

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Supreme Court No.
145594
COA No. 307728
Wayne Circuit Court
LCt No. 1995-003838-

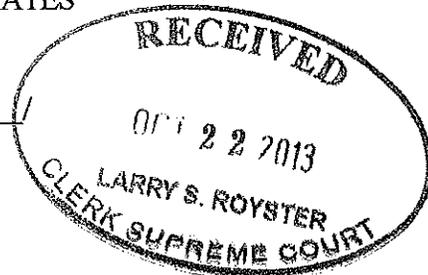
- v s -

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AMICUS CURIAE BRIEF
ON BEHALF OF
AMICUS CURIAE OMAR RASHAD POUNCY

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INTEREST OF AMICUS

Omar Rashad Pouncy is the Defendant-Appellant in the case of *People v Omar Rashad Pouncy*, MSC No. 145994, currently pending before this Honorable Court. Among other questions presented, the following question is pending in that case:

I.

DEFENDANT-APPELLANT POUNCY HAS SATISFIED THE "ACTUAL INNOCENCE" STANDARD UNDER *Schlup v Delo*, 513 US 298, 327; 115 SCt 851; 130 LEd2d 808 (1995), AND ANY PROCEDURAL BARS SHOULD BE EXCUSED IN LIGHT OF THE MULTIPLE FORMS OF NEWLY PRESENTED/DISCOVERED EVIDENCE, *i.e.*: (1) EXCULPATORY SCIENTIFIC EVIDENCE IN THE FORM OF A SHOE PRINT IMPRESSION ANALYSIS POINTING TO SOMEONE OTHER THAN DEFENDANT-APPELLANT POUNCY; (2) EXCULPATORY CELL PHONE RECORDS AND AFFIDAVIT FROM QUILLIE B. STRONG, THE SUBSCRIBER OF THE PHONE NUMBER USED TO CALL THE COMPLAINANTS, POINTING TO SOMEONE OTHER THAN DEFENDANT-APPELLANT POUNCY; (3) EXCULPATORY TESTIMONY FROM DEPUTY SHERIFF SERGEANT ELIGIO SOTO VERIFYING THAT DEFENDANT-APPELLANT POUNCY WAS LODGED IN THE GENESEE COUNTY JAIL ON ONE OF THE DATES IN QUESTION; (4) EXCULPATORY AFFIDAVIT FROM A NEUTRAL TRUSTWORTHY EYEWITNESS WILLIE MCKINLEY JOYCE VERIFYING THAT HE PERSONALLY MET THE PERPETRATOR, AND (5) AN EXCULPATORY AFFIDAVIT FROM HELEN CARR VERIFYING THAT SHE RECEIVED SEVERAL COLLECT TELEPHONE CALLS FROM THE GENESEE COUNTY JAIL FROM DEFENDANT--APPELLANT POUNCY AT THE TIME AND ON ONE OF THE DATES IN QUESTION.

The issues under consideration in *People v Garrett*, the criteria and standards for MCR 6.500 review and the extent of what procedural panacea may result from a credible showing of actual innocence, are squarely raised and inimical to any decision in *People v Pouncy*, where Pouncy has made at least as strong a showing of actual innocence, based on both newly discovered evidence and evidence previously unavailable as a result of prosecutorial misconduct, as has the Defendant-Appellant in *People v Garrett*.

Now pending on reconsideration, with even more newly discovered and previously unavailable evidence of an objective nature soon to be submitted, it appears that *Pouncy* may have been initially decided by this Honorable Court without reference to the Amended/Supplemental Application for Leave filed in the matter, containing the new, compelling showing of actual innocence, and with the questions now raised in *People v Garrett* having been impliedly decided without the close examination of the scope of 6500 relief and of the procedural relief available from a credible showing of actual innocence. Defendant-Appellant Pouncy offers his research and analysis regarding the questions raised in *People v Garrett* to assist the Court's exploration of these questions and in hope that any conclusions on these issues will more thoroughly inform this Honorable Court's opinion of his Amended/Supplemental Application for Leave on reconsideration.

STATEMENT OF QUESTIONS PRESENTED

I.

IS *SCHLUP V. DELO*, 513 US 298, 327, 115 Sct 851, 130 LEd2d 808 (1995), A FEDERALLY MANDATED LIFE RAFT FROM THE DOCTRINE OF PROCEDURAL BAR OF ANY KIND, WHICH OBLIGATES COURTS TO DECIDE THE MERITS OF ANY CLAIM PRESENTED BY A DEFENDANT-APPELLANT WHO CAN MAKE A SHOWING THAT A "CONSTITUTIONAL VIOLATION HAS PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT," IRRESPECTIVE OF WHETHER A STATE COURT HAS PREVIOUSLY DECIDED THE CLAIM ON ITS MERITS?:

- (A) MUST MICHIGAN COURTS EVALUATE A DEFENDANT-APPELLANT'S ASSERTION OF ACTUAL INNOCENCE BASED ON NEW EVIDENCE UNDER THE, "IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE FOUND [DEFENDANT-APPELLANT] GUILTY BEYOND A REASONABLE DOUBT," *SCHLUP* STANDARD?
- (B) TO DETERMINE WHETHER A CASE SATISFIES THE ACTUAL INNOCENCE STANDARD MUST AN EVIDENTIARY HEARING BE CONDUCTED TO PERMIT THE TRIAL COURT TO ASSESS THE PROBATIVE FORCE AND RELIABILITY OF THE DEFENDANT-APPELLANT'S NEWLY PRESENTED EVIDENCE?
- (C) IS MCR 6.508 DESIGNED TO "PROTECT UNREMEDIED MANIFEST INJUSTICE(S)]," AND DOES MCR 6.508(A) ALLOWS A REVIEWING COURT TO "PROCEED IN ANY LAWFUL MANNER", TO RECTIFY A MISCARRIAGE OF JUSTICE, THEREBY PROVIDING A BASIS FOR RELIEF TO THOSE WHO ESTABLISHES ACTUAL INNOCENCE?
- (D) DOES BOTH THE UNITED STATES AND MICHIGAN CONSTITUTIONS PROMOTE THAT "THE GUILTY BE CONVICTED AND THE INNOCENCE GO FREE," THEREBY PROVIDING PROTECTION TO THE INNOCENT?
- (E) IN THE ABSENCE OF A CREDIBLE DEMONSTRATION OF A SIGNIFICANT POSSIBILITY OF ACTUAL INNOCENCE DOES MCR 6.508(D)(2) BAR RELITIGATION OF ISSUES PREVIOUSLY DECIDED ON DIRECT APPEAL?
- (F) IS A SIXTH AMENDMENT CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WHICH IS BASED ON A CONSTITUTIONAL OR STATUTORY VIOLATION WHICH WAS RAISED INDEPENDENTLY AND DECIDED INDEPENDENTLY ON DIRECT APPEAL NOT BARRED BY MCR 6.508(D)(2) BECAUSE THE QUESTIONS PRESENTED ARE DISTINCT BOTH IN NATURE AND IN THE REQUISITE ELEMENTS OF PROOF?
- (G) IN LIGHT OF A MISCARRIAGE OF JUSTICE IS THIS COURT'S POWER UNDER MCR 7.316(A)(7) UNAFFECTED BY MCR 6.508(D)?

(H) IF NECESSARY TO PREVENT A MISCARRIAGE OF JUSTICE MAY A REVIEWING COURT MAY CONSIDER THE CUMULATIVE EFFECT OF BOTH OLD AND NEW ERRORS AND OLD AND NEW EVIDENCE IN ITS DECISION TO GRANT RELIEF TO AN INNOCENT DEFENDANT?

AMICUS SAYS "YES."

STATEMENT OF FACTS

Amici relies on the Appellant's Statement of Facts.

SUMMARY OF ARGUMENTS

Once a defendant-appellant has met the burden established by the United States Supreme Court in *Schlup v Delo*, 513 US 298, 115 SCt 851, 130 LEd2d 808 (1995), the "gateway" opens to allow any claim to be adjudicated on the merits, despite the presence of any procedural hurdles.

A court must assess a defendant-appellant's claim of actual innocence under the standard set forth within *Schlup*, which requires a defendant-appellant to prove that in light of his newly presented evidence "it is more likely than not that no reasonable juror would have found [defendant-appellant] guilty beyond a reasonable doubt. This standard does not require proof of absolute innocence.

In order for a court to determine whether or not a defendant-appellant's proffered newly presented evidence is reliable and credible a court must conduct an evidentiary hearing to assess the probative force of the evidence.

Where a defendant-appellant has established that a constitutional violation has resulted in a wrongful conviction of a defendant-appellant who is innocent, MCR 6.506 allows the correction of the manifest injustice.

Innocent prisoners have a liberty interest as provided under both the United States and Michigan Constitutions.

MCR 6.508(D)(2) bars revisiting a claim previously raised and adjudicated on its merits, unless a credible demonstration of actual innocence has been made.

A Sixth Amendment claim of ineffective assistance of counsel is not defaulted merely because the underlying claim is defaulted, since the right to the effective assistance of counsel serves a completely different constitutional value, distinct from any other claim.

Both MCR 7.316(A)(7) and MCR 6.508(D) serve the exact same purpose, to provide a remedy to a manifest injustice. Both court rules permits a court to grant relief upon a showing of actual innocence.

In determining whether an innocent prisoner is incarcerated as a result of constitutional violations, a court must consider the record as a whole, both old and new evidence and constitutional violations.

ARGUMENT

I.

SCHLUP V. DELO, 513 US 298, 327, 115 Sct 851, 130 LEd2d 808 (1995), IS A FEDERALLY MANDATED LIFE RAFT FROM THE DOCTRINE OF PROCEDURAL BAR OF ANY KIND, WHICH OBLIGATES COURTS TO DECIDE THE MERITS OF ANY CLAIM PRESENTED BY A DEFENDANT-APPELLANT WHO CAN MAKE A SHOWING THAT A "CONSTITUTIONAL VIOLATION HAS PROBABLY RESULTED IN THE CONVICTION OF ONE WHO IS ACTUALLY INNOCENT," IRRESPECTIVE OF WHETHER A STATE COURT HAS PREVIOUSLY DECIDED THE CLAIM ON ITS MERITS:

- (A) MICHIGAN COURTS MUST EVALUATE A DEFENDANT-APPELLANT'S ASSERTION OF ACTUAL INNOCENCE BASED ON NEW EVIDENCE UNDER THE, "IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE FOUND [DEFENDANT-APPELLANT] GUILTY BEYOND A REASONABLE DOUBT," *SCHLUP* STANDARD.
- (B) TO DETERMINE WHETHER A CASE SATISFIES THE ACTUAL INNOCENCE STANDARD AN EVIDENTIARY HEARING MUST BE CONDUCTED TO PERMIT THE TRIAL COURT TO ASSESS THE PROBATIVE FORCE AND RELIABILITY OF THE DEFENDANT-APPELLANT'S NEWLY PRESENTED EVIDENCE.
- (C) MCR 6.508 IS DESIGNED TO "PROTECT UNREMEDIED MANIFEST INJUSTICE(S)," AND MCR 6.508(A) ALLOWS A REVIEWING COURT TO "PROCEED IN ANY LAWFUL MANNER", TO RECTIFY A MISCARRIAGE OF JUSTICE, THEREBY PROVIDING A BASIS FOR RELIEF TO THOSE WHO ESTABLISH ACTUAL INNOCENCE.
- (D) BOTH THE UNITED STATES AND MICHIGAN CONSTITUTIONS PROMOTE THAT "THE GUILTY BE CONVICTED AND THE INNOCENCE GO FREE," THEREBY PROVIDING PROTECTION TO THE INNOCENT.
- (E) IN THE ABSENCE OF A CREDIBLE DEMONSTRATION OF A SIGNIFICANT POSSIBILITY OF ACTUAL INNOCENCE MCR 6.508(D)(2) BARS RELITIGATION OF ISSUES PREVIOUSLY DECIDED ON DIRECT APPEAL.
- (F) A SIXTH AMENDMENT CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHICH IS BASED ON A CONSTITUTIONAL OR STATUTORY VIOLATION WHICH WAS RAISED INDEPENDENTLY AND DECIDED INDEPENDENTLY ON DIRECT APPEAL IS NOT BARRED BY MCR 6.508(D)(2) BECAUSE THE QUESTIONS PRESENTED ARE DISTINCT BOTH IN NATURE AND IN THE REQUISITE ELEMENTS OF PROOF.
- (G) IN LIGHT OF A MISCARRIAGE OF JUSTICE THIS COURT'S POWER UNDER MCR 7.316(A)(7) IS UNAFFECTED BY MCR 6.508(D).

- (H) IF NECESSARY TO PREVENT A MISCARRIAGE OF JUSTICE A REVIEWING COURT MAY CONSIDER THE CUMULATIVE EFFECT OF BOTH OLD AND NEW ERRORS AND OLD AND NEW EVIDENCE, IN ITS DECISION TO GRANT RELIEF TO AN INNOCENT DEFENDANT.

"The maxim of the law is that it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned." *Schlup v Delo*, 513 US 298, 325, 115 S Ct 351, 130 LEd2d 808 (1995) (quoting T. Starkie, *Evidence* 756 (1924)). The fact that "it is far worse to convict an innocent man than to let a guilty man go free," *In re Winship*, 397 US 358, 372; 90 S Ct 1068, 1077, 25 LEd2d 368 (1970) (Harlan, J., concurring), has encouraged exceptions to the principles that inform federal habeas jurisprudence such as, "finality, federalism, and fairness," *Withrow v Williams*, 507 US 680, 697 (1993); 113 S. Ct. 1745; 123 L. Ed. 2d 407 (O'Connor, J., concurring in part and dissenting in part), to protect those who are innocent, even after conviction, albeit a wrongfully conviction. The Court of Appeals in *People v Swain*, 288 Mich App 609 (2010), on remand from this Court, *People v Swain*, 485 Mich 997 (2009), acknowledged the "actual innocence" exception iterated in *Schlup*, and held in pertinent part:

"According to the United States Supreme Court, a defendant may have an otherwise barred constitutional claim arising from his or her trial heard on the merits in a federal habeas action if the defendant can make a "gateway" showing of actual innocence. *Schlup v Delo*, 513 US 298, 314-315; 115 S Ct 951; 130 LEd2d 808 (1995); *Herrera v Collins*, 506 US 390, 404; 113 S Ct 953; 122 LEd2d 203 (1993); *see also House v Bell*, 547 US 518, 536-537; 126 S Ct 2064; 165 LEd2d 1 (2006). This "actual innocence" exception is required by the "ends of justice" or, stated differently, to prevent a "miscarriage of justice." *Schlup*, 513 US at 319-320; *Sawyer v Whitley*, 505 US 333, 339; 112 S Ct 2514; 120 LEd2d 259 (1992).

Swain, 288 Mich App 609, 536-637 (footnote omitted).

In other words, *Schlup* is a federally mandated life raft from any and all procedural bars.

As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error. *See Murray v Carrier*, 477 US 476, 485; 106 SCt 2639, 91 LEd2d 397 (1986); *Engle v Isaac*, 456 US 107, 129; 102 SCt 1556, 71 LEd2d 783 (1982); *Wainwright v Sykes*, 433 US 72, 87; 97 SCt 2497; 53 LEd2d 594 (1977). The rule is based on the comity and respect that must be accorded to state-court judgments. *See, e.g., Engle, supra*, at 126-129, 102 SCt 1558; *Wainwright, supra*, at 89-90, 97 SCt 2497. The bar is not, however, unqualified. In an effort to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," *Schlup*, 513 US, at 324, 115 S.Ct. 851, the Supreme Court has recognized a miscarriage-of-justice exception. "[I]n appropriate cases," the Court, has said, "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration,'" *Murray, supra*, at 495, 106 SCt 2639 (quoting *Engle, supra*, at 135, 102 SCt 1558).

Schlup allows a reviewing Court to review the merits of: (1) Successive claims that raise grounds identical to ones decided previously; (2) New claims not previously raised, but that did not constitute abusive claims; and (3) Procedurally defaulted claims in which the defendant failed to follow state procedural rules in raising the claims. A court must consider the merits to any claim, despite the existence of procedural barriers where actual innocence been demonstrated, lest, by refusing to consider the merits, "the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned." *San Martin v McNeil*, 532 F3d 1257, 1267-68 (11th Cir 2011).

(A) MICHIGAN COURTS MUST EVALUATE A DEFENDANT-APPELLANT'S ASSERTION OF ACTUAL INNOCENCE BASED ON NEW EVIDENCE UNDER THE "IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE FOUND [DEFENDANT-APPELLANT]

GUILTY BEYOND A REASONABLE DOUBT" *SCHLUP*
STANDARD.

In *Schlup*, the Court adopted a specific rule to implement the general principle, discussed above. It held that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt," 513 US, at 327, 115 SCt 851. This formulation, *Schlup* explains, "ensures that petitioner's case is truly 'extraordinary,' while still providing petitioner a meaningful avenue by which to avoid a manifest injustice." *Id.* (quoting *McCleskey v Zant*, 499 US 467, 494; 111 SCt 1454; 113 LEd2d 517 (1991)). In the usual case the presumed guilt of a prisoner convicted in state court militates against federal review of defaulted claims. Yet a Petition supported by a convincing *Schlup* gateway showing "raise[s] sufficient doubt about [the defendant's] guilt to undermine confidence in the result of the trial without the assurance that trial was untainted by constitutional error," such that "a review of the merits of the constitutional claims" is justified. *House v Bell*, 547 US 518 at 536-537; 126 SCt 2064, (quoting *Schlup*, 513 US at 317; 115 SCt 851 (2006)).

The Court of Appeals in *Swain*, *supra*, adopted the "actual innocence" standard iterated in *Schlup*, holding in pertinent part:

To satisfy the "actual innocence" standard, a defendant "must show that it is more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt." *Schlup*, 513 US at 327. This standard does not require absolute certainty about the defendant's guilt or innocence. *House*, 547 US at 538. It is, however, a demanding standard and permits review only in "extraordinary" cases. *Id.*; *Schlup*, 513 US at 327.

Swain, 288 Mich App at 638.

Michigan courts must consider a defendant's assertion that the evidence demonstrates a significant possibility that he is actually innocent of the crime in context of a motion brought

pursuant to MCR 6.508, under the *Schlup* standard which is in light of the new evidence, "it is more likely than not that no reasonable juror would have found [defendant] guilty beyond a reasonable doubt. *House*, 547 US 537. The *Schlup* decision explains the gateway actual-innocence standard is "by no means equivalent to the standard of *Jackson v Virginia*, 443 US 307, 99 SCt 2781, 61 LEd2d 560 (1979)," which governs claims of insufficient evidence. *Id.*, at 330, 99 SCt 2781. When confronted with a challenge based on trial evidence, courts presume the jury resolved evidentiary disputes reasonably so long as sufficient evidence supports the verdict. Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the reviewing court to assess how reasonable jurors would react to the overall, newly supplemented record. *Id.* If new evidence so requires, this may include consideration of "the credibility of the witnesses presented at trial." *Id.* The *House* court notes that ("in such a case, the habeas court may have to make some credibility assessments"). *House*, *supra*, 547 US at 538-539.

(B) TO DETERMINE WHETHER A CASE SATISFIES THE ACTUAL INNOCENCE STANDARD AN EVIDENTIARY HEARING MUST BE CONDUCTED TO PERMIT THE TRIAL COURT TO ASSESS THE PROBATIVE FORCE OF THE DEFENDANT-APPELLANT'S NEWLY PRESENTED EVIDENCE.

According to the *Schlup* standard "[t]o be credible" a gateway claim requires "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *House*, 547 US at 537, 126 SCt 2064 (quoting *Schlup*, 513 US, at 324, 115 SCt 851). In order to determine whether the proffered newly presented evidence is, in a particular case, indeed "new reliable evidence," an evidentiary hearing is required to allow the trial court to make the determinations as outlined within *Schlup*. Implicit in the requirement that a defendant-appellant present reliable evidence is the expectation that a

factfinder will assess reliability. The new evidence at issue in *Schlup* had not been subjected to such an assessment – the claim in *Schlup* was for an evidentiary hearing – and the United States Supreme Court specially recognized that the "new statements may, of course, be unreliable." *Id.* at 331; 115 SCt 851. The Supreme Court stated that the District Court, as the "reviewing tribunal," was tasked with assessing the "probative force" of the petitioner's new evidence of innocence, and "may have to make some credibility assessments." *Id.*, at 327-328, 330; 115 SCt 851. Significantly, the Supreme Court remanded the case to the Court of Appeals "with instructions to remand to the District Court," so that the District Court could consider how the "likely credibility of the affiants" bears upon the "probable reliability" of the new evidence. *Id.*, at 332, 115 SCt 851. In short, the new evidence is not simply taken or rejected at face value; its reliability has to be tested. *See, House*, 547 US, at 556-557, 126 SCt 2064 (Roberts, CJ, concurring in part and dissenting in part).

The Supreme Court in *Schlup* held the "probative force" of the newly presented evidence must be assessed," stating in its pertinent part:

In this case, the application of the Carrier standard arises in the context of a request for an evidentiary hearing. In applying the Carrier standard to such a request, the District Court must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial. Obviously, the Court is not required to test the new evidence by a standard appropriate for deciding a motion for summary judgment. *Cf. Agosto v INS*, 436 US 748, 755, 98 SCt 2081, 2087, 56 LEd2d 677 (1978) ("[A] district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented"); *Anderson v Liberty Lobby, Inc.*, 477 US 242, 249; 106 SCt 2505, 2511; 91 LEd2d 202 (1986) ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). Instead, the court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.

Because both the Court of Appeals and the District Court evaluated the record under an improper standard, further proceedings are necessary. The fact-intensive nature of the inquiry, together with the District Court's ability to take testimony

from the few key witnesses if it deems that course advisable, convinces us that the most expeditious procedure is to order that the decision of the Court of Appeals be vacated and that the case be remanded to the Court of Appeals with instructions to remand to the District Court for further proceedings consistent with this opinion.

Schlup, 513 US at 331-332; 115 SCt 851.

The United States Supreme Court's guidance is clearly applicable here. The point in *Schlup* was not simply that a hearing was required, but why a hearing was required: because the District Court had to assess the probative force of the petitioner's newly presented evidence by engaging in factfinding rather than performing a summary-judgment-type inquiry. 513 US, at 331-332; 115 SCt 851. Recently the Ninth Circuit Court of Appeals, in *Walker v McDaniel*, 495 Fed. Appx 796 (CA 9, 2012), reversed the district court's "summary-judgment-type" assessment of the newly presented evidence and remanded the case for an actual innocence hearing consistent with *Schlup*.

In order to determine whether a particular defendant-appellant's proffered newly presented evidence of actual innocence qualifies under the "new reliable evidence," standard set forth within *Schlup*, a hearing will be necessary so that the probative force of the defendant-appellant's newly presented evidence can be assessed, with the trial court being able to engage in "factfinding" rather than performing a summary judgment-type inquiry. 513 US, at 331-332, 115 SCt 851. At the "actual innocence" hearing all of the newly presented evidence, "whether it be [alleged] exculpatory scientific evidence, [alleged] trustworthy eyewitness accounts, or [alleged] critical physical evidence," the trial court would be able to test it consistently with the requirements of *Schlup*. In *In re Davis*, 557 US ___, 130 SCt 1; 174 LE2d 614 (2009), the United States Supreme Court transferred the case to the District Court and ordered the court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial

clearly establishes petitioner's innocence." *Id.* at 130 SCt 1. It is impossible to determine whether proffered newly-presented evidence is reliable or exculpatory without an evidentiary hearing.

(C) MCR 6.508 IS DESIGNED TO "PROTECT UNREMEDIED MANIFEST INJUSTICE[S]," AND MCR 6.508(A) ALLOWS A REVIEWING COURT TO "PROCEED IN ANY LAWFUL MANNER," TO RECTIFY A MISCARRIAGE OF JUSTICE, THEREBY PROVIDING A BASIS FOR RELIEF TO THOSE WHO ESTABLISHES ACTUAL INNOCENCE.

In *People v Reed*, 449 Mich 375, 378-379, 535 NW2d 496 (1995), this Court unmistakably deemed that the purpose of MCR 6.508 was to protect "unremedied manifest injustice[s]," *inter alia*. The *Reed* Court explicitly held in its pertinent part:

MCR 6.508(D) recognizes that the most fundamental injustice is the conviction of an innocent person and specifically allows the Court to waive the 'good cause/ requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime." If the petitioner in fact demonstrates that there is a significant possibility that he is innocent, the court may consider this claim without requiring the petitioner to demonstrate good cause for his failure to raise the issue in an earlier proceeding.

Reed, 449 Mich at 378 n. 1. This Court also held that "[p]ost-conviction relief is provided for the extraordinary case in which a conviction constitutes a miscarriage of justice." *Reed*, 449 Mich at 381.

On remand from this Court, *People v Swain*, 485 Mich 997 (2009), the Court of Appeals acknowledged that the reviewing court has broad discretion to accommodate the ends of justice.

The following is relevant, in its pertinent part:

However, MCR 6.500(A) provides that "if the rules in this subchapter do not prescribe the applicable procedure, the court may proceed in any lawful manner. The court may apply the rules applicable to civil or criminal proceedings, as it deems appropriate."

Swain, 288 Mich App at 631.

The fact that this Court held that MCR 6.500 "protects unremedied manifest injustice[s]," and "that the most fundamental injustice is the conviction of an innocent person," combined with the fact that the plain language of MCR 6.608(A), holds that a court "may proceed in any lawful manner," makes it clear that there is a basis for relief where a defendant demonstrates that he is the victim of "the most fundamental injustice," *i.e.*, demonstrates that there is a significant possibility that he is actually innocent, in the context of a motion brought pursuant to MCR 6.508.

(D) BOTH THE UNITED STATES AND MICHIGAN CONSTITUTIONS PROMOTE THAT "THE GUILTY BE CONVICTED AND THE INNOCENCE GO FREE," THEREBY PROVIDING PROTECTION TO THE INNOCENT.

Upon a credible demonstration of actual innocence the United States and Michigan Constitutions protects the innocent post-conviction. "[T]he history, purpose and spirit of the habeas corpus provision in the constitution is consistent with the ideal of the government not being allowed to deny liberty to an innocent citizen. Michigan has no interest in depriving an innocent person of their liberty. Mich. Const. 1963, Art. 1." *Matthews v Abramajtys*, 92 FSupp2d 615, 627 (ED Mich 2000). It "'would be on atrocious violation of our Constitution and the principles upon which it is based' to [imprison] an innocent person." *In re Davis*, 557 US ___, 130 S Ct 1, 174 LEd2d 614 (2009) (Stevens, J., concurring). The "ultimate objective" of "our adversary system of criminal justice", is "that the guilty be convicted and the innocent go free." *Evitts v Lucey*, 469 US 387, 394 (1965); 105 S. Ct. 830; 83 L. Ed. 2d 821. It is a violation of the Eighth Amendment to imprison someone who is actually innocent. *See Robinson v California*, 370 US 660, 667, 8 LEd2d 758, 82 S Ct 1417 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold").

Incarceration of an innocent person is a brutal affront to the Due Process Clause. The United States Supreme Court in *United States v Salerno*, 481 US 739, 746, 95 LEd2d 697, 107 SCt 2095 (1987), held in pertinent part:

"The Due Process Clause of the Fifth Amendment provides that 'No person shall . . . be deprived of life, liberty, or property, without due process of law . . .' This Court has held that the Due Process Clause protect individuals against two types of government action. so-called substantial due process' prevents the government from engaging in conduct that shocks the conscience, *Rochin v California*, 342 US 165; 172, 96 LEd 183; 72 SCt 205; 25 4LR2d 1396 (1952), or interferes with rights "implicit to the concept of ordered liberty,' *Palko v Connecticut*, 302 US 319, 325-326, 92 LEd 253, 50 SCt 149 (1937), when government action depriving a parson of life, liberty, or property survive substantive due process scrutiny, it must still be implemented in a fair manner. *Mathews v Eldridge*, 424 US 319, 335, 47 LEd2d 18, 96 SCt 893 (1976). This requirement has traditionally been referred to as 'procedural' due process."

In *Planned Parenthood of Southeastern Pa. v Casey*, 505 US 633, 848; 120 LEd2d 674; 112 SCt 2791 (1992), quoting *Poe v Ullman*, 367 US 497, 543, 6 LEd2d 999, 81 SCt 1752 (1961) (opinion dissenting from dismissal on jurisdictional grounds), the Supreme Court, quoting the second Justice Harlan, explained the role of substantial due process in our constitutional scheme:

"[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere Provided in the Constitution. This "liberty" is not a series of isolated points.... It is a rational continuum which broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints...."

Id.

There can be nothing more equivalent to a "substantial arbitrary imposition and purposeless restraint," than the continued incarceration of the innocent, especially after his or her innocence has been proved. Given the Supreme Court's rich history of protecting those who have demonstrated a significant possibility that they have been wrongfully convicted, there can

be only one conclusion, that a defendant who demonstrates a significant possibility of his or her actual innocence may nonetheless seek relief under the United States or Michigan Constitutions. Condemning an innocent citizen "shocks the conscience" and violates due process. *Rochin v California*, 342 US 165, 172; 96 LEd 183; 72 SCt 205; 25 4LR2d 1396 (1952). Ever may the innocent rely on the Constitution for relief.

(E) IN THE ABSENCE OF A CREDIBLE DEMONSTRATION OF A SIGNIFICANT POSSIBILITY OF ACTUAL INNOCENCE MCR 6.508(D)(2) BARS RELITIGATION OF ISSUES PREVIOUSLY DECIDED ON DIRECT APPEAL.

The Sixth Circuit, in *Hicks v Straub*, 377 F3d 538, 544 (CA 6, 2004), held in pertinent part:

"MCR 6.508(D)(2) is 'simply a rule of res judicata barring a defendant from re[-]litigating claims in a motion for relief from judgment which were decided adversely to him in a prior state court decision.'"

Hicks, 377 F3d at 544.

MCR 6.508(D)(2) bars relief premised on issues previously decided against a defendant on direct appeal, however, the merits of a claim may be revisited upon a "strong showing of actual innocence." *Calderon v Thompson*, 523 US 538, 558; 118 SCt 1489; 140 LEd2d 728, 748-749 (1998). A credible showing of actual innocence overrides the res judicata concern of the threat to finality and comity:"

These same concerns resulted in a number of recent decisions from this Court that delineate the circumstances under which a district court may consider claims raised in a second or subsequent habeas petition. In those decisions, the Court held that a habeas court may not ordinarily reach the merits of successive claims, *Kuhlmann v Wilson*, 477 US 436, 106 SCt 2616, 91 LEd2d 364 (1986), or abusive claims, *McCleskey*, 499 US, at 493, absent a showing of cause and prejudice, see *Wainwright v Sykes*, 433 US 72, 97 SCt 2497, 53 LEd2d 594 (1977). The application of cause and prejudice to successive and abusive claims conformed to this Court's treatment of procedurally defaulted claims. *Carrier*, 477 US 478,

106 SCt 2639; *see also McCleskey*, 499 US, at 490-491; 111 SCt, at 1468 ("The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review"). *See generally Sawyer* at 338-340. The net result of this congressional and judicial action has been the adoption in habeas corpus of a "qualified application of the doctrine of *res judicata*." *McCleskey*, 499 US, at 486; quoting Senate Report, at 2.

At the same time, the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy. This Court has copiously relied on the equitable nature of habeas corpus to preclude application of strict rules of *res judicata*. Thus, for example, in *Sanders v. United States*, 373 US 1, 83 SCt 1069, 10 LE2d 148 (1963), this Court held that a habeas court must adjudicate even a successive habeas claim when required to do so by the "ends of justice." *Id.*, at 15-17, 83 SCt, at 1077-1078; *see also McCleskey*, 499 US, at 495, 111 SCt, at 1471. The *Sanders* Court applied this equitable exception even to petitions brought under 28 USC though the language of § 2255 contained no reference to an "ends of justice" inquiry. 373 US, at 12-15, 83 SCt, at 1075-1077.

Schlup, 513 US, at 318-320, 115 SCt 951 (footnote omitted) (emphasis added).

This Court in *Reed*, 449 Mich, *supra*, at 381, held:

"MCR 6.508(D) is identical to the federal standards for habeas corpus relief under 28 USC § 2255."

Reed, 449 Mich, at 381.

If actual innocence is demonstrated, MCR 6.508(D)(2) does not bar relief premised on issues previously decided against a defendant on direct appeal, since MCR 6.508(D) is identical to 20 USC 2255, and the United States Supreme Court in *Sanders*, *supra*, held that "a habeas court must adjudicate even a successive habeas claim when required to do so by the 'ends of justice.'" If a defendant satisfied the actual innocence standard a court may revisit the merits of a particular constitutional violation to ensure that a manifest injustice isn't unremedied.

(F) A SIXTH AMENDMENT CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHICH IS BASED ON A CONSTITUTIONAL OR STATUTORY VIOLATION WHICH

WAS RAISED INDEPENDENTLY AND DECIDED INDEPENDENTLY ON DIRECT APPEAL IS NOT BARRED BY MCR 6.508(D)(2) BECAUSE THE QUESTIONS PRESENTED ARE DISTINCT BOTH IN NATURE AND IN THE REQUISITE ELEMENTS OF PROOF.

Almost thirty years ago, the United States Supreme Court in *Kimmelman v Morrison*, 477 US 365, 379 (1986); 106 S. Ct. 2574; 91 L. Ed. 2d 305, held that collateral attack is the most appropriate juncture to raise a claim of ineffective assistance of counsel:

Because collateral review will frequently be the only means which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, cf. *Powell v Alabama*, 287 US 45; 53 S. Ct. 55; 77 L. Ed. 158; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel a direct appeal. Were we to extend *Stone* and hold that criminal defendants may not raise ineffective-assistance claims that are based primarily on incompetent handling of Fourth Amendment issues on federal habeas, we would deny most defendants whose trial attorneys performed incompetently in this regard the opportunity to vindicate their right to effective trial counsel. We would deny all defendants whose appellate counsel performed inadequately with respect to Fourth Amendment issues the opportunity to protect their right to effective appellate counsel. See *Evitts, supra*. Thus, we cannot say, as the Court was able to say in *Stone*, that restriction of federal habeas review would not severely interfere with the protection of the constitutional right asserted by the habeas petitioner.

Kimmelman, 477 US, at 397. (footnote omitted).

Over a decade ago, in *Massaro v United States*, 538 US 500; 123 SCt 1690; 155 LEd2d 714 (2003), the United States Supreme Court held that the res judicata doctrine does not bar a claim of ineffective assistance of counsel when that claim is premised on an issue previously decided against a defendant on direct appeal. In *Massaro, supra*, the Petitioner

was indicted on federal racketeering charges in connection with a murder. The day before his trial began, prosecutors learned of a bullet allegedly recovered from the car in which the decedent's body was found, but did not inform defense counsel until the trial was underway. Defense counsel more than once declined the trial court's offer of a continuance so the bullet could be examined. Massaro was convicted and sentenced to life imprisonment. On direct appeal his new counsel argued that the District Court had erred in admitting the bullet in evidence, but did not raise an ineffective-assistance-of-trial-counsel claim. The Second Circuit affirmed. Massaro later moved to vacate his conviction under 28 USC § 2255, claiming, *inter alia*, that his trial counsel had rendered ineffective assistance in failing to accept the trial court's offer of a continuance so that the bullet could be examined. The District Court found his claim procedurally defaulted because he could have raised it on direct appeal. In affirming the Second Circuit adhered to its precedent that when the defendant is represented by new counsel on appeal and the ineffective-assistance claim is heard solely on the trial record, the claim must be raised on direct appeal; failure to do so results in procedural default unless the petitioner shows cause and prejudice. The Supreme Court reversed.

It did not hold that res judicata bars a Sixth Amendment ineffective assistance of counsel claim founded primarily on incompetent representation with respect to a claim which was raised and decided on direct appeal. Instead, the Court held that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal. Requiring a criminal defendant to bring ineffective-assistance-claims on direct appeal does not promote the procedural default rule's objective of "conserv[ing] judicial resources and [] respect[ing] the law's important interest in the finality of judgments." *Id.* at 504. Applying that rule to ineffective-assistance claims would create a risk that "defendants would feel compelled to raise the issue before there has been on

opportunity fully to develop the factual predicate", and raise the issue "for the first time in a forum not best suited to assess those facts," "even if the record contains some indication of deficiencies in counsel's performance." A §2255 motion is preferable to direct appeal for deciding [n] claim of ineffective assistance." *Id.* The Court went on to note that even state courts are holding that a claim of ineffective-assistance-of-counsel is not barred for not being raised on direct appeal:

A growing majority of state courts now follow the rule we adopt today. For example, the Supreme Court of Pennsylvania recently changed its position to hold that "a claim raising trial counsel ineffectiveness will no longer be considered waived because new counsel on direct appeal did not raise a claim related to prior counsel's ineffectiveness." *Commonwealth v Grant*, 572 Pa. 48, 57, 48, 57 813 A.2d 726, 738 (2002); see 735-733, and n. 13 (cataloging other States' case law adopting this position).

Massaro, 538 US, at 508.

In *Kimmelman*, *supra*, the Supreme Court made it clear that a Sixth Amendment claim of ineffective assistance of counsel is completely distinct from another claim, for example, a Fourth Amendment claim, based on a constitutional or statutory violation:

"Petitioners urge that the Sixth Amendment veil now lifted from respondent's habeas petition to reveal what petitioners argue it really is - an attempt to litigate his defaulted Fourth Amendment claim. They argue that because respondent's claim is in fact, if not in form, a Fourth Amendment one, *Stone* directly controls here. Alternatively, petitioners maintain that even if Morrison's Sixth Amendment claim may legitimately be considered distinct from his defaulted Fourth Amendment claim, the rationale and purposes of *Stone*, are fully applicable to ineffective-assistance claims where the principal allegation of inadequate representation is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment. *Stone*, they argue, will be emasculated unless we extend its bar against federal habeas review to this sort of Sixth Amendment claim. Finally, petitioners maintain that consideration of defaulted Fourth Amendment claims in Sixth Amendment federal collateral proceedings would violate principles of comity and federalism and would seriously interfere with the State's interest in the finality of its criminal convictions.

We do not share petitioner's perception of the identity between respondent's Fourth and Sixth Amendment claims. While defense counsel's failure to make a timely suppression is the primary manifestation of incompetence and source of prejudice advanced by respondent, the two claims are nonetheless distinct both in nature and in the requisite elements of proof.

Although it is frequently invoked in criminal trials, the Fourth Amendment is not a trial right; the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens. The gravamen of a Fourth Amendment claim is that the complainant's legitimate expectation of privacy has been violated by an illegal search or seizure. *See, e.g., Katz v United States*, 389 US 347 (1967). In order to prevail, the complainant need prove only that the search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue. *See, e.g., Rawlings v Kentucky*, 448 US 98, 104 (1980); 100 S. Ct. 2556; 65 L. Ed. 2d 633.

The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process. *e.g., Gideon v Wainwright*, 372 US 335, 344 (1963); 83 S. Ct. 792; 9 L. Ed. 2d 799. The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. *See, e.g., Strickland v Washington*, 466 US 668, 685; 104 S. Ct. 2052; 80 L. Ed. 2d 674; *United States v Cronin*, 466 US 648, 655-557 (1984); 104 S. Ct. 2039; 80 L. Ed. 2d 657. In order to prevail, the defendant must show both that counsel's representation fall below an objective standard of reasonableness, *Strickland*, 456 U.S., at 633, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, at 694. Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. Thus, while respondent's defaulted Fourth Amendment claim is one element of proof of his Sixth Amendment claim, the claims have separate identities and reflect different constitutional values.”

Kimmelman, 477 US, at 373-375 (footnote omitted).

Kimmelman provides that res judicata does not bar a Sixth Amendment claim of ineffective assistance of counsel because claims attacking an attorney's constitutionally deficient performance and other assignments of errors are not identical, since they "are nonetheless distinct, both in nature and in the requisite elements proof." *Id.* at 374.

Kimmelman also holds that a Sixth Amendment claim of ineffective assistance of counsel is not barred by res judicata merely because the underlying claim was previously decided against him (and therefore is "defaulted" *Id.* at 373), because the Sixth Amendment claim of ineffective assistance of counsel and the underlying claim are separate from any other claim and because the former is an independent claim which "reflects different constitutional values." *Id.* at 375.

Because *Kimmelman* held that a petitioner can premise his or her ineffective assistance of counsel claim regarding counsel's incompetent representation in connection with a Fourth Amendment claim which "is not a personal constitutional right," *i.e.*, a right not federally cognizable, and obtain relief because, although the Fourth Amendment claim is "defaulted", *id.*, at 373 (quoting *Stone v Powell*, 428 US 465, 456 (1976); 96 S. Ct. 3037; 49 L. Ed. 2d 1067, the Sixth Amendment claim of ineffective assistance of counsel is not defaulted.

MCR 6.508(D)(2) does not bar a claim of ineffective assistance of counsel when that claim is premised on an issue previously decided against a defendant on direct appeal, because the Sixth Amendment claim of ineffective assistance of counsel claim was not raised and decided against him on direct appeal.

(G) IN LIGHT OF A MISCARRIAGE OF JUSTICE THIS COURT'S POWER UNDER MCR 7.316(A)(7), IS UNAFFECTED BY MCR 6.508(D).

Both MCR 7.316(A)(7) and MCR 6.508(D), serves the same purpose, which is essentially to provide "relief as the case may require" and to "protect unremedied manifest

injustice[s]," respectively, which means their intents are in complete harmony with each other.

MCR 7.316(A)(7), holds as follows:

Miscellaneous Relief Obtainable In Supreme Court

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

(7) enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require.

Since "MCR 6.508 protects unremedied manifest injustice", *Reed, supra*, 449 Mich at 378-379, if the lower courts fail to uphold the purpose of MCR 6.508 and remedy manifest injustice, *i.e.*, provide relief to a person who has demonstrated that a constitutional violation has more likely than not resulted in a conviction of an actually innocent person, then the scope of relief under MCR 7.316(A)(7) is not restricted in any fashion. The plain language of MCR 7.316(A)(7) urges this Court to "enter any judgment or order that ought to have been entered." This means that if, in the face of a manifest injustice, a lower court did not provide the remedy that "ought" to have had been provided, then this Court has the unlimited authority to enter the judgment or order that should have previously been put into effect.

If this Court were to conclude that a defendant has met his burden under *Schlup*, by proving that "a constitutional violation has probably resulted in the conviction of one who is actually innocent," *id.*, *Schlup*, 513 US, at 327; 115 SCt 851, then this Court should "grant relief as the case may require." MCR 7.316(A)(7). This would effectively serve the purpose of MCR 6.508. In other words, MCR 6.500(D) in no way restricts this Court's power to protect "an innocent man [from] suffer[ing] an unconstitutional loss of liberty, guaranteeing that the ends of justice will be served in full." *McCleskey v Zant*, 499 US (1991) (quoting *Stone v Powell*, 428 US 465 LEd2d 1067 (1976), *Withrow v Williams*, 467 US 495; 111 SCt 1454; 113 LEd2d 517 465, 492-93, n. 31, 96 SCt 3037, 49 507 US 680, 700; 113 SCt 1745; 123 LEd2d 407 (1993) (O'Connor, J., concurring in part and dissenting in part) (noting that the Supreme Court "continuously has recognized that . . . a sufficient showing of actual innocence" is normally

enough, "standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim"). Indeed, "the individual interest in avoiding injustice is most compelling in the context of actual innocence." *Schlup*, 513 US at 324, 115 SCt 351. In the face of a manifest injustice this Court should not allow it to go unremedied, lest "the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned." *San Martin, supra*, 633 F3d at 1267-60.

(H) IF NECESSARY TO PREVENT A MISCARRIAGE OF JUSTICE A REVIEWING COURT MAY CONSIDER THE CUMULATIVE EFFECT OF BOTH OLD AND NEW ERRORS AND OLD AND NEW EVIDENCE IN ITS DECISION TO GRANT RELIEF TO AN INNOCENT DEFENDANT.

Where constitutional errors have played a role in convicting an innocent citizen, it is entirely appropriate and consistent with the ends of justice for a reviewing court to consider direct appeal *and* collateral attack errors cumulatively and both old and new evidence. For example, on direct appeal the reviewing court may have found merit to one of the defendant's claims, however, it may have subsequently concluded that the error was harmless and declined to grant relief. Then, on collateral attack, the reviewing court may have found merit to one or more of the questions presented, but again concluded that those issues standing alone were harmless. In that instance, the two or more isolated harmless errors, both from direct appeal and collateral attack, can be aggregated and taken cumulatively to have resulted in the wrongfully conviction of an innocent person. This Court in *People v Bahoda*, 448 Mich 261, 292 n. 64; 531 NW2d 659 (1995), held that actual errors can be "aggregated to determine their cumulative effect." The Court of Appeals in *People v Miller (After Remand)*, 211 Mich App 30 (1995) held regarding the cumulative effect of errors:

While we agree that the cumulative effect of several minor errors may warrant reversal when one error standing alone might not, *People v Smith*, 158 Mich. App. 220 (1907);

Miller (After Remand) supra, p. 4C; accord, *People v Dilling*, 222 Mich App 44 (1996), and *People v Kavm*, 160 Mich App 109 (1987).

Schlup makes plain that the reviewing court must consider "all the evidence," old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." 513 US at 327-328; 115 SCt 351. If necessary to prevent the endorsement of a miscarriage of justice, it is entirely appropriate for a reviewing court to consider all of the errors and evidence, old and new, cumulatively. Although the evidence and errors may have been addressed at separate stages, they all were a part of the same case.

Finally, in *McQuiggin v Perkins*, 133 SCt 527, 184 LEd 2d 338 (2012), the United States Supreme Court reaffirmed that a credible claim of actual innocence enables review of the merits of a constitutional claim on direct collateral review; "Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is [a procedural bar]". *Id.* at ___.

RELIEF REQUESTED

WHEREFORE, your amicus curiae respectfully prays that this Honorable Court enter its Order consistent with the following:

1. In general, that once a defendant has met the *Schlup* standard any and all procedural bars are cleared.
2. That Michigan courts should assess a claim of actual innocence under the, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt," *Schlup* standard.
3. That an evidentiary hearing is necessary where newly presented evidence has been proffered in the context of a claim of actual innocence.
4. That MCR 6.508 provides an avenue for innocent defendants to obtain relief.
5. That both the United States and Michigan Constitutions provides protection for the innocent even after a wrongful conviction.

6. That MCR 6.508(D)(2) does not bar revisiting a claim where new evidence has been submitted establishing a defendant's innocence.

7. That a Sixth Amendment claim of ineffective assistance of counsel is not barred where only the underlying claim is defaulted.

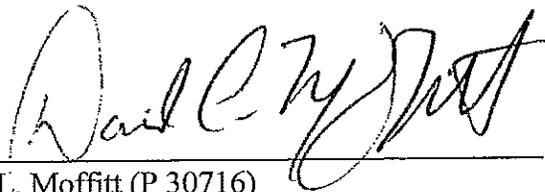
8. That this Court has unrestricted authority to rule as justice may require.

9. That both new and old evidence and constitutional violations may be taken into consideration when determining whether a constitutional violation has resulted in the conviction of one who is actually innocent.

10. That the foregoing be applied and implemented in the instant case and to pending such cases now before the Court, including but not limited to *People v Omar Rashad Pouncy*, MSC No. 145994.

LAW OFFICES OF DAVID L. MOFFITT & ASSOCIATES

By: _____



David L. Moffitt (P 30716)

Attorney for Proposed Amicus Curiae Omar Rashad Pouncy