STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

WILBERT JOSEPH MCKEEVER,

Defendant-Appellee.
_____/

Supreme Court No. 156161

Court of Appeals No. 331594

Lower Court No. 12-7733-01

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellant
_____

CHARI K. GROVE (P25812)
Attorney for Defendant-Appellee
_____

ANSWER IN OPPOSITION TO PLAINTIFF-APPELLANTS'APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: **CHARI K. GROVE (P25812)**
Assistant Defender
State Appellate Defender Office
Suite 3300 Penobscot
645 Griswold
Detroit, MI 48226

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STATEMENT OF JURISDICTION

Defendant-Appellee Wilbert McKeever was convicted in the Wayne County Circuit Court by jury trial, and a Judgment of Sentence was entered on March 29, 2013. Mr. McKeever's motions for a remand were denied by the Court of Appeals, and the Court of Appeals in its first opinion affirmed his convictions. The Supreme Court remanded to the trial court with specific instructions and did not retain jurisdiction. A hearing was conducted by the Wayne County Circuit Court judge who succeeded the retired trial judge, and the motion for new trial was denied. The Court of Appeals in its second opinion, dated May 25, 2017, reversed Mr. McKeever's convictions and remanded for a new trial. The People have filed an Application for Leave to Appeal that decision. For the reasons that follow, this Court should deny Plaintiff-Appellant's Application. The Court of Appeals opinion granting a new trial is not clearly erroneous; the decision is correct.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS DID *NOT* ERR IN GRANTING A NEW TRIAL BASED ON THE TOTAL LACK OF A RECORD INDICATING WHY MR. MCKEEVER'S CRUCIAL WITNESS WAS NOT CALLED TO TESTIFY TO EXONERATE HIM; WHETHER DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, HIS RIGHT TO COMPULSORY PROCESS AND HIS RIGHT TO PRESENT A DEFENSE BY THE FAILURE OF TRIAL DEFENSE COUNSEL TO PRODUCE AN EXCULPATORY WITNESS, OR BY THE TRIAL COURT'S REFUSAL TO ALLOW HER TO TESTIFY, EITHER OF WHICH DENIED HIS RIGHT TO A FAIR TRIAL; WHETHER THE TRIAL COURT ON REMAND ABUSED ITS DISCRETION AND DENIED DEFENDANT HIS RIGHT TO A FAIR TRIAL AND HIS RIGHT TO PRESENT A DEFENSE BY DENYING THE MOTION FOR NEW TRIAL BASED ON LACK OF A RECORD.

Court of Appeals answers, "Yes".

Defendant-Appellee answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellee Wilbert McKeever was charged with assaulting Kenneth Fawaz and taking his money. Mr. McKeever claimed that he was defending his girlfriend, Jennifer Craven, from an attack by Mr. Fawaz. During pretrial proceedings, Mr. McKeever's attorney, Marvin Barnett, indicated that Defendant wanted two or three witnesses, and that he and Mr. McKeever wanted Jennifer Craven (the alleged codefendant) subpoenaed. The prosecutor No one subpoenaed Ms. Craven and she was not produced to testify. Her testimony would have exonerated Mr. McKeever as to the unarmed robbery.

Prior to trial, defense counsel informed the trial court that Mr. McKeever wanted Ms. Craven to testify on his behalf. Ms. Craven had pled guilty to unarmed robbery. When, at trial, counsel told the court he would not be presenting witnesses, Mr. McKeever strongly disagreed, and attempted to tell the judge his concern that Mr. Barnett had not spoken to his witnesses and had not produced them. He was not allowed to speak to the judge. (T 9-11; HT 60). Mr. Barnett told the court that he had tried to explain to Mr. McKeever that he could not put Ms. Craven on the stand; that he (Barnett) did not have anything to do with her testifying. (T 75). He asked the court to let Mr. McKeever know the decision on whether she could testify. *Id*. at 74. The judge ignored this request. (The court later stated, during closing arguments, that she could not, *Id*. at 122). Defendant also wanted his mother to testify. Mr. McKeever was dissatisfied with Mr. Barnett and was refusing to talk to him. Counsel also appeared to be irritated with his client. The judge refused to hear any complaints, commenting that, maybe because she was an older woman, many male defendants think they can talk her "out of stuff," and that Mr. McKeever will be allowed to talk about his complaints if he is convicted. (T 74-77).

Following voir dire, defense counsel began making an objection about representing Mr. McKeever, and the judge cut him off, stating, "No, I've ordered you to represent him…You know what happens when you don't follow my orders." T 126.

Kenneth Fawaz testified that on July 17, 2012, he was at his apartment with his friend Denise Scott. He observed Jennifer Craven in the hallway, drunk and on pills. He and Ms. Scott went to help her. As Mr. Fawaz was holding her up, she asked him for money. Mr. McKeever came into the hallway at that time with something in his hand. The complainant and Ms. Scott ran downstairs and Ms. Scott left. According to Mr. Fawaz, Defendant approached him, arguing, and began hitting him. Mr. Fawaz claimed that Defendant hit him 22 times. *Id*. at 133-134. During the altercation, Jennifer Craven took Mr. Fawaz's wallet from his pocket. Mr. Fawaz claimed that Defendant took money from the wallet and dropped the wallet. Ms. Craven and Mr. McKeever left. Mr. Fawaz got stitches in his head. Photos were displayed to the jury. *Id*. at 134.

On cross examination, Mr. Fawaz admitted that Jennifer Craven was like his daughter, and she had told Defendant that Mr. Fawaz was her father. Ms. Craven had a key to the complainant's apartment. T 139; 143. He had had no previous problems with Mr. McKeever. Ms. Craven takes pills. She told Mr. Fawaz that day that she was very sick and she went into Mr. Fawaz's bathroom before the incident. When she came out of the bathroom, she said she needed ten dollars, and Mr. Fawaz told her he did not have it, even though he actually had $100.00 in twenty dollar bills in his wallet. He denied telling police that it was a $100 dollar bill. *Id*. at 153-157. Julie Craven and Dwayne called the police. Mr. Fawaz denied telling police that he lost consciousness and only realized later, when he regained consciousness, that his money was missing. He also denied telling police that Jennifer Craven "abused" him. *Id*. at 163-169.

Jennifer Craven came back to the apartment building later, on December 24, and she was asked to leave. *Id*. at 176.

Detective Marek Noworyta, the officer in charge, retrieved the video from the apartment, and it was played for the jury. T 184. Mr. Fawaz told him what happened. Defense counsel asked him questions about what the complainant said, the prosecutor objected, and counsel explained that he wanted to impeach Mr. Fawaz with his statement to police. There was a bench conference and the objection was sustained. *Id*. at 189. In the police officer's report regarding the video, the detective stated that Jennifer Craven is observed going through the wallet (contrary to the complainant's trial testimony). *Id*. at 191. The video alse clearly shows Jennifer Craven going through the wallet *after Mr. McKeever walked away*.

After the prosecution rested, defense counsel informed the court that Mr. McKeever wanted his mother to testify, but counsel told him it would be hearsay. The trial court said he should let the mother testify and let the prosecutor object; otherwise Defendant would call counsel ineffective. However, Mr. Barnett announced that there would be no witnesses for the defense. The instructions were discussed, and the court refused to give an instruction on specific intent. T 199-202.

During closing argument, the prosecutor told the jury that Mr. Fawaz never said he had a $100 bill (referring to defense counsel's question on cross examination). T 206. During closing argument by the defense, counsel stated that he was not allowed to tell the jury what the complainant said to the police and without knowing that, how were they to make a decision. *Id*. at 214-215. Counsel admitted Mr. McKeever's guilt of aggravated assault, but argued that Defendant did not commit a robbery. *Id*. at 218. Counsel argued that Jennifer Craven was the robber and Defendant took nothing. When counsel argued that Mr. McKeever was trying to

protect Ms. Craven, the prosecutor objected and the trial court said, "She cannot testify. It's stricken." *Id*. at 221.

With regard to the unarmed robbery, the trial court stated that the jury must find that Defendant took Mr. Fawaz's "property." Counsel objected because the prosecutor chose to charge Defendant with taking only Mr. Fawaz's money. The judge refused to hear the objection. T 240. The jury requested to see the video, and it was played for them. *Id*. at 242. Mr. McKeever's father asked to be able to see the video, and the trial court admonished him about asking the court officer to move out of the way. The father kept talking, and the court held him in contempt and sentenced him to 30 days in jail. (Later in the day, the court decided to let him go home).

At sentencing, the judge referred to the incident with the father. Mr. McKeever requested a downward departure from the guidelines, denying any intent to rob Mr. Fawaz. The judge sentenced him to the top of the guidelines, 85 months to 30 years in prison. (ST).

A Motion to Remand was filed on March 13, 2014 and denied by the Court of Appeals on May 9, 2014. An Amended Motion to Remand with additional offers of proof was filed on May 30, 2014 and denied by the Court of Appeals on July 2, 2014. The issue on remand was whether trial counsel, Marvin Barnett, was ineffective for failing to present a witness who would have given exculpatory testimony, or whether the trial court erred in refusing to allow the witness to testify. It was necessary to make a record, but the Court of Appeals denied Mr. McKeever that opportunity.

The Court of Appeals affirmed Defendant's conviction in an unpublished opinion dated September 14, 2014, and Defendant filed an Application for Leave to Appeal. The Supreme Court remanded this case for a hearing in an order dated June 3, 2015, and hearings were

scheduled in September and November of 2015. The witness, Jennifer Craven, had by this time moved on with her life and was in Northern Michigan (with her baby). The hearing was held on January 15, 2016. At that point, the witness had moved to Texas, but offered to testify by telephone (not having the ability to do a video conference). The prosecutor objected and the trial court denied the request. In an offer of proof, which was entered into evidence, and during Ms. Craven's guilty plea proceeding (transcript attached), Ms. Craven stated under oath that Mr. McKeever did not take anything from the complainant and that he did not know she took his wallet and money. Mr. Barnett testified, professed a lack of memory, and relied on the record. A stipulation was entered that neither the trial judge (long since retired) nor the trial prosecutors could recall why Ms. Craven did not testify. The trial court denied the motion for new trial, finding that counsel was not ineffective but that there was no way to determine whether the trial court erred. The Supreme Court did not retain jurisdiction. The Court of Appeals granted a new trial in an opinion dated May 25, 2017, and the People have filed an Application for Leave to Appeal. Facts from the evidentiary hearing are set forth in the issue that follows.

I. THE COURT OF APPEALS DID NOT ERR IN GRANTING A NEW TRIAL BASED ON THE TOTAL LACK OF A RECORD INDICATING WHY MR. MCKEEVER'S CRUCIAL WITNESS WAS NOT CALLED TO TESTIFY TO EXONERATE HIM; DEFENDANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, HIS RIGHT TO COMPULSORY PROCESS AND HIS RIGHT TO PRESENT A DEFENSE BY THE FAILURE OF TRIAL DEFENSE COUNSEL TO PRODUCE AN EXCULPATORY WITNESS, OR BY THE TRIAL COURT'S REFUSAL TO ALLOW HER TO TESTIFY, EITHER OF WHICH DENIED HIS RIGHT TO A FAIR TRIAL; THE TRIAL COURT ON REMAND ABUSED ITS DISCRETION AND DENIED DEFENDANT HIS RIGHT TO A FAIR TRIAL AND HIS RIGHT TO PRESENT A DEFENSE BY DENYING THE MOTION FOR NEW TRIAL BASED ON LACK OF A RECORD.

The record indicates that Mr. McKeever wanted three witnesses to testify on his behalf, and most specifically Jennifer Craven. His trial attorney, Marvin Barnett, did not call any witnesses. During pretrial hearings, Mr. Barnett was informed that Ms. Craven, the codefendant, had already pled guilty and had been sentenced. (HT, 9-4-12). Mr. Barnett informed the trial judge that the defense wanted Jennifer Craven to testify at trial, and the court provided her address, stating "I don't know why you can't subpoena her." (HT 11-2-13). The prosecutor offered to subpoena Ms. Craven, and Mr. Barnett accepted, saying, "I'd appreciate it if they would do it. Then we'll make sure she's here." *Id*. Mr. Barnett told the court that he would be presenting three witnesses. (HT, 11-2-13). The prosecutor did not subpoena Jennifer Craven.

Jennifer Craven was not produced at trial. Counsel stated that whether she testified was not in his control, and that the court should tell Mr. McKeever its decision on whether Ms. Craven could testify. (T 73-74). The court did not respond to this request. Defendant had indicated his dissatisfaction with Mr. Barnett.

> MR. BARNETT: Mr. McKeever has a number of complaints that he has brought. I just want to put them on the record.

THE COURT: Go ahead. As quickly as you can because we'd like to take a break, too.

MR. BARNETT: First of all, -- not now. You don't have to deal with this now. At some point, would you please allow Mr. McKeever to know that the decision on whether Ms. Craven, who I have placed on the witness list, whether she can testify.

I don't know what this man's problem is. He seems to be upset with me for some reason, and I'm not going to tolerate it. At some point, 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.

Two, for some reason, I do not know why, he told me today that he wants his mother to testify. I don't know why. And then he decided he ain't going to talk to me. So that's terrific. So we've got an attorney thing. So I asked --

THE COURT: Well, you know, let me help you. Let me help you. Let me help you out. I'm going to help you real quick.

MR. BARNETT: Okay. Help me, Judge.

THE COURT: Number one, you're in it to win it or it's over with. We're not going to -- because he wants to get up now and shout I don't want this lawyer. Too late today. Too late. I'm not going to even listen to that.

MR. BARNETT: Okay. I have nothing else to say.

THE COURT: I'm not even listening to that at all.

MR. BARNETT: Judge, I'm through.

THE COURT: But now if he wants to call a mother -- now you are the lawyer.

MR. BARNETT: I don't know why he wants to call her.

THE COURT: You can call -- maybe he'll decide to tell you. If he doesn't want to talk to you, well and good. But you are ordered by this Court to try this case.

MR. BARNETT: I'm going to try the case, Judge.

> THE COURT: I'm not going to fool around with anyone not trying it, and I'm not talking to him.
>
> For some reason I have found -- I hate to say this -- maybe it's because I'm getting to be an older woman. For some reason over in the jail all these men think I've fallen in love with them, and that they can talk me out of stuff. The last three weeks men have been trying to talk me out of stuff. You should tell them -- let them know who they dealing with in the beginning.
>
> MR. BARNETT: I am, your Honor.
>
> THE COURT: They're not going to be able to talk me out of anything.
>
> MR. BARNETT: I don't know what the problem is.
>
> THE COURT: Well, I'm not worried about the problem.
>
> MR. BARNETT: I'm trying as best I can. I've made my record.
>
> THE COURT: You'll let him -- at the end of the trial,
>
> MR. BARNETT: Yes, your Honor.
>
> THE COURT: -- if there is a conviction, he can make his record. We'll let him say anything he wants.
>
> MR. BARNETT: Very well, Judge. Thank you very much." (T 74-77).

During closing argument, when trial counsel argued that Mr. McKeever assaulted Mr. Fawaz only to protect Jennifer Craven, the trial court stated that Ms. Craven could not testify. (T 221).

Beginning in early 2014, Defendant McKeever filed multiple motions to make a record and move for a new trial in the trial court. He filed a motion to remand on March 19, 2014, which was denied on May 7, 2014, and an amended motion to remand on May 30, 2014, attaching to both an affidavit and a letter, both signed by Jennifer Craven, stating specifically

that she was and is available and willing to testify on behalf of Mr. McKeever. Also attached was her guilty plea transcript wherein her statements exculpated Defendant McKeever. On July 2, 2014, the Court of Appeals denied the remand for the second time. The Court of Appeals affirmed Defendant's conviction, and he appealed to the Supreme Court. The Supreme Court issued an order remanding this case to the trial court:

> On order of the Court, the application for leave to appeal the September 16, 2014 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REVERSE that part of the Court of Appeals judgment holding that the defendant abandoned his claim of ineffective assistance of counsel, we REVERSE the Court of Appeals order denying the defendants amended motion to remand for an evidentiary hearing, and we REMAND this case to the Wayne Circuit Court for an evidentiary hearing. 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 decision. To the extent that trial counsel failed to respond to the defendants request for an affidavit on appeal, the defendant cannot be faulted for failing to overcome the presumption that counsel acted reasonably. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.
>
> We do not retain jurisdiction.

A hearing was conducted, at which time appellate counsel explained to the trial court that Jennifer Craven was in Texas but she was willing to testify by telephone. The prosecutor objected and the trial court denied that request. (HT 6). However, the court admitted the offer of proof, the affidavit signed by Jennifer Craven, and the plea transcript of Ms. Craven (attached), as evidence. Both the transcript and the affidavit indicate that although Mr. McKeever assaulted Mr. Fawaz with his fists, he did not steal anything from the victim, nor did he know that Ms. Craven intended to steal or was in the process of taking property from Mr. Fawaz. Ms. Craven stated in her

affidavit that she was willing to testify at trial on Defendant's behalf. The offer of proof was stated as follows:

> [I]f Ms. Craven were to testify today our offer of proof is that she would testify consistently with both the guilty plea transcript and her affidavit that Mr. McKeever did not know she was going to take money from Mr. Fawaz, the victim in this case. That he did not help her take money from Mr. Fawaz and did not know that she took money from him until she told him later on.
>
> And that according to her guilty plea transcript, someone had gone out and told him that she was crying and that's why he came in and beat up Mr. Fawaz. But he did not help her steal any money from Mr. Fawaz. (HT 7).

Ms. Craven's statements are consistent with the video of the assault on Mr. Fawaz. At no point does Mr. McKeever take anything from the complainant and at no point is he in possession of Mr. Fawaz's wallet or money. It was Ms. Craven who approached Mr. Fawaz. Mr. McKeever was outside and someone told him that Jennifer Craven, his girlfriend, was inside hurt and crying. He came in and beat up Mr. Fawaz, but did not know she was going to take the complainant's money had nothing to do with the theft. (See Jennifer Craven's guilty plea transcript). The jury could have watched the video in light of Ms. Craven's testimony and come to the conclusion that she was telling the truth.

At the hearing, a stipulation was entered that the trial prosecutors were contacted but did not remember why Jennifer Craven did not testify, and that Judge Vera Massey Jones, since retired, was contacted and did not recall what happened in the case. Mr. Barnett testified at the hearing that he too did not recall. Throughout his difficult testimony, Mr. Barnett adopted as true his statements on the record and professed not to remember anything beyond what was in the transcripts. (HT 15-16). Although prior to trial the prosecutor had agreed to subpoena Jennifer Craven and Mr. Barnett declared that he would make sure she was at trial, Mr. Barnett testified at the hearing that he did not

know whether she was ever subpoenaed. He did not recall following up on the prosecutor's promise. *Id*. at 23. The record shows that the prosecutor subpoenaed Ms. Craven's mother, Julie Craven, but did not subpoena Jennifer Craven. Mr. Barnett admitted that he never contacted Jennifer Craven, and he did not recall ever speaking to her attorney or requesting to interview her. *Id*. at 23-25; 57. Mr. Barnett did not recall subpoenaing Jennifer Craven himself and he had no idea why she was not produced at trial. *Id*. at 26. Although Barnett testified that Jennifer Craven was on his witness list, the actual list, defense exhibit D, includes Julie Craven's name, but not that of Jennifer Craven. *Id*. at 43. Trial counsel acknowledged telling the judge on November 2, 2013, that he intended to call three witnesses, but professed to not remember who they were. *Id*. at 28. When Mr. Barnett told the court at trial that he had no witnesses, Mr. McKeever said, "Your honor, your honor!" and the trial court told counsel not to let his client shout out. *Id*. at 32-33. Mr. Barnett had no explanation for asking Judge Jones to explain to Mr. McKeever that he did not have anything to do with Ms. Craven not testifying. *Id*. at 35. Mr. Barnett did not know what, if any, rulings the trial court made; he did not remember a side bar or a record outside the jury's presence. *Id*. at 36. He thought that he probably would have preserved whatever ruling was made. *Id*. at 36-37. Counsel did not request an adjournment. *Id*. at 42. Mr. Barnett did not recall meeting with Mr. McKeever between the final pretrial on November 2, 2012, and the beginning of trial on March 11, 2013, but he thought he probably did. *Id*. at 38.

On cross examination, Mr. Barnett testified that he saw the video and found the beating shocking. Barnett testified that the video had and that he heard the complainant's nose break; however, the video does *not* in fact include audio. Counsel claimed that Mr. McKeever refused to acknowledge the concept of aiding and abetting. (HT 48). Mr. Barnett alleged that it was not his

decision whether to call witnesses, and he thought it was the judge's decision that Jennifer Craven did not testify. *Id.* at 52.

Mr. Barnett concluded by stating again that he had to rely on the transcript, that he had no independent recollection, and that he did not know why Jennifer Craven did not testify. (HT 54-57).

Wilbert McKeever testified at the hearing that the three witnesses he wanted to testify were Jennifer Craven, Fred Innes (now deceased), and his mother. (HT, 59). Mr. Barnett did not talk to him between November 2, 2012, and trial. When he said, "Your honor, your honor," he wanted to tell the judge that counsel had not visited him, that Mr. Barnett never consulted with his witnesses, and that he did not want Mr. Barnett to represent him. *Id*. at 59-60.

The trial court ruled that defense counsel was not ineffective because Judge Jones had ruled that she could not testify, but the court could not determine, due to lack of a record, whether or why Judge Jones would not let Jennifer Craven testify. The court therefore denied the motion for new trial. (HT 69-70).

Mr. McKeever appealed the denial of his motion for new trial. The Court of Appeals issued an opinion reversing his conviction and granting a new trial because it was impossible to determine and review the reason Jennifer Craven did not testify as Mr. McKeever desired. The Court of Appeals indicated that the Supreme Court was well aware of the first Court of Appeals' opinion, in which the Court stated in passing that the jury rejected Mr. McKeever's defense. (The first Court of Appeals panel also decided that there was no proof of the trial court ordering that Ms. Craven could not testify, and that the claim of ineffective assistance of counsel was abandoned. Of course, the initial Court of Appeals' opinion was issued without the benefit of an evidentiary hearing because the Court twice denied motions for an evidentiary hearing. The issue of ineffective assistance of

counsel was not abandoned by Defendant; it was abandoned by the Court of Appeals when it denied the motions to remand.)

In the instant (second) Court of Appeals opinion, the Court recognized that the trial court was unable to follow the Supreme Court's directive because it was unable to determine why Jennifer did not testify and was therefore unable to determine whether there was error. On the other hand, Defendant's testimony and the testimony of Jennifer Craven at the guilty plea proceeding, as well as her affidavit and the offer of proof, establish that Mr. McKeever was prejudiced in that he was denied his only defense. Jennifer Craven would have given testimony by telephone had she been allowed. It should be emphasized that the hearing took place nearly three years after the trial, and nearly two years after Mr. McKeever requested the evidentiary hearing. Had the remand been granted when it was first (or second) requested, Jennifer Craven would have been available.

The prosecutor argues that there was no legal basis for the Court of Appeals' decision and that Mr. McKeever has not shown prejudice. This argument lacks merit. This Court ordered the trial court to determine whether trial counsel was ineffective for failing to call Jennifer Craven as a witness at trial, or whether the court ruled off the record that she could not testify and, if so, what was the basis for such a decision. The Court of Appeals did not err in finding that it was impossible to comply with this order. It should be noted that this impossibility was not in any way the fault of Mr. McKeever. Where there is no record and when it is impossible to recreate the record, the courts have frequently been compelled to reverse. This situation is equivalent to those cases where a transcript is missing and the record cannot be settled. By reversing Mr. McKeever's conviction, the Court of Appeals recognized, implicitly if not explicitly, that the denial of a defense, which cannot be justified due to lack of a record and lack of recall, is a serious error requiring a remedy. The only remedy available is a new trial.

Mr. McKeever submits that the Court of Appeals had no other just alternative but to grant a new trial because he was denied his only defense by either ineffective assistance of counsel or error on the trial judge's part.

Standard of Review

Where the trial judge's decision regarding Ms. Craven deprived Mr. McKeever of his constitutional right to present a defense, the standard of review is de novo. *Sitz v Department of State Police*, 443 Mich 744; 506 NW2d 209 (1993). Ineffective assistance of counsel claims are also reviewed de novo.

Constitutional questions are reviewed de novo. *People v White*, 212 Mich App 298, 304 (1995). The "de novo" standard of review applies to a claim that the unavailability of a record has denied a defendant due process on appeal. *See People v Jenkins*, unpublished opinion per curiam of the Court of Appeals, decided March 8, 2005 (Docket No. 250912), lv den 475 Mich 862; 703 NW2d 189 (2005), citing *People v Audison*, 126 Mich App 829; 338 NW2d 235 (1983).

Reversal is required due to the lack of a record

The trial court determined at the hearing that the judge (since retired) who conducted the trial ruled that Jennifer Craven could not testify, but the court could not determine whether this ruling was error due to the lack of a record. The trial court therefore denied relief to Mr. McKeever. The Court of Appeals correctly held that this was error.

Due process requires the trial court to provide a complete record of the trial proceedings, in order to enable appellate counsel to effectively represent the defendant. *See generally, Hardy v United States*, 375 US 277 (1964); *Evitts v Lucey*, 469 US 387 (1985). Anything short of a complete trial transcript is incompatible with effective appellate advocacy. *Hardy v United*

States, supra. In fact, the inability to secure complete trial transcripts may so impede a defendant's right of appeal under Const 1963, art 1, § 20 that a new trial must be ordered. *People v Horton* (After Remand), 105 Mich App 329 (1981). In *Horton*, the Court of Appeals reversed because, with the exception of the defendant, nobody had any recollection of the specifics of the plea-taking proceedings. The Court of Appeals reversed:

> The record, then, was not successfully settled on remand. Since defendant's testimony, if true, would give him a right to relief, we reluctantly reverse his convictions. The courts of this state have held that the inability to obtain the transcripts of criminal proceedings may so impede a defendant's right of appeal that a new trial must be ordered. *People v. Frechette*, 380 Mich. 64, 73, 155 N.W.2d 830 (1968); *People v. Carson*, 19 Mich.App. 1, 172 N.W.2d 211 (1969), lv. den. 383 Mich. 780 (1970); *People v. Drew*, 26 Mich.App. 337, 341, 182 N.W.2d 566 (1970); *People v. Dunn*, 50 Mich.App. 529, 213 N.W.2d 832 (1973). We find that in this case it is impossible to review the regularity of the proceedings due to the lack of transcripts. To insure defendant's right of appeal in a criminal case as guaranteed by Const.1963, Art. 1, s 20, we therefore must reverse." *People v Horton, supra* at 331.

In *Jenkins*, this Court summarized the standard for relief due to the unavailability of a transcript for appeal:

> In examining this issue, "[w]e must determine whether the unavailability of … the transcript so impedes the enjoyment of the defendant's constitutional right to an appeal that a new trial must be ordered." *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). If "it is impossible to review the regularity of the proceedings due to the lack of transcripts," then a new trial must be ordered. *People v Horton*, 105 Mich App 329; 306 NW2d 500 (1981) [*People v Jenkins, supra*, slip op, p 3].

The Court of Appeals granted a new trial in the companion case to *Jenkins*, observing:

> In light of the inability of Simmons [defense trial counsel] to recall many details of the trial, the evidence of lack of cross-examination of witnesses, and the suggestion of the existence of exculpatory evidence with regard to Williams [the defendant in the companion case] that might not have been fully explored by defense counsel, it is simply impossible for us to determine, without benefit of the

> missing trial transcript, whether Williams received adequate assistance from his trial counsel [Id, slip op, p 3].

The trial court conducting the hearing in the instant case decided that Judge Jones ruled that Jennifer Craven could not testify, but due to lack of a record, the court could not determine the reason for such a ruling. The court therefore denied the motion for new trial:

> "And unfortunately **because of the lack of a record being established** I cannot determine whether or not the Court ruled off the record that she could not testify or what the basis for such a decision was. But apparently a decision was made. I don't know if it was made at sidebar or if a record was made outside of the jury. So I cannot make a determination with certainty as to whether or not the Court ruled off the record. I can infer based on what was pointed out in the transcript, but I can't with certainty. So I guess I would have to simply say I am unable to make a ruling in regards to what was said at sidebar based on the affidavit that was presented by the parties and Mr. Barnett's testimony here in Court.
>
> So the defense motion for a new trial is denied." (HT 69-70).

The hearing judge reversibly erred by throwing up her hands and deciding that she had to deny the motion because of the lack of an adequate record. The lack of a record and the lack of agreement on the reason for the absence of the exculpatory witness at trial made it impossible to review whether trial counsel or Judge Jones acted properly. The Court of Appeals correctly recognized this dilemma and made the correct decision to reverse the conviction. There is more than sufficient evidence on the record that Mr. McKeever wanted Jennifer Craven to testify on his behalf (both he and his trial counsel so testified), that Ms. Craven would have testified that Mr. McKeever did not participate in any way in the robbery, and that Mr. McKeever was denied his defense. Ms. Craven was willing to testify at the hearing, and she testified at her guilty plea proceeding that Mr. McKeever did not plan or assist or participate in the robbery and did not know that Ms. Craven was going to take money from Mr. Fawaz.

Denial of Right to Effective Assistance of Counsel, Compulsory Process and Right to Present a Defense

Mr. Barnett admitted that Mr. McKeever wanted Jennifer Craven to testify on his behalf, and that Barnett intended to call her as a witness. Her testimony would have provided Mr. McKeever's only defense; she would have contradicted the prosecutor's theory that Defendant either participated in or aided and abetted the theft from Mr. Fawaz. Trial counsel relied on the prosecutor to subpoena her, but did not follow up when the prosecution did not fulfill its promise. Counsel admitted that he never talked to Jennifer Craven, never talked to her attorney, and never subpoenaed her. He knew that she had already pled guilty and had been sentenced. There was no reason, therefore, that she could not testify on behalf of Defendant, as she wished. Mr. Barnett never requested the transcript of Ms. Craven's plea or sentence. Mr. Barnett claimed at the hearing that he did not know why Jennifer Craven was not present at trial. He did not ask for an adjournment so that she could be produced. Barnett blamed the trial court, but had no explanation for why the court would rule that she could not testify. He did not make a record of the trial court's ruling and did not object. Under these facts, counsel was ineffective.

To be effective, defense counsel must investigate, prepare, and timely assert all substantial defenses. *Kimmelman v Morrison*, 477 US 365 (1986). The failure to call supporting witnesses can constitute ineffective assistance where their testimony could have changed the outcome of the case. *People v Johnson*, 451 Mich 115 (1996); *People v Bass*, 247 Mich App 385 (2001). It is well established that "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v Washington*, 466 US 668, 691 (1984). The duty to investigate derives from counsel's basic function, which is " 'to make the adversarial testing process work in the particular case.' " *Kimmelman v Morrison*, *supra* at 384. "[S]trategic choices made after less than complete

investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins v Smith*, 539 US 510, 521 (2003) (internal quotation marks omitted). Based on the principle, the Sixth Circuit affirmed the grant of a habeas petition in *McClellan v Rapelje*, 703 F3d 344 (CA 6, 2013), a first degree murder case, where trial counsel failed to contact defense witnesses who would have testified that the victim picked up a gun and approached the defendant with a gun before the defendant shot him.

Numerous cases have found that a failure to adequately investigate prior to trial negates an asserted reasonable strategy at the trial. See, for example, *English v Romanowski*, 602 F 3d 714 (Cir 6, 2010); *Avery v Prelesnik*, 548 F 3d 434 (2008); *Brown v Smith*, 551 F 3d 424 (Cir 6, 2008); *People v Grant*, 470 Mich 477 (2004); *People v Bass*, 247 Mich App 385 (2001).

In *Grant*, *supra* at 485, 486, 493, the Supreme Court wrote at length concerning how a failure to make a reasonable investigation of the facts prior to trial can constitute constitutionally ineffective counsel:

> `[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.... [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' *Strickland, supra* at 690–691, 104 S Ct 2052.
>
> * * *
>
> A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments. Counsel must make `an independent examination of the facts, circumstances, pleadings and laws involved....' *Von Moltke v Gillies*, 332 US 708, 721; 68 S Ct 316; 92 L Ed 309 (1948). This includes pursuing `all leads relevant to the merits of the case.` *Blackburn v Foltz*, 828 F2d 1177, 1183 (CA 6, 1987).
>
> * * *

> The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome. *Carbin* at 590, 623 NW2d 884. Counsel's failure to investigate his primary defense prejudiced defendant. It adversely affected the outcome, depriving defendant of a fair trial. In light of the evidence presented at trial, there is a reasonable probability that the outcome would have been different.

In *Robinson v United States*, 744 F Supp 2d 684, 693-694 (E D Mich, 2010), Judge Julian Cook of the United States District Court granted the petitioner's request for habeas corpus relief in part based on a ruling he was denied his Sixth Amendment right to effective assistance of counsel where Mr. Barnett, who was the defense trial counsel in the case, failed to adequately investigate potential defense witnesses, and thus did not present any testimony from those witnesses to corroborate the defense theory of the case:

> The Sixth Circuit declared in 2005 that "[i]t is well-established that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir.2005) (quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052). "This duty includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." Id. (citations omitted). In any case where the defendant alleges ineffective assistance of counsel, the trial court must assess a defense attorney's decision not to investigate for reasonableness under the circumstances, while "applying a heavy measure of deference to counsel's judgments." *Id*. Further, "[a] purportedly strategic decision is not objectionably reasonable 'when the attorney has failed to investigate his options and make a reasonable choice between them.' " *Id*. (quoting *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir.1991)).
>
> The strategic choices of counsel, including a determination that an investigation is not necessary, are accorded great deference. *Workman v. Tate*, 957 F.2d 1339, 1345 (6th Cir.1992). However, "[w]here counsel fails to investigate and interview promising witnesses, and therefore has no reason to believe they would not be valuable in securing the defendant's release, counsel's inaction constitutes negligence, not trial strategy." *Id*. (citations omitted). Indeed, the Sixth Circuit has found that such a failure constitutes ineffective assistance of counsel. See, e.g., *Workman*, 957 F.2d at 1345 (ineffective assistance of counsel where attorney failed to

> interview and call the only two witnesses aside from defendant whose account contradicted officers' versions); *Towns*, 395 F.3d at 259–60 (counsel's decision to refrain from calling witness unreasonable because he had not contacted witness who would have exonerated defendant); *Blackburn v. Foltz*, 828 F.2d 1177, 1183 (6th Cir.1987) (attorney's failure to locate and question alibi witness was ineffective representation).

In two decisions of the Supreme Court, claims were raised, as in the case at bar, that Mr. Barnett provided constitutionally ineffective assistance of counsel. In *People v Andre Hunter*, No. 297542, rel'd 8/30/12, the Court of Appeals panel reviewed the record of a *Ginther* hearing held in the matter, where Mr. Barnett testified he did not investigate potential alibi witnesses because, according to him, the defendant had confessed to him that he committed the offenses, and thus it would have been unethical for Mr. Barnett to present alibi witnesses who would be perjuring themselves. The Court of Appeals, while noting the alibi witnesses testified at the *Ginther* hearing, and the defense denied the accused ever told Mr. Barnett that he committed the offenses, gave deference to the trial judge's finding at the hearing that Mr. Barnett was a credible witness, and thus upheld the denial of the defense claim of ineffective assistance. The Court stated in a footnote that while appellate counsel for Mr. Hunter had transcripts from other *Ginther* hearings where Mr. Barnett had explained his lack of investigation of possible defense witnesses with the same claim that his client confessed to him, the Court would not take those other transcripts into account as they apparently had not been presented or argued to the trial judge.

On further appeal, the Michigan Supreme Court entered an order, in lieu of granting leave to appeal, reversing the trial court's fact finding that Mr. Barnett testified credibly at the remand hearing, and remanding the case to the Court of Appeals for reconsideration of the ineffective assistance of counsel claims in the case, including the failure to adequately investigate the

possible defense witnesses, without giving any deference to the trial judge's factual finding. *People v Andre Hunter*, 493 Mich 1015 (2013). The Supreme Court found the trial judge clearly erred in holding Mr. Barnett credible in his explanations for his representation of Mr. Hunter.[1]

In a subsequent decision, the Michigan Supreme Court unanimously overturned a trial court ruling that Mr. Barnett was credible in his explanations at a *Ginther* hearing concerning his representation, and remanded the matter to the Court of Appeals for reconsideration without deference to the trial court's ruling. See *People v Tion Terrell*, Sup. Ct. No. 146850, rel'd 10/2/2013. On remand, *People v Tion Terrell*, Docket No. 303717, rel'd 4/1/14, the Court of Appeals found counsel ineffective. See also *People v Terrell Thorton*, Docket No. 313070, rel'd 5-27-14, where the Court of Appeals, in an unpublished opinion, reversed the defendant's conviction and remanded for a new trial, finding ineffective assistance of counsel in another case involving the same attorney, Marvin Barnett.

In the instant case, as in the other cases cited, Mr. Barnett was also ineffective. While he was more careful in his testimony and claimed not to remember what happened, the record shows that he failed to investigate the defense by neglecting to even talk to Jennifer Craven, and he failed to produce her at trial or to request an adjournment so she could be produced. Apparently the reason may have been the video and his own opinion that Defendant was guilty of aiding and abetting Ms. Craven. However, his duty was to raise Mr. McKeever's viable and well-supported defense.

The hearing judge failed to address whether trial counsel was ineffective, merely finding that it was the trial judge who would not let Ms. Craven testify, even though there is no record of any such ruling:

[1] On remand, the Court of Appeals held the alibi witnesses for Mr. Hunter were credible on their face, and granted him a new trial.

> Based on testimony that was presented today the Defendant, Mr. McKeever, wished for Ms. Craven to be called as a witness and apparently the assistant prosecutor offered to subpoena Ms. Craven. There is no record that the assistant prosecutor complied with that request and Mr. Barnett indicated he did not recall a sidebar or a record being made outside the presence of the jury regarding Ms. Craven testifying at trial.
>
> And by way of stipulation Judge Jones and two of the assistant prosecutors involved in this case indicated that they did not remember this case. But it is clear by way of both attorneys today referring to the trial transcript, that the trial court indicates without reason that Ms. Craven would not be testifying. And Mr. Barnett asked the Court to explain to Mr. Keever (as spoken) the reasons for Ms. Craven not being allowed to testify. And apparently Mr. Barnett attempted to make mention in his closing argument to the jury about Ms. Craven not testifying and Judge Jones told the jury the same, that Ms. Craven was not allowed to testify.
>
> This Court finds that Mr. Barnett was not ineffective for failing to call Ms. Craven as a witness at trial. And unfortunately because of the lack of a record being established I cannot determine whether or not the Court ruled off the record that she could not testify or what the basis for such a decision was. But apparently a decision was made. I dont know if it was made at sidebar or if a record was made outside of the jury. So I cannot make a determination with certainty as to whether or not the Court ruled off the record. I can infer based on what was pointed out in the transcript, but I can't with certainty. So I guess I would have to simply say I am unable to make a ruling in regards to what was said at sidebar based on the affidavit that was presented by the parties and Mr. Barnett's testimony here in Court.
>
> So the defense motion for a new trial is denied. (HT 69-70).

If the trial court is correct that Judge Jones ruled that Jennifer Craven would not be allowed to testify, Judge Jones denied Mr. McKeever his right to compulsory process and his right to present a defense because there is no legal basis for such a ruling. Moreover, if Judge Jones' reasoning was that Jennifer Craven could not be compelled to testify because she was a codefendant, trial counsel was, at minimum, ineffective in failing to produce the witness for a hearing on her willingness to testify. In *People v Shier*, unpublished opinion (#184811, 6-24-

97), the Court of Appeals held that the defendant was denied his right to effective assistance of counsel and a fair trial by his trial attorney's failure to subpoena witnesses who were present during the alleged crime who had given statements to the police. Attorneys for the witnesses told the defendant's counsel that if their clients were subpoenaed, the attorneys would advise them to take the Fifth, but the Court of Appeals held that it was the trial court, not counsel, who would have to decide whether these witnesses would have had a valid Fifth Amendment privilege. Counsel in the instant case likewise failed to produce the exculpatory witness. It was not up to the prosecutor or counsel or even the trial court to decide whether Jennifer Craven could be produced as a witness. And it is clear that she *would have* testified on Mr. McKeever's behalf.

If Judge Jones ruled that Ms. Craven could not be subpoenaed to testify, then this ruling was erroneous. (T 221). The codefendant had already pled guilty to unarmed robbery and had already been sentenced - in August of 2012 (PSI p. 2), seven months before Mr. McKeever's trial. There was no appeal pending (according to the Court of Appeals website). Ms. Craven retained no Fifth Amendment privilege, and even if she had, it was up to her whether or not to testify on behalf of Mr. McKeever. Before a witness is entitled to remain silent, there must be a valid assertion of the Fifth Amendment privilege. *In re Morganroth*, 718 F2d 161, 167 (CA 6 1983). *See Pillsbury v Conboy*, 459 US 248 (1983). It is for the court to decide whether a witness' silence is justified and to require him to answer if it appears to the court that the witness asserting the privilege is mistaken as to its validity. *Hoffman v United States*, 341 US 479 (1951). Without examining Ms. Craven, Judge Jones was unable to say she was unavailable. Moreover, if she was indeed unavailable, any statement against interest she may have made (specifically, to Defendant's mother) and certainly her guilty plea transcript would have been

admissible at trial as an exception to the hearsay rule. *See* MRE 804(b)(3); *People v Barrera*, 451 Mich 261 (1996). Judge Jones' ruling precluded any of these alternatives and denied Defendant his right to present a defense.

The Compulsory Process Clause of the Sixth Amendment provides an accused with the right to "compulsory process for obtaining witnesses in his favor," US Const, Am VI, a crucial part of the Constitution's more basic guarantee of "a meaningful opportunity to present a complete defense." *California v Trombetta*, 467 US 479, 485 (1984). As applied to the states by the Due Process Clause of the Fourteenth Amendment, the accused has the right at trial to present testimony that is "relevant," "material," and "vital to the defense." *Washington v Texas*, 388 US 14, 16 (1967); *Crane v Kentucky*, 476 US 683, 690-691 (1986).

In *Chambers v Mississippi*, 410 US 284, 302, (1973), the Court held that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Restrictions on the defendant's right to present relevant evidence may not be arbitrary or disproportionate to the purposes they are designed to serve. *Rock v Arkansas*, 483 US 44, 56 (1987). The defense is permitted to offer evidence of third party culpability even in circumstances where application of evidence rules alone might not permit it. *Chambers v Mississippi, supra; United States v Stevens*, 935 F2d 1380, 1401-04 (CA3, 1991); *United States v Armstrong*, 621 F2d 951, 953 (CA9, 1980); (1979); *United States v Robinson*, 544 F2d 110, 113 (CA2, 1976), cert denied, 434 US 1050 (1977)1.

The Supreme Court in *Washington v Texas*, *supra*, explained the right to present a defense as follows:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth

> lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." 388 US 14, 19.

Mr. McKeever was denied the basic right to present a defense by his attorney's failure to produce Ms. Craven and/or by the trial court's apparent ruling denying Defendant's right to present Ms. Craven as a witness in his defense. For all the above reasons, due process requires a new trial. Const 1963, art 1, § 17, 20; US Const, Ams VI, XIV. In light of the constitutional errors denying Mr. McKeever a fair trial, the prosecutor's assertion that no prejudice has been shown lacks merit. Although Ms. Craven was unable to travel to Michigan from Texas (or from Northern Michigan previously) to testify,[2] it was not because of her unwillingness to testify for Mr. McKeever. She was willing to testify by telephone. Moreover, she had testified *under oath* at her own guilty plea that Mr. McKeever was not aiding and abetting the robbery:

> THE COURT: **So he beat up Mr. Fawaz so you could get the money, correct?**
>
> DEFENDANT CRAVEN: **No**.
>
> THE COURT: Oh, well then why did you take the money? Did you ask - -
>
> DEFENDANT CRAVEN: I just took the money.
>
> THE COURT: Did Mr. Fawaz ask you for money? Did you ask Mr. Fawaz for money before that?
>
> DEFENDANT CRAVEN: Yes.
>
> THE COURT: And he didnt give it to you, did he?
>
> DEFENDANT CRAVEN: No.
>
> THE COURT: **So did you tell Mr. McKeever**?

[2] Some three years later, Ms. Craven had moved on with her life and had a new baby and a new relationship.

DEFENDANT CRAVEN: **No**.

THE COURT: **Why did Mr. McKeever beat up Mr. Fawaz**?

DEFENDANT CRAVEN: **Someone had went outside and told him that I was in there crying.**

THE COURT: **Oh, okay. So he came in there because he was trying to defend you?**

DEFENDANT CRAVEN: **Yes**.

THE COURT: **She's not acting in concert with this guy** --

MR. TOUSSAINT: I'm not sure either, you know --

THE COURT: I don't understand.

MR. POSTEMA: While -- I mean we have a video, Judge. The video reveals that the co-defendant was punching -- while the co-defendant was punching my victim in the face, then this defendant was reaching in his pants pocket.

THE COURT: Is that true?

DEFENDANT CRAVEN: Yes.

THE COURT: So you took the money?

DEFENDANT CRAVEN: Yes.

THE COURT: I'm good with that. (Craven's guilty plea transcript, pp. 8-10).

The failure to produce Jennifer Craven was absolutely prejudicial to Mr. McKeever. The evidence was not overwhelming as to the robbery charge, contrary to the People's argument on appeal. The jury was shown a video in which Mr. McKeever is seen punching and hitting Mr. Fawaz. He has his key chain in his hand. However, the video also shows his girlfriend, Jennifer Craven, going through the complainant's pocket and taking something. After Mr. McKeever walks away, Ms. Craven can be seen taking money out of the wallet and throwing it at Mr.

Fawaz. Moreover, Mr. McKeever's vantage point is far different than the birds-eye view from the video camera; he could not necessarily see Ms. Craven swooping in from behind him to grab the victim's wallet. Defendant admitted beating Mr. Fawaz but denied knowing that Ms. Craven was going to steal from the complainant. Ms. Craven stated under oath at her guilty plea proceeding that Mr. McKeever was outside and someone told him that Craven, his girlfriend, was inside hurt and crying. He came in to defend her. He beat up Mr. Fawaz, but did not know she was going to take the complainant's money had nothing to do with the theft. She signed an affidavit to those facts and stated that she was willing to testify at his trial. She exonerated Mr. McKeever under oath at her own guilty plea. Had she testified, her testimony would have been consistent with the video, which does *not* show Mr. McKeever taking the complainant's wallet or money and shows Ms. Craven going into Mr. Fawaz's pocket. It would have been up to the jury - not the People or the trial court or the Court of Appeals - whether to believe her.[3] As the Sixth Circuit Court of Appeals held in *Avery v Prelesnik*, 548 F3d 434, 439 (CA 6, 2008) (finding ineffective assistance of counsel), "evaluation of the credibility of alibi witnesses is 'exactly the task to be performed by a rational jury,' see *Matthews v. Abramajtys*, 319 F.3d 780, 790 (6th Cir. 2003), not by a reviewing court. Cf. *United States v. Kelly*, 204 F.3d 652, 656 (6th Cir. 2000) ('[D]etermining the credibility of witnesses is a task for the jury, not this court.)"

Finally, equity demands that a new trial be granted under the circumstances in the instant case. An equitable remedy is necessary where there is no adequate legal remedy for the plaintiff. *See Multiplex Concrete Machinery Co. v Saxer*, 310 Mich 243, 259-260 (1945); *Powers v Fisher*, 279 Mich 442, 447 (1937). "The absence of precedents, or novelty in incident, presents no obstacle to the exercise of the jurisdiction of a court of equity, and to the award of relief in a

[3] Although the first Court of Appeals panel seemed to think the jury rejected Mr. McKeever's defense, this would have been *impossible* because Mr. McKeever was never allowed to present his defense.

proper case." 30A CJS, Equity, Effect of Absence of Precedents, § 10, pp. 171–172; see also 27A Am. Jur. 2d, Equity, § 100, p. 587 ("The appropriateness of the equitable remedy is determined by current rather than past conditions"). Regardless of how the plaintiff characterizes its pleadings, "[t]he court has equitable jurisdiction to provide a remedy where none exists at law, even if the parties have not specifically requested an equitable remedy, whenever the pleadings sufficiently give notice of a party's right to relief and demand for judgment." 30A CJS, Equity, Lack of Remedy at Law as Ground and Limit of Jurisdiction, § 18, p. 180; see also 27A Am. Jur. 2d, Equity, § 216, p. 699 ("Equity jurisdiction nevertheless may arise even though the claimant has pleaded no equitable claims and has not pleaded inadequacy of the remedy at law."); *Parkwood Ltd. Dividend Housing Ass'n v State Housing Dev. Auth.*, 468 Mich. 763, 774 n. 8 (2003). *See Henry v Dow Chem Co*, 473 Mich 63, 111–12 (2005).

Mr. McKeever was denied his only defense and it should not matter whether the blame lies with trial counsel or the trial court. The Court of Appeals was correct in ruling that Mr. McKeever must be granted a new trial.

SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court DENY the Plaintiff-Appellant's Application for Leave to Appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Chari K. Grove

BY:_____

CHARI K. GROVE (P25812)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: August 11, 2017