

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Schuette, C.J., and Bandstra and Cooper, JJ.

PEOPLE OF THE STATE OF MICHIGAN,)	SUPREME COURT FILE
Plaintiff-Appellant,)	NO. 132421
vs)	COURT OF APPEALS FILE
BERNARD CHAUNCEY MURPHY)	NO. 258397
Defendant-Appellee,)	WAYNE COUNTY CIRCUIT COURT
_____)	NO. 04-001084-01

THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN
Amicus Curiae Brief
IN SUPPORT OF PLAINTIFF-APPELLANT
THE PEOPLE OF THE STATE OF MICHIGAN

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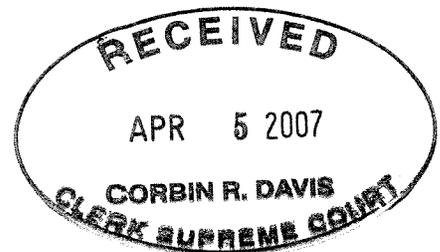


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STATEMENT OF APPELLATE JURISDICTION

Jurisdiction for the Supreme Court to hear this appeal is conferred by MCL 770.3(6), 770.12; MCR 7.301(A)(2) and MCR 7.302(G)(3). Plaintiff-Appellant ("Plaintiff") appealed from the unpublished Court of Appeals' decision, People v Murphy, Docket #258397, which was decided October 12, 2006.

The Supreme Court granted leave on February 9, 2007. The parties were directed to include among the issues briefed:

"(1) whether trial counsel's failure to respond to the prosecutor's interlocutory application for leave to appeal, which resulted in the reversal of a pretrial motion to suppress evidence, should be viewed as structural error under *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), or whether it should be reviewed under the two-part standard for evaluating claims of ineffective assistance of counsel enunciated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); and (2) whether, under either standard, the appropriate remedy is reversal of the defendant's conviction and remand for a new trial, or whether a second appellate review of the trial court's suppression ruling should be conducted with the defendant being afforded constitutionally adequate representation."

The Supreme Court invited filing of briefs amicus curiae from the Criminal Defense Attorneys of Michigan, and the Prosecuting Attorneys Association of Michigan.

STATEMENT OF FACTS

[In Arguments of this Brief, references to “Plaintiff” refers to Plaintiff-Appellant. References to “Defendant” refers to Defendant-Appellee.]

The Prosecuting Attorneys Association of Michigan, Amicus Curiae, joins in the Statement of Facts provided by Plaintiff-Appellant, the People of the State of Michigan.

STATEMENT OF QUESTIONS INVOLVED

I

DEFENDANT WAS REPRESENTED BY TWO TRIAL ATTORNEYS WHO DID NOT OPPOSE THE PROSECUTION'S INTERLOCUTORY APPEAL. THESE ATTORNEYS, NEVERTHELESS, SUBJECTED THE PROSECUTION'S CASE TO MEANINGFUL ADVERSARIAL TESTING. AS A RESULT, SHOULD DEFENDANT BE REQUIRED TO DEMONSTRATE, UNDER *STRICKLAND*, HE WAS PREJUDICED BY HIS ATTORNEYS' TRIAL PERFORMANCES?

Amicus Curiae Answers: "YES"

II

ASSUMING DEFENDANT'S ATTORNEYS ERRED WHEN THEY DID NOT OPPOSE THE PROSECUTION'S INTERLOCUTORY APPEAL, SHOULD DEFENDANT BE REQUIRED TO SHOW, UNDER *STRICKLAND*, THAT HE WAS PREJUDICED BY THEIR PERFORMANCE DEFICIENCIES, SUCH THAT COUNSEL'S ERRORS AFFECTED THE OUTCOME OF THE PROCEEDINGS?

Amicus Curiae Answers: "YES"

ARGUMENT I

DEFENDANT WAS REPRESENTED BY TWO TRIAL ATTORNEYS WHO DID NOT OPPOSE THE PROSECUTION'S INTERLOCUTORY APPEAL. THESE ATTORNEYS, NEVERTHELESS, SUBJECTED THE PROSECUTION'S CASE TO MEANINGFUL ADVERSARIAL TESTING. CONSEQUENTLY, DEFENDANT IS NOT ENTITLED TO A NEW TRIAL WITHOUT FIRST DEMONSTRATING, UNDER *STRICKLAND*, HE WAS PREJUDICED BY HIS ATTORNEYS' TRIAL PERFORMANCES,

Standards for Ineffective Assistance of Counsel Claims

Michigan's standards for ineffective assistance of counsel are the same as the federal standards.¹ Review of such constitutional claims is *de novo*.² A trial court's findings of fact are reviewed for clear error.³

In *Strickland v Washington*⁴, the United States Supreme Court announced a two-part standard for evaluating a defendant's claim of ineffective assistance of counsel, under the Sixth Amendment. In *Strickland*, a defendant has to prove both (1) deficient performance, and (2) prejudice from counsel's unprofessional errors. Released on the same day, *United States v Cronic*⁵, the Court identified several different situations where prejudice to a criminal

¹ *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995) and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

² *People v LeBlanc*, 465 Mich 575, 582; 640 NW2d 246 (2002), cert. of appealability grt'd on issues of ineffective assistance of counsel and due process in *LeBlanc v Berghuis*, 2005 US Dist. LEXIS 32910 (WD Mich, Sept. 12, 2005)

³ *Id.* at 579.

⁴ 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)

⁵ 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)

defendant's right to counsel was *presumed*. The Court determined one such situation occurred when counsel entirely failed to subject the prosecution's case to meaningful adversarial testing.⁶

To distinguish between these *Strickland* and *Cronic* principles, the Court later explained the difference is not one of degree but of kind.⁷ The Court divides constitutional errors into two classes.⁸ The first is called "trial error." These errors occur during presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented, to determine whether they were harmless beyond a reasonable doubt. These include most constitutional errors. The second class of constitutional error is called "structural defects." These defy analysis by harmless-error standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself. Such errors include the denial of counsel, the denial of the right of self-representation, the denial of the right to public trial, and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction.⁹

How to Decide Whether *Strickland* or *Cronic* Applies?

To resolve the ineffective assistance of counsel claim in Defendant's case, this Court must decide whether *Strickland* or *Cronic* principles apply. Guidance from later federal cases is available to complete that task. Since releasing decisions in *Strickland* and *Cronic*, the Supreme Court confronted many cases where it decided whether claims of ineffective assistance based on

⁶ *Cronic* also found "a presumption of prejudice" when counsel is absent from a critical stage of the trial, and when counsel is present but somehow prevented "by state action" from actually assisting the defendant at a critical stage of the proceedings.

⁷ *Bell v Cone*, 535 US 685, 697; 122 S Ct 1843; 152 L Ed 2d 914 (2002)

⁸ *United States v Gonzalez-Lopez*, ___ US ___; 126 S Ct 2557, 2563-2564; 165 L Ed 2d 409 (2006)

⁹ *Id.*

defense counsel's concessions during a trial are properly analyzed under *Strickland* or whether prejudice should be presumed under *Cronic*.

In *Florida v Nixon*¹⁰, the Court explained that, under very narrow circumstances in which a defendant was denied assistance of counsel *entirely*, a defendant need not satisfy the “prejudice” prong of *Strickland* in order to succeed on an ineffective assistance of counsel claim.¹¹ But circumstances justifying a “presumption of ineffectiveness” occur *infrequently*.¹² In *Nixon*, defense counsel made a strategic decision to concede (at the guilt phase of the capital trial) the defendant's commission of the murder, and to concentrate on establishing (at the penalty phase) cause for sparing the defendant's life. The Supreme Court faulted the lower courts for applying *Cronic*'s “presumed prejudice” standard to the case.

In *Bell v Cone*¹³, the Supreme Court reversed a decision that mistakenly applied *Cronic* (the Sixth Circuit found defense counsel failed to subject the case to “meaningful adversarial testing” at the penalty phase of a trial). *Cone* made it clear that for a court to “presume prejudice based on an attorney's failure to test the prosecutor's case, . . . the attorney's failure must be complete.”¹⁴ There, the defendant challenged counsel's failure to present mitigating evidence (in the penalty phase) and failure to give a closing argument. The Court explained these “errors” were of the same kind as other specific attorney errors which the Court had held to be subject to *Strickland*'s performance and prejudice components.

¹⁰ 543 US 175; 125 S Ct 551; 160 L Ed 2d 565 (2004)

¹¹ 543 US at 190.

¹² *Id.*

¹³ 535 US 685; 122 S Ct 1843; 152 L Ed 2d 914 (2002)

¹⁴ 535 US at 697. See also: *Bell v Quintero*, 544 US 936; 125 S Ct 2240; 161 L Ed 2d 506 (2005), Justice Thomas with the Chief Justice, *dissenting from the denial of certiorari*, where “the whole point of the *Cronic* presumption is to presume ineffectiveness *without* inquiring on a case-by-case, error-by-error basis into the wisdom of counsel’s actual performance (and any resulting prejudice) under *Strickland*.” 544 US at 941; and *Miller v Martin*, ___ F3d ___; 2007 US App LEXIS 5936 (CA 7, 2007)

In *Roe v Flores-Ortega*¹⁵, the Court held that counsel had a constitutionally-imposed duty to consult with a defendant *about an appeal* when there is reason to think: (1) a rational defendant would want to appeal (because there are nonfrivolous grounds), or (2) the defendant reasonably demonstrated he was interested in appealing. Reviewing courts take into account all the information counsel knew or should have known. In *Roe*, the Court employed the *Strickland* principles again, because it has consistently declined to impose mechanical rules on counsel -- even when those rules might lead to better representation -- not simply out of deference to counsel's strategic choices, but because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation [but rather] simply to ensure that criminal defendants receive a fair trial."¹⁶

Nixon, Cone, and Roe reveal that the Supreme Court applies the *Strickland* principles in most cases where a defendant's claims are based on specific "errors" made by counsel.¹⁷ *Cronic* principles are reserved for that rare case, where the "circumstances ...are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."¹⁸ None of those "circumstances" occurred in Defendant's case, and *Cronic* is not applicable.¹⁹

Defendant was represented by counsel before, during, and after Plaintiff's emergency, interlocutory appeal. There was no "complete denial of counsel"²⁰ in his case. His counsel was

¹⁵ 528 US 470; 120 S Ct 1029; 145 L Ed 2d 985 (2000)

¹⁶ 528 US at 481, quoting from the *Strickland* case (466 US at 689).

¹⁷ *Cronic*, 466 US at 667, n 41. In the instant case, Defendant is claiming "error" by failing to respond to the interlocutory appeal.

¹⁸ *Cronic*, 466 US at 658. The Supreme Court's Opinion contains footnotes 25 and 26. Cases cited in these footnotes provide examples of factual "circumstances" when a "presumption of prejudice" is appropriate.

¹⁹ See *Van v Jones*, 475 F3d 292 (CA 6, 2007), where the Court explained the differences between the *Cronic* and *Strickland* frameworks.

²⁰ *Cronic*, 466 US at 659.

not “prevented from assisting...[him]...during a critical stage.”²¹ And both defense attorneys subjected Plaintiff’s case to “meaningful adversarial testing.”²² Defendant’s case is not the rare one for which *Cronic* principles were devised.²³ The failure Defendant ascribes to his counsel was not “complete,” but rather took place only at a specific point in the pre-trial/trial stage. As a result, the standards explained in *Strickland* apply to his case.

Record Should Provide a Clear Picture of Counsel’s Performance before Ineffectiveness Claim is Resolved

In Defendant's case, he had *two* defense attorneys who did not file any appellate pleadings opposing Plaintiff's emergency, interlocutory appeal, even though they said they would. One must wonder why two attorneys chose the same course of action. These attorneys had opportunities to get the attention of the appellate courts. Even if their pleadings were untimely, the attorneys could have explained the reasons that created delays. But their *in*activity after Plaintiff's interlocutory appeal did not render them "totally absent" from Defendant's case. Certainly, they were not prevented from assisting Defendant in the appeal.

Defendant's first trial attorney, Salle A. Erwin, presumably was present on April 22, 2004, when the trial began and Plaintiff's Motion in Limine (regarding admissibility of a shotgun and shells) was heard. At that motion hearing, the trial court denied Plaintiff's motion, in part, and then denied a motion to stay proceedings. On Friday, April 23, 2004, Plaintiff filed an Emergency Application for Leave to Appeal.²⁴ The Court of Appeals granted peremptory relief that day, allowing Plaintiff to present evidence about the shotgun.

²¹ *Id.* at 659, n 25.

²² *Id.* at 659.

²³ *Ditch v Grace*, ___ F3d ___; 2007 US App LEXIS 4657 (CA 3, 2007)

²⁴ A motion for immediate consideration, emergency motion for stay, and motion to waive production of transcript were also filed.

The following Monday, the trial court granted defense counsel's request for a stay of proceedings. Defense counsel understood an emergency, interlocutory appeal occurred and understood the issue involved. Counsel intended to attack the appeal when she asked for the stay. Yet Erwin took no action in the appellate courts. Ten days later, Neil J. Leithauser was appointed to Defendant's case. He told the trial judge later:

.... "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."

Although Defendant's jury trial was not held until September, 2004, Leithauser did not file any appeal pleadings. His statements to the trial judge reveal he considered appellate action, but decided against it because the record was not adequate.

With two defense attorneys taking the same course of *in*action, this Court would be remiss in concluding (on the current record) that they were ineffective in representing Defendant. A defense attorney's *non*participation in a prosecution's interlocutory appeal is not unusual.²⁵ Defense counsel must be accorded discretion to decide whether a response is appropriate or necessary.²⁶ An interlocutory appeal can delay a trial and prolong a defendant's incarceration. Thus, defense counsel's decision not to respond to an interlocutory appeal may be a matter of strategy---either to prevent undue delay, or avoid the creation of a frivolous, disingenuous, or

²⁵ The Court of Appeals is now considering the same issue in *People v Alex Goldman*, Docket # 268842. The Court addressed this issue in: *People v Johnson*, 144 Mich App 125; 373 NW 2d 263 (1985), lv den 424 Mich 854 (1985). In the prosecution's interlocutory appeal in *People v James Northey*, Court of Appeals Docket number 218661, defense counsel did not respond to the application for leave to appeal.

²⁶ MCR 7.205(E)(2) states "an answer [to an emergency application for leave] *may* be filed within the time the court directs." The rule does not *require* an answer to be filed before the Court may consider the emergency application.

perfunctory response. Counsel exercises discretion in the same strategic manner, when deciding whether a defense interlocutory appeal should be undertaken.²⁷

Defendant was not *denied* counsel during Plaintiff's interlocutory appeal. The trial court granted him a stay of proceedings, so that his counsel would have time and the opportunity to participate. Counsel's "absence" from the appeal was not structural. Even *if* the "absence" is deemed a professional error now, the effect of the error can be assessed by a reviewing court now. To decide whether Defendant was denied his right to the effective assistance of counsel, this Court should use a "fact sensitive analysis," which measures the quality and impact of counsels' representation under the circumstances of his case.²⁸

This Court has concluded that an ineffective assistance of counsel claim is a mixed question of law and fact.²⁹ It is the trial record that provides the factual basis to prove whether an attorney's representation was unreasonable.³⁰ These are the cases where a defendant alleges "actual" ineffective assistance rather than the rare case where ineffective assistance is "presumed."³¹

A *Ginther*³² hearing was never held in Defendant's case, and it should have been. The current record does not document the attorneys' sworn testimony about their reasons for not taking an active part in the interlocutory appeal. Both attorneys were involved in the case at a time when appellate participation was possible. But their inactivity was not *per se* "ineffective

²⁷ *People v Rosengren*, 159 Mich App 492; 407 NW 2d 391 (1987).

²⁸ *People v Garza*, 180 Ill App 3d 263, 268; 129 Ill Dec 203; 535 NE2d 968 (1989), citing 2 W. LaFave & J. Israel, *Criminal Procedure* § 11.10, at 28 (Supp. 1988).

²⁹ *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003)

³⁰ *Kimmelman v Morrison*, 477 US 365, 384-385; 106 S Ct 2574; 91 L Ed 2d 305 (1986)

³¹ *Id.*, 477 US at 381, n 6

³² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)

assistance.” The Supreme Court rejected *per se* rules as inconsistent with *Strickland's* holdings.³³ The Court consistently declines to impose mechanical rules on defense attorneys.³⁴

Because a claim of ineffective assistance of counsel involves counsel's performance during the course of a legal proceeding, a reviewing court must evaluate those circumstances. In *Roe*, the *Strickland* principles were considered. The Court had to decide whether counsel's failure to file a notice of appeal constituted ineffective assistance of counsel. Rather than apply a *per se* prejudice rule, the Court required the defendant to demonstrate there was a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed.³⁵ Whether a defendant could make such a requisite showing will turn on the facts of the case.³⁶

In the instant case, the Court of Appeals *presumed* attorneys Erwin and Leithauser were deficient by failing to file appellate pleadings and that their deficient performance prejudiced Defendant. The Court of Appeals erred by applying *Cronic* principles. The Court used an *inferential* approach to decide ineffectiveness. This approach is criticized in *Cronic*. The Court should have applied the *Strickland* test.

Defendant's ineffective assistance of counsel claim required proof of facts in the record that demonstrated Erwin and Leithauser did not provide objectively reasonable representation to Defendant, under the circumstances.³⁷ Defendant's case is like the *Roe* case: The United States Supreme Court could not review the existing record to determine whether the defense attorney

³³ *Roe v Flores-Ortega*, 528 US 470, 478.

³⁴ *Id.* at 481

³⁵ *Id.* at 484

³⁶ *Id.* at 485

³⁷ *Harrison v Motley*, ___ F3d ___; 2007 US App LEXIS 3907; 2007 FED App 76P (CA 6, 2007)

acted in a professionally unreasonable manner and, as a result of performance deficiencies, the defendant was prejudiced.³⁸ Likewise, Defendant's case does not contain enough information to determine whether both attorneys acted in a professionally unreasonable manner.³⁹

In *People v Mitchell*⁴⁰, this Court plainly recognized that testimony from defense counsel was important in understanding ineffective assistance of counsel claims. Federal courts later questioned whether Michigan jurisprudence had a "firmly established procedural rule requiring the defendant to call defense counsel at a *Ginther* hearing or risk procedurally defaulting the claim."⁴¹ *Ginther* and its progeny demanded an adequate record of trial counsel's failures for a defendant's ineffectiveness of counsel claim to succeed.⁴² Yet, the United States Court of Appeals for the Sixth Circuit believed that Michigan courts that have rejected ineffective assistance of counsel claims had done so on the merits of the claim and not due to a procedural default.⁴³

In light of the federal court's subsequent treatment of the *Mitchell* case, this Court is now invited to clearly define the necessity for and the parameters of a *Ginther* hearing. Does *Ginther* routinely compel testimony from defense counsel, as a requisite part of an ineffective assistance of counsel claim? If defense counsel does not testify, is a defendant procedurally defaulted from raising matters not of record?

The trial record in Defendant's case does not include testimony from his two attorneys, and a clear picture of their professional performance in Plaintiff's interlocutory appeal is not

³⁸ *Roe v Flores-Ortega*, 528 US at 487.

³⁹ *Harrison v Motley*, *supra*.

⁴⁰ *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997)

⁴¹ *Mitchell v Mason*, 257 F3d 554, 562 (CA 6, 2001), *reaff'd* on remand in 325 F3d 732 (CA 6, 2003)

⁴² *Mitchell*, 325 F3d at 739.

⁴³ *Id.*

apparent. Amicus Curiae asserts the ineffective assistance of counsel claim cannot be resolved. Either Defendant was required to present a record to support his ineffectiveness claim (under *Strickland*) or he is procedurally foreclosed from asserting that claim on appeal now.

Practical Concerns

There are two practical concerns presented in Defendant's case. First, Michigan's legal standards for ineffective assistance of counsel in criminal cases are like the standards for legal malpractice in civil cases.⁴⁴ In fact, for collateral estoppel purposes, the standards for establishing these claims are equivalent.⁴⁵ Litigants must show how specific errors of trial counsel undermined the reliability of the trial.⁴⁶

The importance of a trial record supporting an ineffective assistance of counsel claim in a criminal case cannot be over-emphasized. To assess the performance of defense attorneys on the "existing record"---without a *Ginther* hearing---is patently unfair to the reviewing court, the parties, their attorneys, and the public. Defense attorneys must be ask to speak about their professional performances, as an important part of assessing their effectiveness.

All defense counsel must satisfy the same standards of professional responsibility and be subject to the same controls.⁴⁷ An indispensable element of effective assistance of counsel is the ability to act independently of the Government and to oppose it in adversary litigation. Fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict

⁴⁴ *Radtko v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996) and *Barrow v Pritchard*, 235 Mich App 478, 481-484; 597 NW 2d 853 (1999).

⁴⁵ *Barrow*, 235 Mich at 484.

⁴⁶ *Cronic*, 466 US at 659, n 26

⁴⁷ *Ferri v Ackerman*, 444 US 193; 100 S Ct 402; 62 L Ed 2d 355 (1979)

with performance of that function.⁴⁸ It actually provides the same incentive for counsel to perform that function competently.

The second practical concern in Defendant's case involves Plaintiff's willingness to file interlocutory appeals in criminal cases. If an interlocutory appeal results in defense counsel's "inaction" (for whatever reason), Plaintiff is forewarned that future appellate arguments may include an ineffective assistance claim under *Cronic* principles. This situation will not promote a fair disposition of substantive issues. An interlocutory appeal, under such circumstances, invites reversible results later. Plaintiff's option to litigate legal issues in a pre-trial context is chilled.

⁴⁸ Id., 444 US at 204.

ARGUMENT II

ASSUMING DEFENDANT’S ATTORNEYS ERRED WHEN THEY DID NOT OPPOSE THE PROSECUTION’S INTERLOCUTORY APPEAL, DEFENDANT IS REQUIRED TO SHOW, UNDER *STRICKLAND*, THAT HE WAS PREJUDICED BY THEIR PERFORMANCE DEFICIENCIES. THE “LAW OF THE CASE DOCTRINE” YIELDS TO HIS CONSTITUTIONAL CLAIM. BUT BEFORE RELIEF IS GRANTED, HE MUST SHOW COUNSEL’S ERRORS AFFECTED THE OUTCOME OF THE PROCEEDINGS.

Standards of Review

Michigan’s standards for **ineffective assistance of counsel** are the same as the federal standards.⁴⁹ Review of such constitutional claims is *de novo*.⁵⁰ A trial court's findings of fact are reviewed for clear error.⁵¹

“Under the **law of the case doctrine**, ‘if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case *where the facts remain materially the same*.’”⁵² (Emphasis supplied) The doctrine “merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.”⁵³

There are exceptions to the doctrine. If a case involves an individual's constitutional rights, the “doctrine must yield to a competing doctrine: the requirement of independent review

⁴⁹ *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995) and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

⁵⁰ *People v LeBlanc*, 465 Mich 575, 582; 640 NW2d 246 (2002), cert. of appealability grt’d on issues of ineffective assistance of counsel and due process in *LeBlanc v Berghuis*, 2005 US Dist. LEXIS 32910 (WD Mich, Sept. 12, 2005)

⁵¹ *Id.* at 579.

⁵² *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981).

⁵³ *Messenger v Anderson*, 225 US 436, 444; 32 S Ct 739; 56 L Ed 1152 (1912).

of constitutional facts."⁵⁴ The proper exceptions to the fundamental doctrine of ‘the law of the case’ are still somewhat unclear in Michigan.⁵⁵ But the Court of Appeals “law of the case” does not bind the Supreme Court on a subsequent appeal in the same case.⁵⁶

Unpreserved Claim: Plain Error Analysis

No *Ginther* hearing was conducted in the trial court, and therefore, findings of fact and conclusions of law about defense counsel’s professional performances and “prejudice” do not exist. Defendant’s claims of ineffective assistance of counsel are unpreserved, constitutional “errors.” Such claims are governed by the “plain error rule.”⁵⁷ Plain, unpreserved error may *not* be considered by an appellate court for the first time on appeal unless the error could have been decisive to the outcome of the case.⁵⁸

In *Ditch v Grace*⁵⁹, the United States Court of Appeals, Third Circuit, decided that, although defendant was denied counsel at his preliminary hearing, he was not entitled to relief because the constitutional error was harmless. Even though a witness identification (obtained at the uncounseled preliminary hearing) was later used against the defendant at trial, the Court found that issue to be subject to the “harmless error” standard too. The Court did not apply *Cronic* principles to the case. The Court read *Cronic* in a limited fashion. It proceeded to review the effect of the challenged identification evidence in the trial. Finding no “substantial or injurious effect,” the Court concluded the constitutional error was harmless.

The analysis in *Ditch* applies to Defendant’s case too. Should this Court conclude that

⁵⁴ *Locricchio v Evening News Ass’n*, 438 Mich 84, 109-110; 476 NW2d 112 (1991).

⁵⁵ *People v Ferris*, 477 Mich 886; 722 NW2d 217 (2006), Justice Kelly dissenting from the order denying defendant’s application for leave to appeal.

⁵⁶ *Tebo v Havlik*, 418 Mich 350, 381; 343 NW2d 181 (1984)

⁵⁷ *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999) and *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

⁵⁸ *Id.*

⁵⁹ ___ F3d ___; 2007 US App LEXIS 4657 (CA 3, 2007)

his attorneys' performances fell below an objective standard of reasonableness, Defendant must still prove that he was prejudiced by counsel's unprofessional errors, such that the result of the proceedings would have been different. Defendant bears that burden.⁶⁰

The "law of the case doctrine" does not prevent this Court from reviewing the Court of Appeals' decision resulting from Plaintiff's interlocutory appeal. A second appellate review of the trial court's suppression ruling should be conducted to get to the merits of the "prejudice" prong of *Strickland*. As the record reflects, Plaintiff's emergency, interlocutory appeal was completed without the benefit of a transcript (a motion to waive production of the transcript was filed). Presumably, transcripts for all the motion hearings and the trial are available now. A new trial should not be granted until Defendant satisfies the *Strickland* requirements.

⁶⁰ *People v Carines, supra.*

RELIEF

BASED ON THE REASONS STATED, the Prosecuting Attorneys Association of Michigan, Amicus Curiae in support of Plaintiff-Appellant, the People of the State of Michigan, respectfully requests this Honorable Court reverse the Court of Appeals and reinstate Defendant-Appellee's convictions or, in the alternative, order further proceedings consistent with the *Strickland* principles.

Respectfully submitted,

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