

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

vs

BERNARD CHAUNCEY MURPHY,

Defendant-Appellee.

Court of Appeals No. 258397

Circuit Court No. 04-1084

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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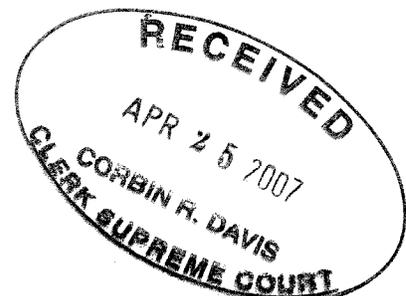


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***STATEMENT OF JUDGMENT BELOW
AND NATURE OF RELIEF SOUGHT***

The trial court sentenced Defendant on October 4, 2004. On July 27, 2006, the Court of Appeals reversed Defendant's conviction in a published opinion. On the People's timely motion for reconsideration, the Court of Appeals vacated its opinion on October 12, 2006, reversing Defendant's conviction in an unpublished opinion issued on the same date. The People filed the instant application for leave to appeal on or about November 2, 2006, seeking reversal of the Court of Appeals judgment, and reinstatement of Defendant's convictions. This Court's jurisdiction arises from MCL 600.151, MCL 770.12, and from MCR 7.301-302.

STATEMENT OF QUESTIONS

- I. A defendant is entitled to the effective assistance of counsel, both at trial and on appeal. Here, trial counsel did not contest or litigate an emergency interlocutory appeal filed by the prosecution which resulted in the reversal of a trial court's order suppressing evidence.**

Did counsel's failure to oppose the prosecutor's interlocutory appeal constitute structural error under *United States v Cronin*, 466 US 648 (1984), precluding an inquiry into deficient performance and prejudice under *Strickland v Washington*, 466 US 668 (1984)?

This question was not before the trial court.

Court of Appeals said: Yes.

Defendant says: Yes.

People say: No.

Does counsel's failure to oppose the prosecutor's interlocutory appeal require a reversal of Defendant's conviction in the absence of a showing of prejudice in the form of an incorrect previous decision on the merits of the suppression issue?

This question was not before the trial court.

Court of Appeals said: Yes.

Defendant says: Yes.

People say: No.

Standard of Review

Questions concerning the construction of the state and federal right to counsel present questions of law, reviewable *de novo*.¹

¹*People v Lugo*, 214 Mich App 699 (1995); *People v Price*, 214 Mich App 538 (1995).

STATEMENT OF FACTS

Defendant Bernard Chauncey Murphy and co-defendant Charles Terrell Jones were charged with two counts of armed robbery, MCL 750.529 and one count of felony firearm, MCL 750.227b. Before trial, Jones pleaded guilty to two counts of armed robbery before Judge Deborah Thomas, and was sentenced to concurrent terms of five to twelve years by Wayne County Circuit Court Deborah Thomas. Following a four-day jury trial before Judge Michael Hathaway, Defendant was found guilty as charged and was sentenced to concurrent terms of 15 to 30 years for armed robbery, consecutive to a two-year sentence for felony firearm. (361a-363a).

Aborted first trial and prosecution's emergency interlocutory appeal

Defendant's first trial began on April 22, 2004 before Judge Thomas. After the jury had been selected, but before it was sworn, the trial court entertained the prosecutor's motion to admit testimony that police recovered a sawed-off shotgun and live rounds at a gas station and in a vehicle the day after the incident: under the authority of *People v Hall*,² the People sought to admit testimony about defendant's arrest 25 or 26 hours after the alleged offense, when Police Officer Ramon Childs began following a black Dodge Ram pickup after he saw it turn off Northlawn because it fit a description of a vehicle involved in a carjacking. (8a). Childs saw the truck pull into a gas station parking lot and saw four people get out—one went inside the station, one went to the back and two stayed by garbage cans next to the gas pumps. (9a). As Childs called for backup, the four people got

²*People v Hall*, 433 Mich 573 (1989).

back in, drove away and were eventually stopped a short distance later. (9a). The four people, including Defendant, got out and walked away from the truck, but were eventually arrested. (9a-10a). Police found a live shotgun shell in the truck, live shotgun shells in the garbage cans next to the gas pumps and a sawed-off shotgun in a dumpster behind the gas station. (10a-11a). The purpose for bringing in the sawed-off shotgun was to allow Holman and Isaac to testify that it “looked like” the gun used to rob them. (9a). Defendant objected, noting that the case which the proffered testimony came from had been dismissed and that Childs had no one with any type of object. (16a-17a). The trial court ruled:

I’m going to admit testimony as it relates to what they found in the receptacle. I’m going to admit testimony as it relates to what they found in the vehicle, but I’m not going to admit anything found out behind the gas station because nobody gave any testimony they saw anybody taking anything behind the gas station. So you can get what’s in the receptacle and you can get what was in the vehicle. The rest of it is not admissible under the rulings of Hall. (20a).

This led the prosecutor to seek to clarify the ruling, leading to the following exchange:

[THE PROSECUTOR]: I understand.... [W]e would ask the Court’s ruling in regards to the admissibility of a shotgun under both the ability of the victims to say that it looks like the weapon that was recovered and the circumstances of its recovery that I’ve placed on the record in light of the link it has to the Black Dodge Ram Pickup.

THE COURT: Or it doesn’t have because the only thing that the record shows from any of these proceedings including the other trial was that the officer was at the gas station. He saw one person go into the gas station. He saw one person go behind the gas station. He saw two people stay with the vehicle. He gave no testimony that he saw anybody carrying anything anywhere. He did give testimony that he saw the people who stayed with the vehicle were around the trash receptacles that were at the pumping station. He did not see what they did with those. He could only identify one of them as a shadow of a person. He did not testify that he saw anybody putting anything in the trash bin. He didn’t see anybody taking anything out of the trash bin, but he did see them milling around the trash bin. Then they got into the vehicle and left and he left. So both he and the vehicle left that location for some period of time.

Chain broken in terms of observations of what did or did not appear at that location with that time span. So I don't know if somebody else got there. I don't know if somebody was there before then.... [H]e didn't say he saw anybody going around the store carrying anything. If I had that, I would allow it. I don't have any of that. So if that is what you're going to rely upon in terms of admissibility, it's not there. Now I don't know what other testimony you may have which may make it both material and relevant but the observations of the officer which showed a break in the observations which did not include seeing anyone carrying anything does not support allowing an object that was found sometime later to come into evidence when you have not connected it to any of these four individuals whoever that may have been. I don't have a problem saying that the four individuals who were at the gas station were the same four individuals that were arrested within a couple of blocks of the gas station. I think that burden has been met. The problem is there's nothing, no testimony whatsoever that any of those found individuals whoever they may have been were carrying anything to the location where this gun was found. So I can't jump that leap. I don't have anything to carry me across the bridge. There's nothing there, so no I will not allow that to come in based on the absence of that evidence, the absence of that testimony. Now, you got something else that might make both relevant and material, then it's in. (23a-25a).

The trial court denied the prosecution's request to stay the trial for purposes of an emergency appeal, indicated it would sign an order the following morning, and ordered the parties to be present for trial at 9:00 a.m. (25a-32a). The prosecutor obtained a signed order dated April 22, 2004, granting his motion "in part as to shotgun shells found gas station trash bin and vehicle, denied to shotgun" that same afternoon. (5a). Using that order, the prosecution filed an *Emergency Application for Leave to Appeal, Motion for Immediate Consideration and Emergency Motion for Stay and to Waive Production of Transcript* in the Court of Appeals on April 23, 2004. In a peremptory order dated April 23, 2004 and issued at 5:35 p.m. the Court of Appeals granted the motion for immediate consideration, granted the motion to waive the production of the transcript and reversed the trial court's ruling:

In light of the proposed testimony of the victims, evidence of the shotgun was clearly relevant to the charge that these defendants utilized the shotgun in committing acts

of armed robbery. MRE 401; *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989). The fact that there were no eyewitnesses to any of the defendants actually depositing the shot gun into the trash dumpster goes to the weight of the evidence, not it's (sic) admissibility. *People v Wager*, 460 Mich 118, 126; 594 NW2d 486 (1999). (46a).

Defense counsel filed no brief opposing the prosecution's emergency leave application, claiming that she had not been served with any "paperwork" and did not "have an appellate section" that could take care of the appeal while she was otherwise occupied. (77a-78a). She acknowledged that a clerk from the Court of Appeals tried to contact her on April 23, 2004, but she was at the hairdresser's until 6:00 p.m. and could not return the call, and learned that the trial court's order had been peremptorily reversed at 10:00 a.m. on Saturday morning. (47a, 58a-59a, 77a-78a). Appellate prosecutor Timothy Baughman told the trial court that someone from his office personally served a copy of the application at the address listed for defense counsel in the State Bar Journal Directory.³

When trial reconvened on April 26, 2004, the trial court stated its belief that the People's emergency application contained incomplete, inaccurate and misleading facts and assertions, including an inaccurate statement of its ruling. (54a-55a). The trial court chided the prosecutor for failing to appear the following morning to present an order, and not presenting it with a written order accurately reflecting its ruling. (54a-58a). Timothy Baughman told the trial court that he based the *Ex-Parte Statement of Facts* solely on what the trial prosecutor had told him, and that the only signed order that he (Baughman) knew about was the one signed on April 22, 2004. (81a-82a). The trial court granted defense counsel a stay of proceedings to seek reconsideration, or file an application in the Supreme Court, and the trial court granted a stay and dismissed the jury due to the

³Counsel told the trial court that the Bar Journal address was not her current address and that no one was in that office on Saturday. She did not say whether anyone was in her office on Friday. (80a).

circumstances surrounding the prosecution's appeal; it also ordered the parties to draft an order that accurately reflected its ruling, entering an amended order on April 26th. (86a, 91a-92a).

Original defense counsel took no action to seek reconsideration or appeal to the Supreme Court, and on May 6, 2004 the trial court appointed Neil J. Leithauser to seek appellate relief on Defendant's behalf. (94a). Court of Appeals records show that telephone contact was made with Leithauser to advise him that his rehearing motion was due on May 14, 2004. Subsequently, the stay was lifted on the prosecution's motion, based on what Leithauser told the trial court:

...Your Honor, this is one of those unusual cases where the Prosecutor had a motion for immediate consideration in the Court of Appeals, And it wasn't ten minutes when he filed his application, but it was almost as a quick. He filed application one day, then the Court of Appeals without retaining jurisdiction, reversed Your Honor's decision (inaudible).

I was appointed about two weeks after that. Then the 21 days for a motion for reconsideration would have run, this was within the two days, and I didn't have any information really on the case where I could have a handle on it.

The Court did retain jurisdiction. So that Court— after my assignment actually the Court—what's this about, we don't even have a case. So then the decision that I undertook was whether or not to proceed to the Michigan Supreme Court under the 56 Day Application. I just didn't think I had enough of a record to do that. So that hasn't been done. There's nothing pending. (95a-96a).

Trial

Testimony at trial showed that at 5:45 a.m. on Thanksgiving Day, 2003, Chris Holman and Tammy Isaac headed to the Detroit Thanksgiving Day Parade from their home in Dearborn Heights on I-94, leaving the expressway at Grand River. (124a-127a, 161a, 177a). Since the area was unfamiliar, Holman drove a few blocks and turned around to drive to the parade on Grand River and was waiting for a stop light to turn when he was rear-ended by a black Dodge Ram Truck. (127a-

129a, 199a, 226a). Holman saw two occupants in the truck when he looked in his rearview mirror, (130a-131a), and left the car, leaving the door open, to check for damage, despite Isaac's advice not to do so. (132a-133a, 200a-203a). As he headed back to the car after seeing no damage, the driver Holman described as a black man in his twenties wearing a black jacket with a hood, approached him and asked if he had hit the car. (134a, 153a, 203a-204a). As Holman turned around to say that the car had been hit but there had been no damage, the passenger, whom he identified as Defendant, yelled "get down on the ground now" from behind the passenger door of the truck; Holman saw Defendant holding a shotgun "somewhat high up in the region of his face and chest," and told jurors that People's Exhibit 1 "looked like" that gun, because the weapon he saw was a fairly long gun with a short barrel. (134a-142a, 204a-205a).

As Holman complied with Defendant's order to get on the ground, Isaac grabbed her cellular telephone to call police. (141a-142a, 205a-206a). After getting on the ground, Holman could no longer see Defendant, but Defendant demanded that he give the driver all of his money, and he could hear metal hitting a window; this caused Isaac to drop the cellular telephone on the floor, and Defendant ordered Isaac to get out of the car. Holman pulled out his wallet, took \$175 in cash out and gave it to the driver. The driver walked back to the truck. Meanwhile, Isaac was "thrown" out of the car by a six-foot tall black man in his twenties wearing a black hooded sweatshirt holding a "long handgun" who demanded all of her money and who threatened to kill her if she did not give him her money. Isaac was not, however, positive that People's Exhibit 1 was the gun used in the robbery. (141a-153a, 205a-217a, 231a-232a).

When Isaac told the gunman that her money was in her purse in the car, she and Holman saw the man search the car, taking two cellular telephones and Isaac's purse, which contained about \$23,

spare keys to another vehicle, driver's license, credit card, bank account card and makeup. (146a, 150a-152a, 163a-164a, 218a-224a).

Defendant again demanded all of Holman's money, threatening to kill Isaac if he had no more. (153a, 219a-220a). Defendant then returned to the truck, holding the gun in both hands, and told the two victims to get back into their car and leave. (156a-159a, 220a). Holman drove to the State Police post in Taylor to report the incident, then went home to Dearborn Heights. (160a-163a).

While on patrol in full uniform in a marked car at about 4:40 a.m. on "the Friday after Thanksgiving," Police Officer Ramon Childs received a complaint from Dennis Johnson that he had been assaulted buy a sawed-off shotgun that that involved a black pickup truck, possibly a Chrysler vehicle, and while heading to where the incident occurred, saw a vehicle matching that description turn west onto McNichols off of Santa Clara. (236a-242a, 259a-260a). It was a black Dodge pickup truck with an extended cab, and Childs saw three or four "shadows" in the back seat. (239a). He followed the truck to a gas station at Wyoming and McNichols, where it parked near a gas pump. He then saw a couple people leave to go inside o the gas station, another get out and go around the side of the gas station, and others stay by the truck, but saw nobody pumping gas. (242a-244a, 260a). Sensing trouble, he called for backup, and officers followed the truck to Kentucky street via Santa Clara, where it was stopped and the four men were seen walking away. One of the men seen walking away was Defendant, who had been driving truck, and who listed his address as 5526 Chalmers; another man was seen throwing away a cellular telephone. (244a-252a, 261a, 267a, 274a).

Upon seeing three shotgun shells in the truck's driver's seat, police looked for a weapon, but did not find one. Childs returned to the gas station and found two of live Remington shotgun shells in the garbage can next to the pump where the truck had been parked; another officer found a sawed-

off shotgun containing three live rounds from a dumpster behind the gas station. (254a-255a, 268a-269a, 275a-276a, 282a-283a). Childs later determined that the truck was registered to Melvin J. Murphy at the same address defendant gave police. (258a). Also recovered from the truck were a watch with a leather band, a “gold toned ring with a diamond colored round in the middle” from the center console and a blue faced watch with a silver band on the gear shift, and a Michigan social Security card in the name of Alissa M. Esper. (284a-287a).

Defendant was arrested at 2:00 a.m. on December 9, 2003; Police subsequently discovered that Isaac’s credit card had been used at a gas station at the corner of Harper and Dickerson on December 1, 2003. (302a-308a).

The jury convicted defendant as charged, (345a-346a), and the trial court imposed a sentence within the guidelines for armed robbery. (361-363a).

On Defendant’s appeal of right, the Court of Appeals reversed his conviction in a published opinion, holding that defense counsel’s failure to oppose the prosecutor’s interlocutory application was structural error involving a denial of counsel, entitling Defendant to a new trial. (366a-372a).

The prosecution filed a timely motion for reconsideration, observing that the law of the case doctrine would ordinarily preclude relitigating the issue in the trial court, noting that the remedy for such an error in an appellate forum should be a new appeal rather than a new trial, and suggesting that the Court simply review the underlying evidentiary claim on the merits. In an unpublished opinion dated October 12, 2006, the Court of Appeals vacated its earlier opinion, but proceeded to reverse Defendant’s conviction nevertheless, maintaining that the error was a structural one but directing that the trial court not be bound by the “law of the case” doctrine on remand. (375a-382a).

The case is now before this Court on leave granted.

SUMMARY OF ARGUMENT

Claims relating to counsel's performance are judged by considering whether counsel's performance was professional deficient, and whether that substandard performance operated to undermine the proper functioning of the adversary process and call the justness of the result into question.

Where counsel's alleged deficiency consists of failing to respond to an emergency interlocutory appeal by the prosecution, no relief is warranted unless the defendant can show that the result of the emergency appeal caused prejudicial error at trial.

ARGUMENT

I.

A DEFENDANT IS ENTITLED TO THE EFFECTIVE ASSISTANCE OF COUNSEL, BOTH AT TRIAL AND ON APPEAL. HERE, TRIAL COUNSEL DID NOT CONTEST OR LITIGATE AN EMERGENCY INTERLOCUTORY APPEAL FILED BY THE PROSECUTION WHICH RESULTED IN THE REVERSAL OF A TRIAL COURT’S ORDER SUPPRESSING EVIDENCE. COUNSEL’S FAILURE TO OPPOSE THE PROSECUTOR’S INTERLOCUTORY APPEAL DOES NOT REQUIRE A REVERSAL OF DEFENDANT’S CONVICTION IN THE ABSENCE OF A SHOWING OF PREJUDICE IN THE FORM OF AN INCORRECT PREVIOUS DECISION ON THE MERITS OF THE SUPPRESSION ISSUE.

In this case, the Court confronts a novel question involving the interplay of trials and appeals, and the effect of an emergency interlocutory appeal on a criminal defendant’s right to counsel at trial. For a variety of reasons, it is clear that the Court of Appeals erred in its reasoning and analysis, and that this Court must reverse the judgment of that Court. In the process, however, there are several aspects of the right to counsel that warrant careful attention, in order to prevent the application the “law of the case doctrine”—a judicial rule of procedure intended to promote efficiency in the administration of justice—from causing unintended consequences and avoidable problems in the context of an ongoing criminal trial.

The Right to Counsel: From Blackstone to the Bill of Rights

Though it may seem alien to our modern notions of due process, the right of an accused to counsel was unknown at common law. In fact, although permitted in civil cases and for criminal misdemeanors, the law did not permit defense counsel to intrude into a criminal felony trial. As Blackstone himself noted:

[I]t is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise to be debated.⁴

The rationale for this disability may sound hollow to 21st Century ears, but contemporaries cited many reasons in justification.⁵ On the one hand, as the judge was responsible for ensuring that the proceedings were “legal and strictly regular,”⁶ it followed that the judge served as de facto defense counsel, making a defense lawyer superfluous; on the other hand, Coke justified the rule on grounds that counsel was simply unnecessary—that is, “because the evidence to convict...should be so manifest, as it could not be contradicted,”⁷ counsel could serve no useful purpose and was therefore unnecessary.

⁴Blackstone, IV *Commentaries on the Laws of England* (1759), 349 (“Blackstone” below).

⁵Trying to explain away what they themselves perceived as an obvious “defect in our modern practice,” Blackstone, at 349, commentators curiously avoided offering what appears to at least one 21st Century observer as the simplest, and therefore likeliest explanation: it was easier for the Crown to convict someone who did not clutter the proceedings with contrary or inconvenient facts. Cf, *Ockham’s Razor*.

⁶Blackstone, at 349.

⁷Coke, III *Institutes of the Laws of England*, 137.

Even so, Blackstone himself had nothing but contempt for a rule that seemed “not at all of a piece with the rest of the humane treatment of prisoners by the English Law.”⁸ Noting that a defendant’s life and freedom were matters “of too much importance to be left to the good pleasure of any judge,”⁹ he deemed the rule denying the assistance of counsel to an accused to be at odds with common decency, as well as common sense: “For upon what face of reason,” he wondered in his *Commentaries*, “can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?”¹⁰ Although the practice was routinely condemned, it was not until 1836 that Parliament finally overturned it and granted criminal defendants the full right to counsel.¹¹

Colonial Americans were well-acquainted with this flaw in their legal heritage, and universally rejected the common law restrictions on counsel in criminal cases. By statute or constitution, each Colony granted criminal defendants the right to counsel,¹² and if viewed in its historical context, the

⁸Blackstone, at 349.

⁹Blackstone, at 350.

¹⁰Blackstone, at 349.

¹¹6-7 William IV, ch 114. See, Cooley, *Constitutional Limitations*, (1868), Ch X, p 336.

¹²See, eg, *Maryland Const of 1776*, Article 19; *Massachusetts Const of 1780*, Part I, Article 15; *New York Const of 1777*, Article 34; *Pennsylvania Const of 1776*, Article 9; *Delaware Const of 1776*, Article 25; *New Jersey Const of 1776*, Article 16; *Connecticut Const of 1818*, Article 1, §9; *Georgia Const of 1798*, Article 3, §8. See also, RevPubLaws, *Rhode Island and Providence Plantations*, §6; and 1 Arnold, *History of Rhode Island*, 336; 1 *North Carolina Rev. Laws, 1715-1796*, 316, 177 *NC Sess Laws*, Chapter 115, §85; Grimke, *SC PubLaws 1682-1790*, p 130, Act of August 20, 1731, §SLIII; 8th Geo II, *Henings Statutes at Large*, vol 4, Ch 7, p 404, §3, *Laws of Virginia*. There is also a good discussion of the Founders’ rejection of the old common law rule in Justice Sutherland’s opinion in *Powell v Alabama*, 287 US 45, 60-67, 53 S Ct 55, 77 L Ed 158 (1932).

Sixth Amendment¹³ itself is a philosophical rejection of the common-law rule in our new nation, expressing the Founders' determination to follow Blackstone on the matter of counsel for the accused. From the outset, American law clearly permitted an accused to retain counsel, and courts had long undertaken, on grounds of common humanity, to appoint counsel to those "who had the double misfortune to be stricken by poverty and accused of crime."¹⁴ But it was not until 1932, in the case of *Powell v Alabama*,¹⁵ that the right to counsel gained the status of a "fundamental right."

In *Powell*, the Supreme Court confronted what we see today as a classic case of racial injustice in the Old South: Nine uneducated and illiterate black youths were accused of raping two white girls; six days later, in an atmosphere of intense public hostility, eight of them were tried, convicted, and sentenced to death. On the morning of trial, an attorney from Tennessee, whom the defendants' families had contacted, appeared to volunteer whatever help he could render. He and a local attorney were named counsel, and the trials commenced.¹⁶ Over a vigorous dissent by the Chief Justice, the Alabama Supreme Court affirmed seven of the convictions, setting the stage for the landmark ruling that was to come.

Noting the Founders' repudiation of the old common law limitations on the right to counsel, Justice Sutherland first considered the Court's past precedents, which seemed to imply that the Due

¹³*US Const*, Am VI.

¹⁴Cooley, *Constitutional Limitations*, at 334.

¹⁵*Powell v Alabama*, 287 US 45, 53 S Ct 55, 77 L Ed 158 (1932).

¹⁶The trial court granted a defense motion to sever the trials, and tried the defendants in three separate proceedings, completing each trial in a single day.

Process Clause of the Fourteenth Amendment¹⁷ did not encompass rights explicitly contained in other clauses of the federal constitution.¹⁸ However, viewing the previous cases as setting down rules of construction, rather than settling questions of constitutional law, Sutherland determined that like any rules of construction they could yield to “more compelling considerations.”¹⁹ And Sutherland found a “compelling reason” to depart from past constructions in the notion of “fundamental principles of liberty.”²⁰

Because the law of the land, was a law “which hears before it condemns,” it followed that:

[N]otice and hearing are preliminary steps essential to the passing of an enforceable judgment, and...they together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law.²¹

Even so, a “hearing” was likely to be little but an empty formality if the result were preordained, or the outcome dictated by ignorance. Therefore, Sutherland reasoned, the notion of a “fair trial” implied the right to the assistance of counsel:

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right.

¹⁷*US Const*, Am XIV.

¹⁸Cf, *Hurtado v California*, 110 US 516, 534-535, 4 S Ct 111, 28 L Ed 232 (1884)(Inclusion of Grand Jury Clause in Fifth Amendment implies that it is *not included* as part of Due Process Clause of same amendment, hence not part of “due process” constraints applied to states under Fourteenth Amendment)

¹⁹*Powell v Alabama*, supra at 67.

²⁰*Ibid*.

²¹*Powell v Alabama*, supra at 68.

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law.... Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.... If in any case...a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.²²

Applying these principles to the case before it, the Court concluded that making counsel available under circumstances that made his assistance meaningless was the same as precluding it altogether, turning it into a denial of counsel. And under the facts of the case, a denial of due counsel was a denial of due process itself:

[I]n a capital case, where the defendant is unable to employ counsel, and incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.²³

²²*Powell v Alabama*, supra at 68-69.

²³*Powell v Alabama*, supra at 70.

Establishing the right to counsel as a basic constitutional right did not, of course, end the matter. As with many legal issues, resolving this point of law merely raised a host of new questions to answer in the years to come.

The Developing Right of Counsel

Having settled the question of whether “due process of law” implied the right to appointed counsel in some cases, the Supreme Court spend several decades grappling with the contours of the right. In *Johnson v Zerbst*,²⁴ for example, the Court decided that the right to appointed counsel in federal felony trials stemmed from the Sixth Amendment; but in *Betts v Brady*,²⁵ the Court determined that a corresponding duty of the trial court to appoint counsel in state criminal cases arose only when “fundamental fairness” demanded it, requiring a particularized showing of need. This rule lasted until the revolution in criminal procedure that began in the early 1960s, an era when the Court began to construe the constitutional notion of “due process” to include then-extant procedural limits on federal power,²⁶ and in the case of *Gideon v Wainwright*,²⁷ the Court first

²⁴*Johnson v Zerbst*, 304 US 458, 58 S Ct 1019, 92 L Ed 1461 (1938).

²⁵*Betts v Brady*, 316 US 455, 62 S Ct 1252, 86 L Ed 1595 (1942).

²⁶In *Palko v Connecticut*, 302 US 319, 323-328, 58 S Ct 149, 82 L Ed 288 (1937), Justice Cardozo’s opinion contains an interesting discussion of the differences between those attributes of a legal system universally acknowledged to be necessary for “fundamental fairness,” and others required of the Federal Government under the Bill of Rights. Viewing the requirements of “due process” to exist on a different plane than the limits placed on Federal power by the constitution, he expressed the view that “[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be possible without them.” *Ibid*, at 325-326.

Three decades later, the Supreme Court would jettison its traditional view of the limited scope of the federal constitution in favor of a “selective incorporation” of the limits on federal power by extending those limits to constrain and standardize criminal procedure in state courts. See, *Benton v Maryland*, 395 US 784, 89 S Ct 2056, 23 L ed 2d 707 (1969). Compare, eg, *Betts*

extended the Sixth Amendment’s guarantee of appointed counsel to indigent defendants in all prosecutions, state or federal.

Even so, the right to appointed counsel does not confer the unrestricted right to free legal services in all forums and for all legal controversies. The right does not extend to proceedings that are non-criminal in nature,²⁸ and arises only “at or after the time” that criminal legal proceedings are commenced.²⁹ For purposes of the Sixth Amendment, and its related provision in the State Constitution,³⁰ this means that the right to counsel attaches at the arraignment on the warrant after

v Brady, supra with *Gideon v Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799, 93 ALR2d 733 (1963); *Twinning v New Jersey*, 211 US 78, 29 S Ct 14, 53 L Ed 97 (1908) with *Malloy v Hogan*, 378 US 1, 84 S Ct 1489, 12 L Ed 2d 653 (1964); and *Wolf v Colorado*, 338 US 25, 69 S Ct 1359, 93 L Ed 1782 (1969) with the seminal case of *Mapp v Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081, 84 ALR2d 933 (1961).

²⁷*Gideon v Wainwright*, supra.

²⁸See, eg, *Gagnon v Scarpelli*, 411 US 778, 93 S Ct 1756, 36 L Ed 2d 656 (1973)(Probation revocation); *Morrissey v Brewer*, 408 US 471, 92 S Ct 2593, 33 L Ed 2d 484 (1972)(Parole revocation); *Lassiter v Durham County*, 452 US 18, 101 S Ct 2153, 68 L Ed 2d 640 (1981)(Termination of parental rights).

²⁹See, eg, *Kirby v Illinois*, 406 US 682, 92 S Ct 1877, 32 L Ed 2d 411 (1972); *Edwards v Arizona*, 451 US 477, 101 S Ct 1880, 68 L Ed 2d 378 (1981) reh den 452 US 477, 101 S Ct 2183, 69 L Ed 2d 984 (1981). Cf, *Moran v Burbine*, 475 US 412, 106 S Ct 1135, 89 L Ed 2d 410 (1986)(Right to counsel does not include right of person arrested but not charged that an attorney wants to see him).

In *People v Wright*, 441 Mich 140 (1992), *People v Bender*, 452 Mich 594 (1996), and *People v Sexton*, 458 Mich 43 (1998), this Court declined to follow the Supreme Court’s lead in *Moran*. The precise rationale for their holding—ie, whether this “right to notification” rests upon Fifth or Sixth Amendment concerns—remains something of a mystery to this day. See, *People v Sexton (After Remand)*, 461 Mich 746 (2000). See also, *People v Leversee*, 243 Mich App 337 (2000)(Finder *Bender* violation arising when defendant’s aunt telephone police station to tell them that an attorney was “on the way,” but concluding that the error was harmless).

³⁰*Const 1963*, Art I, §20.

arrest,³¹ and while extending to a defense appeal of right,³² it does not encompass discretionary appeals by the defense.³³ It does, however, recognize the right to the “effective assistance” of counsel,³⁴ for counsel whose performance is so deficient as to preclude an adversarial testing of the prosecutor’s case fails to protect the client’s right to due process, casting the reliability of the proceedings into question and undermining the proper functioning of our entire system of criminal justice.³⁵

Of course, defining “ineffectiveness” in practice is more difficult than condemning it in principle, and recognizing that the practice of law is as much art as science, courts continue to struggle with the legal and factual inquiries involved in evaluating an attorney’s performance. In all cases, however, however it may be defined, the remedy for deficient performance by an attorney is dictated by the nature of the harm. For a defendant receiving “ineffective assistance,” the remedy is tailored to correct the nature of the injury:³⁶ at trial, the remedy will extend no further than a new

³¹*United States v Gouveia*, 467 US 180, 104 S Ct 2292, 81 L Ed 2d 146 (1984); *People v Bellanca*, 386 Mich 708, 713 (1972); *People v Bladel (After Remand)*, 421 Mich 39, 52 (1984) aff’d sub nom *Michigan v Jackson*, 475 US 625, 106 S Ct 1404, 89 L Ed 2d 631 (1989).

³²*Evitts, v Lucey*, 469 US 378, 105 S Ct 830, 83 L Ed 2d 821 (1985); *Douglas v California*, 372 US 353, 83 S Ct 814, 9 L Ed 2d 811 (1963).

³³*Ross v Moffitt*, 417 US 600, 94 S Ct 2437, 41 L Ed 2d 341 (1974); cf. *Pennsylvania v Finley*, 481 US 551, 107 S Ct 1990, 95 L Ed 2d 539 (1987).

³⁴*McMann v Richardson*, 397 US 759, 771 n 14, 90 S Ct 1441, 25 L Ed 2d 763 (1970).

³⁵*Strickland v Washington*, 466 US 668, 685-686, 104 S Ct 2052, 80 L Ed 2d 674 (1984).

³⁶*People v Whitfield*, 214 Mich App 348, 354 (1995).

trial;³⁷ for a defendant receiving “ineffective assistance” on appeal, the remedy is either a new appeal, or consideration of any points otherwise surrendered by the ineffectiveness.³⁸

Strickland and Cronic: Constitutional Ineffectiveness and the Denial of Counsel

Recognizing that the premise of our adversary system of criminal justice is that “partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free,”³⁹ the Supreme Court distinguishes between two distinct problems when confronting a defendant’s Sixth Amendment claim. The ordinary case, typified by the Supreme Court case of *Strickland v Washington*,⁴⁰ involves a defendant who is actually represented by counsel but whose attorney performs at a constitutionally unacceptable level. The resulting two-pronged inquiry into “ineffective assistance” requires a factual inquiry, carefully protected from the distorting effects of hindsight, to determine whether the attorney representing the defendant performed below all minimum standards for constitutional representation, and whether that deficient performance resulted in prejudice to the defendant. A finding of “ineffective assistance of counsel” means that the attorney’s performance undermined the proper functioning of our adversary system of justice to the extent that we cannot rely upon the justness of the outcome. In turn, this will result either in a new trial for the defendant, or renewed consideration of an otherwise unavailable point of law on

³⁷See, *People v Gridiron*, 439 Mich 880 (1991) revg 190 Mich App 366 (1991); *People v Oster (On Resubmission)*, 97 Mich App 122, 141 (1980).

³⁸*People v Brown*, 119 Mich App 656, 660-661 (1982).

³⁹*Evitts v Lucey*, 469 US 387, 394; 105 S Ct 830; 83 L Ed 2d 821 (1985).

⁴⁰*Strickland v Washington*, supra.

appeal. The second, the outright or constructive denial of counsel in the vein of *Powell v Alabama*,⁴¹ is a more serious structural error affecting the proper functioning of our system of justice, which justifies a presumption of prejudice. Given the advent of modern rules of procedure it is, however, quite rare: courts throughout the country routinely appoint counsel for indigents, and will caution defendants of the risks involved in foregoing counsel for the sake of self-representation.

Though mentioned often in passing,⁴² in the absence of some actual state action interfering with the attorney-client relationship,⁴³ the Supreme Court itself has rarely found an outright “denial of counsel” in the days since *Powell* and has, in fact, cautioned lower courts against the routine or mindless invocation of a perceived “denial of counsel” to avoid the legal or procedural restrictions that would otherwise bar granting relief to those represented under less than ideal circumstances. Thus, in both *United States v Cronic*⁴⁴ and *Bell v Cone*⁴⁵—the very cases often cited as establishing the principle of “automatic reversal”—the Supreme Court carefully explained why those cases, and

⁴¹*Powell v Alabama*, supra.

⁴²See, eg, *United States v Cronic*, 466 US 648, 104 S Ct 2039, 80 L Ed 2d 657 (1984), often cited as authority for the proposition that a denial of counsel warrants “automatic reversal” without a showing of prejudice. See, *People v Murphy*, COA #258397, Slip Opinion of October 12, 2006, pp 6-7; *Mitchell v Mason*, 325 F2d 732, 741-742 (CA 6, 2003); *People v Frazier*, 270 Mich App 172 (2006) lv gtd 477 Mich 851 (2006); *People v Willing*, 267 Mich App 208 (2005).

⁴³The Court has, for example, found a “denial of counsel” in cases involving state procedural rules requiring the defendant to be the first witness called in his defense, *Brooks v Tennessee*, 406 US 605, 612-613, 92 S Ct 1891, 32 L Ed 2d 358 (1972), forbidding consultation between the defendant and defense counsel during an overnight recess, *Geders v United States*, 425 US 80, 96 S Ct 1330, 47 L Ed 2d 592 (1976), and allowing the trial judge to deny counsel the right to make a summation before the verdict, *Herring v New York*, 422 US 853, 858, 95 S Ct 2550, 45 L Ed 2d 593 (1975).

⁴⁴*United States v Cronic*, supra.

⁴⁵*Bell v Cone*, supra.

others challenging aspects of an attorney’s performance, were not excluded from the need to explore both counsel’s performance *and the existence of prejudice*. In *Cronic*, the Court rejected the notion that counsel’s inexperience, the complexity of the case, and the brief time allowed for preparation did not justify a “presumption of prejudice;” and in *Bell v Cone*, the Court found that counsel’s failure to mount a defense to the death-penalty sentencing phase of trial involved a challenge to counsel’s *performance*, rather than a tenable claim of denial of counsel. Moreover, in *Roe v Flores-Ortega*,⁴⁶ the Court applied similar rules to defense attorneys who neglect their duties on appeal, finding that the two-pronged inquiry under *Strickland* was the proper means for evaluating counsel’s failure to undertake actions—in *Roe*, counsel’s failure to file a claim of appeal—which resulted in the defendant forfeiting his right to appeal.

In this case, Defendant was in fact represented by counsel at all stages of the proceedings: counsel was appointed for his defense at trial, and represented him at all times pertinent to this case. Counsel appeared at all court hearings, conducted thorough cross-examination, argued the case vigorously, and appeared as a forceful advocate for Defendant’s cause. The claimed failure—the lack of response to the emergency interlocutory appeal by the prosecutor filed on the eve of trial on the trial-related issue of the admissibility of evidence—stemmed largely from an inability to do multiple tasks at once: engaged in trial, and without a dedicated appellate department to handle litigation in a different forum, counsel was simply unable to do both tasks. Under the circumstances, it is clear that the appropriate inquiry should be an inquiry into ineffective assistance under *Strickland*, rather than a presumption of prejudice under *Cronic* and *Powell*.

⁴⁶*Roe v Flores-Ortega*, 528 US 470, 120 S Ct 1029, 145 L Ed 2d 985 (2000).

As we shall see, however, this point is largely moot, for the Court should apply the same remedy in either case. And to the extent that theory dictates a different approach, practicality suggests that we treat both instances the same.

Tailoring the Remedy to Suit the Harm

Realizing that applying rules mechanically can create traps for the unwary, or needless windfalls for the undeserving, the Supreme Court has been careful not to expand constitutional remedies beyond the harm they are meant to address. Rather, the Court has always tailored the remedy to suit the constitutional injury suffered, and Sixth Amendment claims are treated no differently. As Justice White noted for a unanimous Court in *United States v Morrison*:⁴⁷

...[W]ithout detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.

The Court has consistently applied a rule recognizing the context of a claimed violation of the Constitution, and calibrating any remedy to reflect the right at issue as well as the nature of the violation. This results in extending relief no further than needed to redress constitutional the grievance. In the context of a criminal case, the ordinary consequence of a Fourth Amendment violation will be the suppression of evidence,⁴⁸ but only if the evidence was seized as a result of the

⁴⁷*United States v Morrison*, 449 US 361, 364, 101 S Ct 665, 66 L Ed 2d 564 (1981).

⁴⁸*Mapp v Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961).

violation⁴⁹. Similarly, a violation of the Fifth Amendment may lead to the suppression of an ensuing involuntary confession,⁵⁰ but not a subsequent confession obtained by proper means,⁵¹ and the erroneous admission of an involuntary confession will not be grounds for reversal if the error in admitting it is found to be harmless.⁵² And in the context of the Sixth Amendment's right to counsel, the remedy will depend upon the nature of any violation, and the resulting effect on the proceedings: in the context of police interrogations, a violation of the right to counsel will lead to the suppression of any ensuing confession;⁵³ in the context of an ongoing trial, the remedy can lead to a new trial;⁵⁴ and when dealing with a violation of the right to counsel in the context of a criminal appeal, the appropriate remedy is not to suppress evidence or grant a new trial, but to grant the equivalent of a new appeal—either directly, or by way of reviewing issues otherwise unavailable to the defendant, with counsel present and able to participate in the litigation.⁵⁵

⁴⁹See, eg, *Nix v Williams*, 467 US 431, 104 S Ct 2501, 81 L Ed 2d 377 (1977)(Evidence not excluded if discovery was inevitable); *Segura v United States*, 468 US 796, 104 S Ct 3380, 82 L ed 2d 599 (1984)(Evidence not excluded if obtainable through an independent source); *Hudson v Michigan*, ___ US ___, 126 S Ct 2159, 165 L Ed 2d 56 (2006)(Evidence not excluded if seizure not causally related to violation).

⁵⁰See, eg, *Malloy v Hogan*, 378 US 1, 84 S Ct 1489, 12 L Ed 2d 653 (1964). Cf, *Brown v Mississippi*, 297 US 278, 56 S Ct 461, 80 L Ed 682 (1936).

⁵¹See, eg, *Oregon v Elstad*, 470 US 298, 105 S Ct 1285, 84 L Ed 2d 222 (1985).

⁵²*Arizona v Fulminante*, 499 US 279, 111 S Ct 1246, 113 L Ed 2d 302 (1991).

⁵³*Michigan v Jackson*, 475 US 625, 106 S Ct 1404, 89 L Ed 2d 631 (1986); *Brewer v Williams*, 430 US 387, 97 S Ct 1232, 51 L Ed 2d 424 (1977).

⁵⁴See, eg, *People v Gridiron*, 439 Mich 880 (1991) revg in part 190 Mich App 366 (1991).

⁵⁵See, eg, *People v Percy*, 127 Mich App 1, 13 (1983); *People v Brown*, 119 Mich App 656, 660-661 (1982).

In this case, the Court of Appeals appears to have mistaken the nature of the constitutional harm at issue, leading to its mistake in the application of remedy: Defendant did not, after all, challenge the constitutional effectiveness of counsel at trial; rather, the only trial-related issue raised on direct appeal concerned the trial court's decision to admit a witness' voice identification of Defendant.⁵⁶ The claim that counsel's failure to file a response to the prosecutor's interlocutory appeal alleged a failure at the *appellate* level, not the trial level, limiting any relief to that which would be appropriate to an appellate failure. If this failure had an effect at trial—if, for example, counsel's inability to respond to the appeal resulted in the introduction of inadmissible evidence—then, on only then, might it constitute a separate ground for a new trial. But the failure of counsel at one level cannot result in overturning the result at an entirely different level without detaching the Constitution from the laws of cause and effect. It would, rather, stem from the mechanical application of rules without understand their purpose or scope, a failing which this case clearly illustrates.

In the ordinary course of events, an appeal follows a final order, permitting appellate review of the entire judgment of the lower court. While appeals from final orders are a matter of right,⁵⁷ interlocutory appeals come only by leave of the court, and are rarer events,⁵⁸ involving particular issues of concern in lower court. Rarer still are emergency appeals—such as the one involved in this case, in which an unexpected ruling on the eve of or during trial creates immediate problems that must be addressed promptly, before events render them moot. Sometimes, these emergency

⁵⁶DEFENDANT'S BRIEF ON APPEAL, i, vi, 40-47.

⁵⁷MCR §7.203(A).

⁵⁸MRC §7.203(B).

appeals are the only practical method for reviewing some types of decisions; at other times, the risk of prejudice to the upcoming trial—and the likelihood of a mistake by the trial judge—combine to create a situation in which prompt intervention by the appellate court is needed to prevent a looming injustice at the trial court level.

Emergency appeals do, however, present practical problems for all concerned: while we do not want to preclude a response by the non-moving party, we also do not want to hamstring the appellate court and prevent it from setting aright a correctable trial court error. We also do not want to disrupt a trial needlessly, since that causes practical problems for all concerned—litigants and judges, as well as witnesses and jurors. In a practical sense, emergency appeals are the least elegant forms of appellate advocacy, since there will be little time for research, and none for polishing or crafting a persuasive argument.

Due process and the interests of justice both require that all sides to a controversy have a fair opportunity to litigate a point of law or fact, and appellate forums are no different. There are, however, many inherent differences between a trial court and an appellate one:

- Trial courts resolve factual disputes as well as legal ones; appellate courts do not take testimony, and concentrate on legal issues.
- Hearings in trial courts are often measured in days; hearings in appellate courts are measured in minutes.
- Both sides are expected to attend proceedings in the trial court, and have the chance to produce witnesses to support their claims; arguments are often waived in an appellate court, and the court will often decide matters entirely on the pleadings.

Because of these differences, it is clear that many of the rules relating to representation at trial have no practical application at the appellate level: An attorney who, for example, does not appear for trial will be condemned, and his actions can rightly be deemed an abandonment of his client. But an attorney who does not attend an oral argument on appeal often earns the gratitude of an overworked appellate bench; and like discretion, in some cases waiving an appellate argument can be the better part of valor.⁵⁹

Emergency appeals, however, raise different concerns. The People have no interest in denying a criminal defendant a full and fair opportunity to litigate a point of law, particularly one that the People themselves have raised. But the very fact that defense counsel is being called upon to fulfill two roles simultaneously creates potential problems for all concerned, and it was this very facet of the case that caused such turmoil in the Court of Appeals.

The solution, it seems to the People, is that the law should neither confuse the two roles of counsel, nor judge counsel's performance at one level by concerns relevant to a different level. This means considering how best to structure our system in order to balance the competing interests of everyone in an intelligent and practical way.

⁵⁹It is sometimes said that it is better to hold one's tongue and be thought a fool than to open one's mouth and remove all doubt. An argument cannot, after all, conceal its own illogic. And occasionally an appellate advocate may have better luck by leaving the appellate court to wonder about an apparent shortcoming in a legal position, than by stumbling about at oral argument and turning a minor soft spot into a gaping hole.

Should this come as a shock to any member of the Court, counsel assures the Justices that the foregoing paragraph is a typographical error composed by random electrons set in motion by modern technology, that curiously chose to fire in unpredictable patterns during printing and missed the attention of the proofreader.

A Roman sage once observed that to do two things at the same time is to do neither,⁶⁰ and the People acknowledge that in some circumstances, a trial attorney conscripted to litigate on two simultaneous fronts will be doomed to fail at both. Structuring our system to require this does not advance the interests of justice, and benefits neither the courts, the public, or the parties. On the other hand, structuring our system to require that all trial proceedings come to an immediate halt once either side files an interlocutory appeal benefits no one either, for doing so would institutionalize a means of delaying trials indefinitely.

As the present case suggests, we have three alternatives to deal with the problem of trial counsel who is, for some reason, unable to respond to an emergency appeal by the prosecution: We can follow the lead of the Court of Appeals, presume that the lack of a response constitutes a denial of counsel and direct a response by defense counsel in all cases, we can maintain our present system, and conduct a lengthy evidentiary hearing into the effectiveness of counsel's actions; or we can fashion an alternative.

The People favor the third alternative.

A. Requiring a Response.

While presuming a denial of counsel from a failure to respond to an interlocutory appeal would have the benefit of avoiding the problems that disturbed the Court of Appeals panel in this case, this solution strikes the People as unwieldy, and a recipe for delay. Interrupting the start of a trial will cause problems enough for litigants, witnesses, and lower courts; but many emergency appeals occur during the middle of trial, when an interruption will also disrupt the jurors, causing delays and distractions for the factfinders as courts and attorneys haggle over what, to the jury, will

⁶⁰Publilius Syrus, Maxim 7.

always be a mystery. Their memories of testimony may fade; their recollections of critical facts may become obscure; and their ability to return their focus and attention to the case may become compromised, particularly if the delay is a lengthy one.

On the other hand, a court will always benefit from a presentation by both sides to a controversy.

B. A full post-verdict inquiry into counsel's actions

As we have seen, the appropriate conceptual framework for resolving a case where counsel makes no formal response to an emergency appeal by the prosecution is a full inquiry into the effectiveness of counsel under *Strickland*, known in Michigan as a *Ginther*-hearing.. This would be the conventional response to Defendant's claim that counsel denied him the effective assistance of counsel by failing to respond to the interlocutory appeal and would entail testimony from defense counsel about her actions, reasons for her choices, and justifications for failing to respond. After an evidentiary hearing on counsel's actions and their consequences for the defense, the trial court would then make findings on the competence of counsel's performance, as well as the existence and extent of any prejudice to the defendant.

Aside from any factual questions about whether counsel had an excuse or justification for failing to oppose the prosecution's appeal, this two-pronged review means that in order to determine the question of prejudice: (a) the trial court, whose decision was overturned, will need to determine whether the Court of Appeals erred in its ruling; and (b) the reviewing court will also need to reconsider the merits of the issue involved in the interlocutory appeal, before it can resolve the question of ineffective assistance. Simply put, since there is no tactical advantage at trial derived

from failing to litigate an issue on appeal, if the defendant should have won on the interlocutory appeal, then counsel's failure to oppose it will probably result in a finding of ineffectiveness; if the defendant would have lost regardless, then no prejudice will have occurred. But since the courts involved court cannot escape a review of the merits in either case, this alternative strikes the People as essentially pointless.

C. *The Practical Alternative*

Whether reviewed directly, or in the context of a *Ginther*-hearing, if the reviewing court will have to consider the merits of the points raised in a prosecutor's emergency appeal in any event, whenever the defense fails to respond to the application, it seems to the People that the logical and most practical solution is to avoid the *Ginther*-hearing altogether and simply proceed to the merits of the underlying issue. In practice, this would make a virtue of necessity by recognizing the real-world limitations imposed upon defense counsel by our current understanding of time and space,⁶¹ and giving the defense a tactical choice⁶² to make when confronted with an emergency appeal by the prosecution, deferring to defense counsel's professional assessment of the needs of the case, the likelihood of success on appeal, the benefits gained by electing when to litigate the point of law.

Acknowledging both the right to a "full and fair" opportunity to litigate all points at issue in a controversy, as well as the limits on counsel's time and resources, if the Court chooses to treat counsel's failure or inability to respond to an emergency appeal as *deferring* a response by the

⁶¹Outside the realm of magic, people cannot be in two places at the same time. But see, Rowlings, *Harry Potter and the Prisoner of Azkaban*, (1999) 393-421.

⁶²Either an acknowledged choice, or a *de facto* one.

defense, rather than waiving or forfeiting it, counsel would be free to choose the concentrate all efforts on whichever task seems most important to the case and the client: Responding on the merits would assert the defendant's right to litigate the point of law on the interlocutory appeal; deferring the response would either make further litigation unnecessary (if the prosecution loses the interlocutory appeal or the defendant is acquitted nevertheless), or permit the "full and fair" litigation of the point on direct appeal. The reviewing court, on the other hand, would retain its current array of options—ruling on whatever pleadings are submitted, staying the proceedings below and directing the defense to file a response, or granting leave to appeal and assuming jurisdiction over the case until the point is resolved.

While requiring a small modification to the existing law of the case doctrine,⁶³ this approach eliminates any potential Sixth Amendment problems by placing matters squarely within the control of defense counsel and the defendant, without interfering with counsel's best professional judgment. By giving counsel the opportunity to litigate the point immediately, it would ensure that the Court of Appeals had access to both sides of the issue; by allowing the Court to stay the proceedings and call for an answer, it would allow the Court to dispose of routine matters without undue delay while assuring that the Court could have the benefit of a response whenever the point of law was debatable, or aspects of the case remained unclear; and by allowing counsel to defer the defense response to the time most beneficial to the defendant, it eliminates any claimed denial of the right to counsel by converting the timing of the response into a tactical choice, thereby allowing counsel the professional option of focusing on the legal battle that seemed the most pressing.

⁶³See below, pp 34-36.

Ironically, in many respects this array of choices is already suggested by existing case law from other jurisdictions. In *Goebel v State*,⁶⁴ for example, the Florida Court of Appeals noted the lack of representation on interlocutory appeal—but rather than granting a new trial, simply allowed a “belated appeal” of the suppression order at issue. In *Fields v Bagley*, the Sixth Circuit applied *Strickland* to find ineffective assistance of counsel on appeal for counsel’s failure to respond to an interlocutory appeal by the prosecutor, but limited its relief on habeas to require the State of Ohio to “provide the opportunity to defend the appeal of the trial court’s suppression ruling in the state court of appeals.”⁶⁵ And in *United States v O’Leary*, the Seventh Circuit outlined the three choices facing the State of Illinois after having considered a People’s appeal without affording the defendant a fair chance to litigate the point at issue: release the defendant, retry the defendant, or “conduct a second appellate review of the state court suppression ruling, this time making sure that [the defendant] has constitutionally adequate representation.”⁶⁶ The only difference between the approach those cases, and the People’s preferred alternative, is that the People would spare all concerned the need to conduct an evidentiary hearing in order to arrive at the same conclusion, allowing the appellate courts to proceed direction to considering the merits..

The Law of the Case

A final aspect of this case that warrants discussion is our treatment of issues raised and decided on previous appeals in a given case, commonly called the “law of the case” doctrine. This

⁶⁴*Goebel v State*, 848 So 2d 479, 480-481 (Fla App, 2003).

⁶⁵*Fields v Bagley*, 275 F3d 478, 486 (CA 6, 2001);

⁶⁶*United States v O’Leary*, 856 F2d 1011, 1016, 1019 (CA 7, 1988).

doctrine holds that an appellate decision on a legal question decided in a previous appeal will not be decided differently on a subsequent appeal of the same case.⁶⁷ This doctrine is not a matter of jurisdiction, judicial authority, or bedrock legal principle, but is rather based upon concerns of practicality and expedience, seeking to avoid relitigating matters settled in a first appeal.

As with most legal doctrines, however, there are limits on its application. It does not apply, for example, when there has been an intervening change in the law,⁶⁸ or whenever application would work an obvious injustice on the party affected,⁶⁹ but is discretionary with the reviewing court and will yield to protect the constitutional rights of the litigants.⁷⁰ And as this case demonstrates, its application to emergency interlocutory appeals in criminal cases can create conceptual and practical problems if applied unthinkingly. Our system of justice often has the need for quick decisions to avoid disrupting an ongoing or soon-to-commence trial. This, in turn, implied the need for flexibility in allowing Court of Appeals to obtain response whenever possible, act on the best information and legal analysis available in a short amount of time, and retain the ability both to avoid needless disruptions and to stay proceedings when on only when necessary to ensure justice and the proper operation of our judicial system.

⁶⁷See, eg, *People v Ostanowski*, ___ Mich App ___ (COA #264368, decided March 8, 2007); *People v Ham-Ying*, 178 Mich App 601 (1989); *People v Prophet*, 101 Mich App 618 (1980).

⁶⁸*People v Spinks*, 206 Mich App 488 (1994).

⁶⁹See, eg, *People v Wells*, 103 Mich App 455, 463 (1981).

⁷⁰*Locricchio v Evening News Ass'n*, 438 Mich 84, 109-110 (1991); *People v Phillips*, 227 Mich App 28 (1997).

Unfortunately, rules do not always work perfectly, and foreseeable problems in an imperfect world make at least one thing clearly apparent: We all confront limitations imposed upon us by the real world. In this case, we see problems faced by a sole attorney faced with litigation in same case on two fronts—trial and appellate. The problem is not of counsel’s own making, since it is the People’s appeal, and defense counsel’s only fault lies in prevailing in lower court. But as we have already seen, it is difficult to excel when attempting to do two things at the same time, and counsel may well confront a situation where can either prepare for next day’s trial, or prepare appellate submission for next day; if tries to do both, will likely end up doing neither---or, at best, a marginal job on one and inadequate job on other.

We can best solve this problem by recognizing our own human limitations, and not imposing “law of case” solution in cases where it really does not apply. This is not, after all, a full interlocutory appeal, but rather an emergency intervention by the Court of Appeals to keep things moving in the trial court while correcting what appears to be an obvious error by the trial judge. Here, the defense attorney on the eve of trial had a critical choice to make: counsel had to choose to concentrate limited resources on proceeding to trial, or on litigating the appeal. This is a judgment that will vary with each individual case, making it unlikely that mandating a uniform approach will be well-suited to all cases. But the People’s proposed solution would convert this dilemma into a tactical choice for the defense, recognizing Defendant’s right to a “full and fair” consideration of the issue and giving defense counsel a choice of options. Far from subverting the principles of the “law of the case” doctrine, we would acknowledge its fundamental principle—that matters decided after a full hearing on the merits will not be reconsidered by the same appellate court on a subsequent appeal—but recognize that the doctrine has limited application to emergency decisions rendered on

the eve of trial, under circumstances that might otherwise imperil the defendant's right to counsel. And since the appellate court would have to review the merits of any previous claim anyway, in the context of the "prejudice" aspect of an ineffective assistance of counsel claim, this merely streamlines the process and brings us to the critical issue without the necessity of an often-lengthy evidentiary inquiry into precisely how pressed for time defense counsel was.

Moreover, it appears to the People that this makes the entire problem in this case largely self-correcting: If the prosecutor's claim on the interlocutory appeal is clearly correct, it will be just as easy to see on direct appeal. On the other hand, if the prosecution should have lost its interlocutory appeal, or the issue proves less one-sided than the emergency panel thought, then reconsidering the matter would cure an injustice and show the Court of Appeals the benefit of waiting for a response. In any event, it would be a more expeditious use of resources to approach the problem in a way that recognizes the discretion and judgment of counsel, while maintaining the flexibility that our criminal justice system needs to cope with the unexpected.

Closing Thoughts

From the sentiments expressed in his response to the People's application, Defendant appears to regard a defense failure to respond to an interlocutory appeal by the prosecution as legal malpractice, and appears confident that "no competent or intelligent defense attorney" would risk his reputation by deliberately failing to respond.⁷¹ For its part, the Court of Appeals seems to concur. Both positions, however, ignore the critical differences between claims analyzed under *Cronic* and *Strickland*: such concerns might very well be relevant to a "deficiency and ensuing prejudice"

⁷¹DEFENDANT'S BRIEF IN OPPOSITION, p 23.

inquiry under *Strickland v Washington*, which is precisely the People’s point; under *Cronic*’s “per se reversible” standard, however, the lack of prejudice would be entirely irrelevant: if there was, in fact, a “denial of counsel,” then the reasons for counsel’s actions, as well as the presence or absence of any prejudice, would be entirely beside the point, since they could not mitigate the failure to provide counsel at a “critical stage.” This, in turn, illustrates the illogic of the reasoning of the Court of Appeals and the defense: far from risking reputation or disbarment, counsel’s actions would be legally unassailable and tactically brilliant: if the issue was a significant one, it might complicate the trial in the unlikely event that the Court of Appeals made a mistake in considering the prosecutor’s application, but the worst that would happen would be a second chance at acquittal; responding, on the other hand, might lead not only to an appellate loss, but also to the possibility that the conviction would be sustained on appeal. This would be particularly risky if defense counsel concluded that there was a substantial chance that the prosecution might prevail in its interlocutory appeal—or that, having fooled the trial judge, there was little chance of fooling an entire panel: in that case, responding to the interlocutory appeal would only squander the client’s extra chance at beating the charge for no good reason.⁷²

To see that this is so, we must only imagine the reaction of two clients, whose attorneys were each confronted with a prosecutor’s emergency appeal which looked like a winner: the defense having argued successfully against the introduction of peripheral evidence which did not link the defendant to the crime directly, the prosecutor appealed—on grounds that, as here, clearly show an

⁷²Moreover, under the “*per se*” standard trumpeted by Defendant and the Court of Appeals, it would be arguable that even a ruling favoring the defense would be grounds for reversal, even though such a ruling would end the matter under the *Strickland* prejudice prong.

abuse of discretion by the trial court, leaving the defense without a strong argument in defense of the ruling.

One attorney, agreeing with opposing counsel and the Court of Appeals that failing to respond to the prosecutor's application is legal malpractice, files an answer and loses the interlocutory appeal. The defendant is convicted after an otherwise flawless trial—and in due course, the conviction is affirmed on appeal.

The second attorney, taking a different view of his obligations, concludes that since the prosecutor is likely to win his appeal, responding does his client no good and elects not to file an answer. After the same flawless trial, the defense appeals—and, relying on the rule advanced by Defendant and the Court of Appeals in this case, the conviction is reversed owing to the denial of counsel on the interlocutory appeal and the defendant gets a second trial, with a defense lawyer now armed with the transcripts from the first, and able to pounce upon inconsistencies in the testimony that may be invisible to the naked eye.

Only an insane or masochistic client would prefer the first attorney; and nobody without a vested interest in the outcome of this particular case would regard the first attorney as the more skillful of the two.

Conclusion

The most sensible resolution of the instant appeal would be for this Court to remand the cause to the Court of Appeals, to consider anew the merits of the evidentiary issue raised in the prosecution's interlocutory appeal. This would render moot any claim that Defendant was denied counsel during the initial appeal, since it would permit consideration of the point after full briefing

and argument by counsel, and cure any prejudice caused by counsel's failure to respond to the interlocutory application. Assuming that the appellate court on appeal concludes that the earlier panel erred in its previous decision, the resulting error at trial would be reviewed for harmless error.

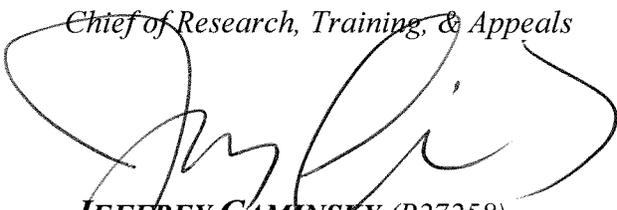
The extent to which this Court wishes to permit routine relitigation of points raised and considered in an emergency appeal by the prosecution from a trial court ruling is more problematic. Since it would largely duplicate the "prejudice" prong of an ineffective assistance of counsel claim, however, the People believe that it would be simpler for all concerned to permit a defendant to raise on direct appeal any point raised by the prosecution on an emergency appeal to which the defense did not make a "full and fair" response.

RELIEF

WHEREFORE, this Court should reverse the Court of Appeals judgment, and remand to that Court for consideration of Defendant's Fourth Amendment claim on the merits..

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