense counsel not to question the minor victim. There are certainly pros and cons to consider when cross examining a young witness. Defense counsel's explanations for her actions were logical and reasonable. Defendant has failed to overcome the presumption that his attorney's actions constituted sound trial strategy.

Defendant also argues that his counsel violated the Rules of Professional Conduct, disclosed confidences and exhibited hostility toward him. At the hearing there was conflicting testimony from the Assistant Prosecuting Attorney and Defense Attorney. They had different views about the discussions/events that took place off the record throughout this case. It is unfortunate, but clear to this Court, that there was animosity and a lack of respect between the attorneys that tried the case. Given the testimony from defense counsel, the handling of matters outside of the Court lacked professionalism at times. However, the Court does not find that such actions rise to the level of ineffective assistance of counsel, or that defense counsels [sic] actions fell below an objective standard of reasonableness under prevailing professional norms.

Furthermore, given the evidence presented at trial, Defendant has not established a reasonable probability that the outcome of the Trial would have been different in the absence of defense counsels [sic] actions.

This appeal followed, alleging ineffective assistance of counsel because of two perceived errors: counsel's disclosure of client confidences and her failure to cross-examine the child victim.

## II. STANDARDS OF REVIEW

Claims of ineffective assistance present a mixed issue of fact and constitutional law, and the trial court must first determine the facts and then decide whether those facts demonstrate a violation of the defendant's constitutional right to the assistance of counsel. *People v Lewis (On Remand)*, 287 Mich App 356, 364; 788 NW2d 461 (2010). "When a defendant asserts that his assigned lawyer is not adequate or diligent . . . the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion." *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973).

We review the trial court's factual findings for clear error and review de novo its ultimate determination. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008) (quotation marks and citation omitted). In reviewing the trial court's determination, this Court must keep in mind "the special opportunity" of the trial court to judge the credibility of the witnesses who appeared

before it. MCR 2.613(C); *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). The trial judge’s resolution of a factual issue where there is conflicting testimony is entitled to deference. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

### III. ASSISTANCE OF COUNSEL—*CRONIC*

#### A. OVERVIEW

I disagree with the majority’s assertion that defendant was completely denied the assistance of counsel under *Cronic*. In my view, the majority improperly applies the presumption of prejudice based on defense counsel’s actions at trial because, when viewing the record as a whole, it cannot be said that defense counsel “entirely fail[ed] to subject the prosecution’s case to meaningful adversarial testing.” *Cronic*, 466 US at 659. In reality, the facts of this case warrant review under *Strickland*, the case under which, as the majority notes, “[m]ost claims of ineffective assistance of counsel are analyzed,” and not under *Cronic*. Specific instances of counsel’s performance are at issue here, not the whole adversarial process. Although the majority pays lip service to the fact that courts will rarely presume prejudice under *Cronic*, the majority ignores relevant case law and inflates its authority to support its contention that *Cronic* applies.

#### B. *CRONIC* AND ITS PROGENY

In *Cronic*, the defendant was indicted on several counts of mail fraud relating to the transfer of over \$9,400,000 in checks between numerous banks. *Cronic*, 466 US at 649. After the defendant’s retained counsel withdrew, the trial court appointed an inexperienced and young real estate lawyer as defense counsel. *Id.* Counsel was only permitted 25 days to prepare for the trial despite the fact that the government had over 4<sup>1</sup>/<sub>2</sub> years to investigate the case and had obtained and reviewed thousands of documents. *Id.* During trial, counsel put on no defense but did cross-examine the government’s witnesses. *Id.* at 651. On appeal, the United States Court of Appeals for the Tenth Circuit reversed the conviction because it “inferred” defendant’s constitutional right to the effective assistance of counsel had been violated. *Id.* at 652. The “inference” was based on “(1) [t]he time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.” *Id.* at 652 (quotation marks and citations omitted).

The Supreme Court of the United States rejected this “inferential” approach holding that only in the circumstances that no *actual* assistance has been provided has there been a constitutional violation. *Id.* at 654 (“If no actual ‘Assistance’ ‘for’ the accused’s ‘defence’ is provided, then the constitutional guarantee has been violated.”). The Supreme Court identified three circumstances in *Cronic*, 466 US at 659-660, where prejudice would be presumed because of the lack of actual assistance:

Most obvious, of course, is the complete denial of counsel. The presumption that counsel’s assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution’s case to meaningful

adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . .<sup>26</sup>

Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

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<sup>26</sup> Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. . . . [Citations and omitted.]

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The Supreme Court mandated that the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer. *Id.* at 657. If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance. *Id.* at 657 n 21, citing *Jones v Barnes*, 463 US 745; 103 S Ct 3308; 77 L Ed 2d 987 (1983) and *Morris v Slappy*, 461 US 1; 103 S Ct 1610; 75 L Ed 2d 610 (1983). Pursuant to *Cronic*, circumstances must indicate that it is unlikely that a defendant *could* have received effective assistance, not whether a defendant *did* receive effective assistance, the latter of which is evaluated under *Strickland*. *Cronic*, 466 US at 660-661.

The majority relies on the second exception in *Cronic*, 466 US at 659, to overturn defendant's conviction: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." The majority then examines specific instances in the trial to determine that, in its opinion, counsel failed to "meaningfully test" the prosecution's case.<sup>1</sup> The majority misunderstands the law.

In *Bell v Cone*, 535 US 685; 122 S Ct 1843; 152 L Ed 2d 914 (2002), the Supreme Court examined this second exception of *Cronic* and the meaning of the failure to subject the prosecution's case to meaningful adversarial testing:

When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, *we indicated that the*

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<sup>1</sup> The majority argues that counsel failed to provide *meaningful* adversarial testing without defining what *meaningful* means by reference to any case law. Rather than relying on the law, the majority bases its decision on its own feelings regarding what is and what is not meaningful.

*attorney's failure must be complete.* We said “if counsel *entirely* fails to subject the prosecution’s case to meaningful adversarial testing.” *Cronic, supra*, at 659 (emphasis added). Here, respondent’s argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind. [535 US at 696-697 (first emphasis added).]

The Supreme Court concluded in *Bell* that the defendant’s allegations regarding the defense counsel’s failure to present mitigating evidence and make a closing argument did not amount to a complete failure to test the prosecution’s case and were the kind of allegations to be addressed by the *Strickland* test and not by *Cronic*. *Id.* at 697-698 (stating that counsel’s errors “are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*’s performance and prejudice components”).

Similarly, in *Florida v Nixon*, 543 US 175, 178; 125 S Ct 551; 160 L Ed 2d 565 (2004), the United States Supreme Court held that prejudice should not be presumed under *Cronic* when at the guilt phase of a capital trial the defense counsel conceded that the defendant committed murder, without the defendant’s express approval, in order to establish a reason for sparing the defendant’s life at the penalty phase. The Florida Supreme Court ultimately held that *Cronic* applied and prejudice should be presumed because the defense counsel failed to obtain the defendant’s express approval for the admission of guilt. *Id.* at 186. The Florida Supreme Court reasoned that the admission of guilt without the defendant’s approval at the guilt phase was analogous to entering a plea of guilty without the defendant’s approval. *Id.* at 185. The United States Supreme Court disagreed and concluded that the defense counsel’s strategy at the guilt phase could not be divorced from his strategy at the penalty phase in a capital case; it held that the defense counsel’s strategy did not amount to a complete failure to test the prosecution’s case. *Id.* at 190-191. It clarified that the *Cronic* test is to be applied in very narrow circumstances:

*Cronic* recognized a narrow exception to *Strickland*’s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney’s performance was deficient, but also that the deficiency prejudiced the defense. *Cronic* instructed that a presumption of prejudice would be in order in “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” 466 U. S., at 658. The Court elaborated: “[I]f counsel *entirely* fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” *Id.*, at 659; see *Bell v. Cone*, 535 U. S. at 685, 696-697 (2002) (for *Cronic*’s presumed prejudice standard to apply, counsel’s “failure must be complete”). We illustrated just how infrequently the “surrounding circumstances [will] justify a presumption of ineffectiveness” in *Cronic* itself. In that case, we reversed a Court of Appeals ruling that ranked as prejudicially inadequate the performance of an inexperienced, underprepared attorney in a complex mail fraud trial. 466 U. S., at 662, 666. [*Nixon*, 543 US at 190.]

Thus, the United States Supreme Court held in *Nixon* that whether the defense counsel was ineffective must be analyzed under the performance and prejudice inquiries set out in *Strickland*. *Id.* at 178, 192.

In *People v Frazier*, 478 Mich 231, 244-245; 733 NW2d 713 (2007), our own Supreme Court clarified how to apply the *Cronic/Strickland* standards to cases within our jurisdiction: “[T]he *Cronic* test applies when the attorney’s failure is *complete*, while the *Strickland* test applies when counsel failed at specific points of the proceeding.”<sup>2</sup> In *Frazier*, our Supreme Court refused to apply *Cronic* and presume prejudice when the defense counsel advised the defendant to waive his right to counsel at the police interrogation and failed to attend the interrogation with the defendant. *Id.* at 244-245. Our Supreme Court held that “[b]ecause counsel consulted with defendant, gave him advice, and did nothing contrary to defendant’s wishes, counsel’s alleged failure was not complete.” *Id.*

In contrast, in *Rickman v Bell*, 131 F3d 1150, 1157, 1160 (CA 6, 1997) the United States Court of Appeals for the Sixth Circuit concluded that there was a *Cronic* violation as a result of a failure to meaningfully test the prosecution’s case when the defense counsel “combined a total failure to actively advocate his client’s cause with repeated expressions of contempt for his client for his alleged actions” to the jury. The Sixth Circuit noted that the defense counsel called the defendant “nuts” or “just . . . out of somebody’s insane asylum” and “wished to portray [the defendant] as vicious and abnormal.” *Id.* at 1159-1160. Similarly, the United States Court of Appeals for the Fifth Circuit concluded that a *Cronic* violation occurred and prejudice should be presumed in a case in which the defense counsel slept through substantial portions of the trial.

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<sup>2</sup> The procedural history of *Frazier* is complex. *Frazier*, 478 Mich at 234. The Michigan courts initially affirmed the defendant’s convictions. *Id.* On habeas corpus review, the United States District Court for the Eastern District of Michigan ordered the defendant to be released unless he was granted a new trial. *Id.* The federal district court found that under *Cronic* the defendant was totally deprived of the assistance of counsel at a critical stage of the proceedings, an interrogation, and, as a result, the defendant’s confession during the interrogation should have been excluded. *Id.* at 237-238. During pretrial hearings for the new trial, the trial court suppressed the testimony of two witnesses whose identity was obtained during the interrogation at which counsel was absent. *Id.* at 238. Following an interlocutory appeal by the prosecution, this Court adopted the reasoning of the federal district court in the habeas proceeding and concluded that, as a result of *Cronic*, the testimony of the witnesses must be suppressed because the witnesses’ identities were obtained when the defendant was totally deprived of counsel. *People v Frazier*, 270 Mich App 172, 179; 715 NW2d 341 (2006), rev’d and vacated in *Frazier*, 478 Mich at 256. The Michigan Supreme Court specifically rejected the reasoning of the federal district court applying *Cronic* and vacated this Court’s underlying published opinion that approved of the reasoning of the federal district court and the application of *Cronic*. *Frazier*, 478 Mich at 246. In doing so, the Supreme Court recognized that the federal district court’s decision excluding the defendant’s confession was binding with regard to *Frazier*, but it ensured that the federal district court’s analysis utilizing *Cronic* was not binding in future case. *Id.*

*Burdine v Johnson*, 262 F3d 336, 349 (CA 5, 2001). While this Court is not bound by the decisions of the lower federal courts, *People v Gillam*, 479 Mich 253, 261; 734 NW2d 585 (2007), and while I do not necessarily agree with their reasoning and conclusions, at least it can be said that these cases, unlike the present case, reflect rather extreme circumstances that may warrant the potential applicability of *Cronic*.

### C. APPLICATION OF THE *CRONIC* TEST

The majority claims that the totality of defense counsel's conduct at trial was completely deficient, effectively depriving him of counsel in violation of the Sixth Amendment. As a result, the majority asserts, defendant's claim of ineffective assistance of counsel falls under the analytical framework of *Cronic*, 466 US at 658-659, which does not require a defendant to show prejudice, as contrasted with *Strickland*, 466 US at 687, 694, which requires a defendant to make a showing of "how specific errors of counsel undermined the reliability of the finding of guilt." *Cronic*, 466 US at 659 n 26, citing *Strickland*, 466 US at 693-696. I disagree. The majority's reasoning is flawed because it utilizes the same analysis specifically *rejected* in *Bell*. *Bell*, 535 US at 697 (finding erroneous the argument that prejudice should be presumed under *Cronic* as a result of counsel's failure "at specific points" rather than "throughout the . . . proceeding as a whole"). *Cronic*—decided the same day as *Strickland*—does not represent a separate standard; rather, it provides an explanation of specific circumstances that are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 US at 658. The presumed prejudice in *Cronic* is based on the premise that the attorney's failure to "subject the prosecution's case to meaningful adversarial testing" was *complete*. *Bell*, 535 US at 697. I see no evidence of that occurring here.

The record indicates that defense counsel adequately ensured the reliability of the adversarial process. Counsel met with defendant before trial on numerous occasions to discuss trial strategy and other pretrial issues. She successfully moved for a forensic examination and a competency hearing. Defense counsel consulted with other attorneys, both before and during trial, and reviewed prior testimony of the prosecution's expert. She successfully obtained a plea deal for defendant. She engaged in voir dire and excused potential jurors from the jury. She conducted cross-examination, made objections and was successful in moving the trial court to provide a cautionary instruction. She utilized inconsistencies in the testimony and the prosecution's expert witness to argue to the jury that the victim should not be believed. Clearly, assistance of counsel was provided and defense counsel's alleged failures were not "complete"; the majority simply quibbles with its effectiveness.

Indeed, the majority's discussion of the facts in this case indicates that *Cronic* does not apply and prejudice should not be presumed. In summarizing the record, the majority highlights specific examples of where it claims counsel failed to test the prosecution's case. The majority appears most troubled by counsel's waiver of an opening statement, her refusal to cross-examine the child victim, the physical education instructor, and the victim's grandmother, and her failure

to present any witnesses on defendant's behalf.<sup>3</sup> The majority highlights these potential deficiencies but does not argue that they were erroneous. At the same time, the majority also indicates areas where counsel did test the prosecution's case. It notes that she cross-examined the victim's mother, Detective Christina Ellis, and expert Connie Black-Pond, and she objected during Detective Ellis's testimony. While the majority questions the efficacy of counsel's cross-examination of all three witnesses, the fact that the majority discusses how effective, or ineffective, she was in her cross-examination demonstrates that *Strickland*, not *Cronic*, should apply to the facts of the case. The majority further remarks that counsel gave a closing statement. It characterizes her closing argument as "the feeblest of defenses imaginable under the circumstances," but, in doing so, recognizes that she provided a defense.

The majority also fails to understand that attorneys representing criminal defendants can face daunting challenges in devising ethically appropriate trial strategies, not the least of which is what to do when a defendant's guilt is often clear. This is particularly true when a defendant invokes his right not to testify, thereby precluding the jury from hearing a denial of the charges. As our Supreme Court held in *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997):

"[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." [*Id.* at 164, quoting *Cronic*, 466 US at 656 n 19.]

While the majority criticizes counsel's use of "the feeblest defense possible" it makes no suggestion as to what other possible theory this case could have been successfully defended on. From the review of the record it is clear that the only bona fide jury issue open to counsel was to argue that the inconsistencies of the testimony and the untrustworthiness of the victim should fail to convince the jury of defendant's guilt beyond a reasonable doubt. Effective assistance of counsel is not the equivalent of successful assistance. *People v Tranchida*, 131 Mich App 446, 449; 346 NW2d 338 (1984).

Finally, I find particularly troubling the majority's holding:

As Justice Stevens once noted, the failure to offer any meaningful adversarial testing makes a prejudice analysis difficult: "a proper *Strickland* inquiry is difficult, if not impossible, to conduct when counsel has completely abdicated his role as advocate, because the abdication results in an incomplete trial record from which a court cannot properly evaluate whether a defendant has or has not suffered prejudice from the attorney's conduct." *Bell*, 535 US at 718 (Stevens, J., dissenting). This is a case in point.

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<sup>3</sup> Notably, with the exception of cross-examining the child witness, even defendant does not complain of any of these actions by defense counsel.

What the majority fails or refuses to recognize is that Justice Stevens's point of view was specifically *rejected* by the eight other Justices of the United States Supreme Court. *Id.* at 687. Rather than feeling bound by United States Supreme Court precedent, the majority adopts the reasoning in the dissent in *Bell* to gauge when a *Cronic* violation has occurred. However, statements in a minority opinion are insufficient to undermine the validity of a majority's holding. It is difficult for me to understand how a Michigan intermediate appellate court panel can ignore the 2002 United States Supreme Court's decision in *Bell* limiting *Cronic*'s application and instead apply *Cronic* more broadly when specific instances of potential error are at issue. *Cronic* and *Bell* are binding on all states in this nation and that includes Michigan. But even if the majority finds that it may simply disregard the United States Supreme Court, it *is* bound by the decision of our Supreme Court in *Frazier*.

#### IV. INEFFECTIVE ASSISTANCE OF COUNSEL—*STRICKLAND*

##### A. OVERVIEW

Since counsel's failure to test the prosecution's case was not complete, this case should be analyzed under the ineffective assistance of counsel test from *Strickland*. In this case, defendant only makes two specific allegations of error with regard to his claim of ineffective assistance of counsel: (1) counsel violated client confidentiality and (2) counsel failed to cross-examine the victim. Neither claim supports his assertion of ineffective assistance of counsel.

The right to effective counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *Strickland*, 466 US 686. To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994). Thus, unlike *Cronic*, the *Strickland* test addresses specific errors made by counsel, requiring defendant to show that not only was counsel's performance deficient but also that the defective performance was prejudicial. *Strickland*, 466 US at 686; *Mitchell*, 454 Mich at 157-158.

Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). Decisions as to when to make an opening statement, what evidence to present, whether to call or question witnesses, and on what to focus in closing argument are presumed to be matters of trial strategy, *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), and declining to raise objections to procedures, evidence, or argument can also be sound trial strategy, *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272, (2008). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

## B. APPLICATION OF *STRICKLAND*

I disagree with the majority's conclusion that counsel's performance "necessarily fell below an objective standard of reasonableness under prevailing professional norms." Under *Strickland*, defendant was not denied the effective assistance of counsel.

### 1. CREDIBILITY DETERMINATIONS

Before discussing the alleged errors committed by counsel, I must note my strong disagreement with the majority's credibility determinations. The majority oversteps its review function and, in effect, makes independent findings, substituting its judgment for that of the trial court when it refuses to defer to the trial court's assessment of the credibility of witnesses and makes new credibility determinations to support its conclusion that defendant was totally denied the assistance of counsel. It also completely ignores the standard of review: the trial court first determines the facts and decides whether there is a violation of constitutional magnitude, *Lewis*, 287 Mich App at 364, and then we review, not substitute, the factual findings for clear error and the trial court's ultimate determination de novo, *Petri*, 279 Mich App at 410. Despite the majority's wishes to the contrary, the fact remains that it was *this* trial court that sat through the trial and evidentiary hearing. It was *this* trial court, and not the majority, that observed the demeanor of witnesses and the conduct of counsel. Our Supreme Court stated:

Resolution of facts about which there is conflicting testimony is a decision to be made initially by the trial court. The trial judge's resolution of a factual issue is entitled to deference. This is particularly true where a factual issue involves the credibility of the witnesses whose testimony is in conflict. [*Farrow*, 461 Mich at 209, quoting *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983).]

A trial court's findings of fact are sufficient if it appears from the record that the trial court was aware of the issues and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995).

In this case, after presiding over the jury trial and the hearing on the motion for a new trial, the trial court made a number of findings with regard to whether counsel's assistance was ineffective. The trial court found that counsel "spoke with three other experienced attorneys, reviewed trial strategy books and reviewed expert testimony in preparation for Defendant's Trial." Moreover, the trial court noted her past "involvement/handling of child witnesses in other cases." It further reasoned:

The Court concludes that it was reasonable for defense counsel to waive an opening statement. Since the Defendant did not testify, it would seem odd to give an opening statement, then rest and immediately proceed with closing arguments. Furthermore, it was reasonable for defense counsel not to question the minor victim. There are certainly pros and cons to consider when cross examining a young witness. Defense counsel's explanations for her actions were logical and reasonable. Defendant has failed to overcome the presumption that his attorney's actions constituted sound trial strategy.

The trial court recognized the “conflicting testimony from the Assistant Prosecuting Attorney and Defense Attorney,” noting “[t]hey had different views about the discussions/events that took place off the record throughout this case” and “there was animosity and a lack of respect between the attorneys that tried the case.” Still, the trial court concluded that counsel’s actions did not “rise to the level of ineffective assistance of counsel,” and it could not find that “counsel’s actions fell below an objective standard of reasonableness under prevailing professional norms.”

Despite these findings of fact, the majority completely ignores the unique position of the trial judge, who is not only experienced but is also the Chief Judge Pro Tem of the Ninth Circuit Court, and disregards the trial judge’s credibility findings. In fact, the majority asserts that the trial court “decline[d] to resolve the credibility dispute between [the assistant prosecuting attorney and defense counsel].” I disagree. The trial court clearly found counsel’s testimony more credible than the assistant prosecuting attorney’s testimony because, despite the assistant prosecuting attorney’s allegations that counsel told her that defendant “made her sick” and counsel “couldn’t look at him,” the trial court found counsel’s performance was not deficient. Without having been at the trial or having witnessed the testimony of the assistant prosecuting attorney and counsel in person, the majority concludes that the assistant prosecuting attorney is more “credible” than counsel, even though the trial judge found just the opposite. The majority even characterizes counsel’s testimony as “impish and contrived” without having watched the trial or seen her testify in person. I find it hard to believe that the majority could make such a credibility determination based on the transcript alone, and I cannot go along with the majority’s refusal to defer to the clear credibility determinations of the trial court.

Moreover, the majority’s faith in the credibility and the motives of the assistant prosecuting attorney is misplaced. The majority finds it “particularly noteworthy” and “an act of courage” that the assistant prosecuting attorney decided to report counsel for the inadequacy of her representation. The majority writes, “Prosecutors are not known for challenging the fairness of the trials they prosecute and the fact that [the assistant prosecuting attorney] did so is . . . compelling evidence that defendant did not receive proper representation at trial.” I adamantly disagree. A prosecutor “has the responsibility of a minister of justice” and has an ethical obligation to ensure that “the defendant is accorded procedural justice . . .” Comment to MRPC 3.8. If the assistant prosecuting attorney felt that counsel’s representation was so deficient, she had an ethical obligation to bring her beliefs to the trial court’s attention *before* defendant was convicted and sentenced. Instead, the assistant prosecuting attorney only raised the issue *after* defendant was convicted and sentenced. The assistant prosecuting attorney’s failure to raise the issue in a timely manner amounts to an ethical violation and reflects her own misfeasance rather than any evidence that counsel’s assistance was ineffective. I also note that the assistant prosecuting attorney’s report regarding counsel’s supposedly ineffective representation of defendant was apparently not made to the Attorney Grievance Commission, but rather to the court administrator; a move clearly designed to affect future assignments rather than any “concern” over competency. Moreover, the assistant prosecuting attorney’s “concerns” and defendant’s motion for a new trial were vigorously opposed by the Office of the Prosecutor. As a result, the assistant prosecuting attorney’s claims were not recognized as legitimate even by the Office of the Prosecutor or the trial court. They should not be given any legitimacy here. The letter to the court administrator merely consisted of the assistant prosecuting attorney’s own feelings on the matter. She was determined to take a particularly vindictive approach to the

issue; otherwise, as a prosecutor bound by our rules of professional conduct, she would have certainly brought it to the attention of the trial court *during* trial. The question whether an attorney has rendered effective assistance has never been one to be decided by plebiscite; we should not start now.

## 2. CROSS-EXAMINATION OF CHILD VICTIM

The majority concludes that counsel was ineffective for failing to cross-examine the victim since counsel expressed a belief that the victim was telling the truth and “for that reason, did not deserve to be put through a cross-examination on behalf of her guilty client.” The trial court concluded that counsel’s decision was reasonable, and I agree. Counsel testified that the victim expanded her testimony slightly during direct examination and that she believed the new testimony could have supported a charge of first-degree criminal sexual conduct. Counsel was concerned that cross-examination would highlight this new information and that the assistant prosecuting attorney, as a result, would amend the felony information to include a new charge. A trial court may amend the information at any time before, during or after trial. MCL 767.76. Counsel also indicated that the jury looked shocked during the victim’s direct examination and she did not want to be perceived as bullying the then eleven-year-old victim. As the trial court noted, “[t]here are certainly pros and cons to consider when cross examining a young witness” and found counsel’s explanation to be reasonable and logical. The trial court’s finding was not clearly erroneous. Decisions regarding the questioning of witnesses should not be second-guessed on appeal. *Horn*, 279 Mich App at 39. Moreover, no two attorneys will ever try a particular case in the exact same way. And this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant has not overcome the strong presumption that counsel’s decision was based on sound trial strategy.

## 3. CONFIDENTIAL COMMUNICATIONS AND PERSONAL ANIMUS

The majority concludes that it cannot determine whether defense counsel was ineffective based on, as defendant alleges, her disclosure of confidential communications to the prosecuting attorney and her personal animus towards defendant. I disagree. With regard to these claims, the testimony at the motion hearing was conflicting. The assistant prosecuting attorney testified that counsel told her that defendant committed the crimes, while counsel denied making such a statement and testified that she only told the assistant prosecuting attorney of the same admissions defendant had made in the police report. The assistant prosecuting attorney further testified that counsel told her that defendant “made her sick,” while counsel testified that she advocated vigorously for defendant and was not pleased that he was convicted. Counsel also denied giving the assistant prosecuting attorney a “thumbs-up” and stating that defendant was “toast” after defendant had been sentenced. Counsel testified that the assistant prosecuting attorney was condescending throughout the case. Counsel admitted to being “snotty” and flippant in return and that, in her view, the assistant prosecuting attorney had taken some of her sarcastic remarks as true. After considering these testimonies, the trial court resolved the conflicting version of events in counsel’s favor.

The trial court's finding was not clearly erroneous. As noted above, the trial court is in a better position to judge the credibility of the witnesses, and we will not displace its findings in this regard on appeal, absent some clear error. *Sexton*, 461 Mich at 752; *Petri*, 279 Mich App at 410. The trial court acknowledged the attorneys' conflicting views of the events and found that "there was animosity and a lack of respect between the attorneys . . . [and that] the handling of matters outside of the Court lacked professionalism . . . ." Given the character of the attorneys' relationship, the trial court found counsel's testimony more believable and found that her performance was not deficient. Nothing in the record testimony leaves me with a definite and firm conviction that this finding was wrong. Accordingly, just as the trial court concluded, I conclude that counsel's performance did not fall below an objective standard of reasonableness under prevailing professional norms.

#### 4. PHYSICAL EDUCATION TEACHER'S TESTIMONY

The majority also criticizes counsel for not cross-examining the gym teacher, although defendant does not raise this as an element of ineffective assistance.<sup>4</sup> I can only note that the teacher's testimony was contained on barely two and one-half pages of the trial transcript. The question asked by the prosecutor was simple: "Can you tell us what happened?" I am unclear as to what possible objection could have been made to this question. While the teacher's response is troublesome, it is a simple fact of life in the trial courts that there are some witnesses who will blurt out inappropriate comments. See *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992). And, "there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). The majority creates this "failing" out of whole cloth.

#### 5. DEFENDANT'S MENTAL LIMITATIONS

The majority also complains that counsel did not bring forward evidence about defendant's mental limitations. Again, this issue is not even raised by defendant. Moreover, it has no support in the record.

Within a week of defense counsel's appointment, she successfully moved for a forensic examination and a competency hearing and met with defendant's mental health providers. At the examination, defendant was "eager to present himself as disabled," with a low IQ and an inability to spell or read, and seemed angry about being charged with the criminal offenses because it "was too long ago!" But, as noted by the examiner, defendant's claims were belied by the examination. Defendant was able to read out loud portions of the documents he brought with him to the examination, and

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<sup>4</sup> This Court usually does not address issues not raised in the parties' briefs. *People v Byrne*, 199 Mich App 674, 677; 502 NW2d 386 (1993). As a result, it was improper for the majority to address this issue, which was not even mentioned in the parties' briefs.

defendant was able to fill out the personal history questionnaire and sign his name providing information about his current address, age, date of birth, number of children, education, etc. He was well able to track the conversation and was very well aware of nonverbal nuances indicating a keen awareness of the forensic process. Moreover, it appeared that the defendant preferred to manipulate this process as noted above. The defendant also appeared to prefer to present himself as one who has less ability to remember than he does truly. For example, he would often state, "I don't know", or "I can't remember," "I'm mentally retarded," and then contradict these statements by providing other details (i.e., about his biker club, Hell's Angels" [sic], his work history," "his knowledge about his past IQ testing) that required a more complex level of memory or associative skills.

When he discussed the charges against him, defendant believed that even if the victim were to testify, she would not want him to go to jail, and he blamed his sister, the victim's mother, for the charges. He also noted that there were no witnesses to the assaults. Finally, he discussed plea bargaining and stated that he would not accept any plea that required him to register as a sex offender. Had counsel tried to introduce defendant's supposed mental limitations, it would have been subject to serious impeachment. Even defendant does not set forth this as a claim on appeal for obvious reasons given the content of the forensic report. The majority's suggestion that failure to explore defendant's mental health limitations is an error committed by counsel ignores the reality that such evidence is unfavorable.

## V. CONCLUSION

In sum, defendant has not shown that the trial court clearly erred by finding that counsel's performance was not deficient. And, after reviewing the record, I cannot conclude otherwise. Because counsel was not deficient, no prejudice resulted. Even if there were errors at trial, the evidence against defendant was overwhelming. Accordingly, the trial court did not err by finding that defendant was not denied the effective assistance of counsel and by denying defendant's motion for a new trial.

I also question how the majority's opinion is now to be applied to future cases. Taken as a whole, it places a burden on the appellate courts of this state to review de novo every claim of ineffective assistance of counsel. I have little faith in the ability of an appellate court, especially in cases where credibility is at issue and the record is cold, to substitute its judgment for that of the trial court judge who actually sat through a trial and conducted the requisite evidentiary hearing. In effect, the majority's position simply permits random referenda on an attorney's overall performance based on what a given Court of Appeals panel believes is "meaningful" while ignoring the duty to actually analyze any given case pursuant to the law. Under this opinion, and keeping in mind that *Cronic* refers to the *kind* of violation and not the *degree* of violation, we have a *Cronic* violation any time a witness blurts out an unresponsive answer, counsel reserves an opening argument, does not cross-examine a child victim of sexual assault, fails to voir dire a previously certified expert witness, and refuses to put into evidence damaging mental health testimony. A *Cronic* violation will also arise whenever an attorney argues in closing trial-testimony inconsistencies or that a victim is not worthy of belief. Application of this new rule of law will result in inconsistent outcomes in every case. The rule of law should

not depend on the idiosyncrasies of a particular Court of Appeals panel. As Justice Scalia recently wrote in his dissent in *Michigan v Bryant*, 562 US \_\_\_, \_\_\_; 131 S Ct 1143, 1176; 179 L Ed 2d 93 (2011):

Judicial decisions, like the Constitution itself, are nothing more than “parchment barriers.” Both depend on a judicial culture that understands its constitutionally assigned role . . . and has the modesty to persist when it produces results that go against the judges’ policy preferences. Today’s opinion falls far short of living up to that obligation—short on the facts, and short on the law. [Citation omitted.]

The trial court did not err in denying defendant’s motion for a new trial. I would affirm.

/s/ Kirsten Frank Kelly