STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	
Plaintiff-Appellee,	Supreme Court No. 140147
vs.	Court of Appeals No. 274148
JAMES EUGENE GRISSOM,	St. Clair County Circuit Court No. 03-000881FH
Defendant-Appellant.	

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BRIEF OF PROPOSED AMICUS CURIAE, THE INNOCENCE NETWORK

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STATEMENT OF BASIS OF JURISDICTION

The Innocence Network adopts the facts supporting jurisdiction as stated by the parties.

STATEMENT OF QUESTIONS INVOLVED

1. WHETHER, AND UNDER WHAT CIRCUMSTANCES, NEWLY DISCOVERED IMPEACHMENT EVIDENCE CAN BE GROUNDS FOR A NEW TRIAL.

   Plaintiff-Appellee says "No."

   Defendant-Appellant says "Yes."

   Innocence Network says "Yes, if the newly-discovered impeachment evidence satisfies the four-prong standard set forth in *People v Cress*, 468 Mich 678, 692, 664 NW 2d 174 (2003)."

2. IF IMPEACHMENT EVIDENCE CAN BE GROUNDS FOR A NEW TRIAL, WHETHER THE DEFENDANT WOULD HAVE HAD A "REASONABLY LIKELY CHANCE OF ACQUITTAL."

   Plaintiff-Appellee says "No."

   Defendant-Appellant says "Yes."

   Innocence Network says "Yes."

AMICUS INTEREST

The Innocence Network is an international affiliation of more than 70 different organizations in 43 states and six countries dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions. In 2010, the work of Innocence Network member organizations led to the exoneration of 29 people around the world, including two in Michigan. These innocent people served a combined 426 years behind bars for crimes they did not commit.[1]

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[1] Innocence Network member organizations include: the Alaska Innocence Project, Association in Defence of the Wrongly Convicted (Canada), Arizona Innocence Project, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Griffith University Innocence Project (Australia), Hawaii Innocence Project, Idaho Innocence Project, Innocence and Justice Project at the University of New Mexico School of Law, Innocence Institute of Point Park University, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Irish Innocence Project at Griffith College, Justice Brandeis Innocence Project, Justice Project, Inc., Kentucky Innocence Project, Life After Innocence, Medill Innocence Project, Miami Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project (State of Ohio), Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Resurrection After Exoneration, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (UK), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.

The Innocence Network has a strong interest in the determination of the issues presented in this case. Like Defendant/Appellant James Eugene Grissom ("Grissom"), the Innocence Network seeks to ensure that Michigan courts retain discretion to grant a new trial to a defendant based on newly-discovered impeachment evidence satisfying the standard articulated by this Court in *People v Cress*, 468 Mich 678, 692, 664 NW 2d 174 (2003). Indeed, courts should maintain discretion to grant a new trial based on newly-discovered impeachment evidence particularly where that evidence attacks of the credibility of a critical witness, such that an acquittal of the defendant is probable if the evidence is introduced at a new trial. This Court should not adopt a *per se* rule that newly-discovered impeachment evidence cannot provide sufficient grounds for grant of a new trial because such a rule may perpetuate unjust incarceration of wrongfully convicted defendants, is inconsistent with extant precedent of this Court and of the United States Supreme Court, and will undermine defendants' rights of confrontation and due process protected by both the United States and Michigan constitutions. For these reasons, the Innocence Network supports the relief requested by Grissom.

SUMMARY OF ARGUMENT

The Michigan Court of Appeals erred by misapplying the standards established by this Court in *Cress*, 468 Mich at 692, when it denied Grissom's motion for a new trial and held that "[b]ecause the newly discovered evidence in this case would be merely for impeachment purposes, it is not grounds for a new trial." *People v Grissom*, No 274148, 2009 WL 3491623, at *8 (Mich App, Oct 29, 2009). This Court should reject a *per se* rule that newly-discovered impeachment evidence cannot form the basis for a new trial because it is contrary to substantial precedent (including United States Supreme Court precedent), which recognizes the exculpatory value of impeachment evidence, and contrary to Michigan's well-established four-part test for the determination of whether to grant of a new trial established in *Cress*.

The *Cress* test does *not* explicitly or implicitly foreclose the grant of a new trial based on newly-discovered impeachment evidence, and does not require such evidence to demonstrate perjury or fraud on the court. Permitting trial courts the discretion to grant a new trial based upon newly-discovered evidence when such evidence casts doubt on the credibility of a key witness is fully consistent with Michigan precedent recognizing the critical importance of such evidence. *See People v Barbara*, 400 Mich 352, 255 NW2d 171 (1977); *People v Armstrong*, -- NW2d --, No 142762, 2011 WL 5083255 (Mich, Oct 26, 2011).

Numerous cases from jurisdictions around the country also recognize that newly-discovered impeachment evidence that casts doubt on the credibility of a key witness can properly form the basis for the grant of a new trial for a criminal defendant. *See, e.g.*, *State v Plude*, 750 NW2d 42 (Wis 2008) (granting a new trial where it was discovered that an expert on which the state relied had testified falsely about his credentials); *State v Strahl*, 768 NW2d 546

(SD 2009) (granting a new trial where prosecution witness had fabricated testimony of a confession in a different case).

Furthermore, courts universally recognize that it is appropriate to grant a new trial in cases where the prosecution withholds impeachment evidence in violation of its disclosure obligations under *Brady v Maryland*, 373 US 83, 83 S Ct 1194 (1963). In *Brady*, the United States Supreme Court granted a new trial where the prosecution failed to disclose impeachment evidence. *Brady* and its progeny stand for the principle that it may be appropriate to grant a new trial when impeachment evidence is unavailable at the time of trial because of the prosecution's deliberate or inadvertent failure to disclose such evidence. By the same logic, it is appropriate to grant a new trial when impeachment evidence is unavailable at the time of trial because it was not yet discovered and could not have been discovered with reasonable diligence. Further, imposing a *per se* rule that newly-discovered impeachment evidence cannot form the basis for a new trial would undermine defendants' constitutional rights under the Confrontation Clause of the Sixth Amendment. *See People v Hackett*, 421 Mich 338, 348, 365 NW2d 120 (1984).

As this precedent, as more fully discussed *infra*, demonstrates, courts must have the flexibility to grant a new trial based on newly-discovered impeachment evidence, particularly in cases where, as here, witness testimony is outcome-determinative and where there is a complete lack of other corroborating evidence.

In this case, Grissom was charged with first-degree criminal sexual assault based almost exclusively on the evidence of a single purported eyewitness – the alleged victim of the crime, Sarah Ylen ("Ylen"). No physical evidence linked Grissom to the crime. Accordingly, the prosecution's case against Grissom rose and fell on the jury's willingness to believe Ylen's testimony that she was raped and could positively identify Grissom as her assailant. Though

certain aspects of Ylen's story seemed incredible – she claimed to have been raped in the middle of a crowded parking lot on the middle of a Saturday afternoon – and though she had repeatedly changed certain aspects of her story and failed to report the rape for more than a year after it allegedly occurred, her testimony yielded a conviction. Grissom remains incarcerated based on the jury's acceptance of Ylen's testimony.

Approximately a year and a half after Grissom's conviction, the parties discovered new evidence that substantially calls into doubt the credibility of Ylen's testimony – the sole testimony linking Grissom to the alleged crime. Specifically, the newly-discovered evidence reveals that Ylen reported to law enforcement officers in California that she had been kidnapped and that she also had been raped on two different occasions. These reports were made by Ylen four months after she allegedly was raped by Grissom, but before Grissom was charged, tried and convicted in this case. Ylen later admitted to the officers in California that she fabricated her allegations about having been kidnapped and raped on one occasion. Her other allegations were uncorroborated and inconsistent with information disclosed by family members and by two of her friends. This newly-discovered evidence raises significant questions about the veracity of Ylen's testimony against Grissom. And, without Ylen's testimony, there is no evidence to suggest that Grissom was the perpetrator of the alleged rape or even that a rape occurred.

While this newly-discovered evidence may be used only to impeach Ylen's testimony, given the centrality of her testimony to Grissom's conviction, it is powerful exculpatory evidence and plainly satisfies the test for the grant of a new trial previously enunciated by this Court: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result

probable on retrial." *Cress*, 468 Mich at 692 (internal quotation marks omitted). While the Innocence Network recognizes that "general" impeachment evidence of a minor witness may not be sufficiently important to yield a new trial, the newly-discovered evidence in this case is both extremely powerful for purposes of impeachment and cuts to the very core of the evidence presented at trial. A new trial is appropriate when newly-discovered evidence calls a key witness's credibility into doubt. This is precisely such a case.

Moreover, a *per se* rule prohibiting a trial court from ever granting a new trial based on newly-discovered impeachment evidence is contrary to the United States Supreme Court's holding in *Brady v Maryland*, 373 US 83, 83 S Ct 1194 (1963). In *Brady*, the Supreme Court recognized that a prosecutor's failure to disclose impeachment evidence to a defendant may result in a new trial; the same principle dictates that newly-discovered impeachment evidence may also result in a new trial under appropriate circumstances.

Accordingly, the Innocence Network respectfully requests that this Court reverse the decision of the Michigan Court of Appeals and hold that newly-discovered impeachment evidence can form the basis for a new trial if the new evidence satisfies the *Cress* standard.

STATEMENT OF RELEVANT PROCEEDINGS AND FACTS

A. Procedural History

In April 2003, Grissom was charged by the St. Clair County prosecutor with two counts of having engaged in criminal sexual conduct in the first degree with the alleged victim, Ylen, on May 12, 2001. These charges were tried before a jury in the Circuit Court for the County of St. Clair between August 19 and 27, 2003.

The jury convicted Grissom of these charges on August 27, 2003. The Honorable Peter F. Deegan ordered that Grissom serve two concurrent sentences of 15 to 35 years in prison as a

result. The Court of Appeals affirmed Grissom's convictions, *People v Grissom*, unpublished *per curiam* opinion of the Court of Appeals, November 18, 2004 (Docket No. 251427), and this Court denied leave to appeal, *People v Grissom*, 472 Mich 919; 696 NW2d 715 (2005).

In March 2006, Grissom filed a *pro se* motion under MCR 6.502 *et seq.*, for relief from judgment based primarily on newly-discovered evidence, as discussed below. The trial court appointed counsel for Grissom and subsequently denied his motion for relief from judgment and a request for an evidentiary hearing. The Court of Appeals denied Grissom's application for leave to appeal from the trial court's decision. This Court later remanded the case to the court for a determination on the merits. A divided panel of the Court of Appeals affirmed the decision in a non-unanimous *per curiam* opinion on October 29, 2009. *People v Grissom*, No 274148, 2009 WL 3491623, at *8 (Mich App, Oct 29, 2009). On January 21, 2011, this Court granted leave to appeal from the appellate majority's decision. *People v Grissom*, SC No 140147 (Mich, January 21, 2011).

B. Factual Background

1. Ylen's Initial Reports of the Alleged Michigan Incident

On Saturday, May 12, 2001, Ylen told her husband, James Ylen, that she had been physically assaulted earlier that afternoon in a Meijer store parking lot in Fort Gratiot Township, Michigan. She did not tell him that she had been sexually assaulted. Neither Ylen nor her husband reported the incident to any law enforcement authorities that day. (*See* Defendant-Appellant's Appendix ("App."), p. 55a.)

On Monday, May 14, 2001, Ylen met with St. Clair County Deputy Sheriff Timothy O'Boyle and reported "an attempted car-jacking" in the Meijer's parking lot, but again did not report that she was sexually assaulted in any manner. (App., pp. 24a, 55a-56a.). She described her alleged assailant as a 30-year-old white male with a "scraggly dirty" beard who wore a ball

cap, sunglasses which hid his face, jeans and a vest. (App., pp. 53a, 57a) Ylen did not report that her alleged assailant wore a ring of any kind on any his fingers or that he had a tattoo of any kind on either of his arms. (App., pp. 24a, 55a-57a)

That same day, Ylen went to the Port Huron Hospital Emergency Room and again failed to report that she had been sexually assaulted. (App., p. 19a, p 56a.)

On May 16, 2001, Ylen called her gynecologist and for the first time reported that she had been sexually assaulted. (App., p. 40a.) According to the trial testimony of her gynecologist, Ylen was "not terribly specific" regarding the details of the assault. (*Id.*)

Ylen returned to the Port Huron Hospital Emergency Room for a gynecological exam later that day. She reported to the examining physician that a man had penetrated her vagina with his finger without removing her underwear. Ylen did not claim that her alleged assailant wore a ring or that he engaged in penile penetration during the alleged sexual assault. (App., pp. 36a-37a, 57a.) The doctor did not obtain specimens for evidentiary purposes because more than 72 hours had elapsed since the alleged attack. (App., p. 33a)

Thirteen months elapsed before Ylen reported to the police that she had been sexually assaulted. During those thirteen months, events unfolded in California involving Ylen's false reports of other alleged sexual attacks. However, the parties did not learn of the California evidence until after a jury had convicted Grissom.

2. Newly-discovered Evidence of Ylen's False Reports of Similar Sexual Attacks

Ylen did not report that she allegedly had been sexually assaulted on May 12, 2001 to any law enforcement authorities until thirteen months after the alleged assault. During the intervening period, in September 2001, Ylen and her husband travelled to California to visit Ylen's parents. (App., p. 114a.) While there, Ylen reported various allegations to Bakersfield,

California Police Department officers that she had been kidnapped by an unknown assailant from a Bakersfield restaurant location, that she also was sexually assaulted and raped that day by an anonymous perpetrator in the parking lot adjacent to the restaurant, and that she had been raped by a friend of her brother in Colorado during the period when she and her husband travelled to Bakersfield to visit her parents. (App., pp. 114a-131a.) Neither the St. Clair County prosecutor nor Grissom learned of this evidence until after Grissom was accused and thereafter charged, tried and convicted in this case.

On September 28, 2001, Ylen's mother called the local police and reported that at around 2:00 pm, while having lunch at a restaurant, Ylen answered her cell phone, stepped outside, and never returned. (App., p. 114a.) The next day, September 29, 2011, at 10:45 a.m., Ylen's father placed a call to police and said that Ylen called and said that she had been kidnapped. (App., p. 116a.) Ylen's father told the investigating police officers that he did not believe his daughter's story. (App., p. 116a.)

Based on information provided by Ylen's mother, the police contacted the fiancé of Katina Mamigonian, a friend of Ylen's living in Fresno, California, who indicated that Ylen was safe and staying with them. (App., p. 117a.) The fiancé also indicated that Ylen said that she had been raped several times and "her husband was in on it." (*Id.*) He further indicated that Ylen said that she had been "hiding out" in Colorado, where she had been raped by her brother. (App., p. 117a.)

On September 28, 2011, Ylen called the Bakersfield police to report she had been kidnapped. (*Id.*) She even provided a purported description of the alleged kidnapper. (*Id.*) A short time later, however, Ylen recanted her story, admitted that the incident had not occurred. (App., p. 118a.)

Ylen again called the Bakersfield police the next day and indicated that she had been raped in the parking lot of the restaurant prior to lunch on September 28, 2001. (*Id.*) She described this alleged assailant as a white male who looked "dirty." (*Id.*) She did not claim, as she later did, that the alleged perpetrator used as flashlight or any other object to sexually assault her. (*Id.*) When asked why she had not told him about the alleged rape during their previous conversation, Ylen said she was "confused" and "didn't know if anybody would believe me." (*Id.*)

Ylen's account contrasted with what her mother and Mamigonian told investigating officers about the September 28, 2001 incident. Ylen's mother reported that Ylen had entered the restaurant for lunch with the rest of her family and had not seemed upset during lunch. (App., p. 119a.) Mamigonian reported that she had picked up Ylen at the restaurant on the day of Ylen's alleged disappearance. Mamigonian said Ylen never mentioned a sexual assault. (*Id.*)

Ylen also told the investigating officer in Bakersfield that she had been sexually assaulted by a friend of her brother at a motel in Colorado during the period when Ylen and her husband were travelling to Bakersfield, California. She later admitted to the officer that the incident had not occurred. (*Id.*)

Mamigonian's fiancé contacted the Fresno, California Police Department on September 29, 2001 and reported his suspicions about Ylen. He told the responding officer that Ylen met Mamigonian through an email "online rape support group." (App., p. 130a.) The fiancé reported that Ylen told both Mamigonian and him that she had been gang-raped by her brother and his friends approximately eighteen months earlier and that the perpetrators were later arrested and convicted. (*Id.*) He also said that Ylen claimed that that her brother had been released from jail a week earlier, found her in Colorado when she was en route to California with her husband, and

raped her again. (*Id.*) The reporting police officer opined that Ylen had lied to Mamigonian, her fiancé, "her family and to law enforcement. She told her family and Bakersfield PD she was being held against her will in Fresno, which was not true. [Ylen] is possibly mentally unstable." (App., p. 131a.)

On September 30, 2001, Ylen went to a hospital in California. There, Ylen met with police and reported that a man approached her in the restaurant parking lot, forced her between two vans, and raped her. (App., p. 123a.) According to Ylen, her alleged assailant initially reached into her pants, moved her underwear aside, and penetrated her vagina with a flashlight that he was carrying, then removed the flashlight and penetrated her vagina with one of his fingers, and eventually dropped his trousers, exposed an erect penis and penetrated her vagina with his penis. (*Id.*) Ylen also reported that after the man fled, she retrieved her purse, went inside and had lunch with her mother and aunts "like nothing happened." (*Id.*)

3. Ylen's Further Reports of the Alleged Michigan Incident

In June 2002 – thirteen months after the alleged Michigan incident, and nine months after the incidents in California – Ylen contacted the St. Clair County Sheriff's Department. Ylen met with Deputy O'Boyle on June 29, 2002 and informed him that although she had not reported it, she had been sexually assaulted in May 2001. (App., p. 25a.)

Ylen stated that her assailant penetrated her with both his penis and with his right middle finger, while wearing a gold ring. (App., p. 54a.) She had described her alleged assailant as a 30 year old white male with a "scraggly dirty" beard and hair. (App., pp. 24a, 55a-56a.). Ylen explained that she was coming forward now because she had seen her assailant in a vehicle that pulled up behind her, and from her rear view mirror she recognized the gold ring that he wore during the assault. (App., pp. 57a., 62a-63a.)

In October 2002, Ylen spent four to five days reviewing photographs of potential assailants and eventually identified Grissom as her assailant from seventeen months earlier. (App., pp. 44a-45a.) But during a police lineup in November 2002 at which Grissom appeared, Ylen identified another individual as her assailant. (App., pp. 47a, 50a.)

In March, 2003, almost two years after the alleged attack, Ylen reported for the first time that her alleged assailant had a tattoo depicting a skull on is right arm. (App., p. 58a.) Grissom had such a tattoo on his right arm at the time of his trial. (App., p. 72a)

In October 2004, more than a year after Grissom's conviction, Ylen again contacted the St. Clair County Sheriff's office to report that she was sexually assaulted by her brother and her father when she was a child. (App., pp. 107a-108a.) The detective referred this case to the Huron County Sheriff's Office. (App., p. 107a.) Ylen told the Huron County authorities that she had also been raped in California. (App., p. 107a.) The Huron County prosecutor subsequently obtained the California police reports and provided them to defendant. (App., p. 104a.)

ARGUMENT

This case presents a quintessential example of a situation in which newly-discovered impeachment evidence discredits the very core of the evidence underlying the defendant's conviction and thus raises grave concerns as to whether an innocent person has been convicted.

A jury convicted Grissom of two counts of criminal sexual conduct in the first degree in the St. Clair County Court. (App., p. 101a.) At trial, the prosecution argued that Grissom raped Complainant Ylen in a busy shopping center parking lot on the afternoon of Saturday, May 12, 2001. Grissom's conviction rested entirely on Ylen's testimony. However, the newly-discovered impeachment evidence casts serious doubt as to the veracity and reliability of this witness, and as such this newly-discovered impeachment evidence makes a different result

probable at trial. The Court should hold that, under such circumstances, it is appropriate to grant a new trial on the basis of newly-discovered impeachment evidence.

A. Standard of Review

A trial court in Michigan has discretion to grant a new trial to a defendant based on newly-discovered evidence. *People v Cress*, 468 Mich 678, 692 (2003). Michigan courts employ a four-part test to decide whether newly-discovered evidence provides sufficient grounds to grant a new trial. A new trial should be granted if the defendant demonstrates that:

> (1) the evidence itself, not merely its materiality, was newly discovered;
>
> (2) the newly discovered evidence was not cumulative;
>
> (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and
>
> (4) the new evidence makes a different result probable on retrial.

Cress, 468 Mich at 692 (internal quotation marks omitted).[2]

The four-part *Cress* test does *not* explicitly or implicitly foreclose the grant of a new trial based on newly-discovered impeachment evidence. This Court has held only that, as a general practice, newly-discovered impeachment typically will be merely cumulative and not material to a defendant's innocence or guilt. *See People v Duncan*, 414 Mich 877, 877-878, 322 NW2d 714 (1982); *People v Barbara*, 400 Mich 352, 363, 255 NW2d 171 (1977). Contrary to the Court of

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[2] This test is consistent with applicable provisions of the Michigan Compiled Laws and Michigan Court Rules governing the circumstances under which a motion for a new trial may be granted. *See* MCL 770.1 ("The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs."); MCR 6.431(B) ("On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.").

Appeals majority opinion, this Court did not hold in *Duncan*, and has not held in any other case, that newly-discovered impeachment evidence is merely cumulative and not material to a defendant's innocence or guilt in *all* cases, regardless of the evidence upon which the defendant's conviction was predicated. Moreover, and contrary to Plaintiff/Appellee's assertion, this Court has never held that newly-discovered impeachment evidence is "merely cumulative" unless it proves that a witness committed perjury or a fraud on the court. Instead, where courts have determined that newly-discovered impeachment evidence was merely cumulative, the courts have done so based on the context of the particular case and where the evidence at issue had minimal exculpatory or probative value and/or where there was other significant evidence of guilt. *See infra*, Argument Section D.

B. Granting a New Trial Based on Newly-Discovered Impeachment Evidence is Wholly Consistent with Existing Michigan Precedent

The Court of Appeals committed reversible error in denying a new trial because its decision was premised, in part, on a misapplication of this Court's prior precedent. *See supra*, Argument Section A.

Consistent with the test enunciated in *Cress*, a defendant should be entitled to a new trial when the defendant's conviction is predicated on the testimony of a key witness linking the defendant to the alleged crime, and when newly-discovered impeachment evidence casts doubt on the credibility of that key witness. This is particularly true where, as in this case, there is no other probative evidence linking the defendant to the crime, and the witness testimony subject to impeachment is thus outcome-determinative. Proper application of this test assures that newly-discovered impeachment evidence will be the basis for new trial only in appropriate circumstances when it makes a different result probable on retrial, as in this case. Thus, permitting this type of evidence to form the basis for a new trial will not result in opening the

floodgates to a host of new trials based on evidence that is only tangentially relevant to the main issues in the case.

A rule that newly-discovered impeachment evidence may form the basis for a new trial when it casts doubt on the credibility of a key witness is consistent with this Court's finding in *People v Barbara*, 400 Mich 352, 255 NW2d 171 (1977). In *Barbara*, the defendant-appellant filed a motion for new trial based on his claim that a key prosecution witness had lied, and to support this claim offered two new witnesses and evidence of polygraph tests passed by himself and one of the two new witnesses. The *Barbara* Court found the court could consider a polygraph examination in considering whether to grant a new trial, even though polygraphs are inadmissible in Michigan and do not satisfy the *Frye* test. The court found that this evidence was "particularly significant when...the only evidence that an offense was ever committed was largely based on the testimony of individuals whose credibility might be put into question by [the] newly-discovered evidence." *Id.* at 363-64. Thus, where the newly-discovered evidence addresses the credibility of a critical witness, as in this case, then the evidence may properly be considered as a basis for new trial. Importantly, and contrary to Plaintiff/Appellee's characterization of *Barbara*'s holding, *Barbara* did not hold that impeachment evidence can be grounds for a new trial only if it demonstrates perjury and/or a fraud on the court. While the newly-discovered evidence in *Barbara* did evince that testimony at trial was perjured, nothing in *Barbara* limits its findings to cases of perjury or fraud on the court.

A rule that newly-discovered impeachment evidence may form the basis for a new trial when it casts doubt on the credibility of a key witness also comports with this Court's recent decision in *People v Armstrong*, -- NW2d --, No 142762, 2011 WL 5083255 (Mich, Oct 26, 2011). In *Armstrong*, this Court found that a defense attorney's negligent failure to introduce

cell phone records which contradicted a complaining witness's trial testimony amounted to ineffective assistance of counsel and was sufficient grounds for a new trial. The *Armstrong* Court held that impeachment evidence is sufficiently important to the determination of a defendant's guilt or innocence such that failure to introduce the evidence renders a defense attorney's performance constitutionally deficient. Accordingly, where impeachment evidence is sufficiently important to the determination of a defendant's guilt or innocence such that it likely may yield a different result upon retrial, it is an appropriate basis to grant a new trial.

A rule that newly-discovered impeachment evidence may result in a new trial if it satisfies the *Cress* test likewise correlates with decisions of this Court in *People v Carter*, 415 Mich 558, 593, 330 NW2d 314 (1982); and *People v Stanaway*, 446 Mich 643, 521 NW2d 557 (1994), and of the United States Supreme Court in *Brady v Maryland,* 373 US 83, 83 S Ct 1194 (1963); *United States v Agurs*, 427 US 97, 96 S Ct 2392 (1976); and *United States v Bagley*, 473 US 667, 105 S Ct 3375 (1985), in which the exculpatory value of impeachment evidence has been recognized as the standard of materiality used to determine whether a new trial should be granted where the prosecution fails to disclose exculpatory evidence. As the Supreme Court stated in *Agurs*:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. ***It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.*** This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether of not the additional evidence is considered, there is no justification for a new trial. On the hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Agurs, 427 US at 1112-113 (footnotes omitted; emphasis added), *quoted in Carter*, 415 Mich at 595.

The newly-discovered evidence in this case is easily sufficient to satisfy the test for the grant of a new trial applied in Michigan, as enunciated in *Cress*. The Plaintiff/Appellee does not dispute that the evidence qualifies as newly-discovered and noncumulative, and that defendant could not have discovered it before his trial using reasonable diligence. The sole contested issue is whether the new evidence would make a different result probable on retrial.

Because Grissom's conviction hinged entirely on Ylen's credibility, newly-discovered evidence that strongly suggests that Ylen's testimony was untruthful or unreliable would make a different result probable on retrial. The newly-discovered impeachment evidence upon which Grissom relies is no less material probative, exculpatory, or outcome-determinative than if it had been discovered that Ylen had committed perjury when she testified at Grissom's trial, had Grissom's defense attorney negligently failed to admit records contradicting the testimony of Ylen into evidence at Grissom's trial, or had the St. Clair County prosecutor possessed but failed to disclose such exculpatory evidence in advance of Grissom's trial contrary to his obligations. There is no logical reason why a trial court's exclusion of such impeachment evidence at a defendant's trial, a defense attorney's negligent failure to admit such impeachment evidence into evidence at trial, or a prosecutor's pretrial failure to disclose such impeachment evidence may warrant a new trial, while post-trial disclosure or discovery of the same type of evidence does not justify the same result.

C. Trial Courts Must Have Discretion To Grant a New Trial Where Newly-Discovered Impeachment Evidence Calls the Credibility of a Critical Witness Into Doubt

Decisions rendered by courts in other states have routinely granted new trials based on newly-discovered impeachment evidence where the newly-discovered impeachment evidence calls a key witness's credibility into doubt.

For example, in *State v Plude*, 750 NW2d 42 (Wis. 2008), the Wisconsin Supreme Court granted a new trial based on newly-discovered impeachment evidence that one of the prosecution's experts had testified falsely about his credentials. In *Plude*, the defendant allegedly found his wife unconscious with her head inside their bathroom toilet. The prosecution charged the defendant with murder, alleging that he had poisoned his wife and then drowned her in the toilet. More than forty witnesses testified at trial, including the prosecution's expert. The expert claimed to be a specialist in "injury mechanism analysis" and testified that he served as a clinical associate professor at Temple University. *Id.* at 47. He testified that he had conducted scientific experiments demonstrating "to a reasonable degree of scientific certainty that [the alleged victim] could not have inhaled toilet bowl water on her own; that it would have required 60 pounds of pressure to the back of her head to get her face in the toilet bowl water and keep it there." *Id.* Subsequently, it was revealed that the expert had lied about teaching at Temple University. The trial court concluded that even though the prosecution had stipulated that the expert was not a clinical professor at Temple University, there was no evidence that his false statements "made his opinions unreliable, therefore, no prejudice to the defendant has been shown." *Id.* at 52. The Wisconsin Court of Appeals affirmed, concluding that a new trial was not appropriate because the newly-discovered evidence pertained only to the expert's "credibility, not his qualifications to testify as an expert." *Id.*

However, the Wisconsin Supreme Court reversed, holding that there existed a reasonable probability that, had the jury discovered that the expert had lied about his credentials, it would

have had a reasonable doubt as to the defendant's guilt; thus, the court vacated the defendant's conviction and remanded for a new trial. *Id.* at 56. The court cited *Giglio v United States*, 405 US 150, 154, 92 S Ct 763 (1972), for the proposition that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule...A new trial is required if the false testimony could...in any reasonable likelihood have affected the judgment of the jury." *Id.* at 154. In *Giglio*, the United States Supreme Court held that prosecution's failure to inform the jury that a witness had been promised not to be prosecuted in exchange for his testimony was a due process violation that required a new trial for the defendant.

Similarly, in *State v Abi-Sarkis*, 535 NE2d 745 (Ohio Ct App 1988), the Ohio Court of Appeals granted a new trial based on newly-discovered evidence that an alleged rape victim's deposition testimony in the civil case following the criminal case contradicted her trial testimony regarding the description of how the rape occurred. In *Abi-Sarkis*, the defendant priest was convicted of rape after the victim testified that he had forced her into performing fellatio in his office. After the defendant's trial and conviction, the victim gave testimony during a deposition in a civil suit against the defendant that was inconsistent with her testimony at the criminal trial. *Id.* at 754. Specifically, the alleged victim's testimony changed regarding the circumstances under which she happened to be in the defendant's office and the details of the manner in which the alleged rape occurred. *Id.* The court held that this evidence merited a new trial for the defendant:

> This evidence is not cumulative, and we believe there is a strong probability that it would change the result of a new trial, especially in light of the trial judge's belief that appellant had motive and opportunity. Thus, while the evidence tends to impeach and contradict the evidence previously presented, it does so with regard to the key issues in the case: consent, force, opportunity and

> motive. Accordingly, the trial court abused its discretion in denying appellant's motion for a new trial. *Id.* at 755.

Likewise, in *City of Dayton v Martin*, 539 NE2d 646 (Ohio Ct App 1987), the court found that newly-discovered evidence impeaching the credibility of the state's rebuttal witness could be the basis for a new trial. In *Martin*, the defendant was convicted of assault. One of the prosecution's rebuttal witnesses testified that a witness for the defense had approached him to testify on behalf of the prosecution for money. *Id.* at 647. The prosecution's witness testified that he was employed as a security guard at an air force base. *Id.* However, in support of his motion for a new trial, the defendant filed affidavits from appropriate personnel at the air force base that the witness was not actually employed there. The court held that this sort of impeachment evidence could properly form the basis for a new trial. The court explained that the case law did not establish "a *per se* rule excluding newly discovered evidence as a basis for a new trial simply because that evidence is in the nature of impeaching or contradicting evidence." *Id.* at 648. The court further stated:

> In a case where the newly discovered evidence, though it is impeaching or contradicting in character, would be likely to change the outcome of the trial, we see no good reason not to grant a new trial.

Id.

Similarly, in *State v Strahl*, 768 NW2d 546 (SD 2009), the prosecution proffered the testimony of Aloysius Black Crow, who testified that the defendant had confessed to murder while the two were incarcerated. After trial, the defendant discovered that Black Crow had fabricated another such confession from a different imnate with whom he had been incarcerated. Importantly, Black Crow's testimony was critical to the defendant's conviction because "[w]ithout Black Crow's testimony, there was a paucity of evidence on how the murder

occurred, defendant's connection to the murder weapon, and, ultimately, proof of premeditation." *Id.*

The South Dakota Supreme Court applied a four-part test that is similar to the Michigan test enunciated in *Cress*. *Id.* at 548. One prong of the test required that "the [newly-discovered] evidence is material, not merely cumulative or impeaching" in order to grant a new trial. *Id.* Despite the test's language regarding evidence that is not "merely impeaching" (language not found in the *Cress* test), the *Strahl* court found that "[w]hen new impeachment evidence effectively eradicates the credibility of a witness, the evidence might warrant a new trial. This is particularly true when the prosecution's case relied heavily on the newly-discredited witness." *Id.* at 549. Accordingly, even though the newly-discovered evidence did not directly demonstrate perjury or a fraud on the court, the court affirmed the grant of a new trial based on the newly-discovered evidence that could be used to impeach Black Crow's credibility.

All of these cases, and a great deal of other authority, *see infra* at Argument Section D, stand for the same rule of law: Newly-discovered impeachment evidence that will likely change the outcome of a trial properly forms the basis for a new trial.

In this case, the only evidence linking Grissom to the alleged rape is the testimony of Ylen. Accordingly, if a juror disbelieved Ylen's testimony, the juror would have voted to acquit Grissom. Furthermore, the newly-discovered evidence as to Ylen's conduct in California shows that Ylen is prone to making false statements to law enforcement of a strikingly similar character to the accusations leveled against Grissom in this case. Therefore, the newly-discovered evidence that could be used to impeach Ylen's testimony is not cumulative, but rather is critical to the determination of Grissom's guilt or innocence and warrants a new trial. *See People v George*, No 288032, 2010 WL 1779898 (Mich App, May 4, 2010) (granting new trial based on

newly-discovered evidence in part because new evidence could be used for impeachment purposes and stating that "[i]n evaluating whether the newly-discovered tip sheets could make a different result probable on retrial, we note the importance of the fact that the case against defendant was entirely circumstantial, and that most of the witness testimony was based on 18-year-old memories that often were inconsistent and frequently conflicted."). Accordingly, a new trial should be granted in this case because Grissom's conviction rests entirely on the identification testimony of a single, critical witness whose testimony may be powerfully impeached by the newly-discovered evidence.

Indeed, the logic of *Strahl* applies with equal force in this case. Like *Strahl*, the newly-discovered evidence strongly suggests that the prosecution's most important witness fabricated a suspiciously similar story before the witness testified at the defendant's trial. Like *Strahl*, the newly-discovered evidence can only be used for impeachment purposes and does not directly demonstrate perjury, but nonetheless provides potentially powerful evidence tending to exculpate the defendant. Like *Strahl*, the witness at issue was subject to impeachment to some extent during trial, but the newly-discovered evidence is not cumulative or "merely" impeaching because it calls into question the witness's motives and credibility and could have caused the jury to reject the testimony in its entirety. Like *Strahl*, the witness's testimony was essential to the finding of guilt or innocence – in this case, Ylen's testimony is the only evidence that links Grissom to the crime. There is absolutely no physical or forensic evidence that corroborates Ylen's testimony. There is no evidence to tie Grissom to the ring that Ylen claimed to have recognized. Ylen also failed to identify Grissom during a lineup. In short, without Ylen's testimony, there is no evidence to find that Grissom was the perpetrator of the alleged incident.

Furthermore, the newly-discovered evidence in this case is a particularly powerful brand of impeachment evidence. As one court has noted, "[t]he strength of impeachment evidence falls along a continuum. That a defendant told lies to his teacher in grade school is at one end; that the witness was bribed for his court testimony is at another." *White v Coplan*, 399 F3d 18, 24 (CA 1, 2005). The newly-discovered evidence in this case falls along the latter end of the continuum. The evidence suggests that Ylen was prone to fabricate allegations of sexual assault and other crimes. Ylen's fabricated and other uncorroborated allegations of rape and sexual assault are remarkably similar to what she alleged against Grissom during her testimony in this case: In both instances, she claimed to have been sexually assaulted and raped in broad daylight during the afternoon in an open-air, public parking lot, and she failed to timely report the alleged incident to the police, her husband, or even her friends or other family members. This evidence very likely would have caused the jury to disbelieve Ylen's testimony in its entirety, and, thus, would likely result in Grissom's acquittal were the case tried again. Accordingly, in this case, the Court should hold that newly-discovered impeachment evidence may constitute grounds for the grant of a new trial.

D. Granting a New Trial Based on Newly-Discovered Impeachment Evidence is Wholly Consistent with Federal Precedent

Granting a new trial to defendant who demonstrates that newly-discovered impeachment evidence is material, probative, exculpatory, and determinative of innocence or guilt is consistent with federal court precedent. Federal courts, consistent with the standard articulated by this Court in *Cress,* have consistently held that whether a new trial is warranted based on newly-discovered impeachment evidence depends upon an assessment of its probative value in the context of the particular case under consideration.

Various federal courts, like courts in Michigan, have held that "general" impeachment evidence which could merely serve to diminish the credibility of a witness's testimony that is also supported by other probative evidence linking the defendant to the crime may not be sufficient to merit a new trial. *See, e.g., White v Coplan,* 399 F3d 18, 24 (CA 1, 2005). Thus, "[t]he practice has been to deny new trials where the only newly-discovered evidence was impeaching. But the practice should not be taken to imply a rule that even if the defendant proves that his conviction almost certainly rests on a lie, the [trial] judge is helpless to grant a new trial." *United States v Taglia*, 922 F3d 18, 24 (CA 7, 1991).

Indeed, the relevant case law indicates that newly-discovered impeachment evidence should be evaluated in the context of the entire record. As one court has explained, "long experience has shown that newly discovered evidence that is *merely* impeaching is unlikely to reveal that there has been a miscarriage of justice. There must be something more, i.e. a factual link between the heart of the witness's testimony at trial and the new evidence. This link must suggest directly that the defendant was convicted wrongly." *United States v Quiles*, 618 F3d 383, 392 (CA 3, 2010) (emphasis in original).

Where the most important evidence linking a defendant to an alleged crime comes from the testimony of a critical witness, that witness's credibility is of singular importance to the result reached at trial. As such, a new trial should be granted when newly-discovered evidence may be used to impeach the most critical testimony linking the defendant to the crime. Courts from numerous jurisdictions have routinely held that a trial court is empowered to grant a new trial based on impeachment evidence under such circumstances. *See, e.g., White,* 399 F3d at 24 (CA 1, 2005) ("White's evidence was not merely 'general' credibility evidence... Many jurors would regard a set of similar past charges by the girls, if shown to be false, as very potent proof in

White's favor."); *United States v Davis*, 960 F2d 820 (CA 9, 1992) ("If newly-discovered evidence establishes that a defendant in a narcotics case has been convicted solely on the uncorroborated testimony of a crooked cop involved in stealing drug money, the 'interest of justice' would support a new trial under Rule 33."); *United States v Fried*, 486 F2d 201 (CA 2, 1973) (where prosecution's case of unlawful sale of stolen goods rested almost entirely on one witness' testimony and it was clear that if indictment against him for possession of other stolen goods had been revealed, his credibility would probably have suffered a severe blow, failure to disclose to defense the fact of indictment entitled defendant to new trial); *United States v Atkinson*, 429 F Supp 880 (EDNC, 1977) (granting new trial in favor of defendant where prosecution witness, who testified that he had only one conviction and had not been paid for his undercover informer work, had actually been convicted of numerous offenses, including court martial convictions, and had been paid for informer work); *United States v Lipowski*, 423 F Supp 864 (DNJ, 1976) (defendants were entitled to new trial on grounds of newly-discovered impeachment evidence that telephone conversation which was tape recorded by main government witness, and which purportedly conveyed a threat by one defendant, was made at the direction of the witness by person reading a prearranged script, since such evidence would have impeached the main witness' credibility at defendants' trial and shown that he may have tampered with other tapes introduced in evidence, thereby casting serious doubt on the authenticity of such tapes); *United States v Gordon*, 246 F Supp 522 (DDC, 1965) (impeachment evidence as to complaining witness' prior petty larceny conviction met requirement that newly-discovered evidence be material on motion for new trial where it was disputed who was robber and who was victim); *People v Gantt*, 786 NYS 2d 492 (NY App Div, 2004) (granting new trial where prosecution failed to disclose prior inconsistent testimony from its main witness).

E. A *Per Se* Rule Against Granting A New Trial Based On Newly-Discovered Impeachment Evidence Raises Troubling Constitutional Concerns

A *per se* rule prohibiting a trial court from granting a new trial based on newly-discovered impeachment evidence would subject prosecutors to perverse incentives and raise troubling constitutional and ethical concerns. First, the Confrontation Clause of the Sixth Amendment, like the analogous provision contained in the Michigan Constitution, affords criminal defendants a constitutional right to confront, i.e. cross examine, the alleged accuser and any witness who testifies against him about their accusations. *People v Watkins*, 438 Mich 627, 650 (1991); *People v Hackett*, 421 Mich 338, 348 (1984); U.S. Const., Am. VI; Const. 1963, Art. 1§ 20. Imposing a rule against granting a new trial based on newly-discovered impeachment evidence could deprive criminal defendants a reasonable opportunity to test the truth of a witness' testimony.

In this vein, this Court has recognized that, with respect to impeachment evidence in a rape case, evidence of an alleged victim's prior sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes. *People v Hackett*, 421 Mich 338, 348, 365 NW2d 120 (1984). However, the *Hackett* Court went on to state:

> We recognize that ***in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation.*** For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, ***the defendant should be permitted to show that the complainant has made false accusations of rape in the past.***

Id. (emphasis added and citations omitted). In short, the *Hackett* Court recognized that exclusion of impeachment evidence – and specifically impeachment evidence pertaining to previous false

accusations of similar conduct – could "unconstitutionally abridge the defendant's right to confrontation." *Id.* at 349. Similar Confrontation Clause concerns apply to a blanket prohibition against granting a new trial in cases where such evidence comes to light only after trial. Because previous false accusations of a similar alleged crime is central to defendants' rights of confrontation, a blanket rule excluding such evidence would seriously undermine the right of confrontation and raise troubling constitutional questions.

Furthermore, courts universally recognize that it is appropriate to grant a new trial in cases where the prosecution withholds impeachment evidence in violation of its obligations under *Brady v Maryland*, 373 US 83, 83 S Ct 1194 (1963). Under *Brady* – which was itself an impeachment evidence case – impeachment evidence must be disclosed along with any other evidence that may tend to exculpate a defendant. *See United States v Bagley*, 473 U.S. 667, 676 (1985); *United States v Price*, 566 F3d 900 (CA 9, 2009) (granting new trial based on government's failure to disclose impeachment evidence of key witness's prior arrests for fraudulent conduct and finding that had this impeachment evidence been disclosed, "there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment" regarding the defendant's guilt); *United States v Austin*, 99 FRD 292, 302 (WD Mich, 1993) ("Where credibility of a witness is critical to or determinative of the verdict of guilt or innocence, impeachment evidence which is suppressed by the Government may be of sufficient materiality to require a new trial.").

These decisions recognize that it may be appropriate to grant a new trial when impeachment evidence is unavailable at the time of trial because of the prosecution's deliberate or inadvertent failure to disclose such evidence. There is no logical reason why the same principle should not apply when the impeachment evidence is unavailable at the time of trial

because it was not yet discovered and could not have been discovered with reasonable diligence. Where credibility of a witness is critical to or determinative of the verdict of guilt or innocence, newly-discovered impeachment evidence may be of sufficient materiality to require a new trial, and it should make no difference whether the impeachment evidence was withheld or not yet discovered. It would make little sense to impose a rule by which such evidence is deemed sufficiently important that it must be disclosed by the prosecution prior to trial, but at the same time is deemed to be of so little importance that it can never result in any relief for a defendant if discovered after trial.

Where the testimony of a witness, like Ylen, was critical to or determinative of the verdict of guilt or innocence, newly-discovered evidence impeaching that testimony is sufficient to require a new trial. Hence, similarly-situated defendants like Grissom will be deprived of his right to confrontation and due process protected by both the United States and Michigan constitutions were this court to hold that newly-discovered impeachment evidence cannot under any circumstances provide sufficient grounds for grant of a new trial.

CONCLUSION

For all of the above-stated reasons, the Innocence Network respectfully requests that this Court reverse the decision of the Michigan Court of Appeals and hold that newly-discovered impeachment evidence may form the basis for a new trial if the new evidence satisfies the *Cress* standard.

Respectfully submitted,

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