Michigan Law Review

Volume 113 | Issue 8

2015

Disentangling Michigan Court Rule 6.502(G)(2): The "New Evidence" Exception to the Ban on Successive Motions for Relief from Judgment Does Not Contain a Discoverability Requirement

Claire V. Madill
University of Michigan Law School

NOTE

Disentangling Michigan Court Rule 6.502(G)(2): The "New Evidence" Exception to the Ban on Successive Motions for Relief from Judgment Does Not Contain a Discoverability Requirement

Claire V. Madill[*]

Michigan courts are engaging in a costly interpretative mistake. Confused by the relationship between two distinct legal doctrines, Michigan courts are conflating laws in a manner that precludes convicted defendants from raising their constitutional claims in postconviction proceedings. In Michigan, a convicted defendant who wishes to collaterally attack her conviction must file a 6.500 motion. The Michigan Court Rules generally prohibit "second or subsequent" motions. Nonetheless, section 6.502(G)(2) permits a petitioner to avoid this successive motion ban if her claim relies on "new evidence that was not discovered" before her original postconviction motion. Misguided by the similarity between the language of section 6.502(G)(2) and the Michigan Supreme Court's opinion in People v. Cress*, Michigan courts have started conflating the four-prong* Cress *legal standard with section 6.502(G)(2)'s "new evidence" exception to the ban on successive motions. This conflation imposes an additional discoverability element on the "new evidence" exception: a court will dismiss a petitioner's motion as successive if the petitioner could have discovered the evidence underlying the motion through the exercise of reasonable diligence. This Note demonstrates that the conflation of section 6.502(G)(2) and the* Cress *standard, and the resulting imposition of an additional discoverability requirement on the "new evidence" exception, is plainly wrong. It contradicts the text and structure of the Michigan Court Rules and imposes unintended adverse consequences on criminal defendants seeking to vindicate their constitutional rights.*

Table of Contents

* J.D. Candidate, May 2015, University of Michigan Law School. I would like to thank Imran Syed for inspiring me to tackle this issue and for sharing his 6.500 expertise. I am eternally grateful to Adam Beagle for always supporting me and for putting up with the number of times I have said the word "6.500." I am thankful to Matt McCurdy and Eve Brensike Primus for helping me improve this piece. This Note is dedicated to all of my past and present clients for their continual inspiration.

Introduction

An alarming trend has emerged in postconviction litigation in the state of Michigan. Michigan courts have become confused by the relationship between two distinct legal doctrines that happen to share similar language. This confusion has led Michigan courts to conflate two separate legal tests. In doing so, courts have imposed significant unintended and adverse consequences on criminal defendants.

The first of the two legal doctrines that courts conflate involves the procedures governing postconviction litigation. Like all states, Michigan recognizes that a criminal conviction has serious ramifications for a person's liberty and other interests.[1] Consequently, Michigan created a set of court rules, known collectively as subchapter 6.500, which outlines the procedures a prisoner may use to challenge her conviction, even after her trial and direct appeal have ended.[2] Legislators drafted these rules to accommodate competing interests. On one hand, Michigan recognizes that litigation must end at some point and consequently imposes a number of procedural barriers that may prevent review of a petitioner's claim.[3] At the same time, Michigan

1. *See* Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 Ala. L. Rev. 421, 441 (1993). *See generally* Inst. of Continuing Legal Educ., Collateral Consequences of a Criminal Conviction, January 2015 Update (Tracey W. Brame ed., 2015); Miriam Aukerman, Legal Aid of W. Mich., Collateral Consequences of Criminal Convictions: A Legal Outline for Michigan (2008), http://reentry.mplp.org/reentry/images/3/39/SADO_Legal_Outline_Kalamazoo.doc (discussing the consequences of convictions in Michigan for employment, housing, and public benefits).

2. Mich. Ct. R. 6.501–.509; *see* Stuart G. Friedman, *Hurdling the 6.500 Barrier: A Guide to Michigan Post-Conviction Remedies*, 14 T.M. Cooley L. Rev. 65, 65 (1997).

3. *See* People v. Reed, 535 N.W.2d 496, 503 (Mich. 1995) ("Before [the adoption of Subchapter 6.500], the procedure for collateral review of criminal convictions in Michigan did

recognizes that the costs of postconviction litigation and finality are outweighed by the needs to protect individual rights and ensure the litigation of colorable constitutional claims.[4] Subchapter 6.500's rules governing when a convicted defendant can file a successive postconviction motion exemplify this balance. The rules provide that under most circumstances, a defendant can file only one postconviction 6.500 motion.[5] This rule aims to reduce the amount of postconviction litigation.[6] At the same time, the rules permit a defendant to bring a "second or subsequent" 6.500 motion if she has "new evidence" that was not previously discovered. Michigan adopted this new evidence exception to ensure that at least some successive motions raising colorable claims prevail. This new evidence exception to the ban on successive motions, codified in section 6.502(G)(2), is the first of the two legal doctrines that Michigan courts are confusing.

The second of the two legal doctrines is called a *Cress* "newly discovered evidence" claim.[7] The Michigan Supreme Court acknowledged that sometimes new evidence emerges after trial that undermines a defendant's conviction.[8] For example, a victim may recant,[9] DNA tests may be conducted,[10] or a new scientific breakthrough might occur.[11] To provide redress for a defendant with newly discovered evidence that casts doubt on her conviction, the court outlined a legal claim for relief in *People v. Cress*.[12] *Cress* established that if a defendant's evidence satisfies four elements, then she is entitled to a new trial "on the basis of newly discovered evidence."[13]

---

not make any provision for finality of judgments. As a consequence, defendants could, and did, repeatedly seek relief without limitation."); Friedman, *supra* note 2, at 65 ("[6.500 procedures] replaced an equitable system of post-conviction relief with a more rigid approach that places many hurdles in a criminal defendant's path.").

4. *See* Friedman, *supra* note 2, at 85–86 ("[Section 6.508(D)(3)'s 'actual innocence' exception] recognize[s] that the societal interest of insuring compliance with state procedural rules cannot outweigh the societal interest in preventing the conviction of the innocent."); *see also* Massaro v. United States, 538 U.S. 500, 504 (2003) (noting that courts have interests in conserving judicial resources and in the finality of judgments); Hutton, *supra* note 1, at 426 (noting the tension between vindication of individual rights and concerns of comity and finality).

5. MICH. CT. R. 6.502(G)(1).

6. *Cf.* Nicholas Matteson, Note, *Feeling Inadequate?: The Struggle to Define the Savings Clause in 28 U.S.C. § 2255*, 54 B.C. L. REV. 353, 386 (2013) ("[T]he successive motion bar [of 28 U.S.C. § 2255] sought to eliminate[ ] prisoners filing repeated motions arguing the same claim or withholding claims in order to receive multiple rounds of judicial review.").

7. People v. Cress, 664 N.W.2d 174 (Mich. 2003).

8. *See id.* at 182.

9. *See, e.g.*, People v. Canter, 496 N.W.2d 336, 340–42 (Mich. Ct. App. 1992) (noting that a victim's recantation testimony served as the basis of a petitioner's newly discovered evidence claim).

10. Caitlin Plummer & Imran Syed, *"Shifted Science" and Post-Conviction Relief*, 8 STAN. J. C.R. & C.L. 259, 288 n.136 (2012).

11. *See id.* at 287–89.

12. 664 N.W.2d 174 (Mich. 2003).

13. *Cress*, 664 N.W.2d at 182.

Although the term "newly discovered evidence" uses similar language to the section 6.502(G)(2) "new evidence" exception to the ban on successive motions, the two doctrines are quite distinct. Subchapter 6.500, including section 6.502(G)(2), operates as a set of *procedural* rules and applies every time a convicted defendant challenges her conviction in postconviction proceedings.[14] In contrast, *Cress* establishes a *substantive* claim for relief.[15] If a convicted defendant has newly discovered evidence, she is entitled to a new trial as long as she meets the four elements of *Cress*.[16] As a substantive doctrine, a *Cress* "newly discovered evidence" claim can be raised at any time after conviction. A defendant does not necessarily have to raise her *Cress* claim through a 6.500 motion; she can also raise it on direct appeal or in a motion for a new trial immediately after her conviction.[17]

Although these two legal standards are distinct, Michigan courts frequently apply the *Cress* four-prong test to successive 6.500 motions. Judges apply this test even if a petitioner does not raise a *Cress* newly discovered evidence claim but rather asserts a constitutional claim, such as an allegation that her counsel was unconstitutionally ineffective or that the state suppressed favorable evidence in violation of due process.[18] Because one of the elements of *Cress* is that "the party could not, using reasonable diligence, have discovered and produced the evidence at trial,"[19] this conflation imposes an additional discoverability element on section 6.502(G)(2)'s new

14. *See* Friedman, *supra* note 2, at 65 (describing subchapter 6.500 as "formal procedures for post-conviction relief").

15. *See* Plummer & Syed, *supra* note 10, at 287 (describing *Cress* as a "common appellate claim[ ]" that may warrant relief).

16. *See id.*

17. *See, e.g.*, People v. Bryant, Nos. 306602, 318765, 2014 WL 4214849 (Mich. Ct. App. Aug. 26, 2014) (dealing with a *Cress* newly discovered evidence claim during a petitioner's appeal as of right).

18. *See, e.g.*, People v. Swain (*Swain II*), No. 314564, 2015 WL 521623, at *1–4 (Mich. Ct. App. Feb. 5, 2015) (citing *Cress* and denying a new trial because defendant failed to exercise due diligence in investigating a potential witness before trial); People v. Vinson, No. 303593, 2012 WL 3046236, at *6–7 (Mich. Ct. App. July 26, 2012) (citing *Cress* and denying a new trial because defendant should have sought independent testing at trial); People v. Swain, 794 N.W.2d 92, 102 (Mich. Ct. App. 2010) (noting, without addressing whether the trial court acted properly, that the court imposed a discoverability requirement on the section 6.502(G)(2) new evidence exception); People v. Freeman, No. W-86-128340-FC, slip op. at 4–5, 9–14 (Mich. Cir. Ct. Nov. 10, 2014) ("[T]he generally applied newly discovered evidence standard set forth in *People v Cress* has been regularly applied to motions brought under MCR 6.502(G)(2)." (citation omitted)); People v. Johnson, No. 99-005393-01, slip op. at 2 (Mich. Cir. Ct. Apr. 23, 2012) (applying *Cress* where defendant claimed prosecutors suppressed evidence), *appeal denied*, No. 99-005393-FC (Mich. Ct. App. May 30, 2013), *remanded*, 855 N.W.2d 750 (Mich. 2014); People v. Woods, No. 03-11636, slip op. at 6–10 (Mich. Cir. Ct. June 17, 2011) (repeatedly conflating *Brady* with the "newly discovered evidence" test and denying petitioner's *Brady* claims on the ground that the proffered evidence was not "newly discovered evidence" within the meaning of *Cress*), *appeal denied*, 858 N.W.2d 423 (Mich. 2015).

19. People v. Cress, 664 N.W.2d 174, 182 (Mich. 2003) (quoting People v. Johnson, 545 N.W.2d 637, 638 n.6 (Mich. 1996)).

evidence exception.[20] This engrafting of *Cress* into the Michigan Court Rules governing postconviction proceedings has enormous consequences for a convicted defendant seeking to overturn her unconstitutional conviction on the basis of a non-*Cress* claim.[21]

This Note dispels the erroneous notion that a petitioner's diligence is relevant to determining whether the motion raises new evidence, permitting the petitioner to avoid the general ban on successive motions. Part I details the law relevant to this particular statutory problem: subchapter 6.500 of the Michigan Court Rules and the *Cress* newly discovered evidence standard. Part II outlines the problem and explains the appropriate definition of section 6.502(G)(2)'s new evidence exception. A court should permit a petitioner to avoid the ban on successive motions as long as she alleges "a claim of new evidence that was not [previously] discovered,"[22] regardless of whether the evidence was *discoverable* at an earlier time. Part II explains why the imposition of *Cress*—that is, a diligence requirement—is improper when analyzing whether a 6.500 motion should be denied as successive, notwithstanding unpublished Michigan court opinions to the contrary. Courts that apply the *Cress* test when deciding whether a 6.500 motion falls within section 6.502(G)(2)'s new evidence exception perpetuate a misunderstanding that prevents criminal defendants from vindicating their constitutional rights.

I. Relevant Law

The statutory interpretation mistake outlined in this Note stems from confusion over the complicated interaction between two separate provisions of Michigan law: subchapter 6.500 of the Michigan Court Rules (specifically, section 6.502(G)(2)) and the Michigan Supreme Court's ruling in *Cress*. This Part gives a brief overview of these two provisions of Michigan law. It concludes by explaining the differences and interaction between section 6.502(G)(2) and *Cress*.

A. *General Overview of Michigan's Procedures for Postconviction Relief*

Subchapter 6.500 is a set of Michigan Court Rules outlining the procedures a petitioner must follow if she wishes to collaterally attack her conviction.[23] Under these rules, a petitioner with a claim of legal error may file a postconviction motion for relief from judgment after the conclusion of

20. *See, e.g.*, *Swain II*, 2015 WL 521623, at *2 (improperly conflating *Cress* and section 6.502(G)(2) and denying a 6.500 motion as successive for failing "to exercise the required reasonable diligence").

21. *See infra* Section II.E.1.

22. Mich. Ct. R. 6.502(G)(2).

23. Mich. Ct. R. 6.501–.509; *see also* Friedman, *supra* note 2, at 67–70 (describing the exclusivity of the 6.500 procedure). A 6.500 motion is the only way for a convicted defendant to collaterally attack her conviction in a Michigan state court. Mich. Ct. R. 6.501 cmt. (1989) ("Subchapter 6.500 . . . provides the exclusive means to challenge convictions in Michigan courts for a defendant who has had an appeal by right or by leave, who has unsuccessfully

the direct appeal process.[24] The most commonly alleged substantive claims in 6.500 motions are ineffective assistance of counsel,[25] the state's failure to disclose exculpatory and material evidence to the defense (*Brady* violations),[26] and newly discovered evidence under *Cress*.[27] The text of subchapter 6.500 does not limit a petitioner to these specific claims, however; she is free to raise other claims such as sentencing issues.[28]

Subchapter 6.500 specifies in detail the various procedures governing the postconviction challenge process. For example, various subsections lay out the requirements for the content of a 6.500 motion, describe how to properly file and serve a 6.500 motion, explain the trial court's duties upon receiving a 6.500 motion, and grant the judge authority to order an expansion of the record,[29] an evidentiary hearing,[30] or an oral argument.[31]

Two sections of subchapter 6.500 are especially important for the purposes of this Note. First, section 6.508(D) restricts when a 6.500 motion may be granted, regardless of the underlying substantive claim or the number of 6.500 motions previously filed. Under section 6.508(D)(3), a court may not grant relief if the motion alleges grounds for relief that could have been raised on appeal or in a prior 6.500 motion, unless the petitioner demonstrates good cause and actual prejudice. The good cause requirement may be waived if the court concludes there is a significant possibility that the petitioner is innocent of the crime.[32]

Second, section 6.502(G) deals with the possibility of the same petitioner filing multiple 6.500 motions. Like many postconviction regimes, section 6.502(G)(1) establishes the general rule that only one postconviction motion for relief from judgment is permitted.[33] But subchapter 6.500 does

---

sought leave to appeal, or who is unable to file an application for leave to appeal to the Court of Appeals because 18 months have elapsed since the judgment.").

24. MICH. CT. R. 6.502(A).

25. *See, e.g.*, People v. Reed, 535 N.W.2d 496 (Mich. 1995); People v. Vinson, No. 303593, 2012 WL 3046236, at *1 (Mich. Ct. App. July 26, 2012); People v. Love, No. 202344, 1998 WL 1990445, at *1 (Mich. Ct. App. July 31, 1998).

26. Brady v. Maryland, 373 U.S. 83 (1963); *see, e.g.*, People v. Freeman, 839 N.W.2d 492 (Mich. 2013); People v. Jahner, No. 255405, 2005 WL 119818, at *2 (Mich. Ct. App. Jan. 20, 2005); *Love*, 1998 WL 1990445, at *1.

27. *See, e.g.*, *Vinson*, 2012 WL 3046236, at *1; People v. Swain, 794 N.W.2d 92 (Mich. Ct. App. 2010); People v. Taylor, No. 284331, 2008 WL 5197084, at *2 (Mich. Ct. App. Dec. 11, 2008); People v. McSwain, 676 N.W.2d 236 (Mich. Ct. App. 2003); *Love*, 1998 WL 1990445, at *1.

28. *See e.g.*, People v. Kimble, 684 N.W.2d 669 (Mich. 2004) (sentencing scoring error); People v. Carpentier, 521 N.W.2d 195 (Mich. 1994) (*Gideon* violation); People v. Watroba, 483 N.W.2d 441 (Mich. Ct. App. 1992) (illusory plea agreement).

29. MICH. CT. R. 6.507.

30. MICH. CT. R. 6.508(C).

31. MICH. CT. R. 6.508(B).

32. MICH. CT. R. 6.508(D)(3).

33. MICH. CT. R. 6.502(G)(1) ("[O]ne and only one motion for relief from judgment may be filed with regard to a conviction."); *see also* 28 U.S.C. § 2244(b)(1) (2012) ("A claim presented in a second or successive habeas corpus application . . . that was presented in a prior

not categorically ban all "second or subsequent" motions.[34] Instead, the rules permit a successive 6.500 motion if the motion is "based on . . . a claim of new evidence that was not discovered before the first such motion."[35] For example, if a petitioner discovers after her first 6.500 motion that her counsel failed to properly investigate the victim's time of death,[36] the petitioner could file a successive 6.500 motion claiming new evidence of ineffective assistance of counsel without violating section 6.502(G)(1). Overall, section 6.502(G)(2)'s new evidence exception allows a petitioner to bypass the successive motion ban.

B. Cress*: Michigan's Legal Standard for "Newly Discovered Evidence"*

In 2003, the Michigan Supreme Court decided *Cress*, the decision that laid out the standard governing when "a new trial [is] to be granted on the basis of newly discovered evidence."[37] Petitioner Cress was convicted of

application shall be dismissed."); People v. Morgan, 817 N.E.2d 524, 527 (Ill. 2004) ("[The Illinois] Post-Conviction Hearing Act contemplates the filing of only one postconviction petition."). Prior to the adoption of subchapter 6.500, no such prohibition existed. Friedman, *supra* note 2, at 94–95. Because this restriction did not exist prior to August 1, 1995, a petitioner who filed one or more motions before that date is permitted to file one more motion without it being considered successive. *Id.* at 95. So, if a petitioner filed a motion for postconviction relief before August 1, 1995, and then files another motion after that date, the reviewing judge should skip the restrictions of section 6.502(G)(1) and move on to reviewing the merits of the motion under section 6.508(D). *Id.*; *cf.* People v. Swain, 794 N.W.2d 92, 107 (Mich. Ct. App. 2010) ("[A]fter the trial court has determined that the successive motion falls within one of the two exceptions [in Section 6.502(G)(2),] . . . [then] MCR 6.508 and the 'good cause' and 'actual prejudice' requirements of MCR 6.508(D)(3) become relevant.").

34. MICH. CT. R. 6.502(G)(2).

35. *Id.* A petitioner can also avoid the general bar on successive 6.500 motions by demonstrating a retroactive change in law that occurred after the first motion for relief from judgment. *Id.* While no published appellate authority in Michigan has permitted a petitioner's successive motion to proceed under this retroactive change in law exception, a few cases hint at circumstances that would allow it. *See* People v. Jones, No. 1979-1104-FC, 2011 WL 7404445 (Mich. Cir. Ct. Dec. 21, 2011) (applying the retroactivity exception to the ban on successive motions to permit a petitioner to raise a claim in a 6.500 motion that his life without parole sentence violated the Eighth Amendment); *see also* People v. Stovall, 764 N.W.2d 786, 786–87 (Mich. 2009) (Kelly, C.J., dissenting) (arguing that the petitioner's 6.500 motion was improperly denied as successive under section 6.502(G)(1) when the petitioner relied on a federal district court case holding that a parole board policy change violated the Ex Post Facto Clause when retroactively applied to prisoners); *In re* Kadzban, 746 N.W.2d 304, 304–05 (Mich. 2008) (Corrigan, J., dissenting) (acknowledging that because the Michigan Supreme Court's decision in *People v. Cornell*, 646 N.W.2d 127 (Mich. 2002), was partially retroactive, some petitioners could take advantage of the retroactive change in law exception, but concluding that this exception did not apply to the petitioner because *Cornell* was decided before the petitioner's first 6.500 motion). The retroactive change in law and new evidence exceptions are thus the only exceptions to Michigan's ban on successive 6.500 motions. *See, e.g.*, *Swain*, 794 N.W.2d at 107.

36. *See, e.g.*, People v. Robinson, No. 298929, 2013 WL 5762991, at *4 (Mich. Ct. App. Oct. 24, 2013).

37. People v. Cress, 664 N.W.2d 174, 182 (Mich. 2003).

murder, but an imprisoned serial killer later confessed to the same murder.[38] Because his conviction had already been affirmed on appeal, Cress filed a 6.500 motion, arguing that the serial killer's confession constituted newly discovered evidence that undermined his original conviction.[39] A newly discovered evidence claim was the only substantive argument before the Michigan Supreme Court; Cress did not raise any constitutional claims, such as a *Brady* or ineffective assistance of counsel claim.[40]

Cress lost, with the Michigan Supreme Court holding "that the trial court did not abuse its discretion in denying defendant's motion for a new trial on the asserted ground of newly discovered evidence."[41] In doing so, the Michigan Supreme Court laid out the four-prong test:

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show: (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.[42]

Because the Michigan Supreme Court agreed with the trial court that the confession "would not make a different result probable on retrial," the court denied Cress relief.[43]

C. *Comparing* Cress *with Section 6.502(G)(2)*

The purpose of this Note is to explain that *Cress*'s newly discovered evidence standard and section 6.502(G)(2)'s new evidence exception to the ban on successive 6.500 motions are *not* the same. Newly discovered evidence from *Cress* is a *substantive* legal doctrine that permits a defendant to attack her conviction.[44] In this respect, newly discovered evidence is analogous to a *Brady* or ineffective assistance of counsel claim. All three represent legal claims that a defendant can employ to challenge her conviction.[45] Case law has established the elements a defendant must meet before she is entitled to relief for each type of claim. For example, the Michigan Supreme Court

38. *Id.* at 176–77.

39. *Id.* at 177.

40. *Id.*

41. *Id.* at 182.

42. *Id.* (quoting People v. Johnson, 545 N.W.2d 637, 638 n.6 (Mich. 1996)).

43. *Id.* at 183.

44. *See* People v. Grissom, 821 N.W.2d 50, 59 (Mich. 2012) (noting that a petitioner is entitled to a new trial if she meets the four elements of a newly discovered evidence claim).

45. *See* People v. Love, No. 202344, 1998 WL 1990445 (Mich. Ct. App. July 31, 1998) (granting relief on newly discovered evidence, ineffective assistance of counsel, and *Brady* claims); Plummer & Syed, *supra* note 10, at 280–89 (acknowledging these three claims as viable avenues to attack a conviction); *cf.* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 611 (2009) (noting that in Wisconsin, an appellate attorney can protect an innocent petitioner during the appellate process by seeking a new trial on the basis of newly discovered evidence, ineffective assistance of counsel, or a *Brady* claim).

provided that a defendant may prevail on a *Brady* claim if "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material."[46] Similarly, *Strickland v. Washington* established that a defendant is entitled to a new trial due to ineffective assistance of counsel if she demonstrates the "two components" of deficient performance and prejudice.[47] *Cress* identifies the four elements a defendant must satisfy before she is entitled to relief on the basis of newly discovered evidence in Michigan.[48] The substantive doctrine of newly discovered evidence serves as a catchall claim to cover situations in which new evidence undermines confidence in an original conviction, but no constitutional violation occurred.[49]

In contrast, subchapter 6.500 is merely one *procedural* vehicle through which a defendant can raise one of these substantive legal claims.[50] There is no such thing as a 6.500 claim in and of itself; a petitioner must allege some underlying substantive claim before filing her motion.[51] While this underlying claim can be a newly discovered evidence claim (to which *Cress* would apply),[52] it could also be a *Brady* claim, an ineffective assistance of counsel claim, a claim of prosecutorial misconduct, or some other claim.[53] As part of subchapter 6.500, section 6.502(G)(2)'s new evidence exception is *not* a substantive legal claim, but rather an exception to a procedural requirement that would otherwise bar relief.[54]

An outline of the analysis a trial judge should follow when addressing a successive 6.500 motion further helps elucidate this distinction between a *Cress* newly discovered evidence claim and the section 6.502(G)(2) new evidence exception to the ban on successive motions. When analyzing the merits of a successive 6.500 motion, a judge engages in a three-step inquiry.[55] First, she determines whether the motion falls within an exception to the general prohibition on successive motions.[56] If not, the judge must dismiss

46. 845 N.W.2d 731, 735 (Mich. 2014); *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963).

47. 466 U.S. 668, 687 (1984).

48. *Cress*, 664 N.W.2d at 182.

49. *Cf.* Plummer & Syed, *supra* note 10, at 280–81, 283–84, 287–89 (arguing that constitutional claims, such as ineffective assistance of counsel, *Brady*, and prosecutorial misconduct are ill-suited for an actually innocent petitioner convicted on the basis of junk science, but that a newly discovered evidence claim "possibly works").

50. *See supra* note 14 and accompanying text.

51. *See* MICH. CT. R. 6.502(C)(12) (noting that a 6.500 motion must include "[t]he grounds for the relief requested").

52. *See, e.g.*, People v. Swain, 794 N.W.2d 92 (Mich. Ct. App. 2010).

53. *See, e.g.*, People v. Love, No. 202344, 1998 WL 1990445 (Mich. Ct. App. July 31, 1998) (granting relief on newly discovered evidence, ineffective assistance of counsel, and *Brady* claims).

54. *See* MICH. CT. R. 6.502(G)(1) (banning successive motions).

55. If a judge is analyzing an initial 6.500 motion, rather than a subsequent one, she would skip this first step.

56. *See* MICH. CT. R. 6.502(G)(1).

the motion as successive.[57] The judge should not even reach the merits of the substantive claim or the issue of whether the issue could have been raised on appeal.[58] In contrast, if the petitioner alleges an exception, the judge continues on to the second step.[59]

At this juncture, the judge examines the procedural merits of the motion under 6.508(D).[60] If the petitioner alleges grounds for relief that could have been raised earlier, then the judge must deny the motion.[61] However, if the petitioner alleges grounds that could not have been raised earlier or, alternatively, meets the cause/innocence and prejudice standard, then the trial court moves on to the third and final inquiry: examination of the substantive claim underlying the motion.[62] For example, if the petitioner alleges that her Sixth Amendment right to effective counsel was denied, the court then analyzes whether the petitioner has satisfied *Strickland*'s performance and prejudice prongs.[63] Similarly, if the petitioner raises a newly discovered evidence claim,[64] the court determines if the petitioner has met the four *Cress* elements.[65]

If the petitioner falls within a section 6.502(G)(2) exception and satisfies her burden with regard to both the procedural requirements of section 6.508 and the underlying substantive claim, the trial court should grant relief.[66] Overall, section 6.502(G)(2)'s new evidence exception is part of a larger procedural scheme and only applies during the first step of analyzing a 6.500 motion, while the *Cress* newly discovered evidence doctrine constitutes the substantive legal claim underlying the motion and is only relevant during the third step of inquiry.

---

57. *Id.*; *see also Swain*, 794 N.W.2d at 106 (dismissing petitioner's 6.500 motion as successive).

58. *Swain*, 794 N.W.2d at 104, 107 ("Any successive motion that does not assert one of these two exceptions is to be returned to the defendant without filing by the court. . . . Only after the trial court has determined that the successive motion falls within one of the two exceptions do MCR 6.508 and the 'good cause' and 'actual prejudice' requirements of MCR 6.508(D)(3) become relevant.").

59. MICH. CT. R. 6.502(G)(2).

60. *See Swain*, 794 N.W.2d at 107.

61. MICH. CT. R. 6.508(D)(3).

62. *See* People v. Love, No. 202344, 1998 WL 1990445, at *8–12 (Mich. Ct. App. July 31, 1998) (waiving the good cause requirement and analyzing the petitioner's *Brady* claim on the merits, finding "a significant possibility that [petitioner] was innocent of the crime").

63. *See, e.g.*, *id.* at *8.

64. *E.g.*, People v. Canter, 496 N.W.2d 336, 340 (Mich. Ct. App. 1992) (noting that a victim's recantation testimony served as the basis of a petitioner's newly discovered evidence claim).

65. *See supra* note 42 and accompanying text.

66. *See, e.g.*, *Love*, 1998 WL 1990445.

II. Imposing *Cress* or a Discoverability Requirement on Section 6.502(G)(2)'s "New Evidence" Exception is Wrong

Michigan courts have started engrafting the *Cress* standard for newly discovered evidence into section 6.502(G)(2)'s new evidence exception.[67] This conflation is wrong. It contradicts subchapter 6.500's textual structure and finds no support in the *Cress* opinion itself. This inappropriate conflation also imposes adverse consequences on both individual criminal defendants and the criminal justice system generally. The conflation prevents defendants from taking advantage of the cause and innocence exceptions in section 6.508(D)(3), resulting in the denial of successive 6.500 motions that would have otherwise prevailed. More generally, the erroneous conflation undermines the U.S. Supreme Court's and the Michigan Supreme Court's explicit rejections of a diligence requirement in the *Brady* context and the state's obligation to provide constitutionally adequate counsel. Given that federal courts may review a petitioner's claim on the merits, notwithstanding the state court's denial of the motion as successive for failure to exercise due diligence, Michigan has an incentive to fix this conflation now. For these reasons, Michigan courts should cease applying the *Cress* test when analyzing 6.500 motions that do not raise a newly discovered evidence claim.

A. *The Mistake: Courts Conflate* Cress *and Section 6.502(G)(2)*

Perhaps confused by the similar language between section 6.502(G)(2)'s new evidence exception and *Cress*'s establishment of a newly discovered evidence doctrine, several courts have complicated postconviction litigation by erroneously reading a discoverability requirement into section 6.502(G)(2).[68] In a few unpublished opinions, courts have either directly imposed a reasonable diligence requirement[69] or, more commonly, applied the four-prong *Cress* test to the section 6.502(G)(2) new evidence exception.[70] Under the

67. *See* People v. Swain, 794 N.W.2d 92 (Mich. Ct. App. 2010).

68. *See id.*

69. *See, e.g.*, *id.* at 102. Without addressing whether the trial court acted properly, the *Swain* court noted that the trial court imposed a discoverability requirement on the section 6.502(G)(2) new evidence exception by holding "that the exception in MCR 6.502(G)(2) for new evidence did not apply because, with reasonable diligence" trial counsel could have discovered the allegedly new evidence. *Id.*

70. *See, e.g.*, People v. Swain (*Swain II*), No. 314564, 2015 WL 521623, at *1–4 (Mich. Ct. App. Feb 5, 2015); People v. Vinson, No. 303593, 2012 WL 3046236, at *6–7 (Mich. Ct. App. July 26, 2012); People v. Freeman, No. W-86-128340-FC, slip op. at 4–5, 9–14 (Mich. Cir. Ct. Nov. 10, 2014) ("[T]he generally applied newly discovered evidence standard set forth in *People v Cress* has been regularly applied to motions brought under MCR 6.502(G)(2)." (citation omitted)); People v. Johnson, No. 99-005393-01, slip op. at 3 (Mich. Cir. Ct. Apr. 23, 2012); People v. Woods, No. 03-11636, slip op. at 6–10 (Mich. Cir. Ct. June 17, 2011) (repeatedly conflating *Brady* with the newly discovered evidence test and denying petitioner's *Brady* claims on the ground that the proffered evidence was not newly discovered evidence within the meaning of *Cress*).

latter approach, before the court analyzes the merits of a petitioner's successive 6.500 motion, the petitioner must meet the four elements of *Cress*, including that the "the party could not, using reasonable diligence, have discovered and produced the evidence at trial."[71]

The Michigan Court of Appeals had a moment of clarity in *People v. Swain*.[72] *Swain*, the only published opinion discussing this issue, involved a successive 6.500 motion that asserted a substantive *Cress* newly discovered evidence claim.[73] The court briefly discussed the relationship between *Cress*'s discoverability requirement and section 6.502(G)(2).[74] The trial court had (erroneously) held that section 6.502(G)(2)'s new evidence exception did not apply, and therefore the 6.500 should be denied as successive, because the petitioner could have discovered the allegedly new evidence with reasonable diligence.[75] The court of appeals intimated that this construction was wrong, stating that "there [was] merit" to petitioner's claim that neither *Cress* nor a discoverability element applied to section 6.502(G)(2)'s new evidence exception.[76] In other words, the petitioner's 6.500 motion should not be denied as successive if she raises new evidence of her underlying substantive claim, even if this new evidence was *discoverable*.

Despite *Swain*'s illuminating discussion, the improper conflation between section 6.502(G) and *Cress* persists. *Swain*'s discussion of the relationship between the two legal doctrines was dicta, as the Michigan Court of Appeals resolved the successive motion issue on other factual grounds.[77] And *Swain*'s discussion appears to have had little impact, as Michigan courts continue to conflate *Cress* and section 6.502(G)(2).[78]

---

71. People v. Cress, 664 N.W.2d 174, 182 (Mich. 2003) (quoting People v. Johnson, 545 N.W.2d 637, 638 n.6 (Mich. 1996)).

72. 794 N.W.2d 92 (Mich. Ct. App. 2010).

73. *Swain*, 794 N.W.2d at 95–96. Specifically, petitioner Swain represented that the testimony of two witnesses, a neighbor and a school bus driver, would have undermined the complainant's accusations against her. *Id.* at 97. Although the court in *Swain* did not cite *Cress* directly, the court clearly applied the *Cress* analysis, citing instead to *People v. Johnson*, 545 N.W.2d 637 (Mich. 1996), the case from which *Cress* derived the four-factor test. *See supra* note 42 and accompanying text.

74. *Swain*, 794 N.W.2d at 106–07.

75. *Id.* at 102.

76. *Id.* at 106–107.

77. Both Swain and her counsel were aware of the two witnesses at issue before she filed her first 6.500 motion. *Id.* Swain had even raised the issue during trial. *Id.* Thus, even under the petitioner's more generous interpretation of section 6.502(G)(2), Swain's evidence was not "new" because she had already "discovered" its existence. If Swain had not known about the existence of the witnesses until after she filed her successive 6.500 motion, the court would presumably have held that the testimony of those witnesses constituted new evidence permitting Swain's successive 6.500 motion to be analyzed on the merits, regardless of whether she *could* have discovered their testimony.

78. *See, e.g.*, People v. Vinson, No. 303593, 2012 WL 3046236, at *6–7 (Mich. Ct. App. July 26, 2012); People v. Freeman, No. W-86-128340-FC, slip op. at 4–5, 9–14 (Mich. Cir. Ct. Nov. 10, 2014). In a more recent opinion, the Michigan Court of Appeals applied the *Cress* test to section 6.502(G)(2)'s new evidence exception. People v. Swain (*Swain II*), No. 314564, 2015

B. *The Proper Interpretation of Section 6.502(G)(2)*

If section 6.502(G)(2)'s new evidence exception is not the same as *Cress*, then what does it mean? The answer is provided in the text of the rule: the petitioner raises new evidence when she files a motion "based on . . . a claim of new evidence that was not [previously] discovered," regardless of whether the evidence *could* have been discovered.[79] Section 6.502(G)(2) operates as a simple threshold requirement by permitting a court to deny a successive 6.500 motion at the outset ("return without filing")[80] if it raises previously litigated legal claims or relies on the evidence already presented at trial, on appeal, or in a previous motion. It permits a court to quickly sort out obviously litigious or frivolous 6.500 motions that repeatedly raise the same evidence.

Defining section 6.502(G)(2)'s new evidence exception this way does not mean that convicted defendants can file endless 6.500 motions in perpetuity. The evidence must still be "new," meaning that the petitioner did not know about it before.[81] Furthermore, section 6.508(D)(3) prevents endless litigation because a motion can still be denied as a result of the defendant's failure to exercise diligence in discovering the new evidence, unless the cause (or innocence) and prejudice exception applies. Overall, defining the new evidence exception to mean "a claim of new evidence that was

---

WL 521623, at *1–4 (Mich. Ct. App. Feb. 5, 2015). However, this opinion is wholly unpersuasive, and it is not binding. *See* MICH. CT. R. 7.215(C)(1) ("An unpublished opinion is not precedentially binding under the rule of stare decisis."). In violation of both stare decisis and law of the case doctrine, *Swain II* applied *Cress* to section 6.502(G)(2)'s new evidence exception, and by doing so, ignored the published opinion within the same case intimating that section 6.502(G)(2) does not have a discoverability requirement. *See supra* notes 72–77 and accompanying text. Furthermore, the court of appeals's reasoning for applying the *Cress* test was fallacious. The court merely stated:

> Defendant alleges that she has presented the trial court with "new evidence" that was not discovered before her previous motion for relief from judgment, thereby satisfying the newly-discovered-evidence exception in MCR 6.502(G)(2). To determine whether evidence is newly discovered, we apply the test articulated in *People v. Cress* . . . .

Swain II, 2015 WL 521623, at *1. Later in the opinion, addressing whether *Cress* should apply, the court replied: "Defendant has not provided this Court, however, with any authority for the proposition that the standards for evaluating whether evidence is newly discovered for purposes of MCR 6.502(G)(2) are inapplicable in cases involving constitutional claims, nor are we aware of any such authority." *Id.* at *4. This statement is plainly false, as the previous appellate opinion in Swain's *own* case is authority for the proposition that *Cress* does not apply to section 6.502(G)(2). *See Swain*, 794 N.W.2d at 106. Furthermore, the court's own logic works against it: the court provided no precedent, policy reasoning, or indeed any rationale to explain why *Cress*, a substantive test created wholly separate from subchapter 6.500, *should* apply to the new evidence exception to successive motions. *See id.* at *1–9.

79. MICH. CT. R. 6.502(G)(2).

80. MICH. CT. R. 6.502(G)(1).

81. *See supra* note 77 and accompanying text.

not [previously] discovered" does not risk overburdening an already taxed judicial system.[82]

For example, say a defendant files a successive 6.500 motion alleging ineffective assistance of counsel because her trial counsel failed to object to improper character evidence at trial. The motion should be denied as successive. The defendant did not raise new evidence that was not previously discovered within the meaning of section 6.502(G)(2); she was present at her own trial, so she knew the improper testimony was admitted without objection.[83] In contrast, imagine the same defendant files a successive 6.500 motion, again alleging ineffective assistance of counsel, but this time she claims her counsel was ineffective because he was under the influence of cocaine during trial. Assume also that the defendant did not realize her trial counsel was high during her trial and only recently learned about it because her counsel was disbarred for drug use.[84] This *would* be new evidence within the meaning of section 6.502(G)(2), even if a reasonable defendant (or her appellate counsel) could have discovered the lawyer's drug habits, because the defendant only discovered the basis of the ineffectiveness claim after filing her first 6.500 motion. The ban on successive motions would not bar her claim. The rest of this Note explains why this interpretation of section 6.502(G)(2) is correct, while conflating *Cress* and section 6.502(G)(2) is improper.

C. *Subchapter 6.500's Text and Structure*

Imposing the *Cress* test on a successive 6.500 motion contradicts the plain text of section 6.502(G)(2).[85] Section 6.502(G)(2) says nothing about *discoverability*. If the Michigan legislature had wanted to make discoverability relevant, it easily could have. Relying on standards from other postconviction regimes, the legislature could have drafted section 6.502(G) to track federal habeas law, thereby barring successive motions unless the petitioner raises newly discovered evidence[86] or alleges facts "that could not have been

82. *Cf.* Massaro v. United States, 538 U.S. 500, 504 (2003) ("The procedural-default rule . . . conserve[s] judicial resources and . . . respect[s] the law's important interest in the finality of judgments.").

83. *See, e.g.*, *Swain*, 794 N.W.2d at 104 (evidence underlying petitioner's *Cress* claim was not "new evidence" for the purposes of section 6.502(G)(2) when petitioner knew about the evidence at trial).

84. *See, e.g.*, *In re* Lehr, 133 P.3d 1279, 1279 (Kan. 2006) (order of disbarment) ("[Counsel]'s admitted use of cocaine and marijuana during the course of representing a criminal defendant in a felony trial . . . caused a mistrial.").

85. Numerous cases have outlined the basic scheme for statutory interpretation. The Michigan Court of Appeals has held that "[i]nterpretation of a court rule is subject to the same basic principles that govern statutory interpretation." Smith v. Henry Ford Hosp., 557 N.W.2d 154, 156 (Mich. Ct. App. 1996). Accordingly, court rules should be interpreted in a way that gives meaning to each word or phrase. *See* Gen. Motors Corp. v. Erves, 236 N.W.2d 432, 438 (Mich. 1975). An unambiguous court rule is to be enforced as written. People v. Orr, 739 N.W.2d 385, 391 (Mich. Ct. App. 2007).

86. 28 U.S.C. § 2255(h)(1) (2012).

previously discovered through the exercise of due diligence."[87] Instead, the Michigan legislature drafted section 6.502(G)(2) to permit a successive motion merely upon a petitioner's presentation of "a claim of new evidence that was not discovered before the first such motion."[88] Section 6.502(G)(2) makes no mention of "discoverability," "diligence," or "newly discovered evidence."[89] Accordingly, scholars have acknowledged since the adoption of subchapter 6.500 that "[l]iterally, the rule does not interpose a requirement that the [new evidence] could not have been reasonably discovered before the second motion."[90]

Comparing the text of section 6.502(G)(2) and section 6.508(D)(3) strengthens this conclusion. Unlike in section 6.502(G)(2), section 6.508(D)(3) does address the issue of previously discoverable evidence. Section 6.508(D)(3) states that a court may not grant the defendant relief if the motion "alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter unless the defendant demonstrates (a) good cause . . . and (b) actual prejudice."[91] The language of section 6.508(D)(3) requires that a successful claim must not have been one that "could have been raised" (unless cause/actual innocence and prejudice can be shown).[92] In contrast, the text of section 6.502(G) requires only that the evidence was not previously "*discovered*," regardless of whether it was *discoverable*, for a court to consider it.[93]

Imposing a discoverability requirement on section 6.502(G)(2)'s new evidence exception renders aspects of section 6.508(D)(3) null.[94] As explained above, section 6.508(D)(3) imposes a due diligence, or discoverability, requirement on petitioners seeking relief under subchapter 6.500, *unless*

87. *Id.* § 2254(e)(2)(A)(ii).

88. MICH. CT. R. 6.502(G)(2).

89. *Compare* People v. Cress, 664 N.W.2d 174, 182 (Mich. 2003) (holding that a petitioner may not successfully challenge his conviction on the grounds of newly discovered evidence unless the petitioner "*could not . . . have discovered* and produced the evidence at trial" (emphasis added) (quoting People v. Johnson, 545 N.W.2d 637, 638 n.6 (Mich. 1996))), *with* MICH. CT. R. 6.502(G)(2) ("A defendant may file a second or subsequent motion based on . . . a claim of new evidence *that was not discovered* before the first such motion." (emphasis added)).

90. Friedman, *supra* note 2, at 94–95. Professor Friedman is not careful with his language. In using the term "newly discovered evidence" to refer to section 6.502(G)(2)'s new evidence exception, Friedman likely contributed to the Michigan courts' confusion over the distinction between *Cress* and section 6.502(G)(2). However, Friedman ultimately reaches the right result, as he is correct in asserting that "[l]iterally," section 6.502(G)(2) does not contain a discoverability requirement.

91. MICH. CT. R. 6.508(D)(3).

92. *Id.*

93. MICH. CT. R. 6.502(G).

94. *See* Gen. Motors Corp. v. Erves, 236 N.W.2d 432, 438 (Mich. 1975) ("Statutory construction should attempt to give effect to every clause and word of a statute. . . . [W]ords in a statute should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the Act as a whole.").

the petitioner can prove cause (or innocence) and prejudice. Because section 6.502(G)(2)'s new evidence exception says nothing about discoverability, it also has no exceptions addressing a petitioner's failure to act diligently. Thus, under the erroneous interpretation, if a petitioner files a successive motion based on evidence that was previously discoverable, the petitioner's motion would be denied under section 6.502(G) for failing to raise the issue previously without any analysis regarding whether the petitioner could show innocence or good cause.[95] By preventing a petitioner from taking advantage of the good cause (or innocence) and prejudice exceptions in section 6.508(D)(3), this reading violates the Michigan Supreme Court's admonishment that court rules be interpreted in a way that gives meaning to each word and phrase.[96]

D. *The* Cress *Opinion*

The *Cress* opinion itself does not support the conclusion that section 6.502(G)(2) has a diligence requirement. *Cress* did not involve a successive 6.500 motion. Rather, it involved a petitioner's first and only motion for postconviction relief.[97] *Cress* merely laid out the four elements a defendant must meet in order to obtain a new trial on a claim of newly discovered evidence and then concluded that Cress's claimed failed on the merits, as a different result was not likely upon retrial.[98]

Nothing in the language of the *Cress* opinion indicates that the four-element *Cress* standard should apply to successive 6.500 motions alleging claims other than newly discovered evidence. Most tellingly, the opinion never mentions section 6.502 or successive 6.500 motions.[99] Furthermore, *Cress* did not involve any substantive legal claim beyond "newly discovered evidence."[100] The defendant did not raise a *Brady* or ineffective assistance of counsel claim.[101] Thus, there is no indication that the standard announced in *Cress* has any applicability beyond cases in which a convicted defendant explicitly raises a newly discovered evidence claim.

---

95. People v. Kimble, 684 N.W.2d 669, 674 (Mich. 2004) (" 'Good cause' can be established by proving ineffective assistance of counsel.").

96. *See Erves*, 236 N.W.2d at 438.

97. *See* People v. Cress, 664 N.W.2d 174, 176–77 (Mich. 2003); *see also supra* notes 44–48 and accompanying text.

98. *Cress*, 664 N.W.2d at 182, 184.

99. *See id.* at 174–84. The only reference to subchapter 6.500 in the *Cress* opinion is an unexplained citation to section 6.508(D). *Id.* at 182.

100. *Id.* at 177 ("[D]efendant filed a motion for a new trial on the basis of newly discovered evidence. . . . [T]he only argument at issue in this case is that Michael Ronning . . . had admitted murdering the victim.").

101. *Id.*

E. *Unintended Adverse Consequences*

Conflating section 6.502(G)(2) and *Cress* imposes serious adverse consequences on defendants raising constitutional, non-*Cress* claims. Engrafting *Cress* into section 6.502(G)(2) prevents petitioners from taking advantage of the cause and innocence exceptions to diligence located in section 6.508(D)(3), resulting in the improper denial of 6.500 motions the Michigan legislature has signaled should prevail.[102] Beyond simply preventing courts from hearing constitutional claims in individual cases, the erroneous conflation also undermines the *Brady* and *Strickland* doctrines. It contradicts the *Brady* doctrine's rejection of a diligence requirement. Furthermore, by preventing defendants from taking advantage of the good cause exception, it undermines *Strickland*'s goal of ensuring that the state provides constitutionally adequate counsel.

1. Consequences for Individual Defendants

When a court properly declines to engraft *Cress* into the "new evidence" exception to the ban on successive motions, a nondiligent petitioner's 6.500 motion may ultimately prevail. Unlike *Cress* newly discovered evidence claims, *Brady* and ineffective assistance of counsel claims do *not* require diligence.[103] Thus, the court would not analyze discoverability of the evidence during the third stage of analysis,[104] when it analyzes the underlying substantive claims in the motion. When a petitioner raises a non-*Cress* claim, the only time the postconviction court would consider discoverability is when analyzing the procedural merits of the motion under section 6.508(D)(3). Yet section 6.508(D)(3) explicitly excuses lack of diligence if the petitioner can show good cause (or innocence) and prejudice.

The conflation of *Cress* with section 6.502(G)(2) results in the inappropriate denial of successive 6.500 motions that raise a claim other than newly discovered evidence. By engrafting *Cress* into section 6.502(G)(2), courts impose a discoverability requirement during the first stage of analysis, when determining whether the petitioner's motion falls within the new evidence exception to the ban on successive motions. The court will deny the 6.500

102. *See supra* notes 94–96 and accompanying text.

103. Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that to prove ineffective assistance of counsel in violation of the Sixth Amendment, a defendant must satisfy "two components": deficient performance and prejudice); People v. Chenault, 845 N.W.2d 731, 733 (Mich. 2014) ("We hold that a diligence requirement is not supported by *Brady* or its progeny.").

104. *See supra* notes 55–66 and accompanying text (outlining the three-stages process a court should undertake when analyzing a successive 6.500 motion).

motion as successive if the evidence underlying the claims could have reasonably been discovered.[105] The court must then forgo engagement with section 6.508(D)(3) or the substantive analysis.[106] By failing to analyze the motion under section 6.508(D)(3), the court's conflation prevents a petitioner from taking advantage of the cause and innocence exceptions to diligence.

Of course, the erroneous imposition of a discoverability requirement does not matter when a petitioner raises only a *Cress* newly discovered evidence claim. In order to win on the substantive merits of the *Cress* claim, a defendant must prove that he could not have reasonably discovered the evidence, one of the four elements of the *Cress* test.[107] Thus, whether the court imposes a discoverability requirement at the first stage of analysis or the third stage of analysis, the result is the same if the petitioner could have discovered the evidence through due diligence: the motion for relief from judgment is denied.[108]

If a petitioner raises a non-*Cress* claim, however, the timing of the imposition of a discoverability requirement can determine the outcome. *People v. Vinson* demonstrates this principle and exemplifies the unintended negative consequences of improperly conflating the two standards. In *Vinson*, the defendant was convicted of criminal sexual conduct.[109] After his previous 6.500 motions were denied, new scientific tests were conducted that undermined the conviction.[110] Vinson filed a successive 6.500 motion, alleging that his counsel was constitutionally ineffective for failing to investigate the possibility that the tests could have been conducted during the trial.[111] Without reaching the merits of his claim under *Strickland*, the Michigan Court of Appeals denied Vinson's motion. The court rejected Vinson's argument that he fell within section 6.502(G)(2)'s new evidence exception to the ban on successive motions, reasoning that if the scientific testing were "pivotal at trial . . . reasonable diligence would have required, at the very least, that Vinson request independent laboratory testing."[112] In other words, the

105. *See, e.g.*, People v. Swain (*Swain II*), No. 314564, 2015 WL 521623, at *1–2, (Mich. Ct. App. Feb. 5, 2015) (denying petitioner's 6.500 motion as successive under section 6.502(G)) ("[D]efendant plainly failed to exercise the required reasonable diligence.").

106. *See* People v. Vinson, No. 303593, 2012 WL 3046236, at *7 (Mich. Ct. App. July 26, 2012) (denying the petitioner's ineffective assistance of counsel claim as successive after concluding that the scientific evidence underlying the ineffectiveness claim could have been discovered with reasonable diligence); People v. Swain, 794 N.W.2d 92, 104 (Mich. Ct. App. 2010) ("Any successive motion that does not assert one of these two exceptions is to be returned to the defendant without filing by the court.").

107. People v. Cress, 664 N.W.2d 174, 182 (Mich. 2003).

108. *See, e.g.*, *Vinson*, 2012 WL 3046236, at *6 (denying the petitioner's 6.500 "newly discovered evidence" motion because the petitioner was not reasonably diligent in pursuing certain scientific testing).

109. *Id.* at *1.

110. *Id.* at *2.

111. *Id.*

112. *Id.* at *6.

Michigan Court of Appeals applied the *Cress* standard in denying Vinson's 6.500 motion under section 6.502(G)(1), finding that Vinson could have discovered the new evidence underlying his *ineffective assistance of counsel* claim with due diligence.

The outcome in *Vinson* would very likely have been different if the court had not conflated *Cress* and section 6.502(G)(2). Under the proper view of section 6.502(G)(2)'s new evidence exception, the court would merely have inquired whether the scientific tests were previously discovered or known when analyzing whether the petitioner's 6.500 motion should be denied as successive. The tests were not previously discovered, as they were only conducted after Vinson's conviction and previous 6.500 motions.[113] Therefore, Vinson had raised new evidence under section 6.502(G)(2) that permitted him to avoid the successive motion ban.[114] The court should have continued on to section 6.508(D) analysis, inquiring whether good cause (or actual innocence) and prejudice excused the failure to exercise reasonable diligence in securing the scientific tests. Strong evidence existed that Vinson was wrongfully convicted, and he probably would have fallen within section 6.508(D)(3)'s innocence exception to diligence.[115] Finally, given the court of appeals's assumption that the scientific testing was "pivotal at trial,"[116] it should have found that Vinson's counsel was ineffective for failing to obtain the tests. In other words, if the court of appeals had not conflated section 6.502(G)(2)'s new evidence exception with *Cress*, Vinson would likely have prevailed. He would have fallen within section 6.508(D)(3)'s innocence exception, and the factual findings indicate that counsel was ineffective. In the end, the court of appeals's erroneous conflation was crucial to the outcome in Vinson's case.

Another hypothetical example demonstrates the improper outcome that results from the conflation of *Cress* and section 6.502(G)(2). Imagine a defendant who has been convicted of murder. The prosecution's case largely rested upon the testimony of an eyewitness who allegedly saw the defendant lurking around the victim's house at the time of the murder. However, the prosecution failed to inform the defense about a second eyewitness, who told the police that the first eyewitness was intoxicated on the night in question. This second eyewitness also told the police that he never saw the defendant on the night in question but did see his cousin, who vaguely looks like

113. *See id.* at *2.

114. *See supra* notes 79–84 and accompanying text.

115. *See Vinson*, 2012 WL 3046236 at *1–3. The victim's bed sheet in Vinson's case contained a bloodstain that included semen. *Id.* at *1. Blood typing showed Vinson's blood type was *not* in the stain. *Id.* at *1–2. At his original trial, an expert testified that Vinson was a "nonsecretor," which meant his blood type would not have shown up in the stain even if Vinson was the perpetrator, explaining the lack of his blood in the stain. *Id.* at *2. After Vinson was convicted, new tests were conducted demonstrating that Vinson actually was a secretor, so if Vinson had been the perpetrator, his blood type should have been in the stain. *Id.* at *2–3. The absence of his blood type in the stain was strong evidence of Vinson's innocence.

116. *Id.* at *6.

the defendant. The prosecution's failure to disclose this evidence to the defense likely constituted a *Brady* violation.[117] However, suppose that the defendant does not learn about the second eyewitness until after he has concluded his direct appeal and first postconviction motion proceedings. Through the exercise of reasonable diligence, defendant's trial or appellate counsel could have discovered the existence of the second eyewitness. The second eyewitness lived near the victim's house and was actively looking for defense counsel in order to explain his version of events. He could have easily been found if either of the defense attorneys had visited the crime scene. Defendant, confined in prison, obviously could not have investigated the crime scene himself. He files his first 6.500 motion pro se,[118] alleging a ground unrelated to this *Brady* violation. Sometime after his first 6.500 motion is denied, defendant learns of the existence of the second eyewitness through prison chatter. Armed with this new evidence of a *Brady* claim (the existence of the second eyewitness), defendant files a pro se successive 6.500 motion.

The likelihood of the defendant prevailing on the merits of his *Brady* claim depends on whether the court conflates *Cress* with section 6.502(G)(2). If the court does engage in the conflation, the defendant loses. His 6.500 motion will be denied as successive, as his counsel's failure to exercise reasonable diligence (which is imputed to the defendant)[119] prevents him from taking advantage of section 6.502(G)(2)'s new evidence exception to the ban on successive motions.[120]

In contrast, if the court does not apply *Cress* when analyzing the successive nature of the motion, the defendant likely wins. The court would first find that he had raised "new evidence" within the meaning of section 6.502(G)(2), as he had discovered the existence of the second eyewitness after he filed his first 6.500 motion. The court would then analyze the motion under section 6.508(D)(3). This rule would seem to require the court to deny the 6.500 motion, as his appellate counsel could have found the second

117. *See* Giglio v. United States, 405 U.S. 150, 153–54 (1972) (noting that when the reliability of a given witness may be determinative of guilt or innocence, nondisclosure of impeachment evidence or evidence affecting credibility falls within the *Brady* rule); *see also* Smith v. Cain, 132 S. Ct. 627, 630–31 (2012) (holding that suppression of statements that would have impeached the eyewitness's testimony constituted a *Brady* violation); Youngblood v. West Virginia, 547 U.S. 867, 868–70 (2006) (per curiam) (same).

118. Michigan does not generally provide for counsel during postconviction proceedings. But a court may appoint counsel at its discretion. MICH. CT. R. 6.505(A). Counsel must be appointed if the court orders oral argument or an evidentiary hearing. *Id.*

119. Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2610 (2013) ("[U]nder traditional agency principles, the actions of defense counsel are imputed to the client . . . [including] mistakes by defense counsel."); Wendy Zorana Zupac, Note, *Mere Negligence or Abandonment? Evaluating Claims of Attorney Misconduct After* Maples v. Thomas, 122 YALE L.J. 1328, 1343 (2013) ("[E]ven the attorney-agent's negligence is imputed to the client.").

120. *See, e.g.*, *Vinson*, 2012 WL 3046236 at *4–7 (denying defendant's successive 6.500 motion, which claimed ineffective assistance of counsel for failure to exercise reasonable diligence).

eyewitness and raised the *Brady* claim on direct appeal.[121] However, our defendant likely falls within the "good cause" exception to section 6.508(D)(3) because ineffective assistance of counsel can constitute good cause.[122] If the court finds that trial and appellate counsel were ineffective for failing to locate the second eyewitness and the defendant was prejudiced as a result, it would excuse the lack of diligence and then proceed to analyze the *Brady* claim on its merits. As long as the defendant also met his burden on the elements of his *Brady* claim, he would be entitled to a new trial. Overall, *Vinson* and the hypothetical example demonstrate that the timing of the discoverability inquiry changes the outcome for a petitioner who raises claims that could have been discovered with reasonable diligence, but for which a petitioner can demonstrate good cause (or innocence) and prejudice for failure to exercise diligence.

2. The Undermining of the *Brady* and *Strickland* Doctrines

This improper conflation has broader consequences than the improper denial in individual cases of successive 6.500 motions. It also undermines the underlying policy rationales of the *Strickland* and *Brady* doctrines.

Reading *Cress* into section 6.502(G)(2)'s new evidence exception undermines *Brady* doctrine. A 6.500 motion is often used when a convicted defendant discovers evidence of a *Brady* violation.[123] In order to succeed in a *Brady* challenge, a defendant must satisfy three elements: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material.[124] The Michigan Supreme Court unanimously held in *People v. Chenault* that *Brady* does not have a diligence requirement and overruled precedent that held otherwise.[125] The Michigan Supreme Court relied on the U.S. Supreme Court's assertion that "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material."[126] The Michigan Supreme Court was very clear that *Brady* does not contain a discoverability or diligence element.

Imposing a discoverability requirement upon successive 6.500 motions would undermine *Chenault*'s holding and the policy of *Brady* in general.

---

121. *See* MICH. CT. R. 6.508(D)(3).

122. People v. Kimble, 684 N.W.2d 669, 674 (Mich. 2004); People v. Reed, 535 N.W.2d 496, 499 (Mich. 1995).

123. *See supra* note 27.

124. People v. Chenault, 845 N.W.2d 731, 735 (Mich. 2014); *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963).

125. *Chenault*, 845 N.W.2d at 737–38, *overruling* People v. Lester, 591 N.W.2d 267 (Mich. Ct. App. 1998).

126. *Id.* (quoting Banks v. Dretke, 540 U.S. 668, 695 (2004)); *see also* Strickler v. Greene, 527 U.S. 263, 281–82 (1999) ("There are [only] three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.").

Brady jurisprudence has consistently rejected the imposition of a discoverability requirement,[127] but the improper conflation imposes precisely such an element. A discoverability requirement imposes an additional burden on a defendant who only discovers evidence of a *Brady* violation after she filed an initial 6.500 motion: she must show that she could not have reasonably discovered the *Brady* violation.[128] Such a rule conflicts with *Chenault*'s clear and explicit holding that "a diligence requirement is not supported by *Brady* or its progeny."[129]

Not only would this requirement fly in the face of *Chenault*'s unmistakable holding, it also undermines the policy of the *Brady* doctrine. The *Brady* doctrine imposes "an important prosecutorial duty,"[130] ensuring that no "prosecutorial misstep may have occurred" during trial.[131] Imposing a diligence or discoverability requirement creates a system in which prosecutorial missteps are not deterred. A prosecutor can withhold material and exculpatory evidence from the defense without retribution as long as the defendant files a 6.500 motion before discovering the violation and the *Brady* evidence could have been discovered with reasonable diligence. Thus, an erroneous construction of the new evidence exception leaves an entire category of *Brady* violations, those only discovered after a petitioner files his motion for relief from judgment, undeterred.

By preventing petitioners from taking advantage of the good cause exception to diligence, the improper conflating of *Cress* with section 6.502(G)(2) also undermines the state's obligation to provide constitutionally adequate counsel. Good cause generally excuses a procedural default, such as the failure to exercise reasonable diligence.[132] In the federal habeas context, the Supreme Court has defined cause as an "external impediment preventing counsel from constructing or raising the claim."[133] Defense attorneys' mistakes are usually imputed to the defendants and, therefore, no external impediment exists.[134] The Supreme Court, however, has recognized that when a defense counsel's error rises to the level of ineffective assistance of counsel, "the Sixth Amendment itself requires that responsibility for the [error] be imputed to the State."[135] The state's failure to fulfill its

127. *See, e.g.*, United States v. Tavera, 719 F.3d 705, 710–12 (6th Cir. 2013) (refusing to adopt a diligence requirement for *Brady* claims).

128. Again, although section 6.508(D) still imposes a discoverability requirement, the rules explicitly excuse diligence if the cause or innocence exceptions are established. *See supra* text accompanying notes 94–96.

129. *Chenault*, 845 N.W.2d at 733.

130. *Id.* at 738.

131. *Strickler*, 527 U.S. at 287.

132. Wainwright v. Sykes, 433 U.S. 72, 81–82 (1977).

133. Murray v. Carrier, 477 U.S. 478, 492 (1986).

134. *See supra* note 119.

135. *Murray*, 477 U.S. at 488.

constitutional obligation to provide effective assistance of counsel thus constitutes an objective factor external to the defense that constitutes cause.[136]

Subchapter 6.500 also exemplifies this principle. Michigan excuses a petitioner's failure to diligently raise her constitutional claims if she has good cause.[137] Like the federal courts, Michigan acknowledges that ineffective assistance of counsel constitutes cause.[138] Yet, as explained in this Note, the improper conflation of section 6.502(G)(2) and *Cress* prevents a petitioner from taking advantage of the good cause exception.[139] By allowing denial of a successive 6.500 motion without providing an opportunity to establish cause, this erroneous conflation imputes an attorney's constitutionally deficient performance to the defendant, even though the U.S. Supreme Court and the State of Michigan recognize that the state (not the defendant) is at fault.[140] Doing so undermines *Strickland*, which helps ensure that the state fulfills its obligation to provide effective counsel.[141]

F. *Interaction with Federal Habeas Review*

The possibility of federal habeas review also lurks in the background. If Michigan courts continue to improperly conflate *Cress* and section 6.502(G)(2), federal courts might intervene. This gives Michigan an incentive to fix this statutory interpretation mistake on its own now.

One purpose of federal habeas review is to ensure that a state "provide[s] an opportunity for full and fair litigation" of constitutional claims.[142] If a federal court believes that conflating *Cress* with section 6.502(G)(2) has prevented an adequate state forum for the constitutional claims, the federal court may intervene.[143] The federal habeas regime, although full of procedural barriers,[144] provides federal courts the tools to interpose when necessary.

---

136. Primus, *supra* note 119, at 2610.

137. MICH. CT. R. 6.508(D)(3)(a).

138. People v. Kimble, 684 N.W.2d 669, 674 (Mich. 2004).

139. *See supra* notes 94–97 and accompanying text.

140. *Murray*, 477 U.S. at 488 ("If [an error] is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State . . . .").

141. Primus, *supra* note 119, at 2607 n.8, 2609–10; *see also* Williams v. Taylor, 529 U.S. 362, 391 (2000) (noting that the right to effective counsel imposes an obligation on states).

142. Stone v. Powell, 428 U.S. 465, 494 (1976); *see also* Saffle v. Parks, 494 U.S. 484, 493 (1990) ("The State must not cut off full and fair consideration of mitigating evidence."); Rose v. Mitchell, 443 U.S. 545, 560–64 (1979).

143. *Cf.* Sanna v. DiPaolo, 265 F.3d 1, 8 (1st Cir. 2001) ("[A] federal habeas court ordinarily cannot revisit a state court's disposition of a prisoner's Fourth Amendment Claims. Withal, this proposition is not absolute: there is an exception for instances in which a habeas petitioner had no realistic opportunity to litigate his Fourth Amendment claim fully and fairly in the state system.").

144. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 1–2 (2010) ("Federal judges expend enormous amounts of time reviewing habeas petitions from state prisoners, but much of that time is spent finding ways to dismiss the petitions on procedural grounds without ever addressing their merits.").

For example, while a defendant's failure to comply with state procedural rules generally forecloses federal habeas review (the doctrine of procedural default), federal courts will refuse to apply this doctrine and hear the claim on the merits if the state procedural rule is inadequate.[145] A federal court may find that a Michigan court's denial of a motion as successive is inadequate because Michigan courts inconsistently apply *Cress* to section 6.502(G)(2)[146] or the conflation unduly burdens a federal right.[147] Alternatively, a federal court may excuse the procedural default by finding cause and prejudice.[148] Cause may exist, for example, because the defendant had ineffective appellate or postconviction counsel or because the state created an external impediment to the presentation of the claim by committing a *Brady* violation.[149]

---

145. *Id.* at 15; *see, e.g.*, Lee v. Kemna, 534 U.S. 362 (2002); Osborne v. Ohio, 495 U.S. 103 (1990).

146. Primus, *supra* note 119, at 2620 ("To be adequate, the underlying state procedural rule must be firmly established and consistently followed."). Michigan courts are inconsistent in their application of *Cress* to the section 6.502(G)(2) "new evidence" exception. *Compare* People v. Roque, Nos. 296197, 297082, 2011 WL 4104977, at *2–3 (Mich. Ct. App. Sept. 15, 2011) (denying 6.500 motion as successive without applying *Cress* because the defendant's present claim was "not based on any actual new evidence" previously undiscovered, as his counsel had already raised the claim during the original sentencing proceeding), *with* People v. Swain (*Swain II*), No. 314564, 2015 WL 521623, at *1–4 (Mich. Ct. App. Feb. 5, 2015) (applying *Cress* to deny petitioner's 6.500 motion raising a *Brady* claim as successive).

147. DeYoung v. Schriro, 201 F. App'x 443, 445 (9th Cir. 2006) ("[A] state procedural rule . . . is inadequate to preclude federal review where the rule frustrates exercise of a federal right."); *see also Lee*, 534 U.S. at 391 (Kennedy, J., dissenting) ("[F]ailure to comply with a . . . rule has been deemed an inadequate state ground only when the State had no legitimate interest in the rule's enforcement."); Primus, *supra* note 144, at 15 ("Before . . . procedurally default[ing] a habeas petitioner's claim for failure to comply with a state procedural rule, the federal court will ask whether the state rule is an adequate one—meaning . . . it is consistently applied . . . and does not unduly burden the exercise of a federal constitutional right."). The unduly burdensome strain of inadequacy may be more difficult to apply to Michigan courts' improper conflation of *Cress* and section 6.502(G)(2). Federal habeas doctrine recognizes finality as a valid concern in the administration of criminal justice. Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion) ("[I]nterests of comity and finality must also be considered in determining the proper scope of habeas review."); *see also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). Therefore, a court may find that it is not an undue burden to ban successive motions, even if the motion is improperly denied because litigation must end at some point. *See* Rose v. Lundy, 455 U.S. 509, 520–21 (1982) (plurality opinion) (noting that federal courts need not tolerate "needless piecemeal litigation" (quoting Sanders v. United States, 373 U.S. 1, 18 (1963))). Yet, to the extent that a constitutional claim could only be discovered after the first postconviction motion, the conflation of *Cress* and section 6.502(G)(2) could unduly burden a petitioner's rights by failing to let her take advantage of the cause and innocence exceptions in section 6.508(D). *See* Amadeo v. Zant, 486 U.S. 214, 222 (1988) (finding cause for procedural default because deliberate concealment of a constitutional violation by local officials was an "objective factor" that prevented the prisoner's lawyers from reasonably uncovering the basis of the claim (quoting Murray v. Carrier, 447 U.S. 478, 488 (1986))).

148. Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977).

149. Martinez v. Ryan, 132 S. Ct. 1309 (2012); Murray v. Carrier, 477 U.S. 478, 488–89 (1986); Primus, *supra* note 119, at 2609–10.

Similarly, a petitioner who establishes the requisite gateway threshold of actual innocence can have her defaulted claims heard on the merits.[150] Federal courts might be especially interested in intervening in cases in which the application of *Cress* to section 6.502(G)(2) results in the denial of a potentially innocent defendant's 6.500 motion. Federalism concerns underlying federal habeas review suggest that state courts have the first opportunity to address an issue.[151] Yet, because the conflation of *Cress* and the new evidence exception prevents a petitioner from taking advantage of the innocence exception to diligence in section 6.508(D)(3),[152] a federal court may be more willing to intervene because it will not feel like it is stepping on the state's toes. Intervention is especially likely given the strong dedication of federal habeas doctrine and federal courts to protecting the innocent.[153]

Federal habeas relief is not inevitable. But doctrines like adequacy, cause and prejudice, and *Schlup v. Delo*'s gateway innocence claim provide federal habeas courts the necessary tools to hear a petitioner's constitutional claims on the merits, even when the state has denied her 6.500 motion as successive based on a failure to exercise reasonable diligence.[154] If federal courts start to litigate defaulted claims on the merits because the conflation of *Cress* and section 6.502(G)(2) prevents the "full and fair consideration of constitutional claims,"[155] federal courts would encourage Michigan to reexamine and correct its understanding of the new evidence exception.[156]

---

150. Schlup v. Delo, 513 U.S. 298 (1995).

151. Rhines v. Weber, 544 U.S. 269, 273 (2005) ("[T]he interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claims."); *see also Rose*, 455 U.S. at 518–19 (majority opinion) ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error.").

152. *See supra* notes 94–97 and accompanying text.

153. Recognizing the importance of protecting the innocent, federal courts have crafted numerous doctrines that permit innocent defendants to bypass procedural barriers that would ordinarily foreclose habeas relief. *See* 28 U.S.C. § 2254(e)(2) (2012) ("[T]he [federal habeas] court shall not hold an evidentiary hearing on the claim unless . . . the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty . . . ."); McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013) (holding that a habeas petitioner who can demonstrate actual innocence can bypass the statute of limitations); House v. Bell, 547 U.S. 518, 536 (2006) ("[T]he principles of comity and finality [underlying procedural default] must yield to the imperative of correcting a fundamentally unjust incarceration." (quoting *Murray*, 477 U.S. at 495 (internal quotation marks omitted)); *Schlup*, 513 U.S. at 327–32 (holding that a petitioner who establishes the requisite gateway threshold of actual innocence can have his defaulted claims heard on the merits); *see also* Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 987 (2000) (describing the view that federal habeas corpus functions primarily to ensure that no innocent person is wrongfully convicted).

154. *See supra* notes 145–150 and accompanying text.

155. *See supra* note 142.

156. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1044, 1047–50 (1977) ("[Federal habeas review] permit[s] and encourage[s] a dialogue between state and federal courts that help[s] define and evolve constitutional rights.").

Conclusion

Michigan courts are conflating *Cress* and section 6.502(G)(2). They do so by applying *Cress*'s four-prong legal standard when determining if the defendant has alleged new evidence that permits a defendant to avoid the ban on successive motions. Even though the two standards use similar language, it is important that courts keep the distinction straight. "Newly discovered evidence" within the meaning of *Cress* is a legal standard for relief, while "new evidence that was not discovered" is an exception to a procedural barrier. Conflating the two standards contradicts the text and structure of subchapter 6.500 of the Michigan Court Rules. More importantly, by preventing defendants from accessing the cause and innocence exceptions of section 6.508(D)(3), the erroneous grafting of *Cress* into section 6.502(G)(2) has significant adverse consequences for individual defendants and constitutional doctrines. If and when the issue of the relationship between *Cress* and section 6.502(G)(2) reaches the Michigan Supreme Court,[157] the court should clarify the distinction between the two legal doctrines and hold that discoverability is irrelevant to the successive motion analysis. It is critical that the Michigan Supreme Court make this clarification, as the improper conflation between *Cress* newly discovered evidence and section 6.502(G)(2)'s new evidence exception to the ban on successive motions is an easy mistake with extraordinary consequences for convicted defendants' constitutional rights.

157. At the time of the writing of this Note, two cases presenting this issue are poised to eventually reach the Michigan Supreme Court. *See* People v. Swain (*Swain II*), No. 314564, 2015 WL 521623 (Mich. Ct. App. Feb. 5, 2015), *appeal docketed*, No. 150994 (Mich. Feb. 5, 2015); People v. Freeman, No. W-86-128340-FC (Mich. Cir. Ct. Nov. 10, 2014), *appeal docketed*, No. 147449 (Mich. July 22, 2013).