

The Michigan Court of Appeals and the Michigan Supreme Court have remanded approximately 30 cases back to the trial court to properly implement MCR 6.502(G)(1); MCR 6.502(G)(2); and MCR 6.508(D)(3). These cases date from 2016 to now. For example, Defendant would be remiss if he did not mention that this list includes one of this honorable court's cases: *People of MI v Kenneth Cooper*, decided February 1, 2024, COA Docket No. 368068, LC No. 01-005593-02-FC. The COA remanded *Cooper* back to this court twice, instructing it to properly implement MCR 6.502(G)(2).

People v. Hubbard

No. 359885 (Mich. Ct. App. Jun. 15, 2023)

Defendant need not satisfy the Cress test to meet the procedural threshold of MCR 6.502(G)(2). See *Swain*, 499 Mich. 920. Instead, defendant must only show that he has "new evidence that was not discovered before the first such motion was filed."

People v. Robinson

No. 337865 (Mich. Ct. App. Jul. 30, 2019)

Under MCR 6.502(G)(2), a defendant may file a second or subsequent motion for relief from judgment based on "a claim of new evidence that was not discovered before the first such motion." See also *People v Swain*, 499 Mich 920 (2016). [*Robinson*, 503 Mich at 883.]

Pouncy v. Macauley

13-cv-14695 (E.D. Mich. Jun. 28, 2021)

*Swain* therefore likely poses no obstacle to a second motion for relief from judgment. Second, the Michigan Supreme Court ultimately held that the defendant in *Swain* did present newly discovered

evidence that permitted her to proceed under Michigan Court Rule 6.502(G)(2), see *People v. Swain*, 878 N.W.2d 476 (Mich. 2016), and thus it is not clear that the Court of Appeals decision cited by Pouncy remains viable on the point for which Pouncy cited it. Notably, Pouncy's lead counsel did not disagree with this interpretation and application of *Swain*. (See 12/2/2020 Hr'g Tr., ECF No. 363, PageID.13443-13445.)

Pouncy v. Macauley

546 F. Supp. 3d 565 (E.D. Mich. 2021) Cited 3 times

*Swain* therefore likely poses no obstacle to a second motion for relief from judgment. Second, the Michigan Supreme Court ultimately held that the defendant in *Swain* did present newly-discovered evidence that permitted her to proceed under Michigan Court Rule 6.502(G)(2), see *People v. Swain*, 499 Mich. 920, 878 N.W.2d 476 (2016), and thus it is not clear that the Court of Appeals decision cited by Pouncy remains viable on the point for which Pouncy cited it. Notably, Pouncy's lead counsel did not disagree with this interpretation and application of *Swain*. (See 12/2/2020 Hr'g Tr., ECF No. 363, PageID.13443-13445.)

Clayton v. Klee

CASE NO. 16-13201 (E.D. Mich. Sep. 21, 2016) Cited 1 times

(Criminal - False Arrest) The Michigan Court of Appeals denied Petitioner's application for leave to appeal, citing Michigan Court Rule 6.508(D), see *People v. Clayton*, No. 329878 (Mich. Ct. App. Dec. 21, 2015), and, on May 6, 2016, the Michigan Supreme Court likewise denied leave to appeal under Rule 6.508(D). See *People v. Clayton*, 499 Mich. 920; 877 N.W.2d 908 (2016) (table). Finally, on September 2, 2016, Petitioner filed his current habeas corpus petition.

People v. Owens

W.2d 834 (Mich. 2022)

In *People v. Cress*, 468 Mich. 678, 692, 664 N.W.2d 174 (2003), we articulated a four-part test for receiving relief on claims of new evidence, which appears to me to indicate what is contemplated by "new evidence" under the rule. While we have held that a defendant need not satisfy the *Cress* test in order to clear the procedural threshold of MCR 6.502(G)(2), see *People v. Swain*, 499 Mich. 920, 878 N.W.2d 476 (2016), it appears to me that proposed "new evidence" would at least need to be information that is capable of satisfying the *Cress* test to qualify as "new evidence." Since one prong of the *Cress* test is that the proposed new evidence "makes a different result probable on retrial," the federal court decision is seemingly not useful under the *Cress* test, which suggests it is not "new evidence" that is contemplated by MCR 6.502(G)(2).

People v. Wagle

W.2d 789 (Mich. 2021)

Further, the circuit court erred in applying *People v. Cress*, 468 Mich. 678, 664 N.W.2d 174 (2003), to an analysis of whether the defendant's motion was successive under MCR 6.502(G). See *People v. Swain*, 499 Mich. 920, 878 N.W.2d 476 (2016). *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test.

People v. Wagle

SC 162686 (Mich. Oct. 8, 2021)

Further, the circuit court erred in applying *People v Cress*, 468 Mich. 678 (2003), to an analysis of whether the defendant's motion was successive under MCR 6.502(G). See *People v Swain*, 499 Mich. 920 (2016). *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test.

People v. Hubbard

959 N.W.2d 505 (Mich. 2021)

The circuit court erred in applying *People v. Cress*, 468 Mich. 678, 664 N.W.2d 174 (2003), to an analysis of whether the defendant's motion was successive under MCR 6.502(G). See *People v. Swain*, 499 Mich. 920, 878 N.W.2d 476 (2016). *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test.

People v. Hubbard

SC 161866 (Mich. Jun. 1, 2021) Cited 1 times

The circuit court erred in applying *People v Cress*, 468 Mich. 678 (2003), to an analysis of whether the defendant's motion was successive under MCR 6.502(G). See *People v Swain*, 499 Mich. 920 (2016). *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test.

People v. Robinson

503 Mich. 883 (Mich. 2018) Cited 1 times

Under MCR 6.502(G)(2), a defendant may file a second or subsequent motion for relief from judgment based on "a claim of new evidence that was not discovered before the first such motion." See also *People v. Swain*, 499 Mich. 920, 878 N.W.2d 476 (2016). We do not retain jurisdiction.

People v. McClinton

SC: 155487 (Mich. Dec. 27, 2017)

MCR 6.502(G)(2); *People v Swain*, 499 Mich 920 (2016). We do not retain jurisdiction.

People v. McClinton

501 Mich. 944 (Mich. 2017) Cited 1 times

Therefore, the motion is not procedurally barred under MCR 6.502(G)(1) because it is "based on ... a claim of new evidence that was not discovered before the first" motion for relief from judgment. MCR 6.502(G)(2) ; *People v. Swain*, 499 Mich. 920, 878 N.W.2d 476 (2016). We do not retain jurisdiction.

People v. Watkins

883 N.W.2d 758 (Mich. 2016) Cited 1 times

The circuit court erred in applying *People v. Cress*, 468 Mich. 678, 664 N.W.2d 174 (2003), to an analysis of whether the defendant's motion was improperly successive under MCR 6.502(G). See *People v. Swain*, 499 Mich. 920, 878 N.W.2d 476 (2016). *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test.

People v. Watkins

SC: 152361 (Mich. Sep. 6, 2016)

The circuit court erred in applying *People v Cress*, 468 Mich 678 (2003), to an analysis of whether the defendant's motion was improperly successive under MCR 6.502(G). See *People v Swain*, 499 Mich 920 (2016). *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test.

People v. McKinney

No. 364289 (Mich. Ct. App. Feb. 1, 2024)

The *Cress* test "does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test." *People v Swain*, 499 Mich. 920, 920 (2016).

People v. Dotson

No. 362945 (Mich. Ct. App. Nov. 30, 2023)

The *Cress* factors, however, do "not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test." *People v Swain*, 499 Mich. 920 (2016). Further, we note that, without analysis as to the threshold question, the court repeatedly stated that the evidence was "newly discovered evidence."

People v. Mims

No. 367068 (Mich. Ct. App. Nov. 14, 2023)

Specifically, the trial court again conflated the question of whether defendant's successive motion for relief from judgment was, for purposes of the procedural bar set forth by MCR 6.502(G), based

on "a claim of new evidence that was not discovered before the first such motion was filed," see MCR 6.502(G)(2)(b), with the distinct question of whether, under the *Cress* test, defendant's new affidavits qualified as "newly discovered evidence" that might warrant granting a new trial. To reiterate, "*Cress* does not apply to the procedural threshold of MCR 6.502(G)(2)[.]" *People v Swain*, 499 Mich. 920 (2016). Indeed, in light of the trial court's finding that the affidavits in question were executed by "two witnesses both of whom . . . never came forward to provide any testimony in this case previously," it necessarily follows that defendant has overcome the procedural hurdle set forth by MCR 6.502(G).

People v. Bell

No. 365022 (Mich. Ct. App. Jul. 10, 2023)

The trial court erred in applying *People v Cress*, 468 Mich. 678; 664 N.W.2d 174 (2003), to an analysis of whether defendant has overcome the procedural threshold for filing a successive motion for relief from judgment pursuant to MCR 6.502(G)(2). See *People v Wagle*, 508 Mich. 950 (2021); *People v Swain*, 499 Mich. 920 (2016). Although the trial court did not cite *Cress*, the court's reasoning reflects an application of one or more of the *Cress* factors.

People v. Daniels

No. 364929 (Mich. Ct. App. Jul. 3, 2023) Cited 1 times

First, the trial court erred by utilizing the *Cress* test as a basis to conclude that defendant's successive 6.500 motion was "precluded" (i.e., procedurally barred) under MCR 6.502(G). See *People v Swain*, 499 Mich. 920 (2016) ("*Cress* does not apply to the procedural threshold of MCR 6.502(G)(2)").

People v. Roberson

No. 364628 (Mich. Ct. App. May. 30, 2023)

Delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the successive motion for relief from judgment. The trial court should not have applied *People v Cress*, 468 Mich. 678; 664 N.W.2d 174 (2003), to an analysis of whether defendant had overcome the procedural threshold for filing a successive motion for relief from judgment pursuant to MCR 6.502(G)(2). See *People v Swain*, 499 Mich. 920 (2016). However, reversal is unwarranted because the trial court reached the correct result in denying defendant's successive motion for relief from judgment.

People v. Carter

No. 364500 (Mich. Ct. App. May. 18, 2023)

By applying the *Cress* test in analyzing whether defendant's motion was barred under MCR 6.502(G), the trial court erred. See, e.g., *People v Swain*, 499 Mich. 920 (2016) ("*Cress* does not apply to the procedural threshold of MCR 6.502(G)(2)").

People v. Young

No. 364099 (Mich. Ct. App. May. 4, 2023)

*Cress* does not apply when determining whether a defendant has presented "new evidence" that satisfies the exception stated in MCR 6.502(G)(2)(b). *People v Swain*, 499 Mich. 920 (2016). In this case, defendant's motion did present "new evidence" under MCR 6.502(G)(2)(b), as the affidavit was authored after his first motion for relief from judgment was filed.

People v. Wilson



No. 363431 (Mich. Ct. App. Mar. 20, 2023)

See also *People v Swain*, 499 Mich. 920 (2016) ("[T]he plain text of [MCR 6.502(G)] does not require that a defendant satisfy all elements of the [*Cress*] test"). However, once a defendant overcomes the procedural threshold of MCR 6.502(G), he or she must still establish entitlement to relief under MCR 6.508(D).

People v. Dennis

No. 363364 (Mich. Ct. App. Mar. 9, 2023)

The trial court erred by relying on caselaw applying the *Cress* test-namely, *People v Rao*, 491 Mich. 271; 815 N.W.2d 105 (2012), and *People v Terrell*, 289 Mich.App. 553; 797 N.W.2d 684 (2010), overruled in part on other grounds by *People v Grissom*, 492 Mich. 296 (2012)-as a means of determining whether defendant had presented "new evidence" for purposes of the procedural bar set forth by MCR 6.502(G). See *People v Swain*, 499 Mich. 920 (2016) ("*Cress* does not apply to the procedural threshold of MCR 6.502(G)(2)"). The trial court further erred by failing to recognize that, when a Brady violation is raised as a ground for relief from judgment, the government's suppression of evidence may, standing alone, establish "good cause" for the defendant's failure to raise the Brady issue sooner.

People v. Brown

No. 363234 (Mich. Ct. App. Mar. 9, 2023)

The trial court erred by relying on caselaw applying the *Cress* test-such as *People v Grissom*, 492 Mich. 296; 821 N.W.2d 50 (2012), and *People v Rogers*, 335 Mich. App. 172; 966 N.W.2d 181 (2020)-as a means of determining whether defendant had presented "new evidence" for purposes

of the procedural bar set forth by MCR 6.502(G). See *People v Swain*, 499 Mich. 920 (2016) ("*Cress* does not apply to the procedural threshold of MCR 6.502(G)(2)"). On remand, the trial court should reconsider this matter on the merits in light of this order

People v. Mims

No. 362761 (Mich. Ct. App. Feb. 3, 2023)

In ruling that defendant's successive motion for relief from judgment was procedurally barred under MCR 6.502(G), the trial court erroneously relied on authority, such as *People v Rao*, 491 Mich. 271; 815 N.W.2d 105 (2012), applying the *Cress* test. See *People v Swain*, 499 Mich. 920 (2016) ("*Cress* does not apply to the procedural threshold of MCR 6.502(G)(2)"). Because the trial court's ruling was founded on legal error, it "necessarily" constituted an abuse of discretion.

People v. Carter

No. 362067 (Mich. Ct. App. Nov. 10, 2022)

And we are cognizant that doing so is contrary to settled precedent. See, e.g., *People v Swain*, 499 Mich. 920 (2016) ("*Cress* does not apply to the procedural threshold of MCR 6.502(G)(2)"). Regardless, we conclude that the trial court reached the correct ultimate result because defendant failed to carry his burden of demonstrating both "good cause" and "actual prejudice" under MCR 6.508(D)(3).

People v. Lemons

No. 348277 (Mich. Ct. App. Nov. 18, 2021)

Lastly, defendant argues that the trial court erred by refusing to consider her claim of ineffective assistance of counsel because the Supreme Court's order in *People v Swain*, 499 Mich. 920