STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

Supreme Court
No.

WILBERT JOSEPH MCKEEVER,
Defendant-Appellee.

Court of Appeals No. 331594
Third Circuit Court No. 12-7733-01-FC

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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[1]The CDs will be delivered separately to this Court via US Mail.

STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The People request leave to appeal the unpublished decision of the Michigan Court of Appeals in *People v McKeever*, dated May 25, 2017.[2] The Michigan Supreme Court has jurisdiction over this application pursuant to MCR 7.301(A)(2) and MCL 770.12(2)(c). The People had 56 days from the date of the unpublished opinion of the Court of Appeals to file the instant application.[3] The legal errors in the Court of Appeals opinion are clearly erroneous and will cause a material injustice.[4]

The Court of Appeals in *McKeever* reversed defendant's convictions of armed robbery and aggravated assault because, upon remand from this Court, the trial court—despite holding a *Ginther* hearing and denying defendant's motion for a new trial—ultimately could not determine why defendant's witness (who never appeared for the *Ginther* hearing despite multiple opportunities) was not called at trial. Instead of addressing the substantive issues raised, the Court of Appeals merely stated that they could not review the issue and, therefore, felt compelled based on this Court's remand order to grant a new trial. Because the Court of Appeals did not cite any legally valid reason for granting defendant a new trial, its opinion should be reversed

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[2]*People v McKeever*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 25, 2017 (Docket No. 331594). See Appendix A.

[3]MCR 7.302(C)(2)(b).

[4]MCR 7.302(B)(5).

or, at the very least, this case should be remanded with an order instructing the Court of Appeals to review the substantive issues and determine if there was outcome-determinative error.

Additionally, the Michigan Supreme Court should intervene because the Court of Appeals' legal errors will create a manifest injustice. Victims and public safety will suffer if appellate courts begin overturning convictions based on legally invalid grounds. Because the Court of Appeals opinion is clearly erroneous and will cause a material injustice, this Court should reverse the decision of the Court of Appeals.

STATEMENT OF QUESTION PRESENTED

I.

According to this Court in *People v Pickens*, a defendant cannot meet the prejudice prong of ineffective assistance of counsel when the case is remanded for a *Ginther* hearing and the witness who counsel allegedly should have called does not appear. Here, this Court remanded for a *Ginther* hearing, and the witness who counsel allegedly should have called did not appear despite multiple opportunities to do so. Can defendant meet the prejudice prong of ineffective assistance of counsel?

The Court of Appeals answered, "Yes."
The People answer: "No."
Defendant answers: "Yes."

STATEMENT OF FACTS

At a final conference on November 2, 2012, defendant rejected the People's plea offer and decided to proceed to trial. After that, his defense attorney, Marvin Barnett, made the following record as it relates to the issue presented in this appeal (that is, if Mr. Barnett was ineffective for not calling co-defendant Jennifer Craven to testify on defendant's behalf):

> MR. BARNETT: Your Honor, there is a person that was the codefendant in this particular case. May I have her name for the record?
>
> APA CAMARGO: Her last name is Craven.
>
> MR. BARNETT: Ms. Craven. Ms. Craven has pled guilty before another Judge. The defendant wishes Ms. Craven to be a witness in this case.
>
> JUDGE JONES: Why don't you subpoena her?
>
> MR. BARNETT: That's good. I don't think I can because she has an attorney.
>
> JUDGE JONES: I don't know why you can't subpoena her. She can bring her attorney to court, and he'd say, "I told her not to say anything." So, I'm trying to figure out, what's the problem here?
>
> MR. BARNETT: Well, your Honor, first of all, well, if the People are willing to give me her address and all that information, then, fine. I mean, yes, literally, I know how to subpoena her. Well, then, I will subpoena her to court.

> JUDGE JONES: Okay.
>
> MR. BARNETT: I have the information.
>
> APA CAMARGO: And when she comes in here, the first thing that we'll do is make sure her lawyer is notified, and she's got to do what—because I don't know whether she has an attorney, so I can't issue a subpoena. I don't think that's what you were trying to communicate to me.
>
> MR. BARNETT: Actually, Judge, I was. I didn't think that they would give me her address. I assumed wrongfully.
>
> JUDGE JONES: Okay.
>
> MR. BARNETT: So, they've given me her address. I've got her address. We will subpoena Ms. Jennifer Marie Craven.
>
> APA CAMARGO: Your Honor, I'm also more than happy to subpoena her on Mr. Barnett's behalf if he'd like.
>
> MR. BARNETT: I'd appreciate it if they would do it. Then we'll make sure she's here.[5]

During a break from voir dire on March 11, 2013, Craven's name again came up when Barnett asked the court:

> MR. BARNETT: At come point, would you please allow Mr. McKeever to know that [sic] the decision on whether Ms. Craven, who I have placed on the witness list, whether she can testify.

[5]References to the trial record are cited by the date of the hearing followed by the page number; 11/2, 7-8.

> I don't know what this man's problem is. He seems upset with me for some reason, and I'm not going to tolerate it. At some point, please explain to this man I don't have anything to do with Ms. Craven testifying. I couldn't explain it to him because he ain't trying to hear it.[6]

Judge Jones then went on to other topics and did not address why Craven would not be testifying. The prosecutor, who at this point was APA RuShondra Jones, did not comment.[7] The trial then progressed.

During trial, the People called two witnesses: the victim and the officer in charge. The victim, Kenith Fawaz, testified that he was at his apartment complex in Dearborn on July 17, 2012 when he saw Jennifer Craven, a woman he had known for a long time and considered like a daughter.[8] Fawaz testified that she appeared drunk and beaten up. When he went to help her, Craven asked him for money. When he said no, Craven held him back by his shirt until defendant (Craven's boyfriend) appeared in the hallway. When the victim attempted to escape, defendant followed him down the stairs. Defendant then began hitting the victim repeatedly in the head and body. After the beating, Craven joined defendant. Fawaz testified that Craven took the wallet out of his pocket, gave it to defendant, and then defendant—after taking $100

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[6]3/11, 74-75.

[7]Id at 75-76. While the People subpoenaed Craven's mother, Julie, there does not appear to be a subpoena for Jennifer Craven.

[8]3/11, 128-129, 139.

from the wallet—threw the wallet back on the ground. Defendant and Craven then left together.[9]

When the police arrived, they took several photos of the victim's injuries. Those photos were published to the jury.[10] The officer in charge, Detective Marek Noworyta, testified to retrieving the surveillance video from the apartment complex. The entire beating and theft was captured on camera. Specifically, the video shows defendant brutally beating the victim and then turning him over and holding him down while Craven picks the wallet out of the victim's pocket and goes through it. The video was published to the jury.[11] After the People rested, defendant waived his right to testify and stated that he did not wish to call any witnesses.[12] During closing arguments, the People urged the jury to watch the video closely and argued that defendant beat the victim up, Craven fished out his wallet, and then the two took the money and left together.[13] Defense counsel argued that—while it was unquestionable

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[9]Id. at 130-135.

[10]Id. at 136.

[11]Id. at 186. The video of this beating and robbery—admitted during trial as People's Exhibit No. 13, 3/11, 185— will be submitted separately to this Court via US mail as Appendix C.

[12]Id. at 197-200.

[13]Id. at 205-209, 222-226. Jennifer Craven pled guilty to unarmed robbery on August 10, 2012, and was originally sentenced to probation. After repeatedly violating her probation, she was eventually sentenced on January 21, 2014 to six months in the Wayne County Jail. At the plea hearing, she stated that she did not know why defendant beat up the victim.

that defendant beat the victim—he did not assist in taking the money and that the victim accused him of taking the money just to protect Craven.[14] During closing argument, Mr. Barnett mentioned Craven, stating "Ms. Craven is—Mr. Fawaz is trying to protect Ms. Craven is what he's doing. He's trying to protect her." The prosecutor objected, and Judge Jones stated, "She cannot testify. It's stricken. The jury is told to disregard it."[15] Mr. Barnett then moved on with his closing argument.

Following jury instructions, defendant was convicted of unarmed robbery and aggravated assault.[16] He was sentenced within the guidelines as a habitual third offender on March 29, 2013, to 85 months to thirty years. He then appealed to the Court of Appeals with three issues. The court affirmed his convictions. [17] He then applied for leave to appeal to this Court. This Court remanded the case back to trial court. Specifically, this Court stated in an order dated June 3, 2015: "The court shall determine whether trial counsel was ineffective for failing to call Jennifer Craven as a witness at trial, *People v Ginther*, 390 Mich 436 (1973), or whether the court ruled off the record that she could not testify and, if so, what was the basis for such a

[14]Id. at 209-222.

[15]Id at 220-221.

[16]MCL 750.530; MCL 750.81a.

[17]*People v McKeever*, unpublished opinion per curiam of the Michigan Court of Appeals, issued September 16, 2014 (Docket No. 315771). Attached as Appendix B.

decision." The Court denied defendant's leave to appeal in all other respects and did not retain jurisdiction.

The first of many adjourned post-conviction hearings was set for September 9, 2015. But, because subpoenaed defense witness Jennifer Craven had apparently gone to Northern Michigan for whatever reason, the court allowed an adjournment. Another hearing was then set for October 6, 2015. Again, Craven was still out of town and chose not to attend the hearing. Yet another hearing was set for November 18, 2015. Again, the witness did not appear for the hearing. Another adjournment was allowed and the hearing was set for January 15, 2016. This time, Craven was in Texas and, once again, would not be attending the hearing.[18]

The defense asked if she could testify by telephone because she did not have the ability to appear for a video conference, but the People objected and the Court did not allow testimony via telephone.[19] The court then decided, in light of the many adjournments already granted, to go ahead with the hearing without Craven, as it was clear she was never going to appear before the Court despite being subpoenaed to do so for several months. The *Ginther* hearing was then conducted with two witnesses: Barnett and defendant.

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[18]1/15, 5-6.

[19]Id at 6.

Before the hearing started, the parties stipulated that neither Judge Jones nor the trial prosecutors involved (APA Camargo or APA Jones) had any memory of why Craven did not testify at the trial.[20] Over the People's objection, the Court allowed defense counsel to submit Craven's affidavit into the record as an offer of proof for what she would have testified to had she ever showed up to any of the court proceedings she was required to attend.[21]

Barnett then testified that he had no independent memory of why Craven was not called during trial. Instead, he simply stood by whatever the transcript said happened regarding the witness.[22] He did add, however, that he recalled she was represented by counsel so he would not, as a general matter, have attempted to speak directly with a co-defendant represented by counsel.[23] He also added that he recalled seeing the video in this case, thinking it was a "terrible case," and that—while he tried to explain to defendant both the plea offer and the concept of aiding and abetting—defendant was adamant he wanted to go to trial despite the video.[24]

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[20]Id at 4.

[21]Id at 4-7.

[22]Id at 15, 17-18, 36.

[23]Id at 23.

[24]Id at 46-49.

Defendant then briefly testified that he wanted co-defendant Craven to testify on his behalf.[25]

Following the testimony and arguments from counsel, the Court denied the motion for a new trial. She reiterated the standard for ineffective assistance of counsel and then noted that, while nobody could recall the specific reason for why Craven was not called, the transcript indicates that it was the Court (not Barnett) who indicated that Craven would not be testifying. She went on to hold that Barnett was not ineffective, but that she was unable to determine whether the Court ruled off the record about Craven testifying or what the basis was for that decision. [26] Defendant appealed.

In an unpublished opinion dated May 25, 2017, the Court of Appeals granted defendant a new trial on the sole ground that this Court had ordered a hearing and the trial court was unable to comply with that order. [27] While the opinion laid out the standard for ineffective assistance of counsel, it then went on to state that "there is simply no way to review the issue because the basis of the ruling [on why Craven was not called] is unknown." It goes on to "assume that an error occurred."

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[25]Id at 59.

[26]Id at 68-70.

[27]*People v McKeever*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 25, 2017 (Docket No. 331594). Attached as Appendix A.

Then—despite reiterating that the evidence of defendant's involvement in the assault and robbery was "overwhelming" and that "it would appear that the jury already rejected essentially the same version of events that Craven would have provided"—the Court nevertheless granted a new trial simply because this Court had ordered a hearing and the trial court could not determine why Craven was not called.

The People now file this timely application for leave to appeal, asserting that there are clear legal errors in the Court of Appeals' opinion that will cause a manifest injustice and the Court of Appeals erred by reversing defendant's convictions for armed robbery and aggravated assault convictions.

ARGUMENT

I.

According to this Court in *People v Pickens*, a defendant cannot meet the prejudice prong of ineffective assistance of counsel when the case is remanded for a *Ginther* hearing and the witness who counsel allegedly should have called does not appear. Here, this Court remanded for a *Ginther* hearing, and the witness who counsel allegedly should have called did not appear despite multiple opportunities to do so. Defendant cannot meet the prejudice prong of ineffective assistance of counsel.

Standard of Review

A trial court's decision to deny defendant's motion for a new trial is reviewed for an abuse of discretion.[28] To warrant this Court's review, the People must demonstrate that the Court of Appeals' decision was clearly erroneous and will result in a material injustice.[29]

Discussion

The Court of Appeals' opinion should be reversed because it erroneously granted defendant a new trial without addressing whether there was actually an outcome-determinative error that would merit relief. Had the Court of Appeals actually applied the correct standards, defendant's convictions should have been

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[28] *People v Jones*, 236 Mich App 396, 404 (1999).

[29] MCR 7.302(B)(5).

affirmed because defendant is unable to establish that the absence of Craven's testimony was an error requiring reversal. Thus, this Court should either reverse the Court of Appeals's decision and reinstate defendant's convictions or, in the alternative, remand this case back to the Court of Appeals with an order requiring the Court to address whether defendant was prejudiced by the alleged error.

A. The Court of Appeals erred by granting a new trial without addressing the substantive issues or citing any legally valid reason for doing so.

In what can perhaps be described as a confusing opinion, the Court of Appeals granted defendant a new trial without ever really reaching the substantive legal issues presented and without ever determining whether the defendant could establish any outcome-determinative error. Rather than examine whether defendant had met his burden of establishing ineffective assistance of counsel, the Court essentially treated this as a structural error and granted a new trial simply because there was no way to determine why Craven was not called. But a witness not testifying—whether because counsel did not call her or because the trial court precluded her testimony—is not tantamount to structural error.[30] Defendant still must establish prejudice. Because the

[30]The United States Supreme Court has found structural error only in a very limited class of cases, such as the complete deprivation of counsel or racial discrimination in selection of the jury. These sort of errors "infect the entire trial process" and "necessarily render a trial fundamentally unfair." *Neder v United States*, 527 US 1, 8 (1999).

Court of Appeals did not determine whether defendant was actually prejudiced by counsel's alleged failure to call Craven, the opinion should be reversed.

In the context of ineffective assistance of counsel, defendant must show: (1) that his counsel's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial.[31] *People v Pickens* articulates the standard Michigan courts use to determine whether there has been ineffective assistance of counsel.[32] There, defendant claimed his counsel was ineffective for failing to file an alibi notice. At the *Ginther* hearing, the subpoenaed alibi witness did not appear. This Court found that, while defense counsel acted unreasonably by failing to properly file an alibi notice, defendant nevertheless was required to show prejudice. Because the defendant failed to establish that the alibi witness' testimony would have altered the proceeding, he was likewise unable to show that there was a "reasonable probability that the evidence would undermine confidence in the outcome of the trial."[33]

Here, while the Court of Appeals' opinion states that it is "turning to the substantive issues," it does not *actually* do so. Instead, the opinion merely lays out the

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[31] *People v Grant*, 470 Mich 477, 485-486 (2004).

[32] *People v Pickens*, 446 Mich 298, 302-303 (1994).

[33] *Id.* at 327.

standard for ineffective assistance of counsel and then says that there is "simply no way to review the issue." The opinion implies that, based on this Court's remand order, the Court of Appeals felt they had no choice but to reverse. The Court reiterates that the evidence of defendant's guilt regarding the armed robbery was "overwhelming" and that "the jury already rejected the same version of events that Craven would have provided." Despite this, the Court then simply says in a simple, unsupported sentence that they must reverse on the sole ground that "there is simply no way to way to determine why Craven was not allowed to testify . . ."

Even assuming Craven did not testify because Judge Jones (arguably) erroneously prevented her from doing so, defendant would still need to show that the error resulted in a miscarriage of justice under a "more probable than not" standard.[34] As MCL 769.26 directs:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.[35]

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[34] *People v Lukity*, 460 Mich 484, 496 (1999).

[35] MCL 769.26.

Here, the Court of Appeals did not determine whether the alleged error resulted in a miscarriage of justice.

Because the Court of Appeals did not actually analyze whether defendant had established ineffective assistance of counsel or a miscarriage of justice, the opinion is erroneous and should be reversed. Or, in the alternative, this Court should remand this case back to the Court of Appeals, instructing the Court to determine whether there was outcome-determinative error.

B. Had the Court of Appeals actually addressed the ineffective-assistance-of-counsel claim, defendant's convictions should have been affirmed.

Regardless of why Craven was not called—whether counsel chose not to call her or Judge Jones ruled that she could not be called and defense counsel failed to make a record regarding that decision—defendant cannot establish outcome-determinative error because (1) Craven never appeared to testify at the *Ginther* hearing so defendant has failed to establish how her testimony would have affected the outcome of the proceedings, and (2) even if she had testified consistently with her affidavit, there is no indication her testimony would have changed the outcome of the proceedings given the overwhelming evidence of defendant's guilt.

First, despite the fact that appellate counsel subpoenaed her for the *Ginther* hearing and the parties repeatedly adjourned the hearing to give her an opportunity to testify, Craven never appeared at the *Ginther* hearing. Here, the only "evidence" of what Craven would have testified to is her plea transcript and affidavit, neither of which were subject to cross-examination and neither of which allowed the court to assess her credibility. While appellate counsel attempted to substitute Craven's brief affidavit for her actual live courtroom testimony, that is simply not a substitution our criminal justice system permits.[36]

Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel:[37]

> A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes

[36]The Court of Appeals correctly rejected defendant's claim that the witness should have been permitted to testify via telephone. MCR 6.006 allows for testimony via "two-way interactive video technology," *not* for testimony by telephone. Craven was apparently only willing to testify via telephone, not video—though whether she would have actually testified by telephone is questionable given her unwillingness to appear in court despite being subpoenaed to do so.

[37]*Strickland v Washington*, 466 US 668, 694 (1984); *People v Hoag*, 460 Mich 1, 6 (1999)("[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel.").

> hypotheses consistent with the view that his trial lawyer represented him adequately.[38]

This burden includes establishing that the witness who did not testify would have provided evidence favorable to defendant to the extent that the result of the trial must be considered unreliable.[39]

Here, defendant failed to establish the factual predicate for his claim because he did not make a *testimonial* record at the trial court level in connection with his motion for new trial. While an affidavit or offer proof regarding the facts to be established at a hearing may be sufficient for this Court to grant a remand under MCR 7.211(C)(1), such documents do not take the place of live testimony at the hearing. Indeed, an affidavit cannot be evaluated for credibility or cross-examined by the opposing party. Because Craven did not appear to testify despite multiple opportunities to do so, defendant cannot show how her proposed testimony would have altered the result of the proceeding.[40]

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[38]*People v Ginther*, 390 Mich 426, 442-443 (1973).

[39]*People v Pickens*, *supra*, 446 Mich at 327 (holding that the defendant could not establish his claim of ineffective assistance on the basis of failing to call an alibi witness at trial because he failed to present the witness at a hearing on his motion for new trial).

[40]Likewise, there is no showing that Craven would testify even if defendant is re-tried in this matter. She obviously felt comfortable ignoring a subpoena to appear despite being given multiple opportunities so there is no reason to believe she would appear for defendant's new trial either.

Second, even if the co-defendant *had* shown up to the *Ginther* hearing and testified consistently with her affidavit, defendant would still be unable to establish prejudice in light of the video evidence presented in this case and the fact that defendant was nevertheless provided with a substantial defense. Here, unlike in most cases, the entire transaction from the beating to the robbery was recorded on video and played for the jury. There was never any question that defendant brutally beat the victim and then, *while the victim was being held down by defendant*, Craven reached into the victim's pocket and then handed something to defendant, who threw it down. The two then fled from the scene together.[41]

In light of the video and the victim's testimony, Craven's supposed testimony that defendant did not "help" her would not have made a difference in the outcome of the trial because the video shows them acting together to corner the victim, beat him up, take his money, and then leave with it.[42] Aiding and abetting, of course, "describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime."[43]

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[41]See Appendix C, the security video of the beating and robbery, admitted during trial as People's Exhibit No. 13.

[42]The People's theory at trial was, of course, that defendant and Craven worked together to rob the victim. Even if defendant's motive for beating him up was unclear, he still aided and abetted Craven in taking the money from the victim.

[43]*People v Carines*, 460 Mich 750, 757 (1999).

There is no question based on the video evidence that defendant aided and abetted his co-defendant when he beat the victim and held him down while he was being robbed. As the Court of Appeals said in its original opinion and reiterated in its subsequent opinion, "the evidence of McKeever's involvement in the assault and robbery was overwhelming."

And finally, despite the video evidence, counsel nevertheless provided defendant with a substantial defense. Indeed, defense counsel did not have to call Craven—a co-defendant who had just violated her probation—as a witness to argue that defendant was only responsible for the beating and not the robbery. While there was little counsel could do in light of the video, he nevertheless argued that defendant was not part of the robbery and that the victim only pointed the finger at defendant because he had a close relationship with Craven. Again, as the Court of Appeals pointed out, "the jury already rejected essentially the same version of events that Craven would have provided."

Ultimately, the Court of Appeals erred by not analyzing whether defendant had established both prongs of ineffective assistance of counsel. Thus, this Court should either reverse the Court of Appeals or remand this matter back to the Court of Appeals with an order instructing the Court to address whether the error, if any, was outcome-determinative.

RELIEF

THEREFORE, the People respectfully request that this Court either grand leave to appeal or peremptorily reverse the Court of Appeals. In the alternative, the People request that this Court remand this matter back to the Court of Appeals with an order instructing the Court to address the substantive issues presented.

Respectfully Submitted,

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