STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Michael J. Talbot, P.J., E. Thomas Fitzgerald, and William C. Whitbeck, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v

WILLIAM CRAIG GARRETT,

Defendant/Appellant.
_____/

Supreme Court No. 145594

Court of Appeals No. 307728

Wayne County Circuit Court
No. 95-003838-01-FC
Hon. Linda V. Parker

BRIEF ON APPEAL OF ATTORNEY GENERAL BILL SCHUETTE AS AMICUS CURIAE

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS PRESENTED

This Court's order granting leave to appeal presented the following questions:

1. By what standard(s) Michigan courts consider a defendant's assertion that the evidence demonstrates a significant possibility that he is actually innocent of the crime in the context of a motion brought pursuant to MCR 6.508, and whether the defendant in this case qualifies under that standard.

2. Whether the Michigan Court Rules, MCR 6.500, et seq. or another provision, provide a basis for relief where a defendant demonstrates a significant possibility of actual innocence.

3. Whether, if MCR 6.508(D) does bar relief, there is an independent basis on which a defendant who demonstrates a significant possibility of actual innocence may nonetheless seek relief under the United States or Michigan Constitutions.

4. Whether MCR 6.508(D)(2) bars relief premised on issues previously decided against defendant on direct appeal.

5. Whether MCR 6.508(D)(2) bars a claim of ineffective assistance of counsel when that claim is premised on an issue previously decided against defendant on direct appeal.

6. The scope of relief, if any, available to a defendant under MCR 7.316(A)(7) in light of MCR 6.508(D).

7. Whether, when the only grounds for relief properly presented under MCR 6.508(D) are insufficient to entitle defendant to relief under that provision, a court may nonetheless consider, in conjunction with those grounds, claims and evidence considered at an earlier stage of review.

STATUTES INVOLVED

MCL 769.26, which addresses the granting of a new trial, provides as follows:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

MCL 770.1, which also addresses the granting of a new trial, provides as follows:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

MCL 770.2, which also addresses the timing of motions for a new trial, provides as follows:

> (1) Except as provided in section 16, in a case appealable as of right to the court of appeals, a motion for a new trial shall be made within 60 days after entry of the judgment or within any further time allowed by the trial court during the 60-day period.
>
> (2) In a misdemeanor or ordinance violation case appealable as of right from a municipal court in a city that adopts a resolution of approval under section 23a of the Michigan uniform municipal court act, 1956 PA 5, MCL 730.523a, or from a court of record to the circuit court, a motion for a new trial shall be made within 20 days after entry of the judgment.
>
> (3) In a misdemeanor or ordinance violation case appealable de novo to the circuit court, a motion for a new trial shall be made within 20 days after entry of the judgment.
>
> (4) If the applicable period of time prescribed in subsection (1) or (2) has expired, a court of record may grant a motion for a new trial for good cause shown. If the applicable time period prescribed in subsection (3) has expired and the defendant has not appealed, a municipal court may grant a motion for new trial for good cause shown.

RULES INVOLVED

Michigan Court Rule 6.431 provides, in relevant part, as follows:

> (A) Time for Making Motion.
>
> > (1) A motion for a new trial may be filed before the filing of a timely claim of appeal.
> >
> > (2) If a claim of appeal has been filed, a motion for a new trial may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).
> >
> > (3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence.
> >
> > (4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.
>
> (B) Reasons for Granting. On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

Michigan Court Rule 6.508(D) provides as follows:

> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> > (1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
> >
> > (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
> >
> > (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
> >
> > > (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
> > >
> > > (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
> > >
> > > > (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
> > > >
> > > > (ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
> > > >
> > > > (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
> > > >
> > > > (iv) in the case of a challenge to the sentence, the sentence is invalid.
> >
> > The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

Michigan Court Rule 7.316(A) provides as follows:

> (A) Relief Obtainable. The Supreme Court may, at any time, in addition to its general powers:
>
> (1) exercise any or all of the powers of amendment of the court or tribunal below;
>
> (2) on reasonable notice as it may require, allow substitution of parties by reason of marriage, death, bankruptcy, assignment, or any other cause; allow new parties to be added or parties to be dropped; or allow parties to be rearranged as appellants or appellees;
>
> (3) permit the reasons or grounds of appeal to be amended or new grounds to be added;
>
> (4) permit the transcript or record to be amended by correcting errors or adding matters which should have been included;
>
> (5) adjourn the case until further evidence is taken and brought before it, as the Court may deem necessary in order to do justice;
>
> (6) draw inferences of fact;
>
> (7) enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require; or
>
> (8) if a judgment notwithstanding the verdict is set aside on appeal, grant a new trial or other relief as it deems just.
>
> (9) dismiss an appeal, application, or an original proceeding for lack of jurisdiction or failure of a party to pursue the case in substantial conformity with the rules.

INTRODUCTION

Trial by jury is the best mechanism our country has developed for determining whether a criminal defendant is innocent or guilty. At trial, the presumption of innocence and all of the guarantees of the U.S. Constitution protect the criminal defendant from an unfair conviction. At trial, due process requires the prosecution to prove each element of the crime beyond a reasonable doubt.

If a defendant is convicted at trial, things change. The presumption of innocence ends. Indeed, on collateral review under MCR 6.508(D), it is "the defendant" who "has the burden of establishing the relief requested"—he must overcome the fact a jury found him guilty beyond a reasonable doubt. That burden is, and should be, a high one, for courts should not lightly second guess decisions made through the trial process. This high burden applies to both avenues by which a defendant seeking post-conviction relief based on a claim of actual innocence.

First, under MCR 6.431(B) and MCR 6.508(D), a defendant may, as Garrett does here, argue that he is actually innocent based on newly discovered evidence. To proceed under this avenue, he must satisfy the four-part test this Court has applied for more than a century. See, e.g., *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003); see also MCL 770.1 (authorizing new trials "when it appears to the court that justice has not been done"). And to show under that test that a different result would be probable on retrial, a convicted defendant must show that it is more likely than not that no reasonable jury could find him guilty beyond a reasonable doubt. In short, to overcome the jury verdict against him, he must prove not just that reasonable doubt exists, but rather that he is actually innocent.

Second, MCR 6.508(D)(3)'s actual-innocence exception provides a gateway for raising a defaulted substantive claim. Under this second avenue, new evidence of actual innocence may excuse a defendant from showing good cause for raising a ground for relief that he could have raised sooner, but it does not excuse him from the prejudice requirement or from showing some error in the proceeding that undermined the trial's fairness. Under the subrule's plain text, he cannot merely assert a freestanding innocence claim independent of a trial error. This rule is consistent with the fact that neither the U.S. nor the Michigan Constitution provides for a standalone innocence claim. They guarantee a fair trial, not a perfect one. Because Garrett is not asserting a trial error, he cannot use this avenue.

Subchapter 6.500 also implements another important criminal-justice principal: finality. As this Court has recognized, the rules apply principles of *res judicata* and law of the case to prevent convicted defendants from repeatedly raising issues that have already been decided against them. These rules are important, for the same reason already highlighted—the trial is the best mechanism for determining innocence or guilt, and issues that were or could have been decided there should not be raised on collateral review. Once an issue is decided against a convicted defendant, such as whether the presentation of certain evidence would have made a difference in the trial, he cannot take second or third bites at that same issue. This prohibition applies to both avenues relating to actual-innocence claims—and there is no third avenue—because delayed motions for a new trial must also travel through—and comply with—subchapter 6.500. MCR 6.431(A)(4).

But this case can be resolved without reaching a number of these issues because the evidence William Craig Garrett presents is insufficient to satisfy the test for newly discovered evidence. The additional alibi witness (Joe Benke) was not newly discovered and was cumulative of two other witnesses. And the evidence offered to undermine the victim's memory (and thus her identification of Garrett) would not result in a different verdict, because the jury already saw the victim have mental lapses, yet believed she could nonetheless identify Garrett.

Garrett's conviction, secured by a constitutionally fair trial, should be upheld.

STATEMENT OF FACTS

The Wayne County prosecutor's brief sets out the relevant facts in detail, so the following recounts only a few of the most pertinent facts.

A jury convicted William Craig Garrett of the knife-point robbery of Eleanor Neault, an 86-year-old woman. Immediately after the robbery, Mrs. Neault positively identified Garrett by name to a neighbor (People's App'x, p 6b), by physical description (*id.* at 6b), and by job position as a repairman who had visited her home just four days before the assault (*id.* at 4b–6b). A neighbor, Shirley Gignac, corroborated Mrs. Neault's story, positively identifying Garrett as present in Mrs. Neault's driveway shortly before the assault occurred. (*Id.* at 80b.)

Garrett presented a number of witnesses to support his alibi theory that he was not present at the scene of the crime. Most of Garrett's alibi witnesses were his friends or family of his friends: his girlfriend, Danell Dixon (*id.* at 51b–53b); his girlfriend's mother, Sandra Dixon (*id.* at 53b–54b); a friend's wife, Sharlene Stewart

(*id.* at 56b–57b); a friend's father-in-law, Charles Klaus (*id.* at 60b–61b), and another friend, Freddie Lockard (*id.* at 66b, 68b–69b). But Garrett also presented testimony from a more disinterested alibi witness, Marie Poma, who said she did not "really know Craig that much," only "through my boyfriend Joe [Benke]." (*Id.* at 70b.)

PROCEEDINGS BELOW

The Attorney General also concurs in the statement of the proceedings below set out in the Wayne County prosecutor's brief and so reiterates only a few relevant details from the proceedings.

Mrs. Neault testified at the trial and identified Garrett as the man who struck her, threatened to cut her with the knife, and then robbed her. (*Id.* at 5b, 25b–29b.) Garrett was aware of Mrs. Neault's age at the time of trial and had the opportunity to observe "some memory lapses during her testimony." (11/6/01 Court of Appeals Op, People's App'x, p 106b.)

Garrett moved for a new trial to present alibi testimony from Joe Benke, another friend. The Court of Appeals denied the motion because, "[a]s acknowledged in the trial court's opinion, the testimony of Joe Benke given at the evidentiary hearing was not newly discovered because [Garrett] knew Joe Benke prior to trial and [it] was cumulative of two alibi witnesses who testified at trial as to the time and manner by which they saw and spoke to [Garrett] on the day in question." (7/18/99 Court of Appeals Op, People's App'x, p 102b.)

Garrett also moved for a new trial to present testimony that Mrs. Neault was diagnosed "with senile dementia and Alzheimer's disease four months after trial." (11/6/01 Court of Appeals Op, People's App'x, p 106b.) The Court of Appeals denied the motion because her age and memory lapses "were evident during her testimony and would have been apparent to the jury" and because the court was "not persuaded that the impact of her diagnosis some months later would have resulted in a not guilty verdict." (*Id.*)

STANDARD OF REVIEW

Appellate courts review a trial court's denial of a motion for relief from judgment for abuse of discretion and its findings of fact for clear error. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). Questions of law are reviewed de novo. *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003). And both court rules and statutes must be interpreted according to their plain language. *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

ARGUMENT

I. The standard for establishing actual innocence is and should be an extraordinarily high standard. (Question 1)

A. Motions for relief for judgment must be narrowly cabined so they do not overwhelm the ordinary process of trial and appeal.

Our criminal-justice system is structured to make the trial the focal point of the process of deciding guilt or innocence. Absent unusual circumstances, the trial will be "the one and only opportunity" for the parties to present their case. *People v*

Rao, 491 Mich 271, 280; 815 NW2d 105 (2012). "The guilt or innocence determination in state criminal trials is a decisive and portentous event." *Herrera v Collins*, 506 US 390, 401 (1993) (quotation marks and citations omitted). "Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Id.* Indeed, at trial a criminal defendant can rely on the full panoply of protections established by the federal and state constitutions, including especially a presumption of innocence until proven guilty. *Id.* at 398–399 (listing constitutional provisions ensuring against the risk of convicting an innocent person, including the rights to confrontation, to compulsory process, to effective assistance of counsel, and to a jury trial, and the requirement that the prosecution must disclose exculpatory evidence).

If a criminal defendant is convicted at trial, he is guaranteed "an appeal as a matter of right," Const 1963, art 1, § 20, but he is no longer presumed innocent: "a criminal conviction in Michigan also destroys the presumption of innocence." *People v Peters*, 449 Mich 515, 519; 537 NW2d 160 (1995); see also *House v Bell*, 547 US 518, 537 (2006) (recognizing "the presumed guilt of a prisoner convicted in state court"); *Herrera*, 506 US at 399 ("Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears."). On appeal, he may raise any errors that he believes deprived him of a fair trial, and if unsuccessful in persuading the Court of Appeals that his conviction is somehow flawed, he also may petition this Court for review.

Once a defendant has been convicted and has exhausted his direct appeals, society's interest in finality, a principle that is "essential to the operation of our criminal justice system," *Rao*, 491 Mich at 280, arises. Once the state has "afforded a full and fair opportunity to reliably determine guilt and an appeal of right, assisted by constitutionally adequate counsel at public expense, all institutional and public interests support the conclusion that proceedings should come to an end unless the defendant's conviction constituted a miscarriage of justice." *People v Reed*, 449 Mich 375, 381–382; 535 NW2d 496 (1995).

This Court has established rules addressing the rare circumstance where there is alleged to be a miscarriage of justice. It adopted these rules to promote society's interest in finality. Before subchapter 6.500 was enacted on October 1, 1989, "the procedure for collateral review of criminal convictions in Michigan did not make any provision for finality of judgments," and "[a]s a consequence, defendants could, and did, repeatedly seek relief without limitation." *Reed*, 449 Mich at 388 (Boyle, J.).

Subchapter 6.500 was designed to change that. Indeed, the draft of what became MCR 6.508 explained that "[t]he collateral postconviction remedy provided by subchapter [6.500] should be regarded as extraordinary." *Id.*, quoting Proposed Rules of Criminal Procedure, 428A Mich 50 (1987); see also People's App'x 122b. Because the post-judgment rule lacks "any statute of limitations," the remedy it gives—a new trial with its attendant costs—"has the potential for seriously undermining the state's important interest in the finality of criminal judgments."

Reed, 449 Mich at 388–389. And the fact that relief under subchapter 6.500 should be a rare event is consistent with the fact that post-conviction petitions "that advance a substantial claim of actual innocence are extremely rare." *Schlup v Delo*, 513 US 298, 321 & n 36 (1995) (identifying only two decisions "from a Court of Appeals in which a petitioner had satisfied any definition of actual innocence").

Further, subchapter 6.500 is the exclusive procedure through which a post-conviction claim can be brought. For instance, if a defendant brings a motion for a new trial after his window for appeal has past, his claim can proceed only through subchapter 6.500. MCR 6.431(A)(4 ("If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500."); MCR 6.501 ("Unless otherwise specified by these rules, a judgment of conviction and sentence. . . not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter."). That means a delayed motion for a new trial is also subject to the limitations on successive motions found in MCR 6.502(G).

B. To obtain relief based on a claim of actual innocence, a convicted defendant must show that he is innocent, not just that reasonable doubt exists.

A defendant contending he is actually innocence has two avenues under Michigan law for seeking relief. If he asserts a freestanding innocence claim—a claim unconnected to any trial error—then he must show that it is more likely than not that no reasonable jury could convict him beyond a reasonable doubt.

If, on the other hand, he asserts he is innocent as a mechanism to avoid MCR 6.508(D)(3)'s good-cause requirement, then he must show (1) that there is a significant possibility that no reasonable jury could find him guilty beyond a reasonable doubt, (2) that actual prejudice exists, and (3) that he is entitled to relief based on the underlying trial error.

The necessary actual-innocence showing under the first approach is higher than under the second, as it should be, because it is attempting to overturn a verdict that was not tainted by any error in the proceedings.

1. For a freestanding actual-innocence claim, a convicted defendant must show that it is more likely than not that no reasonable jury could have convicted him beyond a reasonable doubt.

For a freestanding actual-innocence claim based on newly discovered evidence, the standard is very high. It is "firmly established in our legal system[] that the line between innocence and guilt is drawn with reference to a reasonable doubt." *Schlup*, 513 US at 328, citing *In re Winship*, 397 US 358 (1970) (holding that the Due Process Clause requires "proof beyond a reasonable doubt"). Given this reference point imposed by the federal Due Process Clause, analysis of an actual-innocence claim "*must* incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schlup*, 513 US at 328 (emphasis added). "The meaning of actual innocence" therefore "does not merely require a showing that a reasonable doubt exists in light of the new evidence, but that no reasonable juror would have found the defendant guilty." *Id.*

at 329. In other words, the convicted defendant "must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 328.

This high standard is appropriate because, as noted above, a convicted defendant bringing a motion for relief from judgment no longer is entitled to a presumption of innocence. Quite the contrary, a final conviction resulting from the trial and appellate process "destroys the presumption of innocence." *Peters*, 449 Mich at 519. This is especially true when the defendant is, as here, asserting a standalone innocence claim—that is, one that does not assert that any error at trial violated his constitutional or substantive rights, but rather contends that the jury simply reached the wrong outcome. "In such a case, when a petitioner has been 'tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants,' it is appropriate to apply *an extraordinarily high standard of review*." *Schlup*, 513 US at 315–316 (emphasis added; internal quotation marks and citations omitted).

This standard fits into this Court's own jurisprudence about motions for a new trial based on newly discovered evidence. A long line of this Court's cases has recognized that "a new trial may be granted on the basis of newly discovered evidence." E.g., *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012); see also, e.g., *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003); *People v Clark*, 363 Mich 643, 647; 110 NW2d 638 (1961) (citing cases); *Canfield v City of Jackson*, 112 Mich 120, 123; 70 NW 444 (1897). This line of cases authorizes courts to grant a

new trial if the defendant can "show that: (1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *Rao*, 491 Mich at 279, quoting *Cress*, 468 Mich at 664. Consistent with a freestanding innocence claim, the four-factor *Cress* test does not require that there have been any error in the proceedings; it focuses simply on the existence of new evidence. And the test is often linked to the idea that a court may grant a new trial to prevent a "miscarriage of justice," a concept that includes actual innocence. E.g., *Rao*, 491 Mich at 280–281; *People v Grissom*, 492 Mich 296, 315; 821 NW2d 50 (2012); *People v Pizzino*, 313 Mich 97, 110; 20 NW2d 824 (1945). The Court has applied this test "consistently for more than a century." *Grissom*, 492 Mich at 313 (citing *Canfield*).

In the context of a freestanding actual-innocence claim brought post-conviction, the requirement that "the new evidence makes a different result probable on retrial," *Cress*, 468 Mich at 664, means that the new evidence must make it "more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence," *Schlup*, 513 US at 328.

Garrett does not come close to satisfying this standard. First, neither Benke's testimony nor the medical evidence about Mrs. Neault is newly discovered. As the Court of Appeals recognized, "the testimony of Joe Benke given at the evidentiary hearing was not newly discovered because [Garrett] knew Joe Benke

prior to trial" and Benke's testimony "was cumulative of two alibi witnesses who testified at trial as to the time and manner by which they saw and spoke to [Garrett] on the day in question." (7/18/99 Order, People's App'x, p 102b.) The trial court acknowledged this point and that Garrett "was able to produce Benke at trial." (*Id.*) Similarly, Garrett also knew at the time of the trial that Mrs. Neault had memory lapses. As the Court of Appeals noted, she was 87 years old when she testified, and "she suffered some memory lapses during her testimony." (11/6/01 Op, People's App'x, p 106b.) These lapses "were evident during her testimony and would have been apparent to the jury." (*Id.*)

Second, this evidence is also cumulative. As to Benke's testimony, the Court of Appeals already found that Benke's testimony was cumulative. (7/18/99 Court of Appeals Op, People's App'x, p 102b.) And as to Mrs. Neault, the fact that her memory issues were "evident during her testimony and would have been apparent to the jury" shows that the jury already had eyewitness evidence—its own observations—about her memory lapses, yet the jury convicted Garrett in spite of these lapses.

Third, Garrett cannot show that this evidence makes a different result probable. For one, he cannot show that Benke's alibi testimony makes it is more likely than not that no reasonable jury could find him guilty beyond a reasonable doubt. While Garrett now asserts that Benke's testimony would result in a different verdict because Benke was a disinterested witness (Garrett's Appeal Br, p 17 (emphasizing that Benke was "*not* a close friend of Mr. Garrett"), a jury already

convicted Garrett despite his multiple alibi witnesses, including a witness more disinterested than Benke. That is, while the "new" witness Benke was a friend of Garrett's and so might be considered biased by a reasonable jury, the jury that convicted Garrett already heard the testimony of Benke's girlfriend, Marie Poma, who was not a friend of Garrett (People's App'x, p 70b ("I don't really know Craig that much")) and who was therefore more disinterested than Benke. For another, he also cannot show that the evidence relating to Mrs. Neault's cognitive health is new evidence that makes it more likely than not that no reasonable jury would convict him. That evidence describes her condition *after* the trial. (11/6/01 Court of Appeals Op, People's App'x, p 106b.) At the time of the assault and trial, she had no difficulty remembering that Garrett had visited her home four days earlier to examine her furnace, and she identified him *by name* immediately after being assaulted and robbed. (People's App'x, p 6b.) Garrett must do more than undermine the strength of the case against him; he must affirmatively prove he is actually innocent. He has not done that here.

2. When using actual innocence as a gateway to consider a trial error, the defendant must show three things: a significant possibility no reasonable jury would have convicted him, actual prejudice, and entitlement to relief on the underlying substantive claim.

Under the actual-innocence exception of MCR 6.508(D)(3), a defendant can use a lesser showing of innocence—a "significant possibility" he is actually innocent, as opposed to a "more likely than not" showing—to pass through the good-cause gateway for consideration of an alleged trial error.

MCR 6.508(D)(3) bars a defendant from raising a ground for relief if the defendant "could have . . . raised [it] on appeal from the conviction and sentence or in a prior motion" for relief from judgment. But the rule also provides an exception: the claim can be considered on the merits if the defendant can establish "good cause" for failing to raise the issue and "actual prejudice from the alleged irregularities that support the claim for relief." Within that exception, the rule allows a court to "waive the 'good cause' requirement of subrule (D)(3) if it concludes that there is a "significant possibility" that the defendant is innocent of the crime." The plain language of MCR 6.508(D)(3) thus shows that a defendant can overcome the good-cause requirement by showing a significant possibility that no reasonable jury would convict him of the crime beyond a reasonable doubt.

In the plain language of MCR 6.508(D)(3), the phrase "innocent of the crime" focuses on actual innocence, not merely on the prosecution's inability to prove guilt beyond a reasonable doubt. This is evident from the rule's use of the term "innocent," instead of merely the term "not guilty." While the phrase "not guilty" means only a "jury verdict acquitting the defendant because the prosecution failed to prove the defendant's guilt beyond a reasonable doubt," Black's Law Dictionary (8th ed), p 1090, the word "innocent" means "[f]ree from guilt; free from legal fault," *id.* at 804. To be innocent of the crime therefore means not just that there was a lack of *proof* of guilt, but that the defendant actually did not commit the crime. Indeed, this Court implicitly recognized this point in its order granting the application by inserting variations of the word "actual" into the first three

questions, even though that word does not appear in MCR 6.508(D)(3). And this boundary is drawn, as *Schlup* states, "with reference to a reasonable doubt," 513 US at 328 , so the standard must require that the defendant show a significant possibility that no reasonable jury could have convicted him beyond a reasonable doubt.

Rule 6.508(D)(3) does differ from the federal standard articulated in *Schlup* in one way: while the U.S. Supreme Court adopted a "more likely than not" standard for the threshold question of excusing the cause-and-prejudice standard, Rule 6.508(D)(3) sets out a "significant possibility" standard for excusing the good-cause requirement. But it is also clear from the rule that this significant-possibility standard applies only to the *threshold* question of waiving good cause—as the rule expressly says, "[t]he court may waive the 'good cause' requirement . . . if it concludes that there is a significant possibility that the defendant is innocent of the crime." MCR 6.508(D)(3). The rule does *not* change the standard of proof on the merits of the ultimate relief.

To the contrary, MCR 6.508(D) expressly recognizes that "the defendant has the burden of establishing the relief requested." To establish a right to relief and carry his "burden," a defendant must tip the scales to one side; in other words, he must show that it is more likely than not that he is entitled to relief. See Black's Law Dictionary (8th ed), p 209 ("'[B]urden of proof denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law.'"). Further, the "significant

possibility" language expressly modifies only "the 'good cause' requirement of subrule (D)(3)(a)," MCR 6.508(D)(3); it does not purport to alter the burden of proof of subrule (D) itself, which places "the burden of establishing entitlement to the relief requested" squarely on the defendant.

The Court of Appeals reached the correct conclusion on this issue in *People v Swain*, 288 Mich App 609; 794 NW2d 92 (2010), though making one misstep in its analysis. The *Swain* court stated that it could "discern no meaningful distinction between [the significant-possibility standard] and the 'actual innocence' standard" set out in *Schlup*. 288 Mich App at 639. This statement oversimplifies the analysis, because the former is a gateway standard for claims based on a procedural error (requiring only a *significant possibility* that no reasonable jury could have concluded that the defendant was guilty beyond a reasonable doubt), while the latter applies to freestanding, substantive innocence claims based on newly discovered evidence (requiring a defendant to show that it is *more likely than not* that no reasonable jury could have found him guilty beyond a reasonable doubt).

For his part, Garrett focuses on the phrase "significant possibility," contending that the phrase requires a "meaningful" or "real, substantial" possibility. (Garrett's Appeal Br, p 28–29.) This is fine as far as it goes, but Garrett does not grapple with the fact that the phrase applies only to the waiver of good cause and not to his ultimate burden of establishing an entitlement to relief. And while a "significant possibility" may be sufficient to open the gateway of MCR 6.508(D)(3) and allow a court to consider the merits of an error that a defendant failed to raise

before, it is not sufficient to entitle the defendant to relief: the burden of establishing an entitlement to relief requires a "more likely than not" standard. And if that ground is a claim of actual innocence, the defendant must show "not merely . . . that a reasonable doubt exists in light of the new evidence, but that no reasonable juror would have found the defendant guilty." *Schlup*, 513 US at 328.

II. While neither the Michigan Court Rules nor the federal or state constitutions provide a basis for relief for a standalone innocence claim, MCL 770.1 does.

The Michigan Court Rules do not themselves provide a basis for relief on a standalone innocence claim, and neither of our constitutions do either. But there is a statute, MCL 770.1, that allows a freestanding innocence claim based on newly discovered evidence, and the Court Rules do provide an avenue—using MCR 6.431(A)(4) to convert a late motion for a new trial into a motion for relief from judgment—that allows that type of claim to go forward.

A. The Michigan Court Rules do not establish substantive law, so they cannot by themselves provide basis for relief. (Question 2)

The Court has also asked "whether the Michigan Court Rules . . . provide a basis for relief where a defendant demonstrates a significant possibility of actual innocence." They do not; the Court Rules are merely rules of procedure, not substance, and therefore cannot provide a substantive basis for relief independent of some other source of authority.

This Court has repeatedly recognized that it "'is not authorized to enact court rules that establish, abrogate, or modify the substantive law.'" *People v Watkins*, 491 Mich 450, 473; 818 NW2d 296 (2012), quoting *McDougall v Schanz*, 461 Mich 15, 27; 597 NW2d 148 (1999); see also *People v Glass*, 464 Mich 266, 281; 627 NW2d 261 (2001); *Shannon v Ottawa Circuit Judge*, 245 Mich 220, 223; 222 NW 168 (1928). "Rather, as is evident from the plain language of [article] 6, § 5, this Court's constitutional rule-making authority extends only to matters of practice and procedure." *McDougall*, 461 Mich at 27; Const 1963, art 6, § 5 ("The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.").

Because the Michigan Court Rules govern only procedure, and may not establish a substantive right, they cannot by themselves provide a basis for relief. Instead, they can only serve as a procedural avenue by which some substantive ground for relief (for example, a constitutional error or a statutory violation) can be vindicated.

Garrett sees this differently, arguing that the rule "can be read as allowing relief, whether or not the movant can *also* show that the trial which resulted in his or her conviction was flawed with 'irregularities' that might have altered the result of the proceeding." (Garrett's Appeal Br, pp 32–33, quoting MCR 6.508(D)(3)(b).)

But Garrett does not provide any reasoning or authority supporting that conclusion. To the contrary, by quoting the rule's language about "irregularities," he is highlighting that the language of the rule requires an assertion of actual

prejudice to be based on "irregularities that support the claim for relief," MCR 6.508(D)(3)(b)—that is, the type of prejudice the rule is talking about comes from some error that deprived the defendant of a fair trial.

In other words, to satisfy the actual-prejudice prong of (D)(3)(b)—a prong that is not waived by a showing of a significant possibility the defendant is innocent of the crime—the defendant must show an "error," a "defect in the proceedings," or an "irregularity . . . offensive to the maintenance of a sound judicial process." MCR 6.508(D)(3)(b)(i), (ii), & (iii). And the context—first that the actual-prejudice subrule says nothing about innocence, and second that the very next sentence of (D)(3) itself makes clear that innocence waives only the good-cause requirement—shows that the type of irregularity referenced is an error in the judicial process itself, not an error in the outcome regarding innocence. So MCR 6.508(D)(3) by itself does not allow for an actual-innocence claim that is not linked to an underlying trial error. This means freestanding innocence claims can be brought only under *Cress*'s test for newly discovered evidence.

B. Neither this Court nor the U.S. Supreme Court has recognized a standalone constitutional claim for actual innocence, and this case does not require the Court to recognize one. (Question 3)

In *Herrera v Collins*, 506 US 390 (1993), the U.S. Supreme Court rejected a post-conviction standalone actual-innocence claim, i.e., a claim of innocence that was not tied to any allegation of a constitutional violation in the underlying proceeding. After being convicted of murder for shooting a police officer in the head

and being sentenced to death, Leonel Herrera sought habeas relief based on affidavits asserting that his deceased brother had been the actual killer. *Id.* at 857. Herrera asserted, like Garret does here (Garrett's Appeal Br, p 33), that because "he was 'actually innocent' of the murder for which he was sentenced to death, . . . the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process of law therefore forbid his execution." *Herrera*, 506 US at 393. The Supreme Court rejected his claim for habeas relief.

As for the Eighth Amendment claim, the Court recognized that "the Eighth Amendment" applies to claims that go to the "matter of punishment" and not to "the question of guilt or innocence." *Id.* at 406. This analysis is a straightforward application of the Eighth Amendment's plain text, which, just like Michigan's parallel provision, addresses "bail," "fines," and, most notably, "punishment." US Const, am VIII; Const 1963, art 1, § 16 (addressing "bail," "fines," and "punishment"). Against this plain text, Garrett relies on Justice Blackmun's *dissent* in *Herrera* and a "scholarly discussion" by a federal district judge. (Garrett's Appeal Br, p 35.) But however much one might like to read an actual-innocence exception into the state and federal constitutions' cruel-and-unusual-punishment clauses, neither text addresses innocence; each focuses on the separate question of punishment, a question that arises only *after* guilt has been determined.

Turning to the due-process question, the Supreme Court in *Herrera* recognized that "[c]laims 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 occurring in the underlying state criminal proceeding." *Id.* at 400. This conclusion makes sense in part because "[t]here is no guarantee that the guilt or innocence determination would be any more exact" in a new proceeding; "[t]o the contrary, the passage of time only diminishes the reliability of criminal adjudications." *Id.* at 403.

The Supreme Court further noted that "[t]he fundamental miscarriage of justice exception is available 'only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence,'" and that it "ha[s] never held that it extends to freestanding claims of actual innocence." *Id.* at 404–405 (citation omitted). In other words, the claimed error had to be a defect in the proceedings that deprived the prisoner of a fair process, and not a claim the verdict reached the wrong outcome. Thus, despite Herrera's attempts to tie his claim to due process and the Eighth Amendment, the Court recognized that "a claim of 'actual innocence' is not itself a constitutional claim." *Id.* at 404.

After this legal analysis, the Supreme Court then went further and said that even if it assumed, for the sake of argument, that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of the defendant unconstitutional," Herrera still lost because he could not make such a compelling demonstration. *Id.* at 417.

This Court thus has two ways to decide this question. It could hold that no constitutional violation occurs when a person receives a fair trial and is convicted, (1) because the Eighth Amendment and article 1, § 16 both apply by their terms only to questions of "punishment," not innocence, and (2) because "in both the federal and state systems, the constitution guarantees only a fair trial, not a perfect one," *Reed*, 449 Mich at 379.

Or, the Court could decline to answer this question here, because Garrett has not even come close to making "a truly persuasive demonstration" that he is actually innocent. Instead, he simply attempts to cast doubt on the case against him, rather than proving he did not commit the crime. That is not enough to show that he is actually innocent—that no reasonable jury would have found him guilty beyond a reasonable doubt.

In the end, the only way to treat a standalone innocence claim as a constitutional claim would be to create a substantive-due-process right—to say that even if the process is constitutionally sufficient and no error occurred at trial, a defendant has a right to a substantive outcome. But this Court has, consistent with the guidance of the U.S. Supreme Court, rightly "'been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'" *People v Sierb*, 456 Mich 519, 528; 581 NW2d 219 (1998), quoting *Collins v City of Harker Heights*, 503 US 115, 125(1992). This is especially true here, where Garrett has not even argued that the requirements of that doctrine have been met.

C. This Court's jurisprudence about new trials, if linked with MCL 770.1, may provide a basis for relief for an innocence claim based on new evidence.

As noted above, a long line of this Court's cases have allowed new trials based on newly discovered evidence. But this line of cases does not identify the source of the judiciary's authority to grant a convicted defendant a new trial based on new evidence. The cases do not tie it to any state or federal constitutional provision. They do not tie it to any statutory *grant* of authority; to the contrary, one case that actually cites a statute relied on a statute that *limits* courts' authority—the statute provides that "[*n*]*o* . . . *new trial* [*may*] *be granted* by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, *unless* . . . it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." 3 Comp. Laws 1929, § 17354 (now MCL 769.26) (emphasis added), cited in *People v Pizzino*, 313 Mich 97, 110; 20 NW2d 824 (1945). (This statute is a limitation, not a grant, because it prohibits granting a new trial unless (1) there is an "error" and (2) that error resulted in a miscarriage of justice.) And while one case ties the test to a court rule—*Cress* cites MCR 6.508(D) in support of the rule (after citing case law)—relying on a court rule does not count as a source of authority because "it cannot be gainsaid that this Court is not authorized to enact court rules that establish . . . substantive law." *McDougall*, 461 Mich at 27.

One other theory might be that the Court has some residual common-law authority that could justify creating this right. But this Court has long recognized that its common-law authority, particularly in the criminal-law arena, can be

displaced by statute: "This Court has emphatically stated that once the Legislature codifies a common law crime and its attendant common law defenses, the criminal law of this state concerning that crime 'should not be tampered with except by legislation . . . .'" *People v Reese*, 491 Mich 127, 151; 815 NW2d 85 (2012), quoting *People v Riddle*, 467 Mich 116, 126; 649 NW2d 30 (2002); see also *In re Lamphere*, 61 Mich 105, 109; 27 NW 882 (1886).

This reasoning applies with equal force to the rules of criminal procedure, which the Legislature has also codified—chapters 760 through 777 of the Michigan Compiled Laws set out Michigan's "Code of Criminal Procedure." Given that the Legislature has specifically addressed the substantive question of when a convicted criminal defendant is entitled to a new trial in MCL 769.26 and in MCL 770.1, this Court's common-law authority has been displaced by legislation. See *Reese*, 491 Mich at 151; *Riddle*, 467 Mich at 126; *In re Lamphere*, 61 Mich at 109. To sustain the authority to grant new trials based on new evidence, then, a trial court would need to rely on some other source of authority.

The best way to reconcile the century's worth of case law allowing new trials even in the absence of any error is to turn to MCL 770.1 (even though the statute is not cited in that line of cases) and to MCR 6.431, which links the statute and the miscarriage-of-justice exception to the new trial standard.

The statute provides that a trial court "may grant a new trial to the defendant" if either of two standards are met: "[1] for any cause for which by law a new trial may be granted, or [2] when it appears to the court that justice has not

been done." MCL 770.1. The court rule governing motions for a new trial parallels this statute by providing that a "court may order a new trial [1] on any ground that would support appellate reversal of the conviction or [2] because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B).

The staff comment to the rule states that "[s]ubrule (B) substantially modifies the statutory standards for granting a new trial set forth in MCL 770.1 and applied by the courts." MCR 6.431 1989 staff cmt, citing *People v Hampton*, 407 Mich 354, 372–373; 285 NW2d 284 (1979). The comment explains that "[a]lthough the court rule repeats in stylistically revised language the first standard, it substitutes a new second standard: 'Because [the trial court] believes the verdict has resulted in a miscarriage of justice.'" *Id.* The comment then concludes that "[w]hat substantive difference, if any, exists between the new standard and the former standard is left to be addressed by case law." *Id.*; see also *People v Redd*, 486 Mich 966, 974 n 16; 783 NW2d 93 (2010) (Marilyn J. Kelly, C.J., dissenting) (comparing the second standards and describing them as "similar[]").

Taken together, the comment and the statute suggest that this Court, if asked to interpret MCL 770.1's second clause, could interpret it to address miscarriages of justice, which means the statute could, unlike MCL 769.26, provide the source of authority for the Court's rule allowing the grant of a new trial based on newly discovered evidence independent of any error in the proceedings. The context of MCL 770.1 further shows it can be used to consider newly discovered evidence, because the very next section cross-references the rule about allowing new

testing of DNA evidence. MCL 770.2(1) ("Except as provided in section 16"); MCL 770.16 (addressing DNA evidence). Thus, while the four-part *Cress* test cannot be justified by MCL 769.26 because the test, unlike the statute, does not require a trial error, it can be based on authority found in MCL 770.1, which does not impose that requirement and which does contemplate the introduction of new evidence.

A post-appeal motion for a new trial must be implemented by passing through MCR 6.508(D), with all its attendant limitations. See, e.g., MCR 6.502(G) (limiting successive motions). This is evident both from the statutory provisions and the Michigan Court Rules. To begin, MCL 770.2 provides a 60-day window after entry of judgment in which to bring a motion for a new trial, but then it says that that limitation may be overlooked "for good cause shown." MCL 770.2(4). Similarly, MCR 6.431 sets out a time period—a different one (six months of entry of judgment), which flows from this Court's authority over procedural rules—but then provides that "[i]f the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500." MCR 6.431(A)(4). So a defendant bringing a late motion for a new trial is funneled into subchapter 6.500, which means he must establish that he is entitled to relief. And in the context of an actual-innocence claim based on new evidence, that means he must prove that it is more likely than not that no reasonable jury would convict him beyond a reasonable doubt.

While addressed above, this last point deserves repeating. The fourth prong of *Cress* requires that "the new evidence makes a different result probable on

retrial." *Cress*, 468 Mich at 664. As the U.S. Supreme Court has made clear, when a court is analyzing an actual-innocence claim, "the analysis must incorporate the understanding that proof beyond a reasonable doubt marks the boundary between guilt and innocence." *Schlup*, 513 US at 328. In the context of an actual-innocence claim, then, to prove that a different result would be probable on trial requires the convicted defendant (who is no longer entitled to the presumption of innocence) to prove that "no reasonable juror would have found the defendant guilty." *Id.* at 329.

Garrett asserts that MCR 6.508(D) does not require that a showing of innocence be based on *new* evidence. (Garrett's Appeal Br, p 30.) But if an actual-innocence claim is not based on new evidence, then it must be based on a trial error to satisfy the actual-prejudice requirement of MCR 6.508(D)(3)(b). And because Garrett's claim is not based on a trial error, he must satisfy the newly discovered evidence test, which, as its name suggests, requires that the evidence be new. See also MCR 6.502(G)(2) ("A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion.").

And as discussed above, Garrett is not entitled to relief under this standard, because the evidence he relies on does not satisfy *Cress*'s four-part test.

III. A defendant cannot use the Michigan Court Rules to revive issues decided against him in a prior appeal.

Subchapter 6.500 is carefully drafted to prevent collateral relief from replacing the trial process. The plain language of MCR 6.508(D) in particular incorporates principles of *res judicata* and the law of the case to prevent defendants from re-raising issues already decided against them and from raising new issues for the first time that they could have raised in prior proceedings.

A. MCR 6.508(D)(2), by its plain language, bars relief resting on "grounds for relief which were decided against the defendant in a prior appeal." (Question 4)

In *People v Jackson*, 465 Mich 390; 633 NW2d 825 (2001), this Court unanimously agreed that "[t]he provision of subrule (D)(2) regarding issues that were decided against the defendant in a prior appeal state familiar principles drawn from the doctrines of res judicata and law of the case." *Id.* at 398. This observation aligns with the rule's text: a "court may not grant relief to the defendant if the motion . . . alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter . . . ." MCR 6.508(D)(2).

The question presented—"whether MCR 6.508(D)(2) bars relief on issues previously decided against defendant on direct appeal"—thus tracks the language of the rule except in one respect: it refers to "issues" instead of "grounds for relief." But this distinction does not make a difference: just as the subrule bars relief based on "grounds for relief" that were previously decided against the defendant, so too do familiar rules of *res judicata* and the law of the case bar relitigating issues that were resolved in a prior case. E.g., *Baraga County v State Tax Comm'n*, 466 Mich

264, 269; 645 NW2d 13 (2002) (noting that res judicata applies to "issues . . . resolved in the first case"). In any event, *res judicata* includes collateral estoppel, which applies to specific issues, not just to complete causes of action. See, e.g., *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990).

B. Subrule (D)(2) bars claims for ineffective assistance of counsel premised on an issue previously decided against the defendant on direct appeal. (Question 5)

The same analysis shows that ineffective-assistance claims premised on an issue previously decided against a defendant are also barred by subrule (D)(2). This case provides a good illustration of why.

Both a new-trial motion based on newly discovered evidence and an ineffective-assistance claim raise the same question: would the outcome of the trial have been different if the evidence had been considered? Here, the Court of Appeals denied Garrett's motion for a new trial based on medical evidence of Mrs. Neault's mental acuity on the ground that the new evidence would not have caused a different verdict on retrial: "We are not persuaded that the impact of her diagnosis some months later would have resulted in a not guilty verdict." (11/6/01 Op, at People's App'x 106b.) In other words, the Court of Appeals concluded that the omission of the evidence did not prejudice Garrett, and this Court denied leave to appeal, *People v Garrett*, 467 Mich 936; 656 NW2d 522 (2003), making that determination the law of the case. Garrett's ineffective-assistance claim attempts to relitigate this precise issue: as he acknowledges, to prevail on an ineffective-assistance claim he must show "a 'reasonable probability that but for counsel's

unprofessional errors, the result of the proceeding would have been different.'" (Garrett's Appeal Br, p 15, quoting *Strickland v Washington*, 466 US 668, 694 (1984).) That issue has already been resolved against Garrett, and he is not entitled to a second shot at it.

The same result would occur if the prior appeal rejected a defendant's claim on the ground of harmless error. In that instance too, the court would have already addressed the prejudice prong of *Strickland*, so a ground for relief premised on a showing of prejudice would have already been decided against the defendant. In short, when the ineffective-assistance claim is premised on an issue previously decided against a defendant on direct appeal, the prior resolution of that issue bars relief.

C. MCR 7.316(A)(7) allows this Court to address miscellaneous procedural issues; it does not grant a substantive power. (Question 6)

MCR 7.316(A)(7) provides that "[t]he Supreme Court may . . . enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require." This Court has relied on this subrule to address a variety of issues, including:

- granting a motion to withdraw as counsel, *Macor v Kowalski*, 742 NW2d 356 (Mich 2007);
- recognizing the Court's power to enforce its own rules, *Bierlein v Schneider*, 474 Mich 989; 707 NW2d 594 (2005);
- adding a register of deeds as a defendant, *Cent Ceiling & Partition, Inc v Dep't of Commerce*, 672 NW2d 511 (Mich 2003);

- vacating one of its own opinions and remanding in light of a decision by the U.S. Supreme Court, *Yellow Freight Sys, Inc v State, Dep't of Treasury*, 468 Mich 862; 659 NW2d 229 (2003);

- remanding a case to the Court of Appeals as on rehearing granted, *People v Harlan*, 466 Mich 864; 644 NW2d 763 (2002);

- awarding wages and tips as a matter of equity, *Sanchez v Lagoudakis*, 458 Mich 704, 726; 581 NW2d 257 (1998); and

- reviewing an issue sua sponte, *Caterpillar, Inc v Dep't of Treasury, Revenue Div*, 440 Mich 400, 407; 488 NW2d 182, 185 (1992).

This rule thus allows the Court to address procedural issues not otherwise specifically covered by the court rules. But as explained above, court rules cannot "establish, abrogate, or modify the substantive law." *Watkins*, 491 Mich at 473. In short, Rule 7.316(A)(7) does not allow the Court to grant substantive relief that is not otherwise provided by statute or constitutional provision. And while the Court has residual common-law authority, as explained already, that authority can be superseded by statute, as has occurred here when the Legislature established Michigan's Code of Criminal Procedure.

The rule does not, as Garrett asserts, authorize this Court "'to do whatever needs to be done in a particular case in order to achieve ultimate justice.'" *Jones v Keetch*, 388 Mich 164, 176; 200 NW2d 227 (1972). If that statement were taken at face value and were, to use Garrett's words, "the 800 pound gorilla rule" (Garrett's Appeal Br, p 43), then the Court would be asserting the authority to ignore statutory and even constitutional provisions that stood in the way of the Court's conception of "ultimate justice." Contrary to Garrett's protestations, that rule *would* "authorize a court to act lawlessly" (*id.*) by overriding fundamental

separation-of-powers principles. This Court is a court of law, not a court of "ultimate justice." Indeed, our system provides a separate outlet—the executive's pardon power—for pleas that the law should be set aside or overridden in a particular case. Const 1963, art 5, § 14.

D. If grounds for relief properly presented under MCR 6.508(D) are insufficient, the grounds cannot be combined with claims rejected earlier to justify relief. (Question 7)

The final question presented asks whether grounds for relief that would be insufficient on their own can be combined with claims and evidence considered at an earlier stage of review. Implicit in this question is that the claims and evidence considered earlier must have also been insufficient on their own to grant relief; otherwise, the relief would have been granted at the earlier stage. This question thus appears to address the question of cumulative error.

This Court has explained that "'cumulative error,' properly understood, actually refers to cumulative unfair *prejudice*, and is properly considered in connection with issues of harmless error." *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002). "That is, individual claims of error either have merit or they do not." *Id.* "A ruling or action that is almost wrong does not become an error on the ground that, in the same case, other rulings or actions were almost wrong too." *Id.* In short, "[o]nly the unfair prejudice of several actual errors can be aggregated . . . ." *Id.*

Even this approach of aggregating prejudice would not apply here, however, because it is the same prejudice—the effect of precluding the Benke testimony and

additional evidence of Mrs. Neault's mental capacity—that was being considered at both stages. At the motion for a new trial, the Court of Appeals considered whether consideration of this evidence would have caused a different verdict on retrial and concluded it would not have. The present context of an ineffective-assistance claim presents the same question—is there a reasonable probability that consideration of that same evidence would have caused the result of the proceeding to be different? Since it is the same prejudice that is being considered, it cannot be aggregated with itself.

CONCLUSION AND RELIEF REQUESTED

A defendant seeking relief from judgment on a theory of actual innocence must establish to a more-likely-than-not level that no reasonable jury could have found him guilty beyond a reasonable doubt. Garrett cannot satisfy this requirement. And Garrett cannot use his actual-innocence claim as a gateway to an underlying trial error because he is not asserting any procedural error. The rules in subchapter 6.500 must be enforced as written to protect society's interest in finality and making the trial the crucible of innocence.

Accordingly, the Attorney General respectfully urges the Court to affirm the denial of Garrett's motion for relief from judgment.

Respectfully submitted,

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