

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

WILLIAM CRAIG GARRETT,

Defendant-Appellant.

Michigan Supreme Court No. 145594  
Court of Appeals No. 307728  
Wayne County No. 1995-003838-FH

BRIEF OF *AMICI CURIAE* MICHIGAN INNOCENCE CLINIC  
AND AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN



Daniel S. Korobkin (P72842)  
Michael J. Steinberg (P43085)  
American Civil Liberties Union Fund of Michigan  
COUNSEL FOR *AMICUS CURIAE*  
2966 Woodward Ave.  
Detroit, MI 48201  
(313) 578-6824

David A. Moran (P45353)  
Imran J. Syed (P75415)  
Brian Levy (Student Attorney)  
Michigan Innocence Clinic  
University of Michigan Law School  
COUNSEL FOR *AMICUS CURIAE*  
701 S. State Street  
Ann Arbor, MI 48109  
(734) 763-9353

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
INTRODUCTION .....	2
ARGUMENT .....	3
I. Michigan Statutes and Court Rules Give Our State Courts the Power to Grant a New Trial When Justice Has Not Been Done.....	3
II. MCR 6.508(D)(2) Does Not Categorically Bar Relief Premised on Issues Decided Against the Defendant on Direct Appeal.....	5
A. MCR 6.508(D)(2) is a Codification of the Common Law Doctrine of Law of the Case, and the Common Law Exceptions to That Doctrine Must Apply to MCR 6.508(D)(2) .....	5
B. Since the Law of the Case Doctrine is a Flexible Doctrine Designed to Prevent Manifest Injustice, MCR 6.508(D)(2) Should Also Be Interpreted to Prevent Manifest Injustice, Including the Denial of Relief to the Actually Innocent.....	7
C. In Any Event, This Court Is Never Bound by the Law of the Case Created by an Inferior Court.....	8
III. The Due Process Clause of the Michigan State Constitution Provides a Basis for Relief for Actually Innocent Defendants Presenting Otherwise Barred Claims. ....	9
CONCLUSION.....	12

## TABLE OF AUTHORITIES

### Cases

<i>Ashker v Ford Motor Co</i> , 245 Mich App 9; 627 NW2d 1 (2001) .....	8
<i>Bandfield v Bandfield</i> , 117 Mich 80; 75 NW 287 (1898).....	6
<i>Beverly Beach Props. v Nelson</i> , 68 So 2d 604 (Fla 1953).....	7
<i>C.A.F. Inv. Co. v Saginaw Twp.</i> , 410 Mich 428; 302 NW2d 164 (1981).....	5
<i>Collins v City of Harker Heights</i> , 503 US 115; 112 S Ct 1061; 117 L Ed 2d 261 (1992) .....	9
<i>Driver v Hanley</i> , 226 Mich App 558; 575 NW2d 31 (1997).....	8
<i>Engle v Isaac</i> , 456 US 107; 102 S Ct 1558; 71 L Ed 2d 783 (1982).....	2, 5
<i>Graham v Connor</i> , 490 US 386; 109 S Ct 1865; 104 L Ed 2d 443 (1989) .....	10
<i>Grievance Adm’r v Lopatin</i> , 462 Mich 235; 612 NW2d 120 (2000).....	5
<i>Herrera v Collins</i> , 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993) .....	9, 11
<i>Hoerstman Gen. Contracting, Inc. v Hahn</i> , 474 Mich 66; 711 NW2d 340 (2006) .....	6
<i>Hosko v Hosko</i> , 385 Mich 39; 187 NW2d 236 (1971) .....	6
<i>In re Davis</i> , 557 US __; 130 S Ct 1; 174 L Ed 2d 614 (2009).....	11
<i>Locricchio v Evening News Ass’n</i> , 438 Mich 84; 476 NW2d 112 (1991).....	5, 7
<i>McDougall v Schanz</i> , 461 Mich 15; 597 NW2d 148 (1999) .....	3
<i>Messenger v Anderson</i> , 225 US 436; 32 S Ct 739; 56 L Ed 2d 1152 (1912) .....	5
<i>People v Bullock</i> , 440 Mich 15; 485 NW2d 866 (1992).....	11
<i>People v Carp</i> , 298 Mich App 72; 828 NW2d 685 (2012).....	1
<i>People v Cole</i> , 491 Mich 325; 817 NW2d 497 (2012) .....	1
<i>People v Garrett</i> , 493 Mich 949; 828 NW2d 26 (2013).....	2
<i>People v Hampton</i> , 407 Mich 354; 285 NW2d 284 (1979).....	3
<i>People v Jackson</i> , 465 Mich 390; 633 NW2d 825 (2001).....	5
<i>People v Johnson</i> , 391 Mich 834; 218 NW2d 378 (1974) .....	3
<i>People v Lemmon</i> , 456 Mich 625; 576 NW2d 129 (1988).....	4
<i>People v Moreno</i> , 491 Mich 38; 814 NW2d 624 (2012) .....	6
<i>People v Noel</i> , 88 Mich App 752; 279 NW2d 305 (1979) .....	4
<i>People v Phillips</i> , 227 Mich App 28; 575 NW2d 784 (1997) .....	7
<i>People v Reed</i> , 449 Mich 375; 535 NW2d 496 (1995).....	8, 10, 11

<i>People v Sierb</i> , 456 Mich 519; 581 NW2d 219 (1998) .....	<i>passim</i>
<i>People v Vinson</i> , ___ Mich ___; 829 NW2d 238 (2013).....	1
<i>People v Wells</i> , 103 Mich App 455; 303 NW2d 226 (1981).....	7
<i>People v Yost</i> , 278 Mich App 341; 749 NW2d 753 (2008).....	4
<i>Raven v Board of Commissioners of Wayne County</i> , 399 Mich 585; 250 NW2d 477 (1977).....	8
<i>Richardson v United States</i> , 468 US 317; 104 S Ct 3081; 82 L Ed 2d 242 (1984).....	10
<i>Schlup v Delo</i> , 513 US 298; 115 S Ct 851; 130 L Ed 2d 808 (1995).....	7, 9
<i>Sitz v State Police</i> , 443 Mich 744; 506 NW2d 209 (1993).....	10
<i>Smith v Henry Ford Hosp</i> , 219 Mich App 555; 557 NW2d 154 (1996) .....	6
<i>United States v Becker</i> , 502 F3d 122 (CA 2 2007).....	7
<i>White v Murtha</i> , 377 F2d 428 (CA 5 1967).....	6, 7

Rules

MCL 770.1.....	<i>passim</i>
MCR 6.500.....	1-3
MCR 6.508(D)(2) .....	<i>passim</i>
MCR 7.216(A)(7) .....	4, 5
MCR 7.316(A)(7) .....	3-5

## INTEREST OF AMICI CURIAE

*Amici curiae* Michigan Innocence Clinic and American Civil Liberties Union of Michigan have a professional interest in this Court's consideration of the doctrinal, constitutional, and policy issues involved in this case — particularly in this Court's interpretation of the extent to which Michigan law recognizes an actual innocence exception to claims deemed otherwise barred.

The Michigan Innocence Clinic is a clinical education program at the University of Michigan Law School that was established specifically to represent clients with claims of actual innocence. In that context, much of the Clinic's litigation is under MCR 6.500 *et seq.* Indeed, the Michigan Innocence Clinic regularly files applications for leave to appeal in this Court on behalf of individuals who are actually innocent, and one such leave application is currently being held in abeyance in this Court, pending the outcome of *Garrett. People v Vinson*, \_\_ Mich \_\_; 829 NW2d 238 (2013).

The American Civil Liberties Union of Michigan is the Michigan affiliate of a nationwide nonpartisan organization of over 500,000 members, dedicated to protecting the rights guaranteed by the federal and state constitutions. The ACLU frequently files *amicus* briefs on criminal justice issues in Michigan courts. *See, e.g., People v Cole*, 491 Mich 325; 817 NW2d 497 (2012); *People v Carp*, 298 Mich App 72; 828 NW2d 685 (2012). The ACLU has long been dedicated to protecting the rights of prisoners to challenge the validity of their convictions on direct appeal and in post-conviction proceedings. This case implicates the ACLU's interest in ensuring that inmates who are actually innocent have access to judicial relief.

## INTRODUCTION

*Amici curiae*, Michigan Innocence Clinic and American Civil Liberties Union of Michigan, submit this brief in response to this Court's March 29, 2013 Order granting the application for leave to appeal. *People v Garrett*, 493 Mich 949; 828 NW2d 26 (2013). *Amici* limit this brief to the questions of: (1) whether there are Michigan statutes and court rules that provide a basis for courts to grant relief on a claim of actual innocence; (2) whether MCR 6.508(D)(2) permits relief based on claims already litigated in a prior appeal; and (3) whether the Michigan Due Process Clause provides an independent basis for relief on the grounds of actual innocence.

*Amici* agree with Appellant that the federal Due Process Clause grants a basis for relief for those with a viable claim of actual innocence. In this brief, *Amici* make the following additional points:

1. The Michigan Legislature has granted the courts power to reverse a conviction on grounds of actual innocence, and MCR 6.500, *et seq.*, cannot and does not abrogate that legislatively-granted power.
2. MCR 6.508(D)(2) is broad enough to allow relief based on claims previously decided, particularly if not doing so would result in the continued imprisonment of an innocent person.
3. The Michigan Due Process Clause provides a basis of relief for freestanding claims of actual innocence.

Although finality and judicial economy are important values in the criminal justice system, the U.S. Supreme Court has recognized that there are times when "those principles must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v Isaac*, 456 US 107, 135; 102 S Ct 1558; 71 L Ed 2d 783 (1982). *Amici* urge this Court to similarly

recognize that the Michigan courts must retain the power to remedy a wrongful conviction.

## ARGUMENT

### I. Michigan Statutes and Court Rules Give Our State Courts the Power to Grant a New Trial When Justice Has Not Been Done.

*Amici* agree with Appellant that MCR 7.316(A)(7) permits this Court to grant relief in a case of actual innocence. *See* Appellant's Brief at 43-44. The parallel provision to MCR 7.316(A)(7) for trial courts is MCL 770.1. Through the enactment of this statute, the Michigan Legislature made a clear statement: when justice has not been done, a court must retain the authority to intervene. The statute provides that:

[t]he 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. (Emphasis added).

While MCR 6.500, *et seq.*, provides a procedural framework for post-conviction hearings, the court rules cannot supersede MCL 770.1, a statute that provides a substantive right to the judiciary to grant new trials in order to correct manifest injustice. *McDougall v Schanz*, 461 Mich 15, 26-27; 597 NW2d 148 (1999) (The Michigan Supreme Court is "not authorized to enact court rules that establish, abrogate, or modify the substantive law").

In cases where a trial court determines that "justice has not been done," this Court has recognized that the trial court has broad authority to grant a new trial under MCL 770.1. For example, in *People v Johnson*, 391 Mich 834; 218 NW2d 378 (1974), the Court held that the trial court was within its discretion to grant a new trial under MCL 770.1 where the judge concluded, had he tried the case without a jury, he could not have found guilt beyond a reasonable doubt. Similarly, in *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979), the Court found that the

trial court was within its discretion in granting a new trial under MCL 770.1 where the judge “determined upon the evidence that a reasonable mind might have a reasonable doubt.” *Id.* at 372; *see also People v Lemmon*, 456 Mich 625, 634-35; 576 NW2d 129 (1998) (recognizing that under both the court rules and MCL 770.1, “the operative principles regarding new trial motions are that the court ‘may,’ in the ‘interest of justice’ or to prevent a ‘miscarriage of justice,’ grant the defendant’s motion for a new trial.”) (footnote omitted).

This Court has extended the injustice-correcting principle embodied in MCL 770.1 to itself by adopting MCR 7.316(A)(7), and to the Court of Appeals by adopting MCR 7.216(A)(7), which provides: “The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just: . . . enter any judgment or order or grant further or different relief as the case may require.” The Court of Appeals occasionally uses this provision to review claims which, though defaulted or waived by petitioners, it deems should be reviewed nonetheless for the sake of justice. *See People v Noel*, 88 Mich App 752, 754; 279 NW2d 305 (1979) (“Generally we do not address issues not raised by the parties on appeal. However, our function is to dispense justice . . . .”); *People v Yost*, 278 Mich App 341; 749 NW2d 753 (2008) (reversing an evidentiary ruling of the trial court despite the defendant’s failure to raise the issue, in the interest of justice).

The Legislature’s intent in adopting MCL 770.1 could not be clearer: It unambiguously expressed the view that Michigan courts retain the right and the power to correct manifest injustices in criminal cases. This Court was well within its authority when it granted itself and the Court of Appeals the same power to do justice on appeal.

*Amici* agree that the Legislature intended that this extraordinary power should be reserved for cases in which it is clear that a manifest injustice has been done. A criminal defendant who can make a strong showing of actual innocence but is otherwise barred by procedural rules from

obtaining relief is precisely the sort of person the Legislature had in mind. This Court should make clear that, in such rare cases, Michigan Courts should not hesitate to act under the authority granted by MCL 770.1, MCR 7.216(A)(7) and MCR 7.316(A)(7).

**II. MCR 6.508(D)(2) Does Not Categorically Bar Relief Premised on Issues Decided Against the Defendant on Direct Appeal.**

The question of whether MCR 6.508(D)(2) bars relief premised on claims previously decided against the defendant on direct appeal implicates the doctrine of law of the case. As explained below, law of the case is a rebuttable presumption, not a rigid command. And that rule clearly must yield to a viable claim of actual innocence, as the U.S. Supreme Court has noted. *See e.g. Engle, supra* at 135.

**A. MCR 6.508(D)(2) is a Codification of the Common Law Doctrine of Law of the Case, and the Common Law Exceptions to That Doctrine Must Apply to MCR 6.508(D)(2).**

Law of the case is a common law doctrine that states once an appellate court has determined a legal question, that question “will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.” *Grievance Adm’r v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000) (quoting *C.A.F. Inv. Co. v Saginaw Twp.*, 410 Mich 428, 454; 302 NW2d 164 (1981)). This Court has made clear that MCR 6.508(D)(2) simply codifies that common law rule. *People v Jackson*, 465 Mich 390, 398; 633 NW2d 825 (2001) (noting that the court rule “state[s] familiar principles drawn from the doctrine[s] of res judicata and law of the case.”).

“[A]s Justice Holmes recognized almost a century ago, unlike the later doctrines, the law of the case doctrine ‘merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.’” *Locricchio v Evening News Ass’n*, 438 Mich 84,

109; 476 NW2d 112 (1991) (quoting *Messenger v Anderson*, 225 US 436, 444; 32 S Ct 739; 56 L Ed 2d 1152 (1912)). Accordingly, courts have long recognized that the doctrine has at least three exceptions: (1) an intervening change in the law; (2) newly discovered evidence; and (3) an erroneous decision resulting in manifest injustice. *See, e.g., White v Murtha*, 377 F2d 428, 432 (CA 5 1967).

When a common law rule is codified, unless there is an explicit statement otherwise, a court should assume that all of the common law rule and its exceptions are included. *Bandfield v Bandfield*, 117 Mich 80, 82; 75 NW 287 (1898), *overruled on other grounds, Hosko v Hosko*, 385 Mich 39; 187 NW2d 236 (1971). In *Bandfield*, this Court stated that “statutes are not presumed to make any alteration of the common law, further or otherwise than the act expressly declares,” and “[t]he legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law.” 117 Mich at 82. *See also People v Moreno*, 491 Mich 38, 41; 814 NW2d 624 (2012) (to modify common law, Legislature “must do so by speaking in ‘no uncertain terms’”) (quoting *Hoerstman Gen. Contracting, Inc. v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006)).

MCR 6.508(D)(2) does not explicitly abrogate the common law exceptions to the law of the case. Absent such an explicit statement, this Court should construe MCR 6.508(D)(2) to be consistent with the common law because there is no clear indication that the drafters of the rule or this Court intended to deviate substantially from the common law.<sup>1</sup> Thus, the only reading of MCR 6.508(D)(2) consistent with precedent is that the rule reflects the common law, and all of the common law exceptions are incorporated.

---

<sup>1</sup> MCR 6.508(D)(2) is, of course, a court rule drafted by this Court, and not a statute. But that distinction makes no difference in this context, as this Court has held that, “[i]nterpretation of a court rule is subject to the same basic principles that govern statutory interpretation.” *Smith v Henry Ford Hosp*, 219 Mich App 555, 558; 557 NW2d 154 (1996).

B. Since the Law of the Case Doctrine is a Flexible Doctrine Designed to Prevent Manifest Injustice, MCR 6.508(D)(2) Should Also Be Interpreted to Prevent Manifest Injustice, Including the Denial of Relief to the Actually Innocent.

As discussed above, the law of the case doctrine is a prudential rule designed to promote judicial economy and finality, not a limit to judicial power. *See Locricchio, supra* at 109. Therefore, Michigan courts have recognized that the doctrine must occasionally yield in order to prevent injustice. In *People v Wells*, 103 Mich App 455; 303 NW2d 226 (1981), for example, the Court of Appeals held that a second trial judge could revisit and reverse a prior evidentiary ruling of the first judge because the law of the case doctrine “is not inflexible and need not be applied to create an injustice or where a prior decision is clearly erroneous.” *Id.* at 463; *see also People v Phillips*, 227 Mich App 28, 33; 575 NW2d 784 (1997) (“Particularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice.”).<sup>2</sup>

*Amici* contend that there are few injustices more manifest than invoking a prior, erroneous decision as a ground for refusing to allow a prisoner to make a strong showing of his or her actual innocence. In *Schlup v Delo*, 513 US 298; 115 S Ct 851; 130 L Ed 2d 808 (1995), the U.S. Supreme Court held that a *habeas corpus* petitioner could raise a claim of actual innocence in order to avoid a procedural bar to the consideration of the merits of his constitutional claims. In so holding, the Court noted that “the individual interest in avoiding injustice is most compelling in the context of actual innocence, since the quintessential

---

<sup>2</sup> Other state and federal courts recognize the manifest injustice exception to the law of the case doctrine. *See, e.g., United States v Becker*, 502 F3d 122, 127 (CA 2 2007) (“we may find it appropriate to reconsider an earlier decision when confronted with an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.”); *White v Murtha, supra* at 432 (identifying an exception to law of the case where “the decision was clearly erroneous and would work a manifest injustice.”); *Beverly Beach Props. v Nelson*, 68 So 2d 604, 608 (Fla 1953) (“[w]e may change ‘the law of the case’ at any time . . . if we become convinced . . . that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice.”).

miscarriage of justice is the execution of an innocent person.” *Id.* at 299. Similarly, this Court has stated that, “the most fundamental injustice is the conviction of an innocent person.” *People v Reed*, 449 Mich 375, 392; 535 NW2d 496 (1995).

In short, when this Court adopted MCR 6.508(D)(2) as a codification of the law of the case doctrine for post-conviction claims, this Court did not abolish the manifest injustice exception to the doctrine. This Court should therefore hold that MCR 6.508(D)(2) does not prevent a Michigan prisoner from presenting a claim of actual innocence, even if it is based on certain issues previously decided against the defendant.<sup>3</sup>

C. In Any Event, This Court Is Never Bound by the Law of the Case Created by an Inferior Court.

This Court has long recognized that the law of the case doctrine does not apply to this Court when the legal question at issue was decided by the Court of Appeals. In *Raven v Board of Commissioners of Wayne County*, 399 Mich 585, 587 n 1; 250 NW2d 477 (1977), this Court rejected a “law of the case” argument under such circumstances, finding that: “We are not precluded by the earlier determination of the Court of Appeals from reaching a conclusion contrary to that expressed in its first opinion.” Accordingly, the Court of Appeals has repeatedly stated that “[t]he law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all *lower* tribunals with respect to that issue.” *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001) (emphasis added); *see also Driver v. Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997).

Accordingly, absent any clear indication that MCR 6.508(D)(2) conflicts with or expressly derogates from the common law, the court rule should not be interpreted to bind this

---

<sup>3</sup> If this Court were to conclude that MCR 6.508(D)(2), as presently written, does preclude relief to a defendant who can make a strong showing of actual innocence, *Amici* would request that this Court amend the rule to explicitly include the manifest injustice exception from the law of the case doctrine.

Court to a previous erroneous holding from the Court of Appeals in Appellant's case. Rather, this Court has the authority to decide the issue anew even if MCR 6.508(D)(2) otherwise precluded him from seeking relief on grounds that were decided against him in a prior appeal.

**III. The Due Process Clause of the Michigan State Constitution Provides a Basis for Relief for Actually Innocent Defendants Presenting Otherwise Barred Claims.**

If this Court were to find that Michigan statutory law and the Court's own rules do not provide sufficient authority for a trial court to consider a prisoner's persuasive claim of actual innocence, *Amici* submit that the Michigan Constitution provides an independent basis for the consideration of such a claim.

Appellant's brief discusses thoroughly the twin actual innocence standards arising from the federal constitution under *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993), and *Schlup v Delo*, 513 US 298; 115 S Ct 851; 130 L Ed 2d 808 (1995). *See* Appellant's Brief at 34-38. *Amici* agree that such a right to relief exists under the federal constitution. However, in the event that this Court disagrees that the federal constitution grants a right to relief, or declines to resolve the question, the Michigan Constitution's Due Process Clause also provides an avenue for relief.

Article 1, Section 17 of the Michigan Constitution of 1963 guarantees that the state shall not deprive any person of "life, liberty or property, without due process of law." "Under the aegis of [federal constitutional] substantive due process, individual liberty interests ... have been protected against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *People v Sierb*, 456 Mich 519, 522-23; 581 NW2d 219 (1998) (quoting *Collins v City of Harker Heights*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992)). "The underlying purpose of substantive due process is to secure the individual from the arbitrary

exercise of governmental power.” *Id.* at 523; *see also id.* (“We interpret the state [due process clause] provision as coextensive with the federal provision for purposes of this appeal”).

The continued incarceration of a person who can demonstrate his or her actual innocence is an extreme form of arbitrary exercise of government power. When the wrongful incarceration of an innocent person occurs, there has been a “failure to observe that fundamental fairness essential to the very concept of justice.” *Id.* at 538 (Cavanagh, J, dissenting) (internal citation omitted). That failure is multiplied when the unjust imprisonment persists even in the face of powerful evidence of actual innocence.

This Court has been reluctant to expand the scope of substantive due process beyond the explicit textual source of constitutional protection. This reluctance is proper, for the doctrine of judicial self-restraint requires the Court to exercise the utmost care when treading in this field. *See Sierb, supra* at 527-528. However, protecting the innocent from unjust incarceration is the rare situation where such an exercise of judicial power is justified because “the most fundamental injustice is the conviction of an innocent person.” *People v Reed*, 449 Mich 375, 392; 535 NW2d 496 (1995).

This Court was asked in *Sierb, supra*, to find a right under the Michigan due process clause to bar a third retrial after two hung juries even though the United States Supreme Court had clearly held that: (1) repeated retrials after mistrials are not barred by double jeopardy, *see Richardson v United States*, 468 US 317; 104 S Ct 3081; 82 L Ed 2d 242 (1984); and (2) federal due process cannot be invoked to expand protections specifically provided elsewhere in the constitution. *See Graham v Connor*, 490 US 386; 109 S Ct 1865; 104 L Ed 2d 443 (1989). In rejecting *Sierb*’s argument, this Court stated, “[a]bsent definitive differences in the text of the state and federal provision, common-law history that dictates different treatment, or other matters of particular state or local interest, courts should reject the ‘unprincipled creation of state

constitutional rights that exceed their federal counterparts.” *Sierb, supra* at 523, (quoting *Sitz v State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993)).

The constitutional issue before the Court today is different because, as Appellant has pointed out, the United States Supreme Court has explicitly left open the question whether the federal Due Process Clause provides for a freestanding actual innocence exception. *See Herrera*, 506 US at 417 (assuming, for sake of argument, that “a truly persuasive demonstration of actual innocence” in a capital case would render the execution of that defendant unconstitutional) (internal quotation marks omitted); *see also In re Davis*, 557 US \_\_; 130 S Ct 1; 174 L Ed 2d 614 (2009) (remanding habeas petition for evidentiary hearing to determine whether new evidence “clearly establishes petitioner’s innocence”); *id.*, 130 S Ct at 3 (Scalia, J, dissenting) (arguing that remand for evidentiary hearing improper because “we have repeatedly left that question [whether freestanding actual innocence establishes a constitutional claim] unresolved”).

Since the U.S. Supreme Court has left open the question of whether federal due process prohibits the execution or continued incarceration of a demonstrably innocent prisoner, this Court would not, by recognizing such a protection in the Michigan Constitution, run afoul of the principle that state constitutional provisions should be interpreted consistently with their federal counterparts. On the contrary, when such questions have been left open, this Court has sometimes “led rather than followed the United States Supreme Court” in granting constitutional protections to Michigan’s citizens. *People v Bullock*, 440 Mich 15, 28 n 9; 485 NW2d 866 (1992).

This Court has recognized that “the most fundamental injustice is the conviction of an innocent person.” *Reed, supra* at 392. Denying an innocent person an independent substantive avenue to escape such manifest injustice surely constitutes an “arbitrary exercise of governmental power,” *Sierb, supra* at 523, and an affront to the principles of Michigan’s

Constitution. This Court should thus “lead, rather than follow,” the U.S. Supreme Court and hold that the Michigan Constitution recognizes a freestanding actual innocence exception — to be reserved for those rare instances where a defendant is able to make a truly convincing showing of actual innocence.

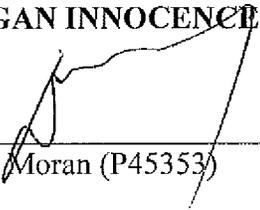
**CONCLUSION**

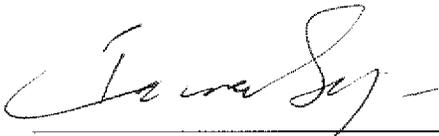
Regardless of procedural bars (real or perceived), Michigan statutory law, the court rules, and the Michigan Constitution allow individuals who are wrongly incarcerated an opportunity to prove their actual innocence.

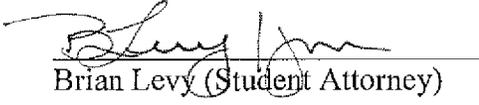
Respectfully Submitted,

Dated: October 22, 2013

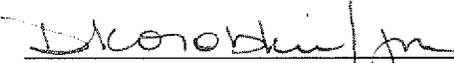
**MICHIGAN INNOCENCE CLINIC**

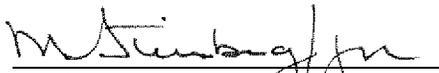
  
\_\_\_\_\_  
David A. Moran (P45353)

  
\_\_\_\_\_  
Imran J. Syed (P75415)

  
\_\_\_\_\_  
Brian Levy (Student Attorney)

**AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN**

  
\_\_\_\_\_  
Daniel S. Korobkin (P72842)

  
\_\_\_\_\_  
Michael J. Steinberg (P43085)