STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

WILBERT JOSEPH MCKEEVER,

Defendant-Appellee.
_____/

Supreme Court No. 156161

Court of Appeals No. 331594

Lower Court No. 12-7733-01

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellant

_____

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

_____

SUPPLEMENTAL BRIEF

STATE APPELLATE DEFENDER OFFICE

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STATEMENT OF JURISDICTION AND RELIEF REQUESTED

Defendant-Appellee Wilbert McKeever was convicted in the Wayne County Circuit Court by jury trial, and a Judgment of Sentence was entered on January 15, 2016. Mr. McKeever's motions for a remand were denied by the Court of Appeals, and the Court of Appeals in its first opinion affirmed his convictions. The Supreme Court remanded to the trial court with specific instructions and did not retain jurisdiction. A hearing was conducted by the Wayne County Circuit Court judge who succeeded the retired trial judge, and the motion for new trial was denied. The Court of Appeals in its second opinion, dated May 25, 2017, reversed Mr. McKeever's convictions and remanded for a new trial. The People filed an Application for Leave to Appeal that decision. Supplemental briefing was ordered. For the reasons that follow, this Court should deny Plaintiff-Appellant's Application. The Court of Appeals opinion granting a new trial is clearly correct.

STATEMENT OF QUESTIONS

I. Is Mr. McKeever entitled to a new trial where the trial court denied his right to present a defense and/or trial counsel was ineffective in failing to produce a witness who would have testified to Mr. McKeever's innocence and where prejudice has been shown; whether the witness's failure to appear at the post-conviction hearing is not attributable to the defense and the Court of Appeals was correct in granting a new trial.

Court of Appeals answers, "Yes".

Defendant-Appellee answers, "Yes".

Statement of Facts

Mr. McKeever adopts the Statement of Facts in his answer to the prosecutor's application for leave to appeal, with additional facts cited in the issue that follows.

I. Mr. McKeever is entitled to a new trial where the trial court denied his right to present a defense and/or trial counsel was ineffective in failing to produce a witness who would have testified to Mr. McKeever's innocence and where prejudice has been shown; the witness's failure to appear at the post-conviction hearing is not attributable to the defense and the Court of Appeals was correct in granting a new trial.

Mr. McKeever has now served more than six years of his seven-year minimum sentence for unarmed robbery despite record evidence of his innocence. This Court has ordered supplemental briefing on two issues: 1) whether Mr. McKeever is entitled to a new trial based on either trial court error or ineffective assistance of his trial counsel, Marvin Barnett, where the defense witness that was not produced at trial also did not appear at the post-conviction hearing, and 2) whether the witness's failure to appear at the hearing is attributable to the defense under the circumstances of this case.

Standard of Review

Where the trial judge's decision regarding Ms. Craven deprived Mr. McKeever of his constitutional right to present a defense, the standard of review is de novo. *Sitz v Department of State Police*, 443 Mich 744 (1993); *People v White*, 212 Mich App 298, 304 (1995). Ineffective assistance of counsel claims are also reviewed de novo. *People v Pickens*, 446 Mich 298 (1994); *Strickland v Washington, infra*. The de novo standard of review applies to a claim that the unavailability of a record has denied a defendant due process on appeal. *See People v Audison*, 126 Mich App 829 (1983).

Discussion

It is obvious from the record that Mr. McKeever wanted the witness in question, Jennifer Craven, to testify on his behalf. Ms. Craven would have testified that, although he admittedly assaulted the complainant with his fists, Mr. McKeever was not involved in a robbery and did not know Ms. Craven took money from the complainant. It is also obvious from the record that the blame for her absence lies with either the trial court or trial counsel, or both. The problem in this case is two-fold: 1) the portion of the record that would answer the question of who is to blame is missing and, several years later, no one remembers what happened; 2) it took so long for the defense to obtain a remand hearing that Jennifer Craven, while willing to testify by phone or video, had since had a baby with her new significant other, had moved on with her life, had physically moved out of the area (first to Oscoda and then to Texas), did not want to travel to court, and provided no forwarding address. Investigative efforts did not produce a mailing address for Ms. Craven. Both the trial court and trial counsel erred in the lower court. Mr. McKeever is not to blame for Ms. Craven's absence at trial or at the hearing, and he has established prejudice.

The Trial Court Erred in Refusing to Allow Jennifer Craven to Testify

Before trial, defense counsel informed the trial court that the defense intended to present two or three witnesses and, specifically, that Mr. McKeever wanted Ms. Craven (the alleged codefendant) to testify on his behalf. Ms. Craven had already pled guilty to unarmed robbery[1], she had been sentenced (Transcript of 9-4-12), and she did not file a claim of appeal. The prosecutor agreed to subpoena Ms. Craven, and Mr. Barnett accepted, saying, "I'd appreciate it if they would do it. Then we'll make sure she's here." (Transcript of 11-2-13). However, the

[1] Guilty Plea Transcript attached, Appendix A.

subpoena was issued for Jennifer Craven's mother instead.[2] No one subpoenaed Jennifer Craven.

When, at trial, counsel told the court he would not be presenting witnesses, Mr. McKeever strongly disagreed, and attempted to tell the judge his concern that Mr. Barnett had not spoken to his witnesses and had not produced them. He was not allowed to speak to the judge. (T[3] 9-11; HT[4] 60). Mr. Barnett told the court that he had tried to explain to Mr. McKeever that he could not put Ms. Craven on the stand; that he (Barnett) did not have anything to do with her testifying. (T 75). He asked the court to let Mr. McKeever know her decision on whether she could testify:

> "MR. BARNETT: First of all, -- not now. You don't have to deal with this now. At some point, would you please allow Mr. McKeever to know that the decision on whether Ms. Craven, who I have placed on the witness list, whether she can testify.
>
> I don't know what this man's problem is. He seems to be upset with me for some reason, and I'm not going to tolerate it. At some point, explain to this man I don't have anything to do with Ms. Craven testifying. I couldn't explain it to him because he ain't trying to hear it."

The judge completely ignored this request. She merely announced that Mr. McKeever would not be appointed a new lawyer. Following voir dire, defense counsel again began making an objection about representing Mr. McKeever, and the judge cut him off, stating, "No, I've ordered you to represent him…You know what happens when you don't follow my orders." (T 126).

During closing argument, defense counsel admitted that Mr. McKeever assaulted Mr. Fawaz, but argued that Mr. McKeever did not commit a robbery. (T 218). Mr. Barnett argued

[2] Subpoena, attached, Appendix B.
[3] Trial transcript
[4] Evidentiary hearing transcript of January 15, 2016

that Jennifer Craven was the robber and Mr. McKeever took nothing, but when counsel argued that Mr. McKeever was trying to protect Ms. Craven, the prosecutor objected and the trial court said, "She cannot testify. It's stricken." (T 221).

The hearing on remand, having been denied twice by the Court of Appeals, did not take place until nearly three years after the trial. By that time, the trial judge had retired and did not remember the case or why Jennifer Craven was not allowed to testify.[5] Mr. Barnett adopted as true his statements on the record pretrial and during trial, and professed not to remember anything beyond what was in the transcripts. (HT 15-16). Neither trial prosecutor (one of whom had since left the prosecutor's office) remembered what occurred. (HT 4). Thus, there is no justification for the trial court's decision that Jennifer Craven would not be allowed to testify.

The trial court did not find that Jennifer Craven had a Fifth Amendment privilege, nor did she. Ms. Craven had already pled guilty to unarmed robbery and had already been sentenced, in August of 2012 (PSI p. 2), seven months before Mr. McKeever's trial. There was no appeal requested or pending. Ms. Craven retained no Fifth Amendment privilege, and even if she had, it was up to her whether to testify on behalf of Mr. McKeever. Before a witness is entitled to remain silent, there must be a valid assertion of the Fifth Amendment privilege on the record. *In re Morganroth*, 718 F2d 161, 167 (CA 6 1983). *See Pillsbury v Conboy*, 459 US 248 (1983). It is for the court to decide whether a witness' silence is justified and to require her to answer if it appears to the court that the witness asserting the privilege is mistaken as to its validity. *Hoffman v United States*, 341 US 479 (1951).

Without examining Ms. Craven, the trial court would have been unable to say she was unavailable. Moreover, if she was indeed unavailable, any statement against interest she may have made (specifically, to Mr. McKeever's mother) and certainly her guilty plea transcript

[5] A stipulation was entered to that effect. (HT 4).

would have been admissible at trial as an exception to the hearsay rule. *See* MRE 804(b)(3); *People v Barrera*, 451 Mich 261 (1996). In *Barrera*, this Court ruled that the trial court erred reversibly in excluding the statement of a separately-tried codefendant that he acted alone and spontaneously in stabbing the victim. It found the statement to be trustworthy under the totality of circumstances. Balancing the due process right to present exculpatory evidence with the policy behind MRE 804(b)(3), this Court found less corroboration required where, as here, the statement against penal interest is crucial to the defense theory. The defendants' felony murder convictions were reversed, and the United States Supreme Court denied certiorari. *Michigan v Barrera*, 519 US 945 (1996). Jennifer Craven's statement at her guilty plea was delivered under oath and before a judge. She did not minimize her role or responsibility and did not shift blame to accomplices. She had no motive to testify falsely. The trial court questioned her extensively, and the prosecutor was free to question her as well. Her guilty plea would have been admissible had trial counsel requested it and moved for its admission.

Neither Judge Jones nor Mr. Barnett so much as mentioned any kind of discussion with Ms. Craven's attorney, nor did anyone intimate that she might not want to testify. There was no justification for the trial court's ruling that Jennifer Craven could not testify. The trial court erred and denied Mr. McKeever his right to present a defense.

Where a constitutional right as vital as the right to present a defense is at stake, the Courts should not merely speculate as to the reason it is denied. Based on the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's Compulsory Process or Confrontation Clauses, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v Kentucky*, 476 US 683, 690 (1986). As the Supreme Court stated in *Washington v Texas*, 388 US 14, 19 (1967):

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, *the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.* Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. *This right is a fundamental element of due process of law*." (Emphasis added).

"Few rights are more fundamental than that of an accused to present evidence in his ... own defense." *People v Unger*, 278 Mich App 210, 248 (2008). The right to present a complete defense "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v Mississippi*, 410 US 284, 295 (1973). "The right to assert a defense may permissibly be limited by 'established rules of procedure and evidence *designed to assure both fairness and reliability in the ascertainment of guilt and innocence*.'" *People v Toma*, 462 Mich 281, 294 (2000), citing *Chambers, supra* at 302. (Emphasis added). A trial court might be justified in excluding evidence that is "incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *United States v Blackwell*, 459 F3d 739, 753 (CA 6, 2006), or evidence that is "repetitive, only marginally relevant or poses an undue risk of harassment, prejudice, or confusion of the issues." *Holmes v South Carolina*, 547 US 319, 326-327 (2006); *United States v Humphrey*, 608 F3d 955, 962 n. 3 (CA 6, 2010).

The Court in *Washington v Texas, supra,* emphasized that there must be a *legitimate* reason, making it clear that the State may not arbitrarily deny a defendant the right to put on the stand a witness who is capable of testifying to events that he or she has personally observed, and whose testimony would have been relevant and material to the defense. "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." 388 US at 23. For example, the Supreme Court in *Holmes v South Carolina, supra,* held that the state rule against the

admission of evidence of third-party guilt did not rationally serve the end that such rules were designed to further. Because the State failed to identify any other legitimate end that the rule serves, "It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have 'a meaningful opportunity to present a complete defense.'" (citing *Crane, supra* at 690.

Here, no legitimate interest in denying Mr. McKeever his right to present a defense was cited, much less established. The trial court did not cite a rule of evidence, or a privilege, or the possibility of incompetent, prejudicial, or confusing testimony. On the contrary, Jennifer Craven would have been able to testify to highly relevant, first-hand, exonerating evidence. (See prejudice argument, below). The trial court denied Mr. McKeever his defense for no legitimate reason.

Mr. McKeever Was Denied the Right to Effective Assistance of Counsel

Mr. Barnett was aware from the very beginning that Jennifer Craven was an essential witness for the defense. The record establishes that Mr. Barnett relied on the prosecutor to subpoena her, but did not follow up when the prosecution did not fulfill its promise. (Transcript of 11-12-13; HT 17). Counsel admitted that he never talked to Jennifer Craven, never talked to her attorney, and never subpoenaed her. (HT 23, 26). He did not ask for an adjournment so that she could be produced. (HT 42). Mr. Barnett testified that he did not know why Jennifer Craven was not present at trial. (HT 15). He blamed the trial court (HT 51-52) but had no explanation for why the court would rule that she could not testify. He did not make a record of the trial court's ruling and did not object. He stated no reason to believe Ms. Craven would not testify to exonerate Mr. McKeever (as to the unarmed robbery). Furthermore, Mr. Barnett never requested

the transcript of Ms. Craven's plea or sentence (HT 38), which he could have offered in lieu of her testimony.

In short, Mr. Barnett had no strategic reason for failing to produce Jennifer Craven at trial. Ineffective assistance of counsel requires a showing 1) that counsel's performance fell below an objective standard of reasonableness, and 2) that, but for counsel's deficient performance, a different result would have been reasonably probable. *Strickland v Washington*, 466 US 668 (1984); *People v Armstrong*, 490 Mich 281, 290 (2011). Mr. McKeever does not need to show that a different result is more likely than not but simply show a "reasonable probability" of a different result. *Strickland*, *supra* at 693.

Mr. McKeever has overcome the presumption that counsel's action, or inaction, constituted sound trial strategy. See *Armstrong*, 490 Mich at 290. Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Wiggins v Smith*, 539 US 510 (2003); *People v Trakhtenberg*, 493 Mich 38, 52 (2012). Failure to conduct a reasonable investigation will constitute ineffective assistance of counsel, *Wiggins*, *supra*; *People v McGhee*, 268 Mich App 600, 626 (2005). Any choice is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v Washington*, *supra* at 690–69. Mr. Barnett admittedly never talked to his essential witness and never subpoenaed her. At the hearing, Mr. Barnett was unable to come up with any professional judgment to support his failure to investigate. His was not, under any standard, a reasonable investigation.

This Court recently addressed a similar situation in *People v Pippen*, 501 Mich 902 (2017) where trial counsel failed to contact a crucial defense witness. This Court held:

> "Defense counsel failed to interview a witness who may have had information concerning his client's innocence prior to trial. The

> witness gave exculpatory statements to the defense investigator, and defense counsel was aware the witness spoke with the investigator. Failure to investigate such a witness is not a strategic decision entitled to deference. See *Wiggins v Smith*, 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003); and *Towns v Smith*, 395 F3d 251 (CA 6, 2005)."

As in *People v Trakhtenberg, supra* at 38, "[B]ecause defense counsel failed to exercise reasonable professional judgment when deciding to forgo particular investigations relevant to the defense, her representation fell below an objective standard of reasonableness." As in *English v Romanowski*, 602 F3d 714 (CA 6, 2010), counsel could not have developed reasonable trial strategy where he failed to even talk to the crucial witness. See also *Towns v Smith*, 395 F3d 251 (CA 6, 2005), where the Court held that trial counsel's failure to interview or call a witness who admitted being involved in the crimes charged against the petitioner and who claimed that the petitioner had played no part in those crimes denied the petitioner his Sixth Amendment right to effective assistance of counsel. Counsel was found to be ineffective in *People v Johnson*, 451 Mich 115 (1996), for failure to produce defense witnesses to testify that the defendant did not shoot the victim even though two witnesses had already testified the same way at trial. This Court found the missing witnesses' testimony substantial and granted a new trial.

Even though he failed to contact Jennifer Craven, Mr. Barnett had previously decided to call her to the stand. Thus, at issue is not counsel's decision as to what evidence to present, but his failure to present the evidence that he intended to present and his failure to seek an adjournment. As in *People v Tommolino*, 187 Mich App 14, 18-20 (1991), where the Court found ineffective assistance of counsel, Mr. Barnett failed to seek an adjournment in order to secure the presence of a crucial witness that he intended to call to the stand. Without Ms. Craven, Mr. McKeever had no substantive defense to the robbery charge. As the Court held in *Hodgson v Warren*, 622 F3d 591 (CA 6, 2010), where a defense witness absented herself during trial and

defense counsel failed to request an adjournment, "a reasonably competent defense attorney would have done more to ensure that the jury heard the witness's testimony."

This is not a case like *People v LaVearn*, 448 Mich 207, 216 (1995), where trial counsel was forced to choose between two inconsistent defenses. In this case, Mr. McKeever had no defense to the assault, other than defense of others, and his *only* defense to the robbery was that he was not acting in concert with Jennifer Craven, that he did not know Ms. Craven was taking the complainant's money, and that he was protecting Ms. Craven, his girlfriend. Ms. Craven's testimony (or statement in her guilty plea) was necessary to present that defense. There was no reasonable trial strategy in this case.

Prejudice Has Been Established

Although Ms. Craven was unable to travel to Michigan from Texas (or from Northern Michigan previously) to testify,[6] it was not because of her unwillingness to testify for Mr. McKeever. She was willing to testify by telephone. Trial counsel had tried, improperly, to introduce her testimony during his closing argument, and was stopped by the trial court. (T 221). Ms. Craven signed affidavits[7] that she would have testified to exculpate Mr. McKeever, and, most importantly, she had testified *under oath* at her own guilty plea that Mr. McKeever was not aiding and abetting the robbery:

> "THE COURT: **So he beat up Mr. Fawaz so you could get the money, correct?**
>
> DEFENDANT CRAVEN: **No**.
>
> THE COURT: Oh, well then why did you take the money? Did you ask - -
>
> DEFENDANT CRAVEN: I just took the money.

[6] Some three years later, Ms. Craven had moved on with her life and had a new baby and a new relationship.
[7] Affidavits attached, Appendix C.

THE COURT: Did Mr. Fawaz ask you for money? Did you ask Mr. Fawaz for money before that?

DEFENDANT CRAVEN: Yes.

THE COURT: And he didn't give it to you, did he?

DEFENDANT CRAVEN: No.

THE COURT: **So did you tell Mr. McKeever**?

DEFENDANT CRAVEN: **No**.

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

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

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

DEFENDANT CRAVEN: **Yes**.

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

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

THE COURT: I don't understand.

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

THE COURT: Is that true?

DEFENDANT CRAVEN: Yes.

THE COURT: So you took the money?

DEFENDANT CRAVEN: Yes.

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

Therefore, there is substantial evidence in the record to support Mr. McKeever's claim of prejudice resulting from ineffective assistance and trial court error. This is not a case, like *People v Pickens, supra*, where the defendant waives the presence of the witness at the hearing and there is no evidence of what the witness would say.[8] Everyone in the instant case knows what Ms. Craven would say because she said it, under oath, at the guilty plea proceeding. Contrary to the prosecution's overly aggressive reading of *Pickens*, this Court did not establish a rule that unless the witness appears and testifies at the evidentiary hearing there is no ineffective assistance of counsel. *Pickens* merely concluded that a defendant needs to show prejudice and that, based on the specific facts before it, there was no showing of prejudice to Mr. Pickens.[9]

In the instant case, Mr. McKeever has proven that the failure to produce Jennifer Craven was absolutely prejudicial to his defense. The evidence was not overwhelming as to the robbery charge, contrary to the prosecution's argument on appeal. The jury was shown a video in which Mr. McKeever is seen punching and hitting Mr. Fawaz. He has his key chain in his hand. However, the video also shows his girlfriend, Jennifer Craven, going through the complainant's

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[8] "Defendant Dwayne Pickens was charged with selling less than fifty grams of cocaine to an undercover police officer in the City of Detroit. During his opening argument at trial, defense counsel indicated that Eric Wright would testify that Pickens had been with him the day in question and had not delivered cocaine. The trial court, however, barred the introduction of the alibi witness because defense counsel had failed to file a notice of alibi as required by M.C.L. § 768.20(1); M.S.A. § 28.1043(1)." *Pickens* at 303-304.

[9] ". . . At the *Ginther* hearing, Pickens' trial counsel testified that her records did not show that she had failed to file a notice of an alibi defense. She indicated that she intended to call Wright to testify at trial as an alibi witness and that she had discussed that possibility with him and Pickens before trial. She could not recall if Wright appeared on the first day of trial, but remembered that he had been subpoenaed by her investigator and did not appear on the second day. She speculated that she did not move for an adjournment because the trial court's ruling precluding Wright was so definite. Following this pattern, Pickens' appellate counsel also waived production of Wright at the *Ginther* hearing. The record does not provide any explanation for his failure to testify at trial or the *Ginther* hearing." *Pickens* at 303–304 (1994).

"Nevertheless, Pickens has failed to establish the required showing of prejudice. Although the alibi witness was subpoenaed, he did not testify at the evidentiary hearing. Instead, for unexplained reasons, Pickens waived his production. Accordingly, no evidence has been presented to establish that the alibi witness would have testified favorably at trial." *Pickens* at 327.

pocket and taking something. After Mr. McKeever walks away, Ms. Craven can be seen taking money out of the wallet and throwing the wallet at Mr. Fawaz. Moreover, Mr. McKeever's vantage point is far different than the birds-eye view from the video camera; he could not necessarily see Ms. Craven swooping in from behind him to grab Mr. Fawaz's wallet. Mr. McKeever admitted beating Mr. Fawaz but denied knowing that Ms. Craven was going to steal from him.

Ms. Craven stated under oath at her guilty plea proceeding that Mr. McKeever was outside and someone told him that Ms. Craven, his girlfriend, was inside hurt and crying. Mr. McKeever came in to defend her. He beat up Mr. Fawaz, but did not know she was going to take the complainant's money. He had nothing to do with the theft. The prosecution complains that there was no opportunity for cross examination at the guilty plea, but this argument lacks merit. The prosecutor was free to question Ms. Craven, the trial court questioned Ms. Craven extensively, and the prosecutor accepted her statements under oath as true. The prosecution cannot now claim that they were not true.

Ms. Craven also signed affidavits attesting to the exoneration of Mr. McKeever under oath at the guilty plea, and she stated that she was willing to testify at his trial. Had she testified, her testimony would have been consistent with the video, which does *not* show Mr. McKeever taking the complainant's wallet or money and shows Ms. Craven going into Mr. Fawaz's pocket. It would have been up to the jury - not the prosecution or the trial court or the Court of Appeals - whether to believe her.[10]

"[D]etermining the credibility of witnesses is a task for the jury, not this court." *United States v Kelly*, 204 F3d 652, 656 (CA 6, 2000). "As the trier of fact, the jury is the final judge of

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

credibility." *People v Lemmon*, 456 Mich 625, 637 (1998). See also *Yaner v People*, 34 Mich 286, 289 (1876). As the Sixth Circuit Court of Appeals held in *Avery v Prelesnik*, 548 F3d 434, 439 (CA 6, 2008) (finding ineffective assistance of counsel), "evaluation of the credibility of alibi witnesses is 'exactly the task to be performed by a rational jury,' see *Matthews v Abramajtys*, 319 F3d 780, 790 (CA 6, 2003), not by a reviewing court." A trial court's credibility determination is concerned with whether a reasonable juror could find the testimony credible on retrial. *Connelly v United States*, 271 F2d 333, 335 (CA 8, 1959). This Court recently stated in *People v Johnson and People v Scott*, ___Mich___(#154128 and 154130, July 23, 2018):

> "If a witness's lack of credibility is such that no reasonable juror would consciously entertain a reasonable belief in the witness's veracity, then the trial court should deny a defendant's motion for relief from judgment. However, if a witness is not patently incredible, a trial court's credibility determination must bear in mind what a reasonable juror might make of the testimony, and not what the trial court itself might decide, were it the ultimate fact-finder."

Ms. Craven's statements are not "patently incredible," and a jury should have heard her testimony.

The Witness's Failure to Appear Should Not Be Attributed to the Defense

The offense in this case was committed on July 17, 2012. (T 128). Jennifer Craven pled guilty on August 10, 2012.[11] Mr. McKeever's trial began and ended on March 11, 2013. Mr. McKeever filed a claim of appeal, and, after investigating the case, appellate counsel filed a Motion to Remand for an evidentiary hearing for Ms. Craven to testify in support of a motion for new trial. In fact, Mr. McKeever filed *multiple* motions to make a record and move for a new trial in the trial court. He filed the first motion to remand on March 19, 2014, which was denied on May 7, 2014, and an amended motion to remand on May 30, 2014, attaching to both an

[11] Guilty Plea Transcript.

affidavit and a letter, both signed by Jennifer Craven, stating specifically that she was and is available and willing to testify on behalf of Mr. McKeever. Also attached was her guilty plea transcript wherein her statements exculpated Defendant McKeever. On July 2, 2014, the Court of Appeals denied the remand for the second time.[12] Mr. McKeever's appeal continued in the Court of Appeals, and that Court affirmed Mr. McKeever's conviction on September 16, 2014, again failing to remand the case for an evidentiary hearing. Mr. McKeever timely filed an application for leave to appeal in the Supreme Court. This Court issued an order on June 3, 2015, remanding this case to the trial court:

> "On order of the Court, the application for leave to appeal the September 16, 2014 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REVERSE that part of the Court of Appeals judgment holding that the defendant abandoned his claim of ineffective assistance of counsel, we REVERSE the Court of Appeals order denying the defendants amended motion to remand for an evidentiary hearing, and we REMAND this case to the Wayne Circuit Court for an evidentiary hearing. The court shall determine whether trial counsel was ineffective for failing to call Jennifer Craven as a witness at trial, *People v Ginther*, 390 Mich 436 (1973), or whether the court ruled off the record that she could not testify and, if so, what was the basis for such a decision. To the extent that trial counsel failed to respond to the defendant's request for an affidavit on appeal, the defendant cannot be faulted for failing to overcome the presumption that counsel acted reasonably. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.
>
> We do not retain jurisdiction."

The long-requested hearing was finally granted, three years after the offense and two years and three months after the trial. At that time, Jennifer Craven had just had a baby. She had moved on with her life, but she was still willing to help Mr. McKeever. The hearing date was scheduled to somewhat accommodate her brand new motherhood. However, when the hearing

[12] Court of Appeals orders, attached, Appendix D.

date approached, Ms. Craven had moved to Oscoda and the date was adjourned. Ms. Craven then moved to Texas. (HT 5-6). Appellate counsel had no forwarding address in either Oscoda or Texas.[13] Understandably, Ms. Craven was unwilling to travel to Michigan to testify. However, she was willing to testify by phone or video. (HT 5-6).

At the hearing, appellate counsel explained to the trial court that Jennifer Craven was in Texas but she was willing to testify by telephone or video. The prosecutor objected and the trial court denied counsel's request. (HT 6). However, the court admitted the offer of proof, the affidavit signed by Jennifer Craven, and the plea transcript of Ms. Craven as evidence. (HT 6-7). Both the transcript and the affidavit indicate that although Mr. McKeever assaulted Mr. Fawaz with his fists, he did not steal anything, nor did he know that Ms. Craven intended to steal or was in the process of taking property from Mr. Fawaz. Ms. Craven stated in her affidavit that she was willing to testify at trial on Mr. McKeever's behalf. The offer of proof was stated as follows:

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

Again, Ms. Craven's statements are consistent with the video of the assault on Mr. Fawaz. At no point does Mr. McKeever take anything from the complainant and at no point is he in possession of Mr. Fawaz's wallet or money. It was Ms. Craven who approached Mr. Fawaz. Mr. McKeever was outside and someone told him that Jennifer Craven, his girlfriend, was inside hurt

[13] This made service of a subpoena impossible, even through extensive investigation efforts by the State Appellate Defender Office.

and crying. He came in and beat up Mr. Fawaz, but did not know she was going to take the complainant's money and he had nothing to do with the theft. (See Jennifer Craven's guilty plea transcript). The jury could have watched the video in light of Ms. Craven's testimony and come to the conclusion that she was telling the truth.

Ms. Craven's absence at the hearing should not be attributed to Mr. McKeever. Through counsel, Mr. McKeever did *everything in his power* to obtain the presence of his witness. Her absence at trial is attributable to the original trial judge and/or trial counsel (see above); her physical absence at the hearing is attributable to the Court of Appeals which erred multiple times by refusing to grant the necessary and properly-requested remand, causing an excessive delay in obtaining the requisite hearing; her virtual absence at the hearing is attributable to the prosecutor's objection and the trial court's ruling preventing her from testifying by telephone or video.

The Michigan Court Rules provide for a Motion to Remand:

> "(1) Motion to Remand.
>
> (a) Within the time provided for filing the appellant's brief, the appellant may move to remand to the trial court. The motion must identify an issue sought to be reviewed on appeal and show
>
> (i) that the issue is one that is of record and that must be initially decided by the trial court; or
>
> (ii) that development of a factual record is required for appellate consideration of the issue.
>
> A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at a hearing." MCR 7.211(C)(1).

Mr. McKeever complied with the requirements for obtaining a remand, twice. As this Court acknowledged by "REVERS[ING] the Court of Appeals order denying the defendant's

amended motion to remand for an evidentiary hearing," *People v McKeever*, 911 NW2d 807 (2018), the Court of Appeals erred in failing to grant the remand. The result of the error was an excessive delay and the inability to obtain the witness's presence.[14]

As the courts have held in the context of a delay in arrest or a delay in trial, when evidence is lost due to the delay, the defendant is not held responsible; to the contrary, the courts have held that the defendant has been prejudiced and reversal is required. See *Doggett v United States*, 505 US 647 (1992); *Barker v Wingo*, 407 US 514 (1972). The most important factor in a speedy trial violation is prejudice to the accused. As the Supreme Court stated in *Barker, supra* at 532:

> "Of these [factors], the most serious is the last [prejudice], because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." See also *United States v Brown*, 169 F3d 344 (CA 6, 1999).

In *People v Bennett*, 84 Mich App 408 (1978), the thirty-two month delay was unexplained, and, although the defendant did not assert the right to a speedy trial, the Court found that he was seriously prejudiced when two defense witnesses and one prosecution witness became unavailable at trial. See also *Dickey v Florida*, 398 US 30 (1970). In *Maples v Stegall*, 427 F3d 1020 (CA 6, 2005), the Court found that the defendant was denied his constitutional right to a speedy trial caused by a 24-month delay, finding prejudice where his defense was impaired by the unavailability of one witness and the inability to locate another. The Court also found that the Michigan trial court's unjustified delay in ruling on motions should not be attributed to the defendant. Likewise, the unjustified refusal to grant a remand in the instant case

[14] Ms. Craven was, in 2012, Mr. McKeever's boyfriend. Obviously, but mid-2015, she had moved on to another relationship and another life. It is not hard to imagine that her significant other would have discouraged her willingness to make sacrifices to help a former boyfriend.

should not be attributed to Mr. McKeever, and he was prejudiced by the inability to obtain his witness's presence at the hearing.

Likewise, when a delay in arrest "meaningfully impair[s] [the defendant's] ability to defend against the charges against him such that the outcome of the proceedings will likely be affected," a due process violation results.[15] *People v Crear*, 242 Mich App 158 (2000). See also *United States v Lovasco*, 431 US 787, 795-796 (1977); *People v Bisard*, 114 Mich App 784 (1982). The Court in *People v Hernandez*, 15 Mich App 141 (1968), held that the defendant was denied due process by a 42-day delay because it deprived the defendant of the use of his memory to determine the existence of witnesses and to establish a defense. See also *People v Hanson*, 178 Mich App 507 (1989) (27-week delay) and *People Dungey*, 147 Mich App 83 (1985) (7-month delay).

Mr. McKeever was prejudiced by the excessive and inexcusable delay in granting the evidentiary hearing because his witness became unavailable. He should not have to pay the price for the delay, which resulted in the denial of his right to present Ms. Craven's testimony at the hearing.

If the prosecutor and the trial court were interested in hearing Jennifer Craven's testimony (in addition to her affidavit and guilty plea), testimony by phone or video could have been arranged. The right of physical confrontation is not a concern when the witness is a defense witness. As Professor Friedman explained in his article, Remote Testimony, 35 U Mich JL Reform 695, 696 (2002), only the accused has the right of confrontation and the prosecutor has no standing to complain on that ground:

> "But video transmission may also be useful for the presentation of defense witnesses. The two situations are not symmetrical. Indeed, the criminal justice system is rife with asymmetries. Most obviously,

[15] The reason for the delay must also be considered.

> in this context, only the accused has the confrontation right.[16] Furthermore, unless the prosecution proves guilt beyond a reasonable doubt, the accused must be acquitted. And the prosecution usually has means and resources for producing witnesses that are superior to those of the accused. Accordingly, it is not appropriate to assume that the same standards should apply in both settings."

In the opinion of the author, as well as those supporting a rule change [to FRCP 26(b)], the trial court should accommodate remote testimony when offered by the defense:

> "In two respects, a rule providing for remote testimony should be more receptive to such testimony when the witness is presented by the defense than when it is presented by the prosecution. First, though it is still desirable for transmission to be two-way, this is not clearly imperative.
>
> Second, there is no need for a rigorous standard of unavailability. If testimony of a witness for the accused in the courtroom would be admissible, which requires that it be more probative than prejudicial, then testimony of that witness by video transmission is likely still to be more probative than prejudicial, but less effective for the accused. A lenient attitude therefore appears presumptively optimal, and no constitutional requirement makes it inappropriate. Ordinarily, then, if the accused finds video transmission his most satisfactory alternative--given the importance of the witness's testimony and whatever costs and difficulties there may be in presenting the witness in the courtroom--the court should not second-guess that judgment." Richard D. Friedman, Remote Testimony, *supra* at 714–15 (2002).

Moreover, the proceeding involved was a motion for new trial, not a trial.[17] At a motion for new trial, the rules of evidence are not the same as at a trial, where the issue is guilt or innocence. *People v Barbara*, 400 Mich 352, 411 (1977): "Since the defendant's guilt or

[16] 40 Justice Breyer emphasized this point in arguing for submission of the proposed amendment. Statement of Breyer, J., supra note 3, at 4 (stating that "where the defendant seeks the witness' video testimony to help secure exoneration, the Clause simply does not apply").35 U Mich JL Reform 695, 717.

[17] The rules of evidence do not apply at all at *Walker* Hearings or *Wade* Hearings. *People v. Richardson*, 204 Mich.App 71, 80 (1994); *People v Parsons* (Court of Appeals No. 202894, November 14, 2000). "[A] trial court may consider any evidence regardless of that evidence's admissibility at trial, as long as the evidence is not privileged, in determining whether the evidence proffered for admission at trial is admissible." *People v Barrett*, 480 Mich 125, 134 (2008). A trial court "need not apply the rules of evidence except those pertaining to privileges" in a probation revocation hearing or at sentencing. *People v Matzke*, 303 Mich App 281, 284 (2013); MCR 6.445(E)(1); MRE 1101(b)(3).

innocence is not at issue [at a hearing on a motion for new trial], some procedures are permissible which would not be acceptable at trial." This Court further stated:

> "In short, is the character of the proceedings on a motion for new trial because of newly discovered evidence so significantly different from the proceedings at trial as to permit the use of polygraph tests in the one and deny its use in the other?
>
> The answer is that the procedure at trial and at a post-conviction hearing for new trial is different and significantly so. The procedures are significantly different because their purposes are significantly different. The purpose of a trial is to determine the guilt or innocence of the defendant. The purpose of a post-conviction hearing for a new trial is, as its name suggests, an action to determine whether there should be such a trial. It is a preliminary, not a final procedure.
>
> The implication of this difference is basic. Since the defendant's guilt or innocence is not at issue, *some procedures are permissible which would not be acceptable at trial. For example, the motion may be argued on the basis of affidavits*, which, of course, would not be possible at trial. It does not determine the defendant's guilt or innocence." *Id*. (Emphasis added).

As *Barbara* acknowledges, a post-conviction motion for new trial may be decided on the basis of affidavits. In the instant case, not only did the defense have two properly sworn affidavits and a signed letter, the defense also had Ms. Craven's statement - under oath and accepted as true by the prosecution - at her guilty plea.

The absence of Ms. Craven's testimony should be attributable, in part, to the trial judge at the hearing. Obviously, however, the principle fault for her absence at the hearing is the original failure by Mr. Barnett to obtain her presence at trial.

Ultimately, the Court of Appeals Was Correct in Granting a New Trial

The Court of Appeals held that it was impossible to answer the questions posed by this Court. Rather than risk the denial of Mr. McKeever's right to present a defense (as the trial court was willing to do), the Court of Appeals correctly remanded for a new trial.

The appellate court, in reviewing a defendant's claim that his or her right to appellate review has been denied because portions of the record are missing, "must determine whether the unavailability of those portions of the transcript so impedes the enjoyment of the defendant's constitutional right to an appeal that a new trial must be ordered. The defendant's right is satisfied where the surviving record is sufficient to allow the evaluation of defendant's claims on appeal. The sufficiency of the record depends on the questions which must be asked of it." *People v Federico*, 146 Mich App 776; 58 A.L.R.4th 1205 (1985); § 24:47; Record on appeal, generally, 2A Gillespie Mich. Crim. L. & Proc. § 24:47 (2d ed.).

The Court of Appeals here found that the "surviving" record is insufficient to evaluate Mr. McKeever's claims on appeal. The Court did not err, therefore, in remanding for a new trial.

For example, in *Parrott v United States*, 314 F2d 46, 47 (CA 10, 1963), the Court held that the unavailability of a full transcript made it impossible to determine whether the error [that in the voir dire the trial judge mentioned other bank robbery cases pending against the defendant] were harmless and should be disregarded. The Court therefore reversed the conviction and remanded for a new trial.

In *People v Killpack*, 793 P2d 642, 643 (Colo App, 1990), the Court granted a new trial where, due to an incomplete transcript, it was not possible to determine if error occurred or if the instructions were sufficient to cure the error; i.e., the incomplete transcript prejudiced the defendant's appeal:

> "While we agree that loss of a portion of the complete trial record does not automatically require reversal, nonetheless, when a defendant can show that the incomplete record "visits a hardship upon [the appellant] and prejudices his appeal" reversal is proper. *United States v. Valdez*, 861 F.2d 427 (5th Cir 1988); *United States v. Renton*, 700 F.2d 154 (5th Cir 1983).

> Here, we cannot tell, without examining the language used and the context in which the statements were made, whether error occurred in the admission of the testimony, and if so, whether the instructions were sufficient to correct it. We therefore conclude that a new trial is required on the underlying substantive offenses."

The error and resulting prejudice in the instant case are not mere speculation. The trial court determined that the presiding judge prevented Ms. Craven from testifying but there is no record of her ruling or the basis for her ruling. It is therefore impossible to speculate that there was some sort of justification for the presiding judge's ruling. It follows that it is impossible to address the questions on appeal and it is impossible to address the questions posed by this Court. Mr. McKeever must not be the one to suffer.

A New Trial is Required Where the Record Cannot be Recreated

The trial court conducting the hearing decided that Judge Jones (since retired) ruled that Jennifer Craven could not testify, but due to *lack of a record*, the court could not determine the reason for such a ruling. Although the Court of Appeals reversed the conviction before reaching the "missing transcript" issue, it is clear that the Court decided that the missing portions of the record were so essential that the only recourse was to remand for a new trial.

Due process requires the trial court to provide a complete record of the trial proceedings, in order to enable appellate counsel to effectively represent the defendant. *See generally, Hardy v United States*, 375 US 277 (1964); *Evitts v Lucey*, 469 US 387 (1985). Anything short of a complete trial transcript is incompatible with effective appellate advocacy. *Hardy v United States, supra*. In fact, the inability to secure complete transcripts may so impede a defendant's right of appeal under Const 1963, art 1, § 20 that a new trial must be ordered. *People v Horton* (After Remand), 105 Mich App 329 (1981). As in *Horton*, in Mr. McKeever's case the record was not adequately settled on remand, and, as in *Horton*, "it is simply impossible for us to

determine, without benefit of the missing trial transcript, whether [the defendant] received adequate assistance from his trial counsel." The unavailability of the transcript "so impede[d] the enjoyment of the defendant's constitutional right to an appeal that a new trial must be ordered." *People v Audison*, 126 Mich App 829, 834-835 (1983).[18]

Here, "it is impossible to review the regularity of the proceedings" due to the lack of a complete record, and a new trial must be ordered. *People v Horton, supra*. The inability to reconstruct the record so impeded Mr. McKeever's right of appeal under Const 1963, art 1, § 20 that due process requires a new trial. Const 1963, art 1, § 17; US Const, Am XIV. The Court of Appeals was correct in remanding for a new trial.

Mr. McKeever was offered a plea to assault with intent to do great bodily harm, with a sentence agreement of one to ten years. (Conference, 10-26-12, p. 4). He chose a jury trial, and then his rights were trampled. He has now served 6 years[19] of his 7 to 30-year sentence. And he has served this sentence despite record evidence, through Ms. Craven, that he did not commit the crime of which he was convicted. It is time for justice for Mr. McKeever.

[18] See *People v Jenkins*, (#250912, March 8, 2005): "[I]t is simply impossible for us to determine, without benefit of the missing trial transcript, whether Williams received adequate assistance from his trial counsel. '[I]t is impossible to review the regularity of the proceedings due to the lack of transcripts,' [citing *People v Horton, supra*] and a new trial therefore must be granted with regard to Williams' convictions."

[19] From the date of his arrest, 7-17-12, he has been incarcerated continuously.

SUMMARY AND RELIEF REQUESTED

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

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Chari K. Grove

BY:_____

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