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.
_____________________________________/

BRIEF ON APPEAL - APPELLANT

ORAL ARGUMENT REQUESTED

Mark J. Kriger (P30298)
LARENE & KRIGER, P.L.C.
Attorney for Defendant-Appellant
645 Griswold, Suite 1717
Detroit, Michigan 48226
(313) 967-0100

TABLE OF CONTENTS

INDEX OF AUTHORITIES iv

BASIS OF JURISDICTION IN THE SUPREME COURT 1

QUESTIONS PRESENTED FOR REVIEW 2

STATEMENT OF FACTS 6

ARGUMENT[1] 15

I. TRIAL COUNSEL'S FAILURE (1) TO MOVE TO SUPPRESS IDENTIFICATION TESTIMONY, AND (2) TO INTERVIEW AND CALL AN ALIBI WITNESS DENIED DEFENDANT-APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS MOTION FOR RELIEF FROM JUDGMENT SHOULD NOT HAVE BEEN DENIED WITHOUT AN EVIDENTIARY HEARING, AND APPELLATE COUNSEL'S FAILURE TO PRESENT THESE CLAIMS CONSTITUTED DEFICIENT PERFORMANCE, AND SUFFICIENT "CAUSE" TO ALLOW THEM TO BE RAISED IN THAT MOTION

Standard of review. "Because defendant is seeking relief pursuant to subchapter 6.500 of the Michigan Court Rules, we review for an abuse of discretion the circuit court's decision to grant this relief. See *People v Osaghae* (On Reconsideration), 460 Mich 529, 534, 596 N.W.2d 911 (1999). However, we review *de novo* any underlying questions of constitutional law. *People v LeBlanc,* 465 Mich 575, 579, 640 N.W.2d 246 (2002)" *People v Trakhtenberg,* 493 Mich 38, 62 n. 6 (2012)

Failure to interview and call alibi witness Joseph Benke 16

Failure to move for the suppression of identification testimony by the complainant Eleanore Neault. 18

Ineffective assistance of appellate counsel 22

[1] NOTE: Issue One is a simplified restatement of the issue set forth in defendant-appellant's Application for Leave to Appeal. Issue Two encompasses the matters addressed by this Court's March 29, 2013 Order Granting Leave to Appeal; specifically, subissues (A) - (C) are as directed by the Court in that Order, and subissues (D) - (G) are stated as suggested by the concurring statement of Justice McCormack, joined by Justice Markman.

II. WHETHER OR NOT THE FAILURE TO RAISE THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ON DIRECT APPEAL MAY BE EXCUSED ON "CAUSE AND PREJUDICE" GROUNDS, THE SIGNIFICANT POSSIBILITY THAT DEFENDANT-APPELLANT IS INNOCENT OF THE CHARGES PERMITS THEM TO BE RAISED IN A COLLATERAL ATTACK ON HIS CONVICTION, AND THE EVIDENCE OF HIS INNOCENCE PROVIDES AN INDEPENDENT GROUND FOR RELIEF AS WELL

Standard of review. The several subissues embraced hereunder present mixed questions of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews *de novo* questions of law. *People v Armstrong,* 490 Mich 281, 289 (2011).

(A)(i) BY WHAT STANDARD(S) DO 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 26

Standard of review. This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

(A)(ii) WHETHER THE DEFENDANT IN THIS CASE QUALIFIES UNDER THAT STANDARD 30

Standard of review. This appears to be a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews *de novo* questions of law. People v Armstrong, 490 Mich 281, 289 (2011).

(B) 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 32

Standard of review. This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

(C) 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 33

Standard of review. This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

(D) WHETHER MCR 6.508(D)(2) BARS RELIEF PREMISED ON ISSUES PREVIOUSLY DECIDED AGAINST DEFENDANT ON DIRECT APPEAL 37

Standard of review. This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

(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 39

Standard of review. This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

(F) WHAT IS THE SCOPE OF RELIEF, IF ANY, AVAILABLE TO A DEFENDANT UNDER MCR 7.316(A)(7) IN LIGHT OF MCR 6.508(D) 43

Standard of review. This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

(G) 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 44

Standard of review. This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich. 106, 119 (2012).

SUMMARY AND RELIEF SOUGHT 46

INDEX OF AUTHORITIES

CASES PAGE(S)

Bahr v Miller Bros. Creamery, 365 Mich 415 (1961) 43

Baty v Balkcom, 661 F.2d 391, 394-95 (5th Cir.1981) 16

Bigelow v. Haviland. 576 F3d 284, *reh. denied,* 582 F3d. 670 (6th Cir. 2009) 17

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) 34

Coleman v Thompson, 501 U.S. 722 (1991) 22

DiMattina v United States, ___ F Supp 2d ____, 2013 WL 2632570 (E.D.N.Y. 2013) 35, 36

*District Attorney's Office for Third Judicial Dist. v Osborne,*557 US 52, 129 SCt 2308 (2009) 34

Herrera v Collins, 506 U.S. 390 (1993) 34

House v Bell, 547 U.S. 518 (2006) 27, 30, 36, 45

James v Borg, 24 F.3d 20 (9th Cir. 1994) 20

Jones v Keetch, 388 Mich 164 (1972) 42

Kimmelman v Morrison, 477 U.S. 365 (1986) 17, 20

Locricchio v Evening News Ass'n, 438 Mich 84 (1991) 39, 40

Mansfield v. Dormire, 202 F.3d 1018 (8th Cir. 2000) 34

Manson v Brathwaite, 432 U.S. 98 (1977) 19

Mapes v. Coyle, 171 F.3d 408 (6th Cir. 1999) 22

McCleskey v Zant, 499 US 467 (1991) 28

Messenger v Anderson, 225 US 436 (1912) 39

Neil v Biggers, 409 U.S. 188 (1972) 19

Paley v Coca-Cola Co., 389 Mich 583 (1973) 42

People v Armstrong, 490 Mich 281 (2011) . . . . ii, 26, 30

People v Colon, 233 Mich App 295 (1998) 20

People v Garrett, 467 Mich 936 (2003) 13

People v Gursky, 486 Mich 596 (2010) 29

People v Herrera (On Remand), 204 Mich App 333 (1994) 40

People v Kachar, 400 Mich 78 (1977) 20, 45

People v Kowalski, 492 Mich.106 (2012) . . . . ii, iii, 26, 32, 33, 39, 41, 44

People v Lemmon, 456 Mich 625 (1998) 34

People v Phillips, 227 Mich App 28 (1997) 40

People v Reed, 449 Mich 375 (1995) 22, 26

People v Swain, 288 Mich App 609 (2010) 26, 27

People v Trakhtenberg, 493 Mich 38 (2012) . . . . i, 15

Ramonez v. Berghuis, 490 F.3d 482 (6th Cir. 2007 17

Safir v Dole, 718 F2d 475 (D. C. Cir. 1983) 40

Sanders v United States, 373 US 1 (1963) 37, 40

*Scarpa v Dubois,*38 F. 3d 1 (1st Cir 1994) 16

Schlup v Delo, 513 US 298 (1995) 27-29, 40

Shannon v Cross, 245 Mich 220 (1928) 42

State ex rel. Woodworth v Denney 396 SW3d 330 (Mo. 2013) 36

Strickland v Washington, 466 U.S. 668 (1984) 15, 16, 17, 21

Towns v Smith, 395 F.3d 251 (6th Cir.2005) 16

Triestman v United States, 124 F.3d 361 (2d Cir. 1997) 34

*United Sav. Ass'n of Texas v Timbers of Inwood Forest Associates,*484 US 365 (1988) 45

United States v Frady, 456 US 152 (1982) 22

United States v Streater, 70 F.3d 1314, 1321 (D.C. Cir. 1995) 16

United States v Wade, 388 U.S. 218 (1967) 21

Wainwright v Sykes, 433 US 72 (1977) 22

Warner v United States, 975 F.2d 1207, 1211 (6th Cir. 1992) 16

Washington v. Hofbauer, 228 F.3d 689 (6th Cir. 2000) 15

Yick Man Mui v United States, 614 F3d 50 (2d Cir. 2010) 38

CONSTITUTIONS, STATUTES, COURT RULES AND OTHER AUTHORITIES

Const 1963 Art. 1, §16 37

Const 1963 Art. 1, §17 37

MCL 750.529 .... 1, 6

MCL 769.12 .... 1, 6

MCR 6.431 32

MCR 6.508(D) 30, 32, 44

MCR 6.508(D)(2) 37, 38

MCR 6.508(D)(3) 22

MCR 6.508(D)(3)(iii) 33

MCR 7.316(A)(7) 41, 43

MCR Chapter 6.500 .... 28, 33

Webster's Unabridged Dictionary (online, as viewed June 27, 2013) 29

Honigman and Hawkins, 6 Mich.Ct.Rules Anno., 2d ed 42

BASIS OF JURISDICTION IN THE SUPREME COURT

Defendant-appellant appeals the June 8, 2012 Order of the court of Appeals denying his timely filed Application for Leave to Appeal from the Third Circuit Court's denial of his Motion for Relief From Judgment, seeking to have his conviction and sentence for Robbery Armed, MCL 750.529, and as a fourth felony offender, MCL 769.12.

This Court granted his Application for Leave to Appeal, filed pursuant to MCR 7.302, in an Order entered March 29, 2013.

QUESTIONS PRESENTED FOR REVIEW[2]

I.

WHETHER TRIAL COUNSEL'S FAILURE (1) TO MOVE TO SUPPRESS IDENTIFICATION TESTIMONY, AND (2) TO INTERVIEW AND CALL AN ALIBI WITNESS DENIED DEFENDANT-APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS MOTION FOR RELIEF FROM JUDGMENT SHOULD NOT HAVE BEEN DENIED WITHOUT AN EVIDENTIARY HEARING, AND APPELLATE COUNSEL'S FAILURE TO PRESENT THESE CLAIMS CONSTITUTED DEFICIENT PERFORMANCE, AND SUFFICIENT "CAUSE" TO ALLOW THEM TO BE RAISED IN THAT MOTION?

The defendant-appellant says that the answer to this question is: Yes.

The plaintiff-appellee says that the answer to this question is: No.

The courts below answered this question: No.

II.

WHETHER OR NOT THE FAILURE TO RAISE THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ON DIRECT APPEAL MAY BE EXCUSED ON "CAUSE AND PREJUDICE" GROUNDS, THE SIGNIFICANT POSSIBILITY THAT DEFENDANT-APPELLANT IS INNOCENT OF THE CHARGES PERMITS THEM TO BE RAISED IN A COLLATERAL ATTACK ON HIS CONVICTION, AND THE EVIDENCE OF HIS INNOCENCE PROVIDES AN INDEPENDENT GROUND FOR RELIEF AS WELL?

---

[2] NOTE: Issue One is a simplified restatement of the issue set forth in defendant-appellant's Application for Leave to Appeal. Issue Two encompasses the matters addressed by this Court's March 29, 2013 Order Granting Leave to Appeal; specifically, subissues (A) - (C) are as directed by the Court in that Order, and subissues (D) - (G) are stated as suggested by the concurring statement of Justice McCormack, joined by Justice Markman.

The defendant-appellant says that the answer to this question is: Yes.

The plaintiff-appellee says that the answer to this question is: No.

The courts below did not answer this question.

A(i) BY WHAT STANDARD(S) DO 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?

The defendant-appellant says that the answer to this question is: Whether there is a meaningful possibility that in fact the defendant did not commit the crime of which he has been convicted.

The plaintiff-appellee says that the answer to this question is: unknown.

The courts below did not answer this question.

(A)(ii) WHETHER THE DEFENDANT IN THIS CASE QUALIFIES UNDER THAT STANDARD?

The defendant-appellant says that the answer to this question is: Yes.

The plaintiff-appellee says that the answer to this question is: No.

The courts below answered this question: No.

(B) 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?

The defendant-appellant says that the answer to this question is: Yes.

The plaintiff-appellee says that the answer to this question is: No.

The courts below did not answer this question.

(C) 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?

The defendant-appellant says that the answer to this question is: Yes.

The plaintiff-appellee says that the answer to this question is: No.

The courts below did not answer this question.

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

The defendant-appellant says that the answer to this question is: No.

The plaintiff-appellee says that the answer to this question is: Yes.

The courts below answered this question: Yes..

(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 defendant-appellant says that the answer to this question is: No.

The plaintiff-appellee says that the answer to this question is unknown.

The courts below did not answer this question.

(F) WHAT IS THE SCOPE OF RELIEF, IF ANY, AVAILABLE TO A DEFENDANT UNDER MCR 7.316(A)(7) IN LIGHT OF MCR 6.508(D)?

The defendant-appellant says that the answer to this question is: the Court may grant a new trial, or any other and further relief it deems necessary to ensure that justice is done.

The plaintiff-appellee says that the answer to this question is unknown.

The courts below did not answer this question.

(G) 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?

The defendant-appellant says that the answer to this question is: Yes.

The plaintiff-appellee says that the answer to this question is unknown.

The courts below did not answer this question.

STATEMENT OF FACTS

Defendant William Garrett was charged with and convicted of one count of robbery armed, MCL 750.529, and as a fourth felony offender, MCL 769.12, after a five day jury trial before the Honorable Isidore Torres in October, 1995, and sentenced to 15-30 years imprisonment on November 2 of that year.

The charges arose out of the knife-point robbery of Eleanore Neault, then 87 years of age, in her home in Plymouth. There was no physical evidence linking Mr. Garrett to the robbery and the prosecution's case rested almost exclusively on the identification testimony of the complainant. Mr. Garrett presented an alibi defense, calling seven witnesses, but did not testify on his own behalf.

The trial testimony.

Ms. Neault testified that sometime after 3:30 on the day of the assault, March 14, 1995, she noticed a man she identified as Mr. Garrett (who had apparently been at her house four days earlier to inspect her furnace for his employer, Century Comfort) as she was attempting to open her garage door after retrieving her mail. 148A - 153A. After gaining entry into the house, she said that he demanded money, slapped her on the cheek, struck her in the back of the head with a knife, which she variously described as black, amber, or orange. 157A - 160A, 164A. Ms. Neault then took him down to the fruit cellar and showed him a tin can where she kept money for emergencies and the man took the money, which she described as $50 bills. 161A - 162A, 170A. According to Ms. Neault, the incident lasted approximately 45 minutes. 163A.

Ms. Neault's identification of Mr. Garrett as her assailant was subject to impeachment in a number of particulars. Thus, for example:

- She described her assailant as being clean-shaven, even though a picture of Mr. Garrett taken the day of the robbery showed him wearing a moustache.

166A. She also testified that she was shown a single photograph of Mr. Garrett on two occasions-before the preliminary examination and then again the day she testified at trial. 168A - 171A.[3]

- She also testified that 10 minutes before she noticed the man she identified as Mr. Garrett, another man, whom she had never seen before, arrived at her house and gained admission to her basement on the representation that he was there to inspect her water supply - odd, because Ms. Neault's water comes from a well. 153A -155A. She was unable to offer any description of the man other than that he was white and in his 30's, but testified that when the man she identified as Mr. Garrett arrived, the water inspector was still in her basement. 152A - 155A, 164A - 165A.

- At trial Ms. Neault testified that she did not notice the man who robbed her arrive in a truck. 155A. At the preliminary examination, however, she testified that she saw a yellow-green wooden truck with bars. 164A. There was also testimony that Mr. Garrett drove a white truck. 175A - 176A.

- According to Mary Colleen Smith. a neighbor who found her after the assault, Ms. Neault described her assailant as Hispanic (Mr. Garrett is white). 173A.

In addition, when Mr. Garrett was arrested later that day, searches of his person and the white truck he was driving failed to turn up any of the fruits of the robbery, or a knife. 177A, 184A - 185A. Furthermore, the tires of his truck did not match tire tracks found at Ms. Neault's home. 181A - 184A.[4]

Mr. Garrett's alibi witnesses, all of whom testified that he was driving a white company truck at the time they saw him, covered the following time periods:

---

[3] On redirect, however, she said she had only seen the photograph on the day she testified at trial. 172A.

[4] Another witness, Shirley Gignac, who lived across the street from Ms. Neault, also identified Mr. Garrett at trial, but her testimony was shot through with contradictions, For example, she described Mr. Garrett as looking to be 21, but had described the person she saw on March 14 as being in his mid-thirties. 187A, 189A - 190A, In addition, she said she was "absolutely positive" that the man arrived in a blue truck, 190A - 191A, although all the other testimony was to the effect that Mr. Garrett was driving a white company truck on that day.

2:00 - 3:00 P.M.: Patricia Moyd testified that he was at her home in Detroit inspecting her furnace from approximately 2:00 to 3:00 p.m..[5] 196A.

3:15 - 4:30 P.M.: Danell Dixon testified that Mr. Garrett picked her up at her mother's house in Warren at approximately 3:15 p.m., and drove her to her uncle's house in Hazel Park and dropped her off at approximately 3:45 p.m. 197A - 199A. At approximately 4:00 p.m., Mr. Garrett called her from Sharlene Stewart's house, according to the caller ID displayed on her phone. 200A. She and Mr. Garrett talked for approximately 15 minutes.[6] 201A. Sharlene Stewart testified that Mr. Garrett arrived at her home in Hazel Park at 3:50 p.m., and stayed until around 4:30.[7] 205A - 206A.

4:30 - 5:5:30 P.M.: Freddie Lockard testified that he was at his friend Joe Benke's house in Hazel Park on the afternoon of March 14, 1995 when Mr. Garrett arrived at Mr. Benke's house. 215A. He estimated that Mr. Garrett arrived at approximately 4:20 p.m. 216A. Mr. Benke's girlfriend, Marie Poma, was also at the house until she left for work at approximately 4:45 p.m.. 219A - 220A. Mr. Lockard testified that he, Joe Benke, and Mr. Garrett talked until sometime between 5:30 and 5:45 p.m. when Mr. Garrett left to go to another furnace job.[8] 215A - 220A. Marie Poma testified that when she left for work at approximately 4:45 p.m., Mr. Garrett was at her house in Hazel Park talking to Joe Benke, her boyfriend, and Fred Lockard. 191A - 195A.

Not called as a defense witness, however, was Joseph Benke. notwithstanding the fact that several of the other defense witnesses' testimony referred to him, and the prosecution pointed to his

[5] The police corroborated that Mr. Garrett did make a service call at Patricia Moyd's house at 2:15 p.m.. 174A, 178A - 179A.

[6] Sandra Dixon, Danell Dixon's mother, corroborated her daughter's testimony that Mr. Garrett had picked up Danell, but put the time as approximately 3:30 p.m.. 202A - 204A.

[7] Charles Klaus, Ms. Stewart's father, corroborated his daughter's testimony that Mr. Garrett came to his home at approximately 3:40 p.m.. 207A - 214A

[8] The police corroborated that Mr. Garrett did make a service call at 6:00 p.m.. 174A.

absence as a weakness in the alibi defense, illustrating that absence in the cross-examination of the other witnesses, *e.g.,* 220A - 221A, and specifically pointing to it in closing argument. 223A.

Post-trial proceedings.

Ms. Neault filed a civil lawsuit against the heating company for which Mr. Garrett had worked at the time of the robbery, and in the course of the deposition and that of her daughter-in-law Elizabeth, it emerged that she had suffered significant impairments prior to and at the time of the assault, and continuing through the time of her testimony at defendant-appellant's trial. Thus, Ms. Neault testified that "in 1992 or thereabouts" it was discovered that she had a brain tumor.[9] 39A, Elizabeth Neault testified that her mother-in-law had had a series of "mini strokes" (Transient Ischemic Attacks, or TIA's) culminating in a fall in November of 1995.[10] 46A - 47A.

In addition, after the trial, Mr. Garrett passed a polygraph examination verifying the truthfulness of his statement that he had not robbed Ms. Neault, as did one of the alibi witnesses, Ms. Stewart, regarding her statement that Mr. Garrett was in her presence at 4:30 p.m. on March 14, 1995. Also, Joseph Benke, who was not called at trial, passed a polygraph examination verifying that Mr. Garrett was with him from 4:30-5:30 pm in Hazel Park on the day of the crime. (The examiner's CV and reports are found at 28A - 36A.)

Based on these developments, appellate counsel filed a motion to remand the case to the trial court to allow him to file a Motion for New Trial and to conduct an evidentiary hearing. This

---

[9] She also testified, contrary to her trial testimony, that the assailant did not have a knife when she was robbed. 40A.

[10] She further testified that her mother-in-law told her shortly after the robbery that another man, a water man with a clipboard, was in the upstairs of her house and had told her to go into the basement and run some water. It was while she was helping the water man that the other man in the basement robbed her. 53A - 55A.

motion was initially denied, but granted after the Court of Appeals had heard oral argument in the case.

An evidentiary hearing on the motion was held before Judge Sean Cox on February 12, 1999 and March 26, 1999.

At the evidentiary hearing, appellate counsel called Joseph Benke, the alibi witness who was not called at trial, Sharlene Stewart, and Mr. Garrett, who had not testified at trial.

Mr. Garrett denied any involvement in the robbery (but acknowledged having been there on an earlier occasion to clean her furnace), and outlined his movements on the day of the crime, consistently with the testimony of the alibi witnesses. 142A - 148A. Ms. Stewart confirmed her trial testimony. 116A - 121A.

Mr. Benke testified that on the afternoon of March 14, 1995 he was in his house in Hazel Park when his friend Fred Lockard came over. 113A. Also present was his girlfriend, Marie Poma. *Ibid.* When Mr. Lockard arrived, he opened the door and proceeded to the front porch and began talking with Mr. Lockard. 113A - 114A He estimated that Mr. Lockard arrived sometime between 4:00 and 4:30 p.m. 114A. While he was talking to Mr. Lockard, he noticed Mr. Garrett coming down the street in his white work truck. *Ibid.* He estimated that Mr. Garrett arrived sometime and Mr. Benke between 4:30 and 4:45 pm. *Ibid.* He estimated that he, Mr. Lockard, and Mr. Garrett talked for at least an hour and that Mr. Garrett left after receiving a page. 114A - 115A. He testified that he was never contacted by trial counsel. 112A.[11]

---

[11] Mr. Benke also testified to the circumstances of his polygraph examination, as did Charlene Stewart, who also stated that she went to the Plymouth Township Police Department the day following Mr. Garrett's arrest and made a written statement, 131A, 119A - 121A.

Further, the polygraph examiner, Charles Ghent, testified that, based on the results of his examination, Mr. Garrett, Ms. Stewart, and Mr. Benke were being truthful as to the substance of their testimony. 122A - 141A

In addition, Ms. Neault's medical records from Dr. Mark Oberdoerster, her personal physician, Dr. Robert Levy, her neurologist, and Dr. Jeffrey Thomas, her internist. Ms. Neault's were admitted.

As introduced at the evidentiary hearing, Mrs. Neault's medical records demonstrated that she had a "waxing and waning mental status" and memory at both the time of the incident and at trial, and had been diagnosed with senile dementia and Alzheimer's in early 1996. According to those records:

- Her cognition problems started in late 1992, when she fell down her basement stairs, fracturing her left wrist. 103A. A three cm right parietal meningioma and associated edema of the brain parenchyma was found, which necessitated surgery. *Ibid.* A repeat CT scan was performed a year later, and this showed no recurrence of the tumor. 99A. Consequently, she was discharged from the surgeon's care. However, she was experiencing senile tremors. 100A.
- On October 26, 1994, an EEG was read as abnormal due to a right front temporal intermittent theta-delta activity consistent with a focal neuronal disturbance in the area. 83A.
- Diagnostic tests given and notes written shortly after the trial conclusively showed that Mrs. Neault's mental status was compromised throughout 1995: she suffered another fall a month after the trial, and was described by her daughter as having had a "history of waxing and waning mental status." 67A.
- By February, 1996, Dr. Oberdoerster diagnosed her with Alzheimer's, and progressive memory loss. 65A.
- In April, 1996, Dr. Levy wrote that "she has had decrease in memory for the past year." 81A.

Judge Cox issued a written opinion on April 21, 1999, granting Mr. Garrett a new trial.

As to the medical evidence that Mrs. Neault had a history of brain tumors, TIAs. Senile dementia, and Alzheimer's, Judge Cox found that the evidence was newly discovered, it was not cumulative, and the defense could not have presented the records as evidence at trial. The court, however, determined that this evidence did not raise the probability of a different result upon retrial. 15A.

Judge Cox did, however, grant Mr. Garrett's motion on the basis of Joe Benke's testimony. The court found that Mr. Benke provided a complete alibi and that he had no motive to lie:

> Finally, while the defendant could have produced this witness at trial, it is the opinion of this court that the testimony of this witness is of such importance that this fact alone should not prevent the granting of defendant's motion. "The grant or refusal a new trial generally rests in the sound discretion of the trial court. Such discretion, however, is not mere whim worker priests, but the exercise of a deliberate judgment, founded on well-established principles, and having for its object the promotion of justice and the protection of the innocent." *People v Inman*, 315 Mich 456, 476 (1946). The exercise of this discretion by the court is to be done to protect the accused against mistakes and prejudice. *Inman*, at 476. Based upon the testimony from the evidentiary hearing and the above noted cites, it is this court's opinion that defendant has met his burden or proof with regard to newly discovered evidence and his motion for new trial should be, and is, granted.

16A - 17A.

The Court of Appeals granted the prosecution's application for leave to appeal and peremptorily reversed Judge Cox's order granting Mr. Garrett a new trial, finding that Joe Benke's testimony was cumulative and not newly discovered. 19A.

Mr. Garrett filed a motion for reconsideration in the trial court, relying on the grounds not reached by Judge Cox, which was denied. 20A.

Mr. Garrett filed a delayed Application for Leave to Appeal to the Court of Appeals, arguing that the verdict was against the great weight of the evidence, that the trial court abused its discretion

in denying his motion for new trial based on newly discovered polygraph evidence and evidence of the complainant's mental condition, and that his right to due process guaranteed under the Fifth and Fourteenth Amendments were violated where the evidence demonstrated that Mr. Garrett was, in fact, innocent. After granting leave, the Court of Appeals affirmed his conviction in an unpublished opinion dated November 6, 2001. 23A - 27A.

Mr. Garrett then filed a delayed Application for Leave to Appeal to this Court, raising the same issues he raised in the Court of Appeals and arguing that he was convicted of a crime he did not commit. The Court denied the Application, with Justices Cavanagh, Kelley and Markman voting to grant leave. *People v Garrett*, 467 Mich 936 (2003).

On December 29, 2010, Mr. Garrett filed a Motion for Relief From Judgment arguing that he was denied effective assistance of counsel by trial counsel's failure to interview and call Joseph Benke as an alibi witness and by counsel's failure to move to suppress Ms. Neault's in-court identification as the product of an unduly suggestive photo show-up and by appellate counsel's failure to raise these issues. Initially, the trial court granted Mr. Garrett's request for an evidentiary hearing without requiring an answer from the prosecutor. 107A - 108A. The prosecution, however, filed a Motion for Reconsideration which was granted in an Order dated July 5, 2011. 109A

In an Opinion and Order dated November 30, 2011, the trial court (the Hon. Linda V. Parker, Circuit Judge, presiding) denied Mr. Garrett's Motion for Relief From Judgment. (Exhibit A). As to trial counsel's failure to move to suppress Ms. Neault's in-court identification, the Court held that there was an independent basis for the in-court identification. In rejecting defendant's claim that trial counsel's failure to interview and call Joseph Benke, the trial court ruled that it was bound by the

Court of Appeals' July 28,1999 order (Docket Number 219803) that Joseph Benke's testimony was cumulative. 7A - 11A.

On December 20, 2011, defendant filed a timely Application for Leave to Appeal which was denied by the Court of Appeals on June 8, 2012, under docket number 307728. 110A.

I

TRIAL COUNSEL'S FAILURE (1) TO MOVE TO SUPPRESS IDENTIFICATION TESTIMONY, AND (2) TO INTERVIEW AND CALL AN ALIBI WITNESS DENIED DEFENDANT-APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS MOTION FOR RELIEF FROM JUDGMENT SHOULD NOT HAVE BEEN DENIED WITHOUT AN EVIDENTIARY HEARING, AND APPELLATE COUNSEL'S FAILURE TO PRESENT THESE CLAIMS CONSTITUTED DEFICIENT PERFORMANCE, AND SUFFICIENT "CAUSE" TO ALLOW THEM TO BE RAISED IN THAT MOTION[12]

The standard of review for claims of ineffective assistance of counsel based on deficient performance is, of course, the two-step process described by the Supreme Court in *Strickland v Washington*, 466 U.S. 668 (1984). First, the defendant must show that his attorney's performance was deficient. "Deficient performance" is not merely below-average performance; rather, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. Second, the defendant must show that he was prejudiced by the substandard performance: "Prejudice" is a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "The essential question is whether better lawyering would have produced a different result." *Washington v Hofbauer*, 228 F3d 689, 702 (6th Cir. 2000) (internal quotations and citations omitted).

As it must, the law allows trial attorneys to make tactical and strategic decisions as they must, and, to varying degrees, insulates such decisions from attacks facilitated by the benefit of

[12] **Standard of review.** "Because defendant is seeking relief pursuant to subchapter 6.500 of the Michigan Court Rules, we review for an abuse of discretion the circuit court's decision to grant this relief. See *People v Osaghae* (On Reconsideration), 460 Mich 529, 534, 596 N.W.2d 911 (1999). However, we review *de novo* any underlying questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579, 640 N.W.2d 246 (2002)" *People v. Trakhtenberg*, 493 Mich 38, 62 n. 6 (2012).

20/20 hindsight: "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland v Washington, supra,* at 690. On the other hand, patently erroneous advice or decisions, based on misunderstandings of the law or misapprehension of critical facts, cannot be excused as "reasonable," and, if they significantly affected the proceedings, constitute constitutionally ineffective assistance of counsel. *See, e.g., United States v Streater*, 70 F.3d 1314, 1321 (D.C. Cir. 1995) (erroneous advice); *Scarpa v Dubois,*38 F. 3d 1 (1st Cir 1994) (pursuit of doomed "conduit" theory of defense); *Warner v United States,* 975 F.2d 1207, 1211 (6th Cir. 1992) (erroneous advice regarding consecutive sentencing possibilities); *Baty v Balkcom,* 661 F2d 391, 394-95 (5th Cir.1981) (holding that defense counsel's unfamiliarity with his client's case transgressed performance standard).

Mr. Garrett maintains that trial counsel failed to adequately safeguard his fair trial rights in two particulars:

1) He failed to interview and call a critical alibi witness, Joseph Benke; and

2) He failed to move to suppress the identification testimony by the complainant Eleanore Neault.

He also maintains that appellate counsel denied him effective assistance of counsel by failing to raise these issues on direct appeal.

Failure to interview and call alibi witness Joseph Benke

The case law "dispels any doubt that a lawyer's *Strickland* duty 'includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence.'" *Ramonez v Berghuis,* 490 F3d 482, 487 (6th Cir. 2007) (citing *Towns v Smith,* 395 F3d 251, 258 (6th Cir.2005)). As the *Towns* court noted, "[t]he duty to investigate derives from counsel's

basic function, which is '"to make the adversarial testing process work in the particular case."'" *Id.*, at 258 (Quoting *Kimmelman v Morrison,* 477 U.S. 365, 384 (1986) and *Strickland, supra,* at 690).

The operation of this principle, and its application to the case at bar, is well illustrated by the decision of the Sixth Circuit in *Bigelow v Haviland.* 576 F3d 284, *reh. denied,* 582 F3d. 670 (6th Cir. 2009). In that case, trial counsel had, through the defendant located and called an alibi witness who testified that he had been working at a house in a distant city on the day of the crimes for which defendant was convicted, and he had seen the defendant there. The Sixth Circuit, however, found that habeas relief was appropriate based on counsel's failure to " take even . . . minimal steps to corroborate" that testimony with the testimony of other witnesses who had also been at the house and could have confirmed that defendant was indeed there. *Id,* at 287-288.

In the case at bar, unlike in *Bigelow,* defense counsel was actually aware of the fact that Mr. Garrett was with Joseph Benke at the time of the robbery. Despite this knowledge, trial counsel failed to even interview Mr. Benke before making a decision not to call him to corroborate Mr. Garrett's alibi.

Mr. Benke would have provided strong corroboration of that alibi. Mr. Lockard, a good friend of Mr. Garrett, was the *only* witness that testified that Mr. Garrett was in Hazel Park at the precise time of the robbery and that he remained in Hazel Park the entire time the robbery was occurring in Plymouth. Any evidence that corroborated Mr. Lockard's testimony may have very well tipped the balance in Mr. Garrett's favor, particularly a witness such as Mr. Benke who was *not* a close friend of Mr. Garrett.

Indeed Judge Cox, who heard Mr. Benke's testify and had the opportunity to evaluate his credibility found that Mr. Benke's testimony would have "render[ed] a different result on retrial" noting that Mr. Benke had no motive to lie:

> The time that defendant was talking to Mr. Benke and Mr. Lockard was a time that the complainant was allegedly attacked in her home. More importantly, Mr. Benke is a neutral and detached witness in that he is not close to the defendant and in fact he does not know defendant very well and thus has no incentive not to tell the truth.

16A.

Indeed, Judge Cox found that Mr. Benke's testimony "was of such importance" that he felt it was necessary to grant the motion even though Mr. Benke was known to the defense and his testimony would not, therefore, not technically constitute newly discovered evidence. 17A. Whatever the legal merits of this decision (which was reversed by the Court of Appeals) its status as the judgment of a first-hand judicial factfinder regarding the impact of the unpresented testimony should be entitled to great weight.

Failure to move for the suppression of identification testimony by the complainant Eleanore Neault.

There was no physical evidence tying Mr. Garrett to the robbery. Although Ms. Neault testified her house was ransacked, Mr. Garrett's fingerprints were not found in the house. (T III, 116). In addition, the tire tracks that were found at Ms. Neault's house did not match, the tire treads on Mr. Garrett's truck. *Id.*, at 143, 146-148. The search of Mr. Garrett's truck less than three hours after the robbery did not produce any evidence tying Mr. Garrett to the crime, and specifically did not turn up a knife nor any money or property taken from Mr. Neault's house. *Id.*, at 96, 148-149, Moreover, the coat found inside Mr. Garrett's truck did not fit the description of the windbreaker given by Mrs. Neault's neighbor, Shirley Gignac, who saw a man pull into Mrs. Neault's driveway

with a blue truck at the approximate time of the robbery. *Id.*, at 150, 160-161. Thus, the identification of Mr. Garrett as her assailant was of critical importance to the prosecution's case.

At trial, Mrs. Neault testified that the police showed her a photograph of Mr. Garrett just before the preliminary examination and that the assistant prosecuting attorney showed her a photograph of Mr. Garrett on the date she testified at trial. T. II, pp. 131, 139-141.

Despite the fact that the witness testified that she was shown a single photograph of Mr. Garrett just before she testified at the preliminary examination and then again at trial, trial counsel failed to file a motion to suppress or move to strike Mrs. Neault's in-court identification as being the product of an unduly suggestive photo show-up.[13] Nor did appellate counsel raise the issue on direct appeal even though he was aware of the fact that Ms. Neault was suffering from a mental impairment at the time of the robbery and at trial. The Due Process Clause of the Fourteenth Amendment protects an accused from the use of evidence derived from unreliable identifications that resulted from impermissibly suggestive procedures. *Manson v Brathwaite*, 432 U.S. 98 (1977). The Courts have consistently criticized the use of single photograph and have recognized that the Due Process standard "is that of fairness . . . reliability is the linchpin in determining the admissibility of identification testimony." *Id.*, at 113-114. In other words, "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Neil v Biggers*, 409 U.S. 188, 199 (1972). In that case, the Court identified the factors to be considered in making the determination of reliability as including: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of

[13] It seems unlikely that simply striking the testimony would have been an adequate remedy, but it would have been a necessary first step toward a motion for a mistrial.

attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.,* at 199-200.

Similarly, Michigan decisions examine whether, notwithstanding the suggestive confrontation, the prosecution can demonstrate - by "clear and convincing evidence," *People v Colon,* 233 Mich App 295, 304 (1998) - that there is an "independent basis" for the witness's identification, and generally identify eight factors as being appropriately examined in this inquiry:

> 1. Prior relationship with or knowledge of the defendant;
>
> 2. The opportunity to observe the offense. . . . ;
>
> 3. Length of time between the offense and the disputed identification;
>
> 4. Accuracy or discrepancies in the pre-lineup or show-up description and defendant's actual description;
>
> 5. Any previous proper identification or failure to identify the defendant;
>
> 6. Any identification . . .of another person as defendant;
>
> 7. . . .[T]he nature of the alleged offense and the physical and psychological state of the victim. . . . ; [and]
>
> 8. Any idiosyncratic or special features of defendant.

People v Kachar, 400 Mich 78, 95-96 (1977) (Internal quotation marks and citations omitted).

Obviously, "[c]ounsel's failure to make a futile motion does not constitute ineffective assistance of counsel." *James v Borg,* 24 F3d 20, 27 (9th Cir. 1994). Thus, the defendant must show not only that counsel's failure to move to suppress the identification (or strike the testimony) constituted deficient performance, but also that the unasserted claim was "meritorious and that there

is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman v Morrison*, 477 U.S. 365, 375 (1986) (unmade Fourth Amendment motion).

Here, however, the record compels the conclusion that a motion to suppress Mrs. Neault's identification as tainted, based on the considerations outlined in *Biggers,* or the so-called "*Kachar* factors," would have been meritorious indeed. Obviously, the hearing which would have been necessitated by such a motion (known colloquially as a "Wade hearing," after *United States v Wade,* 388 U.S. 218 (1967)) would have focused the testimony more clearly, but even without the benefit of such a hearing, the record reflects the following, all of which significantly undercut the reliability or "independent basis" of the witness's in-court identification:

a. Mr Garrett was not well known to Mrs. Neault. She had seen him only once before had there was nothing particularly remarkable about that encounter which would have left an impression on Ms. Neault;

b. There was over a six month time gap between the time of the alleged crime and her identification at trial;

c. She described her assailant as clean shaven yet a photograph taken of defendant by the on the day of the robbery revealed he was clean shaven.

d. The record does not suggest that Mr. Garrett possessed of any "idiosyncratic or special features" which would facilitate his identification.

No tactical or strategic reason could possibly justify trial counsel's failure to challenge the admissibility of Mrs. Neault's identification testimony - after all, what could possibly have been the harm of mounting such a challenge? Moreover, had the appropriate motion been made, the Court would have been bound to uphold it, and had Ms. Neault's identification of Mr. Garrett been successfully challenged, the nature of the proofs against him would have been markedly different, and the chance of his acquittal much greater. Thus, both prongs of the *Strickland* standard are established - "performance" and "prejudice."

In denying Mr. Garrett's Motion for Relief From Judgment the trial court foud that an independent basis existed for the in-court identification. 9A. This finding, however, completely ignores the extensive medical evidence that Ms. Neault was suffering from a severe mental impairment both at the time of the robbery and at trial, as detailed hereinabove.

Ineffective assistance of appellate counsel

The issue of ineffective assistance of counsel was not raised on direct appeal. Thus, under MCR 6.508(D)(3) defendant must demonstrate both good cause for the failure to raise the issue previously and actual prejudice.[14]

As with trial counsel, of course, the law recognizes that appellate counsel must make professional judgments about what issues to raise, and insulates such judgments from after-the-fact claims of ineffectiveness - so long as appellate counsel really made a professional judgment in the matter, *and so long as that judgment was objectively reasonable*:

> [A]ppellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance. *Jones v Barnes*, 463 US 745, 752, 103 SCt 3308, 3313, 77 LEd 2d 987 (1983). Nor is the failure to assert all arguable claims sufficient to overcome the presumption that counsel functioned as a reasonable appellate attorney in selecting the issues presented.

People v Reed, 449 Mich 375, 392 (1995). "The question is whether a reasonable appellate attorney could conclude" that the issue was "not worthy of mention on appeal." *Ibid.* In *Mapes v Coyle,* 171

[14] The Staff Comment to the Rule makes clear that these standards are based on the "cause and prejudice" requirements applicable to federal habeas corpus law, as outlined by the United States Supreme Court in cases such as *Wainwright v Sykes,* 433 US 72 (1977) and *United States v Frady*, 456 US 152 (1982). Under those decisions, "[a]ttorney error that constitutes ineffective assistance of counsel is cause." *Coleman v Thompson*, 501 US 722, 753-754 (1991).

F.3d 408, 427-428 (6th Cir. 1999), the Sixth Circuit identified several non-exclusive factors to be considered in determining whether a defendant was denied effective assistance of appellate counsel:

(1) Were the omitted issues "significant and obvious"?;

(2) Was there arguably contrary authority on the omitted issues?

(3) Were the omitted issues clearly stronger than those presented?;

(4) Were the omitted issues objected to at trial?;

(5) Were the trial court's rulings subject to deference on appeal?;

(6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?;

(7) What was appellate counsel's level of experience and expertise?;

(8) Did the petitioner and appellate counsel meet and go over possible issues?;

(9) Is there evidence that counsel reviewed all the facts?;

(10) Were the omitted issues dealt with in other assignments of error?; [and]

(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Applying the above factors to the case it bar it is simply beyond debate that the failure to raise ineffective assistance of trial counsel based on counsel's to interview and call Joseph Benke as an alibi witness and his failure to move to suppress Ms. Neault's in-court identification of Mr. Garrett constituted ineffective assistance of appellate counsel.

As the Court of Appeals recognized in peremptorily over turning Judge Cox's order granting Mr. Garrett a new trial, Mr. Benke's testimony certainly did not meet the definition of newly discovered evidence, since trial counsel was unquestionably aware of the fact that Mr. Benke was at the house in Hazel Park speaking to Mr. Lockard when Mr. Garrett arrived. Both Mr. Lockard

and Ms. Toma testified to this very fact. Thus, appellate counsel's argument that Mr. Benke's testimony constituted newly discovered evidence was doomed from the outset.

Obviously, appellate counsel understood the significance of Mr. Benke's alibi testimony because he actually sought to raise it in the context of newly discovered evidence. There is simply no strategic reason for appellate counsel's failure to raise the issue of ineffective assistance of counsel based on trial counsel's failure to interview and call Mr. Benke as an alibi witness.[15]

The same can be said of appellate counsel's failure to raise the issue of the trial counsel's failure to move to suppress Ms. Neault's in-court identification of Mr. Garrett as the product of an duly suggestive photo show up.

The failure of appellate counsel to raise the issue is even more egregious because appellate counsel was aware of the fact that Ms. Neault was suffering from a severe mental impairment at the time of the robbery and at trial clearly calling into question whether she would have been able to make any identification at trial had she not been shown a single photograph of Mr. Garrett immediately before she testified. Once appellate counsel learned of Ms. Neault's mental impairment, there was simply no reason for appellate counsel not to raise the issue that Ms. Neault's in-court identification was impermissibly tainted by the prosecutor showing Ms. Neault a photo of Mr. Garrett shortly before she testified. While appellate counsel did raise Ms. Neault's mental

[15] Most importantly, Judge Cox certainly recognized the importance of Joe Benke's testimony because he concluded after hearing the "the alibi testimony of Joe Benke . . . would . . . render a different result on retrial. (Exhibit B, p. 4). Had appellate counsel raised Mr. Benke's failure to testify in the context of ineffective assistance of counsel, it is safe to assume that Judge Cox would have come to the same conclusion. There is a reasonable probability that the outcome of the prosecutor's appeal would have been different and that Judge Cox's order granting Mr. Garrett a new trial would have been affirmed. It simply cannot be maintained that the issue was "not worthy of mention on appeal."

impairment in the context of newly discovered evidence, he completely ignored the impact that the photograph may have had on her in-court identification given her mental impairment.

On their face, the issues raised herein are clearly worthy of mention on appeal, and had counsel been diligent in raising them, there is a reasonable probability that the outcome of the appeal would have been different. This is sufficient, counsel submits, for a finding of cause and prejudice sufficient to overcome appellate counsel's failure to raise the issues on appeal, and to allow the Court to reach their merits.[16]

[16] Although the Michigan decisions do not specifically call for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973) in regard to allegations of ineffectiveness of appellate counsel, if the Court is not prepared to find counsel ineffective on the face of the record, such a hearing should be conducted.

II.

WHETHER OR NOT THE FAILURE TO RAISE THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ON DIRECT APPEAL MAY BE EXCUSED ON "CAUSE AND PREJUDICE" GROUNDS, THE SIGNIFICANT POSSIBILITY THAT DEFENDANT-APPELLANT IS INNOCENT OF THE CHARGES PERMITS THEM TO BE RAISED IN A COLLATERAL ATTACK ON HIS CONVICTION, AND THE EVIDENCE OF HIS INNOCENCE PROVIDES AN INDEPENDENT GROUND FOR RELIEF AS WELL.[17]

(A)(i)

BY WHAT STANDARD(S) DO 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?[18]

The "significant possibility" of innocence is set forth as a "gateway" provision in MCR 6.508(D), which provides in pertinent part that "[t]he 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." In *People v Reed, supra,* this Court explained that this provision"recognizes that the most fundamental injustice is the conviction of an innocent person," *id.,* at 378 n. 1, but did not further define it.

In *People v Swain,* 288 Mich App 609, 638-639 (2010), the Court of Appeals noted the lack of a definition in the Rule, and in Michigan decisional authority as well, but stated that it "could discern no meaningful difference between it and the 'actual innocence' standard" developed in Federal habeas corpus jurisprudence, under which "A defendant must show that it is more likely

---

[17] **Standard of review.** The several subissues embraced hereunder present mixed questions of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews *de novo* questions of law. *People v Armstrong,* 490 Mich 281, 289 (2011).

[18] **Standard of review.** This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt.'" (quoting *Schlup v Delo,* 513 US 298, 327 (1995)).

Defendant contends that the *Swain* panel was incorrect in this, and that the federal "actual innocence" exception is distinguishable, both functionally and linguistically, from the standard set forth in the Michigan rule - meaningful differences, which should move the Court to adopt a different, and effectively more open-handed, working definition of the "significant possibility" standard.

As the United States Supreme Court explained in *House v Bell,* 547 U.S. 518, 536-537 (2006), the "actual innocence" was derived as a "gateway" to the litigation in federal habeas corpus of claims which had not first been presented to state courts as a needed counterweight to the principles of comity and federalism which ordinarily preclude the federal litigation of claims upon which state courts have not had an opportunity to rule:

> As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error. The rule is based on the comity and respect that must be accorded to state-court judgments. The bar is not, however, unqualified. In an effort to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case, the Court has recognized a miscarriage-of-justice exception. [I]n appropriate cases, the Court has said, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration.
>
> In *Schlup* [*v. Delo,* 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)], the Court adopted a specific rule to implement this general principle. It held that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." 513 U.S., at 327, 115 S.Ct. 851. This formulation, *Schlup* explains, "ensures that petitioner's case is truly 'extraordinary,' while still providing petitioner a meaningful avenue by which to avoid a manifest injustice." *Ibid.* (quoting *McCleskey v. Zant*, 499 U.S. 467, 494, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991)). In the usual case the presumed guilt of a

> prisoner convicted in state court counsels against federal review of defaulted claims. Yet a petition supported by a convincing *Schlup* gateway showing "raise[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error"; hence, "a review of the merits of the constitutional claims" is justified. 513 U.S., at 317, 115 S.Ct. 851.

While the standard set forth in the Michigan rule is obviously also aimed at avoiding manifest injustice, the principle of comity which underlies the federal "cause and prejudice" rule, and ensures that any exception to it be narrowly drawn, is not at work in the case of Michigan post-conviction review.[19] It follows, defendant would suggest, that the need for and appropriateness of a similarly exacting standard is therefore lessened.

Additionally, the federal standard is one of "probability," as *Schlup* makes clear - that "the constitutional violation 'probably has caused the conviction of one innocent of the crime.'" *Id.,* at 322 (quoting *McCleskey v Zant,* 499 US 467, 494 (1991)). On its face, "probably" - *i.e.,* more likely than not - implies a greater degree of likelihood than "possibly," even as modified by "significant."

Obviously, and properly, the function of the "significant" modifier is to make clear that - in a world where almost *everything* is (or at least seems) "possible" - that more than the merely chimerical possibility of innocence is shown. Rather, what is required is a real, substantial possibility that the kind of "fundamental injustice" against which the provision is intended to guard has taken place.

---

[19] Obviously, concern for the finality of judgments and the conservation of judicial resources are implicated in the restrictions built into Chapter 6.500, and are important considerations, but respect for the work of another sovereign adds a whole new dimension to the equation.

This Court has repeatedly stated that in interpreting statutes or court rules, it is appropriate to "refer to dictionary definitions in the absence of an explicit definition in the text being interpreted." *People v Gursky,* 486 Mich 596, 608 n. 21 (2010). With this in mind, the Court may wish to note the relevant entries in Webster's Unabridged Dictionary's definition of "significant" as an adjective:

> 1: having meaning; especially : full of import : suggestive, expressive <the painter's task to pick out the significant details — Herbert Read> <significant anecdote>
>
> * * *
>
> 3a : having or likely to have influence or effect : deserving to be considered : important, weighty, notable <even though the individual results may seem small, the total of them is significant — F.D.Roosevelt> . . .

http://unabridged.merriam-webster.com/unabridged/SIGNIFICANT, as viewed June 27, 2013.

Linguistically, then, all the Michigan rule should be read as requiring is a meaningful possibility that in fact the defendant did not commit the crime of which he has been convicted, and *not*, as the federal rule requires, the probability that no reasonable factfinder would find him guilty of that crime.[20]

---

[20] It might also be noted that, in addition to the textual and contextual arguments made in the body of this submission, the federal rule is a less than exemplary model, inasmuch as it conflates the reality of "actual innocence" (a phrase suggesting a factual, as opposed to legal condition) with a sufficiency of the evidence-based test - what a factfinder would conclude, as opposed to what happened in the real world.

This is obvious, of course, from the formulation itself. Additionally, in the course of pointing out that "it is by no means equivalent to the standard of *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard that governs review of claims of insufficient evidence," *Schlup, supra,* at 330, the Court itself observed that " the use of the word 'would' focuses the inquiry on the likely behavior of the trier of fact." *Ibid.*

In addition, the *Schlup* standard requires that the showing of innocence be based on "new evidence," [21] while MCR 6.508(D) includes no such requirement, but merely speaks to a general finding: "there is a significant possibility that the defendant is innocent of the crime." This textual difference as well counsels against importing the federal standard.

(A)(ii)

WHETHER THE DEFENDANT IN THIS CASE QUALIFIES UNDER THAT STANDARD?[22]

Unsurprisingly, defendant's position is that he does qualify for relief under this standard - indeed, it seems clear that, when the evidence developed since his trial is factored in, there is far more than a "significant possibility" that he is in fact innocent.

To recapitulate briefly: after his conviction Mr. Garrett passed a polygraph that he had not robbed Ms. Neault, and gave testimony to this effect at an evidentiary hearing. (He also testified, without contradiction, that following his arrest, he told the police he had not committed the crime and asked that he be administered a polygraph test but the police denied that request and did not administer a polygraph examination. EH II, p, 58.

Ms. Stewart, one of the witnesses who had gone to the police to tell them that they had the wrong man also passed a polygraph that she was being truthful when she testified that Mr. Garrett was in her presence at 4:30 p.m. on March 14, 1995. Mr. Benke, who did not testify at trial also

[21] At the same time, as *House v. Bell, supra,* makes clear, "although '[t]o be credible" a gateway claim requires 'new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial,' the habeas court's analysis is not limited to such evidence." *Id.,* at 537.

[22] **Standard of review.** This appears to be a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews *de novo* questions of law. *People v Armstrong,* 490 Mich 281, 289 (2011).

passed a polygraph that Mr. Garrett was with him from 4:30-5:30 pm in Hazel Park on March 14, 1995. Taken together with the testimony of the seven alibi witnesses who testified at Mr. Garrett's trial, this information strongly suggests that it was someone other than Mr. Garrett who committed the crime of which he was convicted.

Moreover, after trial it was discovered that the complainant had a history of brain tumors and dementia which impaired her mental capacity not only when she testified at trial but also at the time of the incident. At her deposition in the civil case, Ms. Neault testified that she had a brain tumor in 1992. She also testified, contrary to her trial testimony, that the assailant did not have a knife when she was robbed.

There is also the deposition testimony of Mrs. Neault's daughter-in-law. She testified that her mother-in-law had fallen down a stairway in November of 1992 and it was discovered at that time that she had a brain tumor. She had brain surgery, and the tumor was removed. Following that, however, she had a series of mini strokes-transient ichschemic attacks - culminating in another fall in November of 1995. She further testified that her mother-in-law told her shortly after the robbery that another man, a water man with a clipboard, was in the upstairs of her house and had told her to go into the basement and run some water. It was while she was helping the water man that the other man in the basement robbed her. Obviously, the medical records cast significant doubt on the reliability of Ms. Neault's identification or Mr. Garrett - as, of course, does the suggestive photo-identification procedure which trial counsel failed to challenge.

(B)

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?[23]

Unlike MCR 6.431, relating to motions for new trials,[24] MCR Chapter 6.500 does not set forth any substantive standards for relief generally, other than stating, in MCR 6.508(D), that "[t]he defendant has the burden of establishing entitlement to the relief requested."

That subsection goes on to define the kinds of substantive showings of "Actual prejudice" required to be made in the event the movant "alleges grounds for relief. . .which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter" (*e.g.,* under romanette (i), "in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal"), but, as it does with regard to the requisite showing of "cause" referred to above, under romanette (iii) it allows for relief if "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."

In defendant's view, a sufficiently persuasive showing that an actually innocent person has been convicted of a crime would fall squarely within the heartland of this description. Accordingly, the Rule can be read as allowing relief, whether or not the movant can *also* show that the trial which

---

[23] **Standard of review.** This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

[24] Subsection (b) of which, of course, provides: "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."

resulted in his or her conviction was flawed with "irregularities" that might have altered the result of the proceeding.

Moreover, Chapter 6.500 clearly provides a procedure through which independent claims of the deprivation of rights assured by both State and Federal constitutions can be vindicated, and even if those claims could have been litigated on direct appeal, for relief to be granted under MCR 6.508(D)(3)(iii), as above. As is argued immediately below, it is defendant's position that a "freestanding" claim of factual innocence actually implicates both Due Process and Cruel and Unusual Punishment violations, and if the Court accepts that contention, Chapter 6.500 must clearly be read as an appropriate vehicle for the vindication of those constitutional claims, as surely as any other.

(C)

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?[25]

It is defendant's position that he has submitted significant new evidence which, at the very least, demonstrate a "significant possibility" that his claim that he is innocent of the charges of which he was convicted is true - that he is "actually innocent" of those charges. The question posed is whether the existence of such evidence, *vel non* - that is, absent a justiciable claim that his trial was flawed by the absence of the evidence, or by trial counsel's failure to marshall it - provides an independent basis for setting aside his convictions, so that another jury will have the opportunity to

---

[25] **Standard of review.** This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

weigh his claim of innocence with the benefit of that evidence.[26] That is to say, does his "freestanding" claim of innocence, as supported by that evidence, provide an independent basis for relief? Defendant contends that it does.

Although *Herrera v Collins,* 506 U.S. 390 (1993) is often cited for the proposition that "a claim of 'actual innocence' is not itself a constitutional claim," *e.g. Mansfield v. Dormire,* 202 F.3d 1018, 1024 (8th Cir. 2000), in fact, as the *en banc* Ninth Circuit noted in *Carriger v. Stewart,* 132 F.3d 463, 476 (9th Cir. 1997), in *Herrera,* "a majority of the Supreme Court assumed, without deciding, that execution of an innocent person would violate the Constitution. A different majority of the Justices would have explicitly so held. *Compare id.* at 417, 113 S.Ct. at 869 (majority opinion) with *id.* at 419, 113 S.Ct. at 870 (O'Connor, J., joined by Kennedy, J., concurring) and *id.* at 430-37, 113 S.Ct. at 876-79 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting)." [27]

In addition, as the Second Circuit observed in *Triestman v. United States,* 124 F.3d 361, 379 (2d Cir. 1997), a weighty argument can be made, based on Supreme Court precedent (including *Herrera*), that no claim of actual innocence is truly "free-standing," but, rather, inevitably implicates an underlying violation of the Eighth Amendment:

---

[26] "The historic division of functions between the court and the jury needs no citation of authority. It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon,* 456 Mich 625, 636-637 (1998). It is presumably for this reason that even when a court concludes that a jury's verdict is against the great weight of the evidence - after *Lemmon,* "where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result" - a new trial, not a judgment of acquittal, is the appropriate remedy.

[27] "Whether such a federal right exists is an open question. We have struggled with it over the years, in some cases assuming, arguendo, that it exists while also noting the difficult questions such a right would pose and the high standard any claimant would have to meet." *District Attorney's Office for Third Judicial Dist. v Osborne,*557 US 52, 129 SCt 2308, 2321 (2009) (citations omitted).

Justice Blackmun, writing for himself, Justice Stevens, and Justice Souter, has noted the distinct possibility that the continued incarceration of an innocent person violates the Eighth Amendment, and has suggested that, for that reason, such a person must have recourse to the judicial system. See *Herrera v. Collins*, 506 U.S. 390, 432 n. 2, 113 S.Ct. 853, 877 n. 2, 122 L.Ed.2d 203 (1993) (Blackmun, J., dissenting) (explaining that it "may violate the Eighth Amendment to imprison someone who is actually innocent," but declining to address the question, because the Court was "not asked to decide in this case whether petitioner's continued imprisonment would violate the Constitution if he actually is innocent"); *id.* at 432-33, 113 S.Ct. at 877 (arguing that, at least in capital cases, where a prisoner could not have raised his claim of innocence at an earlier time, the Eighth Amendment mandates the availability of an avenue for collateral attack); *cf. Robinson v. California,* 370 U.S. 660, 667, 82 S.Ct. 1417, 1421, 8 L.Ed.2d 758 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); *Pottinger v. City of Miami,* 810 F.Supp. 1551, 1565 (S.D.Fla.1992) (finding that a person "may not be convicted under the eighth amendment" of "innocent conduct"). Without addressing the ultimate merits of this question, we are confident that doing so would involve an examination of serious and unresolved constitutional issues.

In a recent, typically scholarly discussion, United States District Judge Jack B. Weinstein (author of Weinstein's Evidence), canvassed the developing case law, and discerned a "powerful trend" towards recognition of such claims, which he found commendable:

> Submitting those who can prove their innocence through highly reliable evidence to continued criminal punishment following an otherwise constitutional trial is "brutal and ... offensive to human dignity." *Chavez v. Martinez,* 538 U.S. 760, 774 (2003) (quoting *Rochin,* 342 U.S. at 172). What once might have been viewed as regrettable, but acceptable, error in our criminal justice system cannot be countenanced in an age where DNA testing, reliable social science research, and other forms of decisive proof are available.

DiMattina v United States, ___ F Supp 2d ____, 2013 WL 2632570, *26 - *32 (E.D.N.Y. 2013).

For essentially the same reasons, defendant contends, the parallel provisions of the Michigan Constitution (Art. 1, §§ 16 and 17) provide a basis for relief on collateral review on the basis of a "freestanding" claim of actual innocence.

Most discussions of "freestanding" claims of innocence assume that a more exacting showing of the likelihood of a defendant's factual innocence is called for than where a "gateway" claim is

involved. *See, e.g., Herrera v Collins, supra,* at 417 ("the threshold showing for such an assumed right would necessarily be extraordinarily high.") *Id.* at 417.[28] Indeed, Judge Weinstein suggests a "shock the conscience" test. *DeMattina v United States, supra,* at *32. Such a conclusion would, of course, suggest that the "significant possibility that the defendant is innocent" standard which Michigan has adopted for "gateway" claims would not apply to "freestanding" ones, and that a stringent standard, such as "clear and convincing evidence that the defendant is innocent" would be called for. This is the standard which had been adapted by the Missouri Supreme Court. *State ex rel. Woodworth v Denney* 396 SW3d 330, 337 (Mo. 2013) ("a freestanding claim of actual innocence, if shown by a clear and convincing evidence, provides grounds for habeas relief without the need to prove any constitutional violation at trial.")

Why this should be so, however, is unclear; if there is a constitutional right not to be convicted or imprisoned if one is innocent, it is surely as weighty, and should be as assiduously guarded, as any other constitutional right - perhaps more so, as the violation of such a right injures not only the defendant, but the criminal justice system itself, insofar as it undermines confidence in its reliability, fairness, and accuracy.

In defendant's view, however, the important thing is that the evidence of his innocence is weighty enough to measure up to any rational standard or threshold which may properly be employed to judge such claims.

---

[28] "The sequence of the Court's decisions in *Herrera* and *Schlup*--first leaving unresolved the status of freestanding claims and then establishing the gateway standard--implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*." *House v. Bell, supra,* at 555.

(D)

WHETHER MCR 6.508(D)(2) BARS RELIEF PREMISED ON ISSUES PREVIOUSLY DECIDED AGAINST DEFENDANT ON DIRECT APPEAL?[29]

The unambiguous language of MCR 6.508(D)(2) provides that - in the absence of an intervening change in the law - relief may not be granted in a Motion for Relief From Judgment on the basis of "grounds for relief which were decided against the defendant on direct appeal:"

> (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
>
> (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.

The phrase "grounds for relief," however, is a narrow one, and, in defendant's view, is properly read as meaning no more than that a particular claim of entitlement to relief cannot be reasserted. It does not, defendant maintains, mean that a defendant is procedurally barred from raising a *new* claim simply because that claim somehow *involves* factual or legal issues which were previously litigated. Thus, in defendant's view, the fact that he previously (unsuccessfully) sought a new trial on the basis of the testimony of, *inter alia*, the newly presented testimony of Joseph Benke, does not foreclose his application for relief on the basis of a claim that trial counsel's failure to marshall that testimony impinged on his Sixth Amendment rights.

Federal Habeas Corpus jurisprudence may be instructive here. In *Sanders v United States,* 373 US 1, 15-16 (1963), the United States Supreme Court explained the analysis of successive, factually or legally related claims as follows:

[29] **Standard of review.** This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.
>
> By "ground," we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different "ground" than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments, or be couched in different language, or vary in immaterial respects. Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant. [Footnote and citations omitted.]

While the procedural default rules applicable to federal collateral review proceedings have been significantly altered by statute, the *Sanders* analysis remains a valid (and oft-cited) guide. *See, e.g., Yick Man Mui v United States,* 614 F3d 50, 56 (2d Cir. 2010).

In short, because they advance differing legal bases for granting relief, the "grounds for relief" cited in defendant's Motion for New Trial - including, for example, the contention that the Benke testimony entitled him to relief - are legally distinct from the "grounds for relief" cited in his Motion for Relief From Judgment - including the contention that trial counsel's failure to interview and call Mr. Benke as a trial witness. The fact that, in his direct appeal, the Court of Appeals held that that testimony would have been "cumulative" raises other issues, discussed below, but does not foreclose relief under MCR 6.508(D)(2).

(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?[30]

As noted, in response to the prosecution's appeal from Judge Cox's 1999 ruling granting defendant a new trial, the Court of Appeals held, in a one-page order entered without the benefit of briefing from the defense, that Joseph Benke's testimony was cumulative. 19A.[31] Defendant contends, immediately above, that the prohibition contained in MCR 6/508(D)(2) does not foreclose the current claim of ineffective assistance of counsel for failing to investigate and present that testimony, but the question remains as to whether that finding forecloses its success - or, perhaps, the findings of deficient performance and prejudice necessary to such a claim - under issue preclusion principles like *res judicata* or the law of the case doctrine. In defendant's view, the application of such principles is discretionary in this setting, and is elsewhere the case, the interest of finality which they represent can and should yield to a showing that reconsideration of prior decisions in light of new information, and as the ends of justice require.

In *Locricchio v Evening News Ass'n*, 438 Mich 84, 109 (1991) this Court, quoting Justice Holmes's opinion in *Messenger v Anderson*, 225 US 436, 444 (1912) noted that "the law of the case doctrine 'merely expresses the practice of the courts generally to refuse to reopen what has been decided, not a limit to their power.'"[32] In this regard, the *Locricchio* Court cited then-Judge Scalia's

[30] **Standard of review.** This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich106, 119 (2012).

[31] As also noted, in her 2011 Opinion and Order denying Mr. Garrett's Motion for Relief From Judgment, Judge Parker held that she was bound by that decision.

[32] The Court of Appeals has similarly recognized that "[p]articularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice." *People*

opinion in *Safir v Dole,* 718 F2d 475 (D. C. Cir. 1983) with approval for the proposition that "the law of the case doctrine is discretionary and does not preclude courts from reexamining issues that address their constitutional power."

Flexibility in applying principles of issue preclusion is particularly appropriate in the context of collateral review of criminal convictions, as the United States Supreme Court pointed out in *Schlup v. Delo, supra*:

> [T]he Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata. Thus, for example, in *Sanders v. United States,* 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963), this Court held that a habeas court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." *Id.*, at 15-17, 83 S.Ct., at 1077-1078; *see also McCleskey* [*v. Zant*], 499 U.S. [467,] 495, 111 S.Ct., at 1471 [(1991)]. The *Sanders* Court applied this equitable exception even to petitions brought under 28 U.S.C. § 2255, though the language of § 2255 contained no reference to an "ends of justice" inquiry. 373 U.S., at 12-15, 83 S.Ct., at 1075-1077.

Id., at 319-320.

The *Sanders* holding referred to by the Court in *Schlup* was simply stated as follows: "Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground." *Id.,* at 16. Such an approach is entirely consistent with the nature of the post-conviction review process, and especially so where, as here, a credible showing of factual innocence is made, and it is certainly open to this Court to follow that rule.

In such a case, a court is not dealing with a mere procedural miscue, a failure to dot the i's in "criminal" or cross the t in "justice," but a serious allegation that the system has gone awry in the

---

v Phillips, 227 Mich App 28, 33 (1997). *See also, People v Herrera (On Remand)*, 204 Mich App 333, 340-341 (1994).

worst of all possible ways: that an innocent man has been falsely imprisoned. One would think that every participant in our system of criminal justice should be eager to give such an allegation the most careful kind of scrutiny, to hear and examine any evidence which may help to evaluate such a claim, to exercise such discretion as may be available to give it a fair hearing - and specifically, to revisit prior decisions insofar as to do so may seem appropriate in light of further developments.

In the case at bar, the best exercise of the Court's unquestioned discretion is to consider the implications of the unpresented testimony (which the Court of Appeals peremptorily dismissed as cumulative without the benefit of full briefing and argument) as well as the impact of the medical evidence as it may illuminate the complainant's testimony, all in light of all the available evidence, both presented and unpresented, as informed by the testimony of the polygraph examiner, and including the presumable impact of the unobjected-to photographic identification procedures, the significance of which were casually brushed aside by the trial court without a hearing. If this is done, defendant submits, the Court will conclude that defendant is entitled to a new trial.

(F)

WHAT IS THE SCOPE OF RELIEF, IF ANY, AVAILABLE TO A DEFENDANT UNDER MCR 7.316(A)(7) IN LIGHT OF MCR 6.508(D)?[33]

Rule 7.316, titled "Miscellaneous Relief Obtainable in Supreme Court," provides in pertinent part as follows:

> (A) Relief Obtainable. The Supreme Court may, at any time, in addition to its general powers:
>
> * * *

[33] **Standard of review.** This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

> (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.

As Justice Black noted, writing for the majority in *Jones v Keetch*, 388 Mich 164, 173 n. 4 (1972) this rule "entered by the 1931 revision of Michigan Court Rules as No. 79. Then, by the revision of 1945, it became Court Rule 72." With respect to its import, he quoted Honigman and Hawkins, 6 Mich.Ct.Rules Anno., 2d ed. p. 213 as follows: "Notwithstanding the constraints of rules and practices otherwise applicable, the Michigan Supreme Court has generally maintained its power to do whatever needs to be done in a particular case in order to achieve ultimate justice." *Id.,* at 176.

It seems clear, then, that at the very least the Rule allows the Court, in an appropriate case, to bypass procedural constraints in the interest of justice, even if those constraints are contained in other rules.[34]

Thus, for example, in *St. John v Nichols*, 331 Mich 148, 158-159 (1951) the Court referred to the inherent power recognized by the Rule to grant a new trial in a civil case even though where another Rule seemingly foreclosed such relief: "This court possesses inherent power, however, to order a new trial whenever it deems that the ends of justice so require. . . . While this court should and does give due regard to its own rules, the promulgation thereof cannot shackle the powers of this court to do that which ought to be done if otherwise within the powers of the court." *See also, In re Kent County Airport,* 368 Mich 678, 680 (1962) ("Appellee cites [cases] in support of the proposition that inasmuch as there is no specific provision in the statutes for an appeal from a decision of the court with regard to attorney fees, such decisions are not appealable. The cited cases

---

[34] At the same time, it has often been said that "rules of procedure can neither expand nor enlarge jurisdiction nor change the substantive rights of the parties." *Paley v Coca-Cola Co.,* 389 Mich 583, 601 (1973); *See also, Shannon v Cross,* 245 Mich 220, 222 (1928) and authorities there cited.

so hold, yet art[35] not controlling of this Court's constitutional power to review by certiorari or to interpose its judgment, as now done in this case, since advent of 1931 Court Rule 79 (Now Court Rule 72).")

The traditional office of the Rule, and its predecessors, has been to allow the Court to excuse a variety of what would otherwise have been considered procedural defaults (or to codify the Court's authority to do so). *See, e.g., Bahr v Miller Bros. Creamery*, 365 Mich 415, 428 (1961) ("Defendants have made no motion for new trial. But in the interest of justice, and on our own motion (see Michigan Court Rule No. 72, § 1[g]), we feel constrained to reverse and remand for new trial as to the individual defendants only.").

While this provision, and others like it does not authorize a court to act lawlessly - notwithstanding the fact that it is sometimes irreverently referred to by practitioners as "the 800 pound gorilla rule" - it does recognize the inherent authority of reviewing courts to take a broader view in order to ensure that substantial justice is done. This is a commonsense undertaking, defendant would think, and particularly appropriate to a case such as this.

Thus, if the Court concludes that the grant of a new trial in this case is necessary or appropriate "in order to achieve ultimate justice," MCR 7.316(A)(7) seems clearly to authorize the Court to enter an Order to that effect (or recognize the Court's inherent power to do so). Under its aegis, the Court may grant a new trial, or any other and further relief it deems necessary to ensure that justice is done.

---

[35] So in original.

(G)

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?[36]

As argued is connection with Issue II(E), judicially fashioned doctrines of issue preclusion may appropriately give way to the ends of justice where the integrity of a criminal conviction is genuinely at issue, and as argued in connection with Issue II(D), the preclusive effect of MCR 6.508(D) is narrowly drawn.

It follow, then, that it is appropriate to consider claims which may not, perhaps, be directly litigable under MCR 6.508(D) in the process of evaluating those which are.

Thus, for example, in considering the Sixth Amendment claims advanced in Mr. Garrett's Motion for Relief From Judgment, it is appropriate to do so in light of the claims and evidence advanced in support of his Motion for New Trial - and, if so moved, to consider their merits anew insofar as to do so informs on the matters directly at issue.

Under such an approach, a court (and this Court) might well conclude that defendant has made out both prongs of the "deficient performance" and "prejudice" test based on an independent view of review of the entire record, unbound by the Court of Appeals' conclusion that the Joseph Benke testimony was "cumulative" and in light of the entire evidentiary record, including the later-discovered evidence bearing on the weight to be accorded Ms. Neault's recollection and testimony, notwithstanding the trial court's assessment that that evidence would not render a different result

---

[36] **Standard of review.** This is a pure question of law, which is subject to *de novo* review. *People v Kowalski,* 492 Mich.106, 119 (2012).

likely. And the weight of (and need for) the unpresented testimony might also be considered in light of the testimony of the polygrapher examiner, Charles Ghent, and his validation of the witness's credibility.[37]

A court (and this Court) might likewise find the weight of defendant's contentions regarding trial counsel's failure to challenge Ms. Neault's identification testimony enhanced by that later-discovered evidence, insofar as that evidence is relevant to the seventh *Kachar* factor: the "psychological state of the victim."

Defendant does not contend here for a rule-free environment, but precisely for the kind of "holistic judgment about all the evidence" which the *House v. Bell* majority found appropriate in cases such as this.[38]

This is appropriate, defendant submits, because, like federal habeas corpus, the post-conviction review process governed by MCR 6.500 is ultimately - and particularly in the case of an applicant like Mr. Garrett, who makes a credible showing of actual innocence - the system's fail-safe mechanism, and, in many cases, the last, best hope of the wrongfully convicted. While interests of finality and judicial economy are weighty ones, they must, in the end, yield to the need to prevent manifest injustice.

---

[37] Manifestly, the evidentiary hearing testimony of the defendant himself, and his assertion of innocence polygraph testimony could and should also be considered in light of the polygraph examiner's conclusions as to his credibility when weighing the sufficiency of his showing of actual innocence.

[38] The writer invokes the "holistic" descriptor with reservations, wary of suspicions of "new agey" tendencies. In his defense, he reminds the reader that in *United Sav. Ass'n of Texas v Timbers of Inwood Forest Associates*, 484 US 365, 371 (1988), Justice Scalia - never himself accused of such tendencies - described statutory construction as "a holistic endeavor."

SUMMARY AND RELIEF REQUESTED

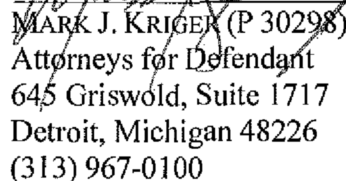
The Court should, on plenary review, conclude that the defendant was denied the effective assistance of counsel at trial, both on the basis of trial counsel's failure to move to suppress the identification testimony of Eleanore Neault, and his failure to interview Joseph Benke and call him as a witness at trial.

Although those claims could have, but were not, raised on direct appeal, the Court should excuse that procedural default on one of two grounds: (a) that the entire demonstrates a significant possibility that Mr. Garrett is actually innocent, or (b) that counsel on direct appeal rendered constitutionally ineffective assistance by failing to raise these issues.

Although defendant maintains that the record is sufficient on its face to allow the Court to find appellate counsel's failure in this regard ineffective, and the Court does not choose to rest its decision on significant possibility of Mr. Garrett's actual innocence, at the very least it should remand for an evidentiary hearing regarding appellate counsel's performance, with instructions to grant a new trial in the event that it is found deficient.

Respectfully submitted,

LARENE & KRIGER, PLC



BY: ____________________
MARK J. KRIGER (P 30298)
Attorneys for Defendant
645 Griswold, Suite 1717
Detroit, Michigan 48226
(313) 967-0100

DATED: July 3, 2013

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,

-v- Docket No. 145594

WILLIAM CRAIG GARRETT,

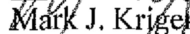
Defendant-Appellant.
__________________________________/

CERTIFICATE OF SERVICE

Under penalty of perjury, the undersigned avers and says that on July 3, 2013, he mailed two copies of defendant-appellant's **Brief on Appeal and Appendix and a copy of this Proof of Service** upon the following:

Wayne County Prosecuting Attorney
Attn: David A. McCreedy
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, MI 48226

by placing same in the U.S. Mail with sufficient first class postage affixed thereto and also served copies by e-mail to dmccreed@co.wayne.mi.us.



Mark J. Kriger