STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2016
v	No. 324963 Van Buren Circuit Court
JOSE L. GARCIA-MANDUJANO, Defendant-Appellant.	LC No. 14-019392-FC

Before: METER, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct ("CSC I"), MCL 750.520b(1)(a) (victim under 13 years of age). He was sentenced to 25 to 38 years' imprisonment. We affirm.

I. FACTUAL BACKGROUND

This case arises from defendant's sexual abuse of his niece between her years in the fourth grade and seventh grade.[1] When the abuse occurred, the victim lived with her immediate family in a mobile home that was next door to another mobile home shared by several members of the victim's extended family, including defendant. The victim testified that she often played video games with defendant in both of the mobile homes, and they frequently were alone together.

At trial, the victim explained that defendant started acting differently towards her when she was approximately nine years old. He first touched her under her shirt on multiple occasions. Later, he inserted his fingers into her vagina five or six times, which was painful for the victim. The incident giving rise to the CSC I conviction at issue in this appeal occurred when she was alone with defendant in the mobile home in which he lived. He took her into her aunt's room, removed her clothing, laid her down onto the bed, and put his penis inside of her vagina. After two to three minutes, the victim "pulled away," put on her clothes, and left the mobile home. She then went to the bathroom and noticed "that there was blood coming out." When this

[1] Defendant was born on January 18, 1994, and the victim was born on June 1, 2001.

incident occurred, the victim had not yet begun menstruating. Although she explained that it was difficult for her to remember the exact dates and times of each instance of abuse, she testified that the vaginal-penile penetration occurred in January of her sixth grade year, *i.e.*, January 2013.

The victim also described another occasion when she and defendant were sitting in the living room at the victim's house with other people. Defendant put a blanket over them, grabbed her hand, and made her touch his penis. She testified that no one else in the room was aware of what was happening. According to the victim, the last instance of sexual touching occurred in June 2013.

When the victim was in the seventh grade, she "was tired of keeping it in," so she told her friend about defendant's conduct. Her friend then reported what she heard to a school counselor. After the counselor met with the victim alone as well as with the victim and her mother, the counselor contacted Child Protective Services ("CPS"). Subsequently, the Michigan State Police investigated the case.

After the victim and her mother met with the school counselor, the victim underwent an examination by a physician's assistant. At trial, the physician's assistant explained that the victim and her mother wanted to "make certain that [the victim] was physically okay and that she had no sexually-transmitted diseases." According to the physician's assistant, the victim stated during the exam that "she had been molested by her uncle who lived next door[.] . . . [H]e had started out by touching her and advanced to using his finger, but most recently he had pulled her clothes off and raped her."[2] The physician's assistant testified that the victim told her that the vaginal-penile penetration occurred in June 2013, but she also clarified that it was her understanding that this was the time at which the last instance of sexual abuse occurred.[3] In response to a question posed by defense counsel on cross-examination, the physician's assistant stated, "It was very easy to examine [the victim]. I used an adult woman's speculum on her and it entered very easily. She had no problem receiving that. That was highly unusual for a 12-year-old."

Alejandra Gonzalez was the defense's only witness. She is defendant's older sister, who testified regarding the victim's reputation for truthfulness. She also discussed defendant's announcement of his engagement to his girlfriend and his girlfriend's pregnancy on Facebook in September or October 2013, which supported the defense's theory that the victim fabricated the sexual abuse allegations because she feared growing apart from her uncle in light of these developments.

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[2] The physician assistant clarified that she used the term "rape" to denote penile-vaginal penetration.

[3] The victim denied telling the physician's assistant or anyone else that the vaginal-penile penetration occurred in June 2013. Instead, she maintained that the last time defendant had "touched" her was in June 2013, but the charged act of CSC I occurred in January 2013.

Defendant was charged with one count of CSC I and one count of second-degree criminal sexual conduct ("CSC II").[4] The jury found defendant guilty on both counts. At sentencing, the prosecution indicated that it had prepared an order of *nolle prosequi* with regard to the CSC II conviction due to an error in the jury instructions. Accordingly, the CSC II conviction was dismissed.

After he was sentenced, defendant moved for a new trial and a *Ginther*[5] hearing. In his amended motion, defendant raised, *inter alia*, the five claims of error at issue in this appeal. After holding a *Ginther* hearing, the trial court denied defendant's motion for a new trial on all of the grounds asserted.

II. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Defendant first argues that his trial counsel was ineffective for (1) failing to call witnesses who would have supported his defense; (2) failing to interview before trial the physician's assistant, who provided damaging testimony on cross-examination regarding her examination of the victim with an adult speculum; and (3) failing to object to the testimony of the physician's assistant indicating that the victim identified defendant as the perpetrator of the sexual abuse. We reject defendant's claims.

A. STANDARD OF REVIEW AND APPLICABLE LAW

As in *People v Cooper*, 309 Mich App 74, 79-80; 867 NW2d 452 (2015):

> This issue is preserved because a hearing was held pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. This Court reviews for clear error a trial court's factual findings, while we review de novo constitutional determinations. [Quotation marks and citations omitted.]

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to prove that counsel provided ineffective assistance, a defendant must demonstrate that (1) " 'counsel's representation fell below an objective standard of reasonableness,' " and (2) defendant was prejudiced, i.e., "that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v Vaughn*, 491 Mich 642, 669-671; 821 NW2d 288 (2012), quoting *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence

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[4] The CSC II charge was for engaging in "sexual contact" with a victim who was under 13 years of age in violation of MCL 750.520c(1)(a).

[5] *People v Ginther, 390 Mich 436, 443; 212 NW2d 922 (1973).*

in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation marks and citation omitted). "A defendant must also show that the result that did occur was fundamentally unfair or unreliable." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). "Effective assistance of counsel is presumed," and a defendant bears a heavy burden of proving otherwise. *People v Petri*, 279 Mich App 407, 410-411; 760 NW2d 882 (2008).

B. FAILURE TO CALL ADDITIONAL DEFENSE WITNESSES

Defendant first contends that defense counsel provided ineffective assistance when he failed to investigate and call several of defendant's family members as defense witnesses. We disagree.

"When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The failure to interview a witness does not, in itself, establish inadequate preparation. *Id*. at 642. "It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Id*. "[D]ecisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight." *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

There was no clear error in the trial court's finding that defense counsel's decision not to call several defense witnesses did not fall below objective standard of reasonableness. See *Cooper*, 309 Mich App at 80. The witnesses defendant presented at the *Ginther* hearing lived in his home during the general time period when the vaginal-penile penetration occurred, and they testified that they never witnessed defendant and the victim alone together, that defendant was never in the home alone, and that they never saw any inappropriate contact between defendant and the victim. At the *Ginther* hearing, defense counsel testified that his defense strategy at trial was to argue that the victim was an incredible witness and had fabricated the allegations. He also testified that he generally relies on cross-examination, if possible, to achieve this. He strategically declines to call defense witnesses, unless he has to, in order to avoid the risk inherent in calling any witness. Likewise, he did not call additional defense witnesses in this case because he was able to put his fabrication defense before the jury by cross-examining the victim and by calling only one witness. Defense counsel confirmed that he focused a portion of his closing argument on the fact that numerous individuals were coming and going between the victim's and defendant's homes, yet the prosecution failed to present any witnesses living in these cramped houses, with their limited privacy, who were able to corroborate the victim's testimony.

As such, the record shows that defense counsel strategically—and reasonably—concluded that he was able to argue his fabrication defense without incurring the risk inherent in calling additional defense witnesses. Again, "we will not second-guess strategic decisions with the benefit of hindsight," *Dunigan*, 299 Mich App at 589-590, even in the midst of defense counsel's own statements at the *Ginther* hearing regarding what he would have done differently

with the benefit of hindsight. Likewise, given defense counsel's ability to argue that the victim fabricated the claims without the additional witnesses, there is no indication that defense counsel's failure to call these witnesses deprived defendant of a substantial defense. See *Dixon*, 263 Mich App at 398.

Further, as the trial court concluded, there is not a reasonable probability that the outcome of defendant's trial would have been different but for counsel's alleged failure to call these witnesses. See *Vaughn*, 491 Mich at 669-671. Contrary to defendant's claims on appeal, the record shows that the additional witnesses (1) could provide only minimal value to defendant's case and (2) were unable to directly contradict the victim's testimony. Moreover, in addition to the minimal value of their testimony in undermining the victim's credibility, the witnesses actually corroborated, among other things, the victim's assertion that no one else was present when the vaginal-penile penetration occurred, and they contradicted each other on several occasions. In addition, the trial court correctly noted that the proffered witnesses' testimony "painted a picture" of a crowded and somewhat chaotic home, with numerous individuals coming and going at various times, which had a strong likelihood of inadvertently bolstering the prosecution's case by depicting an environment conducive to undetected sexual assault. The trial court also found that the proffered witnesses, who were either related to defendant or the mother of his child, "presented as biased [in defendant's favor]" or appeared, "at points[,] incredible." This is a factual determination to which we must defer in light of "the trial court's special opportunity to determine the credibility of witnesses appearing before it." *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005), citing MCR 2.613(C). Thus, defendant has failed to demonstrate the requisite prejudice in support of his ineffective assistance of counsel claim.

We reject defendant's claim of ineffective assistance based on defense counsel's failure to call additional witnesses. See *Vaughn*, 491 Mich at 669-671; *Cooper*, 309 Mich App at 79-80.

C. FAILURE TO INTERVIEW PHYSICIAN'S ASSISTANT PRIOR TO TRIAL

Defendant next contends that defense counsel provided ineffective assistance when he failed to interview the physician's assistant prior to trial. We disagree.

On cross-examination, the physician's assistant testified that she "used an adult woman's speculum on [the victim] and it entered very easily. She had no problem receiving that. That was highly unusual for a 12-year-old." Defendant argues that defense counsel could have prevented the jury from hearing this testimony if he had interviewed the physician's assistant prior to trial.

To obtain relief on this claim, defendant bears a heavy burden of establishing that he was prejudiced by defense counsel's alleged unpreparedness. See *Cabellero*, 184 Mich App at 640. Defendant has failed to meet this burden. He has presented no evidence, and the record reveals no indication, that the physician's assistant would have spoken with counsel before trial, or that she would have revealed that she examined the victim with an adult speculum if she had spoken with him, so that defense counsel would have been aware of the need to prevent the introduction of this testimony on cross-examination. For these same reasons, defendant has failed to establish a reasonable probability that the outcome of the trial would have been different but for counsel's

failure to interview her. See *Vaughn,* 491 Mich at 669. Furthermore, "[t]he failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome," and we find no basis for drawing such a conclusion here. *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

Thus, defendant has failed to demonstrate that defense counsel's failure to interview the physician's assistant constituted ineffective assistance of counsel.

D. FAILURE TO OBJECT TO IDENTIFICATION TESTIMONY

Defendant next argues that defense counsel was ineffective when he failed to object to the physician's assistant's testimony that the victim identified defendant as the perpetrator of the sexual abuse. We disagree.

In general, an attorney's decision not to object is a matter of trial strategy. See *Cooper*, 309 Mich App at 85. Here, however, the challenged identification testimony was admissible under MRE 803(4), and failing to raise a meritless objection does not constitute ineffective assistance of counsel. *People v Chapo*, 283 Mich App 360, 369; 770 NW2d 68 (2009).

Pursuant to MRE 803(4), the following statements "are not excluded by the hearsay rule, even though the declarant is available":

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

"In cases of suspected child abuse, statements the child makes may be admitted under [MRE 803(4)] when the totality of the circumstances surrounding the statements supports that they are trustworthy." *People v Duenaz*, 306 Mich App 85, 95; 854 NW2d 531 (2014).

> Factors related to trustworthiness guarantees surrounding the actual making of the statement include: (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. [*People v Meeboer (After Remand)*, 439 Mich 310, 324-325; 484 NW2d 621 (1992) (footnotes omitted); see also *Duenaz*, 306 Mich App at 95-96 (quoting *Meeboer*).]

Here, the victim was 12 years old when she was examined by the physician's assistant. Thus, she was of a sufficient age and maturity to relate the details of the assault. See *Duenaz*, 306 Mich App at 96. The physician's assistant stated that the victim "volunteered [the] information" regarding defendant's identity and how the abuse occurred "because she was quite concerned about her own health and whether she was physically okay . . . ." Thus, it does not appear that the physician's assistant used leading questions that would undermine the trustworthiness of the victim's statement.[6] Contrary to defendant's suggestion on appeal, there is no indication in the record that the prosecution initiated the examination. Rather, the victim's mother initiated the examination after the victim revealed the sexual abuse allegations. The examination occurred in December 2013, nine months before the trial in September 2014, and it does not appear to have been primarily for purposes of prosecution. The examination was medical and not psychological, which further weighs in favor of admissibility. The victim was related to, and very familiar with, defendant, so mistaken identity was not at issue. Although the defense argued that the victim had a motive to fabricate her allegations, *i.e.*, a fear of losing her close relationship with defendant, one could equally infer that she lacked a motive to fabricate criminal allegations against a family member with whom she shared a close relationship. There is no indication that the victim was still in physical pain at the time of the examination, as she testified that the last incident of abuse occurred several months prior to the examination. However, we have recognized that a child sexual assault victim's identification of the perpetrator to a medical professional serves several important purposes, including, among others, the identification and treatment of sexually transmitted diseases. *Id*. at 96-97. The physician's assistant expressly stated that this was one of the reasons why she examined the victim.

Therefore, an application of the *Meeboer* factors in this case demonstrates that the identification testimony was admissible under MRE 803(4). Accordingly, any objection to this testimony would have been meritless and does not constitute ineffective assistance of counsel. *Chapo*, 283 Mich App at 369.

Even if defense counsel's failure to object fell below an objective standard of reasonableness, defendant cannot demonstrate the requisite prejudice. The sole issue at trial was the victim's credibility and whether she fabricated her story, *i.e.*, whether the crime occurred at all. Defendant's identity was not contested. The physician assistant's testimony, which was solely based on what the victim had told her, was cumulative to the victim's testimony at trial, which had been subjected to vigorous cross-examination. Thus, as the trial court concluded, there is no reasonable probability that this identification testimony affected the outcome of the trial. See *Vaughn,* 491 Mich at 669.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the prosecution failed to present sufficient evidence to support his conviction. On appeal, he contends only that the prosecution presented insufficient evidence

[6] There is no evidence regarding the specific terminology used by the victim. Thus, the third and fourth factors are inapplicable here.

to establish the ages of the victim and defendant at the time of the offense for purposes of MCL 750.520b(2)(b). We disagree.

A. STANDARD OF REVIEW

We review a challenge to the sufficiency of the evidence *de novo*. *People v Harverson*, 291 Mich App 171, 175-177; 804 NW2d 757 (2010).

> In ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. A reviewing court is required to draw all reasonable inferences and make credibility choices in support of the trier of fact's verdict. [*People v Strickland*, 293 Mich App 393, 399; 810 NW2d 660 (2011) (quotation marks, alterations, and footnotes omitted).]

Notably, MCL 750.520h provides that a victim's testimony need not be corroborated to sustain a CSC I conviction.

B. ANALYSIS

> To prove CSC I under MCL 750.520b(1)(a), the prosecution was required to show that defendant engaged in sexual penetration with another person under the age of thirteen. "Sexual penetration" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). [*People v Waclawski*, 286 Mich App 634, 676; 780 NW2d 321 (2009).]

In *Alleyne v United States*, ___ US ___; 133 S Ct 2151, 2155; 186 L Ed 2d 314 (2013), the United States Supreme Court held, "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." In this case, the prosecution sought the imposition of a 25-year mandatory minimum sentence for CSC I under MCL 750.520b(2)(b). Accordingly, the parties agree that the prosecution was required to prove beyond a reasonable doubt that defendant was 17 years old or older when the sexual act occurred. See MCL 750.520b(2)(b). As stated *supra*, defendant only argues that the prosecution presented insufficient evidence at trial to prove beyond a reasonable doubt the age of the victim and defendant when the incident occurred, particularly because the victim allegedly changed her story and failed to identify a specific time at which the vaginal-penile penetration occurred. He does not contest the sexual penetration element.

The victim testified that her birthdate is June 1, 2001. She stated that the incident of vaginal-penile penetration giving rise to the CSC I conviction occurred in January 2013. At trial, she denied that she told the physician's assistant, or anyone else, that the incident actually occurred in June 2013. Given this testimony, sufficient evidence was presented to allow a rational jury to find beyond a reasonable doubt that the vaginal-penile penetration occurred when the victim was under 13 years of age. See MCL 750.520h; *Strickland*, 293 Mich App at 399.

Additionally, defendant's birthdate is January 18, 1994. Accordingly, he turned 17 on January 18, 2011. Given the victim's testimony that the act occurred in January 2013, sufficient evidence was presented to allow the jury to rationally conclude beyond a reasonable doubt that defendant was 17 years of age or older when the incident occurred. See MCL 750.520h; *Strickland*, 293 Mich App at 399.

Thus, we reject defendant's claim.

IV. GREAT WEIGHT OF THE EVIDENCE

Lastly, defendant argues that the jury's verdict was against the great weight of the evidence. We disagree.

A. STANDARD OF REVIEW

We review "a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence" for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

B. ANALYSIS

"A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Unger*, 278 Mich App at 232, citing *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); see also *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial," as "[a]bsent exceptional circumstances, issues of witness credibility are for the trier of fact." *Unger*, 278 Mich App at 232. Additionally, in general, "a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). Stated differently, "[u]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003) (quotation marks and citations omitted).

Defendant asserts that the jury's verdict was against the great weight of the evidence because (1) "[i]n the absence of the numerous defense witnesses available to testify as to the scene of the accusation, insufficient evidence existed to support the conviction[]," and (2) "without the inadmissible 'tiebreaker' testimony of the physician's assistant and the speculum testimony, the verdict would be unsupported." These claims lack merit, as the location of the incident is not relevant to a CSC I conviction, see *Waclawski*, 286 Mich App at 676, and the victim's testimony was, on its own, sufficient to support defendant's conviction, see MCL 750.520h.

In his brief on appeal, defendant also cross-references the facts that he cited with regard to his insufficiency of the evidence claim, analyzed *supra*, without providing any additional explanation regarding why these facts demonstrate that the jury's verdict was against the great weight of the evidence. To the extent that defendant is arguing that his conviction was against the great weight of the evidence for the same reasons previously discussed, we reject defendant's claim; the victim's testimony was sufficient to support defendant's conviction. See *People v Brown*, 239 Mich App 735, 745-746, 746 n 6; 610 NW2d 234 (2000) (noting that whether a defendant's convictions were supported by sufficient evidence and whether they were against the great weight of the evidence involve two separate questions, but if the arguments are parallel or based on the same reasons, both arguments succeed or fail together).

Likewise, to the extent that defendant is suggesting that his impeachment of the victim's testimony, through the introduction of testimony that she had previously told the physician's assistant that the vaginal-penile penetration occurred at a different time, rendered the verdict against the great weight of the evidence, we reject defendant's claim. In general, impeachment is insufficient to warrant a new trial on great-weight grounds. *Musser*, 259 Mich App at 219. Additionally, there was no testimony at trial that directly contradicted the victim's account, which established all of the necessary elements of defendant's conviction. As such, the record includes no basis for concluding that the victim's testimony was deprived of all probative value or defied all physical facts or realities. See *id*. Thus, the trial court was required to defer to the jury's determination that the victim was a credible witness. See *Unger, 278 Mich App at 232*.

Thus, the trial court properly denied defendant's motion for a new trial based on his claim that the verdict was against the great weight of the evidence.

V. CONCLUSION

Defendant has failed to establish that any of the claims of error raised on appeal warrant relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark T. Boonstra
/s/ Michael J. Riordan