STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Talbot, P.J., Fitzgerald and Whitbeck, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Docket No. 145594

-v-

WILLIAM CRAIG GARRETT,

Defendant-Appellant.
_____/

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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I. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The prosecution's defense of trial counsel's failure to call Joseph Benke as a witness, and its litany of supposed "strategic" reasons for not doing so, Prosecution's brief, pp. 15-16, are undermined by its misreading of the record, and its invitation to this Court to do likewise. Thus, the prosecution asserts that the defendant has "never explored the reason why" trial counsel did not call Benke, and "has not attempted to meet his burden of proving" that counsel did not do so for "strategic" reasons. These statements simply ignore a number of important circumstances.

First, of course, Joseph Benke testified, definitively and directly, at the Evidentiary Hearing held in connection with the 1999 Motion for New Trial, that he was *never* contacted by Mr. Garrett's trial counsel, and that the first contact he had had was from Gary Sumeracki, 111A, an investigator who testified that he spoke to Mr Benke in September, 1997. 132b.[1] Obviously, if counsel had no knowledge of what Mr. Benke would say, or how he would say it, he could hardly make a strategically reasonable decision to forego calling him as a witness.[2]

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[1] The prosecution claims that Mr. Benke's testimony in this regard is "obviously wrong," Prosecution's brief, p. 16, n. 3, but this claim, based on its own reading of a bit of ambiguous testimony by Mr. Benke's girlfriend to the effect that she and Mr. Benke were interviewed at the same time but only he was called to testify, is no more than self-serving *ipse dixit.* While the prosecution may prefer this testimony, it does not have the authority to proclaim it true, and Mr. Benke's false. Indeed, should the evidentiary hearing which defendant seeks be held, the factfinder might conclude that Ms. Popa conflated 1995 and 1997 interviews, or was otherwise mistaken, and that Mr. Benke's recollection was the correct one - but it would be for the factfinder, not the advocates, to draw that conclusion.

[2] The prosecution also suggests that the Court should not consider the impact of the fact that Mr. Benke passed a polygraph examination. Prosecution's brief, p. 21, n. 6. Counterintuitively, the prosecution relies here on this Court's decision in *People v Barbara,* 400 Mich 352 (1977), in which the Court specifically held that a judge has discretion to consider polygraph evidence in post-trial proceedings. No further response seems necessary.

Secondly, it is manifestly *not* true that the defendant has not attempted to make a factual record. Indeed, Mr. Garrett's Motion for Relief From Judgment requested an evidentiary hearing, and Judge Parker initially granted "a *Ginther* hearing in which it will be determined the reason for which Mr. Benke was not called to testify by defense counsel," 108A, but after the State moved for reconsideration of that Order, she vacated it. 109A. Thus, it is the prosecution, *not* the defense, which has caused the gap in the record of which the prosecution now complains.

Likewise, with respect to the matter of trial counsel's failure to raise the issue of tainted eyewitness identification testimony, the prosecution offers no more than its own opinion of the merits of the claim, Prosecution's brief, p. 17, n. 5, - a poor substitute for the evidentiary hearing which the law requires - and offers no suggestion as to why, in the face of the evidence detailed at page 21 of defendant's opening brief, trial counsel could have had anything to *gain* by not filing the motion.

II. ACTUAL INNOCENCE AS A "GATEWAY" OR "FREESTANDING" CLAIM

(A)(i): THE "ACTUAL INNOCENCE" STANDARD UNDER MCR 6.508

The prosecution argues that the "actual innocence" standard of MCR 6.508 should be read as equivalent to that which as been developed under federal law, principally because of the reliance by the drafters of the Rule on *Murray v Carrier*, 477 US 478 (1986), in which the "actual innocence" phase first appeared. Prosecution's brief, pp. 27-30. This is simply incorrect, for a number of reasons:

(1) As the prosecution itself notes, Prosecution's brief, p. 30, n. 16, this Court modified the formulation proposed by the drafters;

(2) Whether or not the Rule was intended to incorporate the federal rule, as expressed in *Murray v. Carrier, supra,* that rule, as it stood in 1989, did *not* include the formulation "it is more likely than not that no reasonable juror

would have found petitioner guilty beyond a reasonable doubt," which was not developed until *Schlup v. Delo,* 513 U.S. 298 (1995), as explained by the Court in *House v Bell,* 547 U.S. 518, 536-537 (2006); and

(3) The contextual and linguistic differences between the two formulations - which the prosecution does not discuss, but seeks to dismiss as "minor" - command a different reading.

(A)(ii):THE APPLICATION OF THE "ACTUAL INNOCENCE" STANDARD OF MCR. 6.508 TO THE CASE AT BAR

The prosecution belittles the significance of the impact of the never-presented evidence, *see., e.g.,* Prosecution's brief, pp. 40-43, the defense view of which was summarized at pages 30-31 of Mr. Garrett's original submission. It is to be recalled, however, that the *only* judicial factfinder to ever actually hear any of this evidence, Judge Sean Cox, found that a single piece of this evidence, the testimony of Joseph Benke, was so convincing that it required the grant of a new trial, notwithstanding the fact that it could not truly be considered "newly discovered." 16A-17A. When *all* of the evidence is considered under the proper standard, defendant maintains, it is more than sufficient to raise a "significant possibility" that he is in fact innocent of the charges of which he was convicted.

(B):"ACTUAL INNOCENCE" AS A "FREESTANDING" CLAIM FOR RELIEF

Unsurprisingly, as evidenced by the section of the prosecution's brief entitled "Introduction," and reprised throughout its submission, the dominant theme voiced by the State is a paean to finality and a plea to erect all-but-insurmountable barriers to attacks on criminal convictions premised on (or facilitated by) claims of factual innocence. Thus, for example, in arguing that our courts should not entertain "freestanding" claims of actual innocence, the prosecution, eschewing the "position that truly innocent individuals should remain incarcerated on the justification that they had a fair

trial," maintains nonetheless that "it is the *trial itself* that determines who is guilty and who is innocent." Prosecution's brief, p. 35.[3]

It is easy enough, in the give-and-take of written advocacy, to lose sight of the basics, although one does so at one's peril, and those of us fortunate enough to have some role to play in the shaping of what we refer to as the criminal justice system, would do well to hold tight to the fundamental realities, including the simple truth that "a map *is not* the territory." A. Korzybski, "A Non-Aristotelian System and its Necessity for Rigour in Mathematics and Physics," Reprinted in *Science and Sanity,* p. 750 (1933).

It deprecates the system not one bit to recognize the reality that in real world terms - the terms in which the actual lives of the actual people whose actual futures are determined by the criminal justice system - "the trial itself" may indeed determine legal status, but certainly does *not* determine "who is guilty and who is innocent" in fact. And to ignore the difference, as the State argues the law commands, *does* in fact deprecate the system, and its worth as an institution.

To say, as the State argues, that the criminal justice system should have no mechanism for addressing real-world innocence, to suggest, as the State does, that such matters are to be left wholly

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[3] This, the writer supposes, is the thrust of the Shakespearean reference in the "Introduction"to the prosecution's brief, a modified quote from Act II, Scene II of "Hamlet," which the brief sets forth as "The [trial's] the thing." Prosecution's brief, p. 9. As originally written, of course, the line reads "The *play's* the thing." This refers to a play that Hamlet is having staged, and the lines of which he is planning to alter in such a way as to evoke the murder of his father. In so doing he hopes to set a trap for King Claudius, whom he suspects of having been responsible for the crime. His hope is that on viewing the performance, Claudius will betray his guilt when he sees the crime re-enacted. In its entirety, the statement is as follows: "The play's the thing/Wherein I'll catch the conscience of the King." The writer does not wish to read too much into the State's advocacy, but would observe that the proceeding to which Hamlet referred - a staged performance the lines of which have been doctored, and on the basis of which a suspect's guilt will be judged - does not much resemble the kind of "thing" on which we should be relying to produce conclusive judgments about people's lives. But of course, in real life trials are *never* like that.

to the executive through the power of pardon, undervalues both the judicial function and the most fundamental rights of personal liberty, which predate, but are encompassed in Due Process protections:

> The liberty protected by the Due Process Clause is not a creation of the Bill of Rights. Indeed, our Nation has long recognized that the liberty safeguarded by the Constitution has far deeper roots. See Declaration of Independence ¶ 2 (holding it self-evident that "all men are ... endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty, and the pursuit of Happiness"); *see also Meachum v. Fano*, 427 U.S. 215, 230, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976) (STEVENS, J., dissenting). The "most elemental" of the liberties protected by the Due Process Clause is "the interest in being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion); *see Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause").

District Attorney's Office for Third Judicial Dist. v Osborne, 557 US 52, 93 (2009) (Stevens, dissenting).

Whatever the historical function or political realities of the executive clemency power, it is clearly not the reciprocal of this fundamental liberty interest - as the Supreme Court noted in *District Attorney's Office for Third Judicial Dist. v Osborne, supra,* "noncapital defendants do not have a liberty interest in traditional state executive clemency." *Id.,* at 67-68, citing *Connecticut Bd. of Pardons v Dumschat*, 452 US 458, 464 (1981). Nor, of course, can a purely discretionary, essentially unreviewable executive function - an appeal to "the conscience of the King," so to speak - ever function as an adequate or equivalent substitute to a judicial remedy.

It may be, of course, that the principle *ubi jus ibi remedium* has always been one "[m]ore honor'd in the breach than the observance" - to borrow (and admittedly misapply[4]) another familiar

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[4] In this passage, Hamlet is referring to the "custom" of drunken revelry, expressing the opinion that it is more honorable to breach the custom than to observe it. Thus, if one were to

phrase from "Hamlet" (Act I, Scene IV). But to the extent that the principle, expressed by this Court in *Hasselbring v Koepke,* 263 Mich 466, 481 (1933), as "[a] remedy should exist for every threatened invasion of one's legal rights," if the Court is to recognize the existence of the fundamental liberty interest contended for here, it should not hesitate to vindicate it.[5]

None of this, of course, is to suggest that the Court should ignore the importance to the legal system of the interest of finality. Still, as Justice Stevens observed, dissenting in *District Attorney's Office for Third Judicial Dist. v Osborne, supra,* at 98, "finality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens." While finality of legal judgments is, of course, a *desideratum* in the law, the prosecution's arguments ascribe to it a value exceeding that of the fundamental liberty interest which a claim of

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employ the phrase accurately, it would be to refer to a bad rule that should be ignored or disobeyed. That is not, of course, how it is here meant, and, in his defense, the writer would observe that he has *never* seen it "properly" used. *See, e.g., Fair Assessment in Real Estate Ass'n, Inc. v McNary,* 454 US 100, 128-129 (1981) ("Although in 1932 *Matthews v. Rodgers* stated a broad principle of restraint in the exercise of federal equity powers,, the rule was soon honored more in breach than in observance."); *Moore v City of East Cleveland, Ohio,* 431 US 494, 531 (1977) (referring to "the judicial penchant of honoring the doctrine more in the breach than in the observance"); *Sexton v Ryder Truck Rental, Inc.*, 413 Mich 406, 413 (1982) ("the doctrine is at least as much honored in the breach as observed"); *Veriden v McLeod,* 180 Mich 182, 185 (1914) ("this homely maxim has become honored in its breach rather than in its observance in Michigan.")

[5] One concern, of course, is that failure to recognize the need to vindicate such rights may lead us to devalue them, to treat them casually. Such a phenomenon would explain the way in which the State dismisses Mr. Garrett's claims of innocence, arguing that, at most, freestanding claims of innocence "should be reserved for truly innocent persons, not four-time felons who weakly maintain that this time they really didn't do it." Prosecution's brief, p. 43. It is certainly appropriate for the prosecution to claim, however wrongly, that Mr. Garrett's claims are "weak," but it would ill behoove the legal system to value one citizen's "interest in being free from physical detention by one's own government," *Hamdi v Rumsfeld,* 542 US 507 (2004), over another's. If, as he maintains, Mr. Garrett "really didn't do it this time," his right to be free from punishment by his government is exactly as valuable as that of any other citizen, no matter what he may have done in the past, and should be so regarded by all the participants in this process; the fact that the prosecution feels free to even suggest otherwise is, in and of itself, evidence that the process needs to be changed.

actual innocence seeks to assert, and such a proposition, defendant maintains, stands the kind of values on which our democracy is founded on their head.

(C): THE CONSTITUTIONAL BASIS FOR A "FREESTANDING" CLAIM OF "ACTUAL INNOCENCE"

While the prosecution cites *Herrera v Collins*, 506 U.S. 390 (1993) for the proposition that a claim of actual innocence is not itself a constitutional claim, Prosecution's brief, p. 34, as explained at pages 34-35, this is an overstatement of the actual impact of that decision. In fact, the United States Supreme Court has repeatedly expressly noted that the question is unresolved by its decisions, as Judge Weinstein noted in *DiMattina v United States*, ___ F Supp 2d ____, 2013 WL 2632570, *27 (E.D.N.Y. 2013)

> Whether a freestanding claim of innocence may be adjudicated, either in capital or noncapital cases, remains "an open question." *See Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 71 (2010) (Roberts, C.J.) (assuming, without deciding, that a freestanding innocence claim exists in a non-capital case); *McQuiggin v. Perkins*, No. 12–126, slip op. at 7 (S.Ct. May 28, 2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." (citing *Herrera*, 506 U.S. at 404–05)). *Cf. In re Davis*, 130 S.Ct. 1 (2009) (remanding an "original" habeas petition to district court for factfinding on freestanding innocence claim).

In addition, while the prosecution argues that no decision has interpreted our state constitution as supporting such a claim, Prosecution's brief, p. 35, the fact is that there is no reported Michigan decision holding to the contrary, either. Perhaps this is one reason why the grant of leave to appeal in this matter asked the parties to address this question.

(D): WHETHER MCR 6.508(D)(2) BARS RELIEF PREMISED ON ISSUES PREVIOUSLY DECIDED AGAINST DEFENDANT ON DIRECT APPEAL

The prosecution argues that MCR 6.508(D)(2) bars litigation of defendant's ineffective assistance of counsel claim in regard to Mr. Benke as a 'previously denied "ground[] for relief,"

based, interestingly, on the same authorities cited by defendant at pages 37-38 of his original submission in favor of a contrary conclusion. Prosecution's brief, pp. 23-26. The State simply misreads the law here, as evidenced by the decision of the United States Supreme Court in *Kimmelman v Morrison,* 477 US 365, 373 (1986), holding that a Fourth Amendment claim, and a Sixth Amendment claim based on the failure to raise it are distinct from one another: "[w]hile defense counsel's failure to make a timely suppression motion is the primary manifestation of incompetence and source of prejudice advanced by respondent, the two claims are nonetheless distinct, both in nature and in the requisite elements of proof."

(E): 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

The prosecution maintains that MCR 6.508(D)(2) "codifies" the law of the case doctrine, and so requires a positive answer to the question posed. Prosecution's brief, p. 25. This is incorrect, however. At most, the provision prohibits relief *based on* previously litigated "grounds for relief." Here, although the defendant asks the Court to reconsider previously considered questions, his prayer for relief is premised of different legal *grounds,* as explained at pages 37-38 of his opening brief, and immediately above.

(F): THE SCOPE OF RELIEF AVAILABLE UNDER MCR 7.316(A)(7)

The prosecution contends that a holding that MCR 7.316(A)(7) "provides grounds for relief on a freestanding innocence claim would constitute an amendment to the rules governing motions for relief from judgment," subject to the notice and public hearing requirements of MCR 1.201. Prosecution's brief, p. 38. This statement is premised on the prosecution's interpretation of MCR

6.508(D) as barring such claims,[6] a proposition with which the defense takes issue, *see,* Defendant-Appellant's Brief on Appeal, pp. 32-33, but even if defendant's view does not prevail on this point, the prosecution's claim here is unfounded.

As noted at pages 41-43 of defendant's opening submission, MCR 7.316(A)(7) well predates the adoption of MCR Chapter 6.500, and has been relied on repeatedly by this Court to allow relief based on claims which were seemingly foreclosed by other rules. There is no reason to conclude that when Chapter 6.500 was adopted, it was with the understanding that proceedings under its provisions would not to be subject to the claims-processing rules, such as MCR 7.316(A)(7) already in effect at the time. *Cf. United States v Burroughs,* 289 US 159, 164 (1933) ("[I]f effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in force").[7]

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[6] Indeed, the prosecution argues that MCR 6.508 "*prohibits* relief in cases where there were no trial errors," because its "actual prejudice" requirement "requires a defendant to identify an 'error' or 'irregularity' at trial." Prosecution's brief, pp. 33-34 (emphasis in original). The starting point for that argument is the proposition that "irregularity" refers only to *procedural* irregularities, flaws in the way the proceeding was conducted - the equivalent of "trial error," as that phrase is commonly understood. There is no linguistic reason why that should be so, but it is true that MCR 6.508(D)(3)(iii), which defines the species of "actual prejudice" required for relief as including situations in which "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," a phrase which, by incorporating a definition of "irregularity" as something which has an "effect on the outcome of the case," certainly suggests the reading contended for. At the same time, it may be noted, this is not the *only* permissible reading of the phrase. Indeed, one may also read the subsection as incorporating a definition of "irregularity" as including both procedural errors (having an "effect on the outcome of the case") and ones not of this character (*i.e., not* having an "effect on the outcome of the case").

[7] It is true, of course, that MCR 6.501 provides: "Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court or the Recorder's Court for the City of Detroit 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 statement, of course, must be read in conjunction with other provisions of the subchapter, including MCR 6.508(A) ("If the rules in this

(G): WHETHER A COURT MAY CUMULATE CLAIMS, INCLUDING THOSE CONSIDERED AT AN EARLIER STAGE OF REVIEW

In his initial brief, defendant argued that consideration of claims which may not, perhaps, be directly litigable under MCR 6.508(D) in the process of evaluating those which are is an appropriate aspect of the "holistic judgment about all the evidence," *House v. Bell, supra,* at 539, which "actual innocence" analysis requires. While the prosecution disdains such an approach, *see,* Prosecution's brief, pp. 39-40, it does not explain why this should not be so.

Indeed, the degree to which the State's arguments would confine the search for the truth illustrate precisely why this Court, sitting at the helm of Michigan's One Court of Justice, should use this case as a vehicle to set broader and more inclusive standards for cases in which a convicted defendant makes a credible showing of actual innocence.

Respectfully submitted,

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subchapter do not prescribe the applicable procedure, the court may proceed in any lawful manner") and MCR 6.509(A), cross-referencing the provisions of the appellate rules relating to appeals by leave.