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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL HUBBARD,
Petitoner,

v.

WILLIE SMITH,
Respondent.
_____/

Case:2:13-cv-14540
Judge: Lawson, David M.
MJ: Komives, Paul J.
Filed: 10-30-2013 At 03:58 PM
HC HUBBARD V SMITH (EB)

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF

HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Petitioner, Carl Hubbard, in Pro Se, petitions this Court to grant a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, and states in support that:

1. Petitioner was convicted after a bench trial on September 2, 1992, in the Third Circuit Court for the County of Wayne, before the Honorable Richard P. Hathaway, of murder in the first degree (MCL § 750.316).

2. On September 23, 1992, Petitioner was sentenced to imprisonment to the mandatory term of life without the possibility of parole for this conviction. Petitioner was represented by Ronald Giles (P-38107) throughout all proceedings held in the trial court.

3. Petitioner is currently incarcerated at the Carson City Correctional Facility at 10274 Boyer Road in Carson City, MI 48811-5000, serving the aforementioned sentence.

4. On August 4, 1993, being represented by Frederick M. Finn (P-32268), Petitioner filed a Motion to Remand for an Evidentiary Hearing and appealed by right to the Michigan Court of Appeals raising the following

issues:

I. THIS CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER THE RECALL OF THE PEOPLE'S WITNESS CURTISS COLLINS AND HIS LATER TRIAL TESTIMONY WAS THE PRODUCT OF IMPROPER COERCION BY THE PROSECUTOR AND/OR DETROIT POLICE.

II. THIS CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

III. THIS CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER THE WARRANTLESS ARREST AND DELAYED ARRAIGNMENT OF DEFENDANT WAS A VIOLATION OF CONSTITUTIONAL RIGHTS AND WHETHER HIS IN-CUSTODY POLICE STATEMENT SHOULD HAVE BEEN EXCLUDED AS EVIDENCE AT TRIAL.

IV. WHERE THE PROSECUTION'S CASE FAILED TO SET FORTH EVIDENCE BEYOND A REASONABLE DOUBT AS TO EACH OF THE ELEMENTS OF THE OFFENSE, THE LOWER COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

V. DEFENDANT'S CONVICTION SHOULD BE REVERSED BECAUSE THE EVIDENCE PRESENTED AT TRIAL FAILED TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT.

VI. DEFENDANT'S BENCH TRIAL CONVICTION SHOULD BE OVERTURNED BECAUSE THE LOWER COURT'S DECISION WAS NOT ADEQUATELY SUPPORTED BY FINDINGS AND CONCLUSIONS, AND THE TRIAL JUDGE'S DECISION AMOUNTED TO AN IMPROPER, INCONSISTENT VERDICT.

On February 9, 1994, Mr. Finn moved the trial court to withdraw as appellate counsel and, on February 14, 1994, the Honorable Dalton A. Roberson granted appellate counsel's request. On October 28, 1994, Judge Roberson appointed Gerald Surowiec (P-21172) as Petitioner's new appellate counsel and he merely added the additional argument that Petitioner did not provide a valid waiver of his right to a jury trial when he chose to take a bench trial. In his Pro Se supplemental brief on appeal, Petitioner raised the following issues:

I. THE INVESTIGATING OFFICERS AND THE PROSECUTION USED INTIMIDATING UNPROFESSIONAL CONDUCT TO OBTAIN STATEMENT AND SECURE TESTIMONY FOR PEOPLE'S KEY WITNESS CURTISS COLLINS.

II. THE ADMISSION OF THE PRELIMINARY EXAMINATION TESTIMONY WAS IMPROPER WHERE THE WITNESS WAS PRESENT AT TRIAL AND REPUDIATED HIS PRIOR TESTIMONY.

III. IMPROPER IMPEACHMENT/RES GESTAE WITNESS/PROSECUTORIAL

MISCONDUCT.

IV. INADMISSIBILITY OF EVIDENCE OF UNCHARGED CRIME/SIMILAR ACT/PROSECUTORIAL MISCONDUCT.

V. ADMISSIBILITY OF PRIOR CONSISTENT STATEMENT/IMPROPER REHABILITATION OF WITNESS/ PROSECUTORIAL MISCONDUCT.

VI. PROSECUTORIAL MISCONDUCT/FALSE TESTIMONY.

On September 13, 1993, the Motion to Remand for an Evidentiary Hearing was denied and on December 19, 1995, Petitioner's conviction was affirmed in Court of Appeals Docket #159160.

5. Petitioner subsequently applied for leave to appeal in the Michigan Supreme Court, arguing that the Michigan Court of Appeals' September 13, 1993, and December 13, 1995 decisions were erroneous. Petitioner had represented himself in Pro Se in regards to this appeal which was denied on October 28, 1996 in Docket #105540.

6. On, December 28, 2011, Petitioner filed a motion for relief from judgment in Pro Se and argued that:

I. DEFENDANT IS ENTITLED TO A NEW TRIAL BASED ON THE NEWLY DISCOVERED EVIDENCE PRESENTED TO THIS COURT.

II. DEFENDANT'S CONVICTION THAT WAS BASED ON PERJURED TESTIMONY VIOLATED HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

III. DEFENDANT WAS DENIED HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY TO OBTAIN THIS CONVICTION.

IV. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WAS VIOLATED TO THE EXTENT THAT THE STATE FAILED TO DISCLOSE AGREEMENTS FOR MR. COLLINS' FAVORABLE TESTIMONY.

V. DEFENDANT WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO (A) INVESTIGATE AND CALL ROY BURFORD AND STEVE KONJA TO TESTIFY AT TRIAL, (B) QUESTION CURTISS COLLINS ABOUT HIS PENDING PAROLE VIOLATION AND WHETHER HE BELIEVED OR EVEN ONLY HOPED THAT HE WOULD SECURE IMMUNITY OR A LIGHTER SENTENCE, OR ANY OTHER FAVORBALE TREATMENT FROM THE PROSECUTOR, (C) MOVE FOR THE SUPPRESSION OF MR. COLLINS' IN-COURT IDENTIFICATION OF DEFENDANT, AND (D) DO ALL OF THE ABOVE WHICH, WHEN CONSIDERED CUMULATIVELY, DEMONSTRATE THAT DEFENDANT WAS PREJUDICED BY COUNSEL'S ERRORS.

VI. DEFENDANT IS ENTITLED TO A NEW TRIAL ON THE GROUNDS THAT THE VERDICT WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE.

VII. THE "GOOD CAUSE" REQUIREMENT OF MCR 6.508(D)(3)(a) SHOULD BE WAIVED WHERE DEFENDANT HAS SHOWN THAT HE IS ACTUALLY INNOCENT.

VIII. DEFENDANT WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHICH PROVIDES THE "GOOD CAUSE" REQUIRED BY MCR 6.508(D)(3)(a).

This Motion was denied on March 15, 2012, in Docket #92-1856.

7. Petitioner appealed the trial court's March 15, 2012 denial by leave to the Michigan Court of Appeals which was denied on May 7, 2013 in Docket #311427, Judge Cynthia Diane Stephens dissenting.

8. Petitioner subsequently appealed the Michigan Court of Appeals' May 7, 2013 denial to the Michigan Supreme Court in an application for leave to appeal which was denied on September 30, 2013 in Docket #147211.

9. Petitioner raises the following claims in this habeas corpus petition:

I. PETITIONER HAS MADE A COLORABLE CLAIM OF ACTUAL INNOCENCE WHICH EQUITABLY TOLLS THE AEDPA'S ONE-YEAR STATUTE OF LIMITATION, OVERCOMES ANY PROCEDURAL BARS APPLICABLE TO ANY ISSUES PRESENTED, PERMITS AN EVIDENTIARY HEARING IN THIS COURT, AND SUPPORTS A FREESTANDING CLAIM OF ACTUAL INNOCENCE.

II. PETITIONER'S CONVICTION THAT WAS BASED ON PERJURED TESTIMONY VIOLATED HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

III. PETITIONER WAS DENIED HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY TO OBTAIN THIS CONVICTION.

IV. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WAS VIOLATED TO THE EXTENT THAT THE STATE FAILED TO DISCLOSE AGREEMENTS FOR MR. COLLINS' FAVORABLE TESTIMONY.

V. PETITIONER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO (A) INVESTIGATE AND CALL ROY BURFORD AND STEVE KONJA TO TESTIFY AT TRIAL, (B) QUESTION CURTISS COLLINS ABOUT HIS PENDING PAROLE VIOLATION AND WHETHER HE BELIEVED OR EVEN ONLY HOPED THAT HE WOULD SECURE IMMUNITY OR A LIGHTER SENTENCE, OR ANY OTHER FAVORBALE TREATMENT FROM THE PROSECUTOR, (C) MOVE FOR THE SUPPRESSION OF MR. COLLINS' IN-COURT IDENTIFICATION OF

PETITIONER, (D) FAILURE TO OBJECT TO THE ADMISSION OF PETITIONER'S STATEMENTS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT, AND (E) DO ALL OF THE ABOVE WHICH, WHEN CONSIDERED CUMULATIVELY, DEMONSTRATE THAT PETITIONER WAS PREJUDICED BY COUNSEL'S ERRORS.

VI. PETITIONER'S CONVICTION SHOULD BE REVERSED BECAUSE THE EVIDENCE PRESENTED AT TRIAL FAILED TO PROVE GUILT BEYOND A REASONABLE DOUBT.

VII. THE INCONSISTENT VERDICT OF THE TRIAL COURT VIOLATED THE FOURTEENTH AMENDMENT.

Therefore, Petitioner asks this Court to either release Petitioner unconditionally or to order a new trial.

Respectfully submitted,

Carl Hubbard #205988

Carl Hubbard #205988
Petitioner in Pro Se
Carson City Correctional Facility
10274 Boyer Road
Carson City, MI 48811-5000

Dated: October 22, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL HUBBARD,
Petitioner,

v.

WILLIE SMITH,
Respondent.
_____/

BRIEF IN SUPPORT OF

PETITION FOR HABEAS CORPUS

By: Carl Hubbard #205988
Petitioner in Pro Se
Carson City Correctional Facility
10274 Boyer Road
Carson City, MI 48811-5000

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STATEMENT OF QUESTIONS PRESENTED

I. HAS PETITIONER MADE A COLORABLE CLAIM OF ACTUAL INNOCENCE WHICH EQUITABLY TOLLS THE AEDPA'S ONE-YEAR STATUTE OF LIMITATION, OVERCOMES ANY PROCEDURAL BARS APPLICABLE TO ANY ISSUES PRESENTED, PERMITS AN EVIDENTIARY HEARING IN THIS COURT, AND SUPPORTS A FREESTANDING CLAIM OF ACTUAL INNOCENCE?

The Michigan courts answered, "No."

Petitioner answers, "Yes."

II. DID PETITIONER'S CONVICTION THAT WAS BASED ON PERJURED TESTIMONY VIOLATE HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS?

The Michigan courts answered, "No."

Petitioner answers, "Yes."

III. WAS PETITIONER DENIED HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE PROSECUTION KNOWINGLY USED PERJURED TESTIMONY TO OBTAIN THIS CONVICTION?

The Michigan courts answered, "No."

Petitioner answers, "Yes."

IV. WAS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT VIOLATED TO THE EXTENT THAT THE STATE FAILED TO DISCLOSE AGREEMENTS FOR MR. COLLINS' FAVORABLE TESTIMONY?

The Michigan courts answered, "No."

Petitioner answers, "Yes."

V. WAS PETITIONER DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO (A) INVESTIGATE AND CALL ROY BURFORD AND STEVE KONJA TO TESTIFY AT TRIAL, (B) QUESTION CURTISS COLLINS ABOUT HIS PENDING PAROLE VIOLATION AND WHETHER HE BELIEVED OR EVEN ONLY HOPED THAT HE WOULD SECURE IMMUNITY OR A LIGHTER SENTENCE, OR ANY OTHER FAVORABLE TREATMENT FROM THE PROSECUTOR, (C) MOVE FOR THE SUPPRESSION OF MR. COLLINS' IN-COURT IDENTIFICATION OF PETITIONER, (D) OBJECT TO THE ADMISSION OF PETITIONER'S STATEMENTS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT, AND (E) DO ALL OF THE ABOVE WHICH, WHEN CONSIDERED CUMULATIVELY, DEMONSTRATE THAT PETITIONER WAS PREJUDICED BY COUNSEL'S ERRORS?

The Michigan courts answered, "No."

Petitioner answers, "Yes."

VI. SHOULD PETITIONER'S CONVICTION BE REVERSED BECAUSE THE EVIDENCE PRESENTED AT TRIAL FAILED TO PROVE GUILT BEYOND A REASONABLE DOUBT?

The Michigan Courts answered, "No."

Petitioner answers, "Yes."

VII. DID THE INCONSISTENT VERDICT OF THE TRIAL COURT VIOLATE THE FOURTEENTH AMENDMENT?

The Michigan courts were not presented with this issue.

Petitioner answers, "Yes."

STATEMENT OF FACTS

(Parenthetical reference "PE" refers the the February 4, 1992 Preliminary Examination transcripts, "T1", "T2" and "T3" refer to the August 31, September 1 and September 2, 1992 trial transcripts respectively. Numbers following indicate page number.)

Petitioner was charged with murder in the first degree and possession of a firearm during the commission of a felony. The Information filed charged that on January 17, 1992 in front of 3960 Gray, in the City of Detroit, Michigan, Petitioner shot an killed Rodnell Penn (Count I), while armed with a firearm. (Count II). Petitioner entered a waiver of right to jury trial. (T1, 3-5). Curtiss Collins was the first witness called and denied being at the party store on January 17, 1992 at about 9:30 p.m. and denied seeing Petitioner at that time and place. (T1, 18-19). Mr. Collins testified that the City of Detroit Homicide officers coerced him to say things that weren't true and that he lied under oath in his preliminary examination testimony about seeing Petitioner. (T1, 39). He stated that altough he was afraid of Petitioner's family, he was now telling the truth, that he did not see anything on the evening of January 17, 1992. (T1, 41-42). Mr. Collins stated that the homicide detectives pressured him to lie with promises of money and protection and threats regarding his pending prison escape charge. (T1, 49-51).

John Trammel testified to knowing Petitioner, to being present on Gray on January 17, 1992, and to seeing Petitioner standing among the spectators at the crime scene. (T1, 60-62).

Leon Penn testified that on January 16, 1992 he saw Petitioner and Rodnell walking down Charlevoix Street and heard Petitioner tell Mr. Penn that he would see him tomorrow. (T1, 73-74).

Officer Sewell testified that on January 17, 1992 he responded to Gray regarding a shooting and observed a man laying in the driveway at 3960 Gray. (T1, 86-87). He didn't observe anyone else when he arrived. (T1, 90-91). He said that the party store was approximately two hundred yards away from where the body had been found. (T1, 93).

Officer Turner testified that on January 17, 1992 at about 9:00 a.m. he saw Petitioner on Gray (T1, 96-97) and had two conversations with him. (T1, 97-99).

On the second day of trial, Evidence Technician Randy Richardson responded to the scene at 3960 Gray (T2, 4-5) and described the area where Mr. Penn was shot as being fairly dark (T2, 21). He estimated the distance from in front of the party store to the location of the body as about three hundred to three hundred seventy five feet. (T2, 21-22).

Andrew Smith testified that on January 17, 1992 at 8:30 p.m. he saw Petitioner walking from Gray across Mack with two other guys. (T2, 35-40). Mr. Smith went into the party store and three or four minutes later heard gunshots. (T2, 42). Mr. Smith stayed in the store another few minutes, came out, saw the police down the street, and walked down Gray and saw the body. (T2, 42-43). Mr. Smith testified to knowing Mr. Collins and that he did not see him that night. (T2, 47-49).

Lucinka Gross testified that on January 17, 1992 she found Mr. Penn's body laying in the street. (T2, 51-53). She didn't see anyone else in the area. (T2, 53-55).

On the third day of trial, Christopher Harris testified that Mr. Penn spent the night of January 16, 1992, he dropped Mr. Penn off the next day and planned to meet him that evening at 9:00 p.m. (T3, 5-10).

Shannon Holcomb testified that she knew Rodnell Penn and had a

telephone conversation with him that Friday evening. (T3, 18-21). She said that she heard two voices during the call (T3, 29-30) and thought the call was coming from the party store. (T3, 34-36).

Curtiss Collins was then recalled and testified that he didn't tell the truth on the first day of trial, that his preliminary examination testimony was now the truth, that he was arrested after his testimony on the first day of trial, and that he really was on Mack and Gray on January 17, 1992. (T3, 36-38). Mr. Collins said that the testimony from two days earlier on the first day of trial was the result of threats made on him and his family. (T3, 38-40). He now claimed to have saw Petitioner with Mr. Penn, he left the party store and heard three or four gunshots, ran across Mack, and saw the same guy that he saw five to ten minutes earlier laying in the driveway and seeing Petitioner running through a field without a weapon. (T3, 44-46). He testified to being arrested for perjury after the testimony that he gave on the first day of trial but that he was given no promises regarding his new testimony. (T3, 47-51). He couldn't see the face of the person running away, but could see a scar on the back of his head. (T3, 64-65).

Petitioner presented his alibi defense (T3, 129-132, 147-149) and was found guilty of murder but acquitted of possessing a firearm. (T3, 185).

ARGUMENT I

PETITIONER HAS MADE A COLORABLE CLAIM OF ACTUAL INNOCENCE WHICH EQUITABLY TOLLS THE AEDPA'S STATUTE OF LIMITATION, OVERCOMES ANY PROCEDURAL BARS APPLICABLE TO ANY ISSUES PRESENTED, PERMITS AN EVIDENTIARY HEARING IN THIS COURT, AND SUPPORTS A FREESTANDING CLAIM OF ACTUAL INNOCENCE.

In House v Bell, 547 US 518 (2006), the United State Supreme Court explained that a claim of actual innocence must be both "credible" and "compelling." House v Bell, 547 US at 521. For a claim to be "credible," it must be supported "with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." Schlup v Delo, 513 US 298, 324 (1995). As long as the petitioner has presented "some new reliable evidence," the court may proceed to the "compelling" prong of the claim, at which point the court's analysis "is not limited to [new reliable] evidence" but must be based on "all the evidence, old and new." House v Bell, 547 US at 537 (emphasis added). For the claim to be "compelling," the petitioner must demonstrate that "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt-or to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." Id. at 538.

Petitioner will address the two requirements for a gateway actual innocence claim-"credible" and "compelling"-in turn.

A. CREDIBLE

Petitioner has presented thirteen pieces of new reliable evidence in support of his actual innocence claim. (See Appendix A through F, J, and M through Q). Petitioner first asserts that all of this evidence is "new" for actual innocence purposes because it was not presented at the time of trial. Petitioner recognizes that "[t]he circuit courts are split on whether 'new'

includes only 'newly discovered' evidence-evidence that was not available at the time of trial-or more broadly encompasses 'newly presented' evidence-all evidence that was not presented to the jury during trial." Lopez v Miller, 915 F Supp 2d 373, 400 n. 16 (E.D.N.Y. 2013)(collecting cases)(emphasis in original). While there is even a split within the Sixth Circuit "about whether the 'new' evidence required under Schlup includes only newly discovered evidence that was not available at the time of trial, or broadly encompasses all evidence that was not presented to the fact-finder during trial, i.e., newly presented evidence," Cleveland v Bradshaw, 693 F 3d 626, 633 (6th Cir. 2012), this split stems from Connolly v Howes, 304 Fed Appx 412, 419 (6th Cir. 2008) which is considered an unpublished opinion and "unpublished opinions carry no precedential weight". United States v Webber, 208 F 3d 545, 551 n. 3 (6th Cir. 2000). On the other hand, the Sixth Circuits' published "opinion in Souter suggests that this Circuit considers 'newly presented' evidence sufficient." Cleveland v Bradshaw, 693 F 3d at 633. Specifically, the Court in Souter v Jones held that:

> "to support a claim of actual innocence, a petitioner must support his arguments 'with new reliable evidence ... that was not presented at trial.' Schlup, 513 US at 324, 115 S Ct 851 (emphasis added). The Supreme Court noted that '[b]ecause such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.' Id. Thus, even if the photographs of the bloody clothes were available in 1992, there is no evidence in the record that they were ever presented to the jury and therefore, are new evidence in support of Souter's actual innocence claim under Schlup. See, e.g., Allen, 366 F 3d at 405-06 (assessing a habeas petitioner's actual innocence claim by evaluating new statements from co-defendants, who could have testified at trial, but not evidence already presented to the jury)." Souter v Jones, 395 F 3d at 595 n. 9.

Even if the six affidavits relied upon by Petitioner were available at the time of trial, "there is no evidence in the record that they were ever presented to the jury and therefore, are new evidence in support of [his] actual innocence claim under Schlup." Souter v Jones, 395 F 3d at 595 n. 9.

If this Court falls on the other side of this division amongst the circuit's and within this circuit, and concludes that Petitioner must provide "evidence that was not available at the time of trial," Cleveland v Bradshaw, 693 F 3d at 633, Petitioner asserts that these affidavits are nonetheless "new" as they were unavailable at the time of trial. Askia Hill states in his affidavit that "I never told anybody what I s[aw] that day because I was afraid for my life and I didn[']t want any trouble with anybody in the neighborhood, because I have to live in that neighborhood." (See Appendix A, ¶ 4). It is only now that he is in prison and out of that neighborhood that he is willing to testify to what he saw that night because he knows that Petitioner is innocent. Id. at ¶ 5. Roy Burford states that it was only after Petitioner was convicted that he heard everyone saying that it was Mark Goings that committed the murder that Petitioner stands convicted of. (See Appendix B, ¶ 10). Petitioner was unaware of the contents of Emanuel Randall's affidavit-and Roy Burford's and Elton Carter's affidavits as well (See Appendix G, ¶¶ 2-4)-until a chance encounter while incarcerated. Raymond Williams states that he never told anyone about what Curtiss Collins told him until he got in contact with Petitioner in late 2010 through 2011 (See Appendix D, ¶ 6) which led to the second affidavit (See Appendix E) from Mr. Williams. (See Appendix G, ¶ 5). Elton Carter states that it was only after Petitioner was found guilty that Curtiss Collins came to him with the information in his affidavit. (See Appendix F, ¶ 7).

The question for this Court is thus whether these pieces of evidence are "reliable." As an initial matter, is it important to note that in considering the reliability of evidence for actual innocence purposes, this Court "is not bound by the rules of admissibility that would govern at trial." Schlup v Delo, 513 US at 328. As will be discussed in addressing whether these

affidavits were "compelling," the six affidavits submitted by Petitioner "do not merely add to the defense, but also deduct from the prosecution. As a result, the affidavits can be considered 'new reliable evidence' upon which an actual innocence claim may be based." Souter v Jones, 395 F 3d at 593.

B. COMPELLING

To make a "compelling" claim of actual innocence, Petitioner must demonstrate that this new evidence would "make it more likely than not [that] no reasonable juror would find him guilty beyond a reasonable doubt." House v Bell, 547 US at 538. "It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather, the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." Schlup v Delo, 513 US at 329.

Askia Hill provides an affidavit stating that he will testify that he witnessed Mark Goings kill a man on Gray and Mack on the evening of January 17, 1992 (See Appendix A), and Roy Burford and Emanuel Randall state that the word on the street was that Mark Goings was the one who had actually killed Rodnell Penn on Gray and Mack on January 17, 1992. (See Appendix B, ¶ 10 & C, ¶ 6 & 7).

The trial judge, sitting as the finder of fact in this case, was of the opinion that the entire case centered in and around Curtiss Collins' testimony (T3, 101) and there were also four affidavits providing statements that Curtiss Collins was coerced by homicide detectives from the Detroit Police to commit perjury on the third day of Petitioner's trial. Roy Burford will testify that he knows Curtiss Collins personally and was told by him that he was not on Gray and Mack on the night of January 17, 1992 and that he "lied on" Petitioner because Petitioner had supposedly robbed him around 1986 and

that the police had something on his as well. (See Appendix B, ¶¶ 6 & 8). Emanual Randall will testify that he couldn't understand why Curtiss Collins lied in court as to Petitioner's involvement in the alleged crimes, he never would say. All he would say was that the police had something over his head. (See Appendix C, ¶ 8). Raymond Williams will testify that, while incarcerated with Mr. Collins between August 31, 1992 and September 2, 1992, he heard him crying in another cell and when he asked his what was wrong, Mr. Collins said that Sergeants Kinney and Gale were forcing him to lie on Petitioner at trial on September 2, 1992, or else he would be charged with the murder rather than Petitioner. (See Appendix D, ¶¶¶ 3, 4 & 8). Mr. Williams also states that Steve Konja told him, if subpoenaed, he would testify that while working at the party store on the night of January 17, 1992, he did not see Mr. Collins in the store. (See Appendix E, ¶¶ 2 & 3). Elton Carter will testify that Curtiss Collins admitted to him that the testimony he provided at Petitioner's trial was forced upon him by the officers from Detroit's 5th Precinct and that if he did not agree to give the testimony that he gave, that he would be charged with the murder rather than Petitioner. Mr. Collins further admitted that he was not at the scene of the crime when the murder occurred. (See Appendix F, ¶¶¶ 2, 3 & 5).

The affidavits alleging that Mr. Collins had falsely implicated Petitioner in the murder of Mr. Penn are corroborated by another piece of new evidence. An investigation by the Justice Department revealed that homicide detective, Sgt. Joann Kinney-the same Sergeant that Mr. Collins told Mr. Williams had coerced him to commit perjury (See Appendix D, ¶ 3)-admitted to threatening other witnesses. (See Appendix I).

Several other items of new evidence demonstrate that Mr. Collins was not only given a "deal" for his testimony implicating Petitioner on the third day of trial, but also that the perjury charges he was faced with after he

provided testimony exonerating Petitioner on the first day of trial were never pursued after he gave testimony implicating Petitioner on the third day of trial. Search results from the Michigan Department of States' Uniform Commercial Code Debtor Information file revealed that a LEIN was placed on Mr. Collins on August 25, 1992 for a parole violation (See Appendix O); less than a week before he first testified at trial on August 31, 1992. Mr. Collins gave testimony exaonerating Petitioner and he was immediately arrested for perjury. (T3, 47-50). Mr Collins was recalled two days later and testified that he had lied on the first day of trial and that the testimony he gave implicating Petitioner during his preliminary examination was now the truth (T3, 36-40) and only a few days later, on September 5, 1992, the LEIN for the parole violation was recalled. (See Appendix O). Moreover, a Freedom of Information Act request to the Michigan State Police produced a criminal history on Mr. Collins verifying the fact that he was never charged with perjury (See Appendix P) and Mr. Collins' trial court docket entries support this as well. (See Appendix Q). Petitioner's trial attorney, Ronald Giles, provided Petitioner with a post-trial affidavit indicating that his recollection of the perjury charge was that "Mr. Collins was released and not charged when he changed his testimony the following day." (See Appendix N, ¶ 5).

Petitioner's trial attorney also wrote Petitioner a post-trial letter explaining to him "that Mr. Collins was on ... parole, and was given a 'deal' in order to maintain his ... parole, after his testimony." (See Appendix M).

Petitioner asserts that this new evidence would "make it more likely than not [that] no reasonable juror would find him guilty beyond a reasonable doubt". House v Bell, 547 US at 538. Certainly a witness testifying that he had witnessed someone else other than the Petitioner killing Rodnell Penn would be sufficient to meet this standard but this evidence is coupled with

evidence that Mr. Collins was coerced by homicide detectives into giving false testimony and was also provided favorable treatment in other pending cases for his testimony implicating Petitioner. Mr. Collins was the only witness to allege that Petitioner was present when the murder occurred and, when first called to testify at trial, Mr. Collins said at that time that he didn't even see Petitioner at all. Mr. Collins specifically denied being present at the party store on Gray and Mack on January 17, 1992 at the time Mr. Penn was killed or seeing Petitioner there. (T1, 18-19). Mr. Collins testified that homicide detectives from the Detroit Police coerced him to say things that weren't true and that he lied under oath when providing testimony at the preliminary examination implicating Petitioner. (T1, 39). He testified that the homicide detectives pressured him to lie with promises of money and protection regarding his pending prison escape charges. (T1, 49-51).

After giving this testimony on the first day of trial, Mr. Collins was arrested for perjury and held in the custody of the homicide detectives from the Detroit Police. (T3, 47-50). Two days later, on the third day of trial, Mr. Collins was recalled by the prosecution and recanted his testimony given on the first day of trial. Mr. Collins testified that he lied on the first day of trial and that now his preliminary examinations testimony was really the truth. (T3, 36-40). He claimed that his testimony exonerating Petitioner on the first day of trial was given out of fear of the death threats made on him and his family (T3, 38-40) but, despite his belief in these threats (T3, 40) and without any promises from the homicide detectives (T3, 50-51), he mysteriously abandoned his fear for the life of himself and his family and gave testimony implicating Petitioner.

It was based on this questionable foundation that Mr. Collins gave his testimony implicating Petitioner on the third day of trial. However, he did

not even testify to actually seeing Petitioner shoot Mr. Penn. Mr. Collins testified to hearing three of four gunshots, running across Mack, and claimed that it was the Petitioner that he saw running through a field. (T3, 44-46). But he testified that he coudn't even see the face of the person he claimed to be the Petitioner but, rather, he made his identification from a scar on the back of the head of the person he saw running through the field. (T3, 64-65).

But Police Officer Randy Richardson, the police evidence technician who examined the crime scene, testified that the party store at the corner of Grey and Mack, where Mr. Collins claimed to be standing when he saw Petitioner's scar, was about three hundred to three hundred and seventy five feet away from the location of Mr. Penn's body. (T3, 21-22). Officer Richardson also testified that the area where his body was found was fairly dark. (T3, 21). In fact, after being shown People's Exhibit Number 13, which was taken basically from the side of the party store at roughly 9:45 to 10:00 a.m., and depicted himself standing "pretty close to" the crime scene (T3, 28-29), Officer Richardson testified that he could make not make out any of his own features and could make out no more than the body outline of himself. (T3, 29-30).

This begs the question that, if Officer Richardson could make out no more than the outline of his own body in the photograph showing him at the crime scene at about 9:45 to 10:00 in the morning that was taken at the party store (T3, 28-30) where Mr. Collins claims to have observed Petitioner running through a field (T3, 64), then how could Mr. Collins have possibly identified Petitioner from the same distance at night in a fairly dark area (T3, 21) only by a scar on the back of Petitioner's head? (T3, 64-65).

The only logical conclusion is that Mr. Collins committed perjury due to the police coercions described in the affidavits of Roy Burford, Emanuel Randall, Raymond Williams, and Elton Carter. After all, Mr. Collins had

already provided testimony that the homicide detectives from the Detroit Police had coerced him into saying things that weren't true and that he lied under oath at the preliminary examination. (T1, 39). He testified that the homicide detectives pressured him to lie with promises of money and protection and threats regarding his pending prison escape charge (T1, 49-51) and this testimony coincides with the contents of the affidavits stating that the homicide detectives from the Detroit Police coerced Mr. Collins into testifying favorably for the prosecution. This is further supported through an investigation by the Justice Department which revealed that homicide detective, Sgt. Joann Kinney-the same sergeant that Mr. Collins had told Mr. Williams had coerced him to commit perjury (See Appendix D, ¶ 3)-admitted to threatening other witnesses. (See Appendix I). In fact, the judge sitting as the trier of fact considered all of Mr. Collins' testimony (T3, 174-174) and stated his belief that "Mr. Collins' testimony at times was very conflicting and down right lying to this Court." The judges' opinion here addressed Mr. Collins' testimony from the first day of trial as that which was disbelieved as he goes on to state that Mr. Collins "did tell this Court today as to the reasons as to why he lied two days ago in this courtroom." (T3, 176).

Had the judge known that Mr. Collins was coerced by homicide detectives from the Detroit Police to commit perjury on the third day of trial, the day he told the "Court ... the reason as to why he lied two days ago in this courtroom," the testimony given "two days ago" on August 31, 1992 that exonerated Petitioner would have been the testimony accepted as true by the judge and Petitioner would have been acquitted.

Furthermore, had the trial judge known that Mr. Collins was given "a 'deal' in order to maintain his ... parole, after his testimony" (See Appendix M) and that he was to be "released and not charged when he changed his

testimony" (See Appendix N, ¶ 5), the outcome would have been different. The trial judge was of the opinion that the entire case centered in and around Mr. Collins' testimony (T3, 101) and accepted his explanation for lying on the first day of trial (T3, 176) which was because of his belief in the alleged death threats made on him and his family. (T3, 38-40). Had the trial judge had knowledge that Mr. Collins' explanation for lying on the first day of trial was only given on the third day of trial after making agreements with the prosecutor and through threats from police, considered in combination with the fact that Mr. Collins claimed to have abandoned his fear for the life of his family and himself (T3, 38-40) without any promises from homicide detectives (T3, 50-51), the testimony exonerating Petitioner would have been the testimony accepted as true and Petitioner would have been acquitted. To be sure, Mr. Collins testified that he never saw Petitioner with a weapon (T3, 44-46) and Petitioner was found not guilty of the possession of a firearm during the commission of a felony charge (T3, 185) even though the prosecution's case was that the "killing was done by the defendant with a firearm, particularly a handgun." (T1, 6).

For these reasons, Petitioner asserts that it is "more likely than not, in light of the new evidence, [that] no reasonable juror would find [Petitioner] guilty beyond a reasonable doubt." House v Bell, 547 US at 538.

C. TOLLING OF THE STATUTE OF LIMITATIONS

In McQuiggin v Perkins, 133 S Ct 1924 (2013), the United States Supreme Court announced that "[s]ensitivity to the injustice of incarcerating an innocent individual should not abate when the inpedement is AEDPA's statute of limitations." Id. at 1932. "To invoke the miscarriage of justice exception to the AEDPA's statute of limitations ... a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. Unexplained delay in presenting new evidence bears on the

determination whether petitioner has made the requisite showing." Id. at 1935 (internal cite and quotations omitted).

As shown above, Petitioner has made this showing and is therefore entitled to equitable tolling of the AEDPA statute of limitations for this petition.

D. OVERCOMING PROCEDURAL BARS

The Supreme Court has applied the actual innocence exception to overcome a procedural default in state court in Coleman v Thompson, 501 US 722, 750 (1991), Murray v Carrier, 477 US 478, 495-496 (1986), and in House v Bell, 547 US at 521-522, and since Petitioner has made a colorable showing of actual innocence above, no procedural defaults are applicable to any claims presented in this petition.

E. ENTITLEMENT TO AN EVIDENTIARY HEARING

Petitioner first argues that he is entitled to an evidentiary hearing in relation to the claims raised in his post-conviction motion for relief from judgment that was filed in the Wayne County Circuit Court under subchapeter 6.500 of the Michigan Court Rules as those claims were not adjudicated on the merits. The United States Supreme Court explained in Cullen v Pinholster, 131 S Ct 1388 (2011) that "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." Id. at 1400. But, "if the state court did not adjudicate the petitioner's claim on the merits, Pinholster explains that a federal court can still hold an evidentiary hearing, subject of course to the restrictions of 28 U.S.C. § 2254(e)(2)." Ballinger v Prelesnik, 709 F 3d 558, 562 (6th Cir. 2013), citing Cullen v Pinholster, 131 S Ct at 1401 & n. 10.

In appealing the denial of his post-conviction motion, the Michigan

Court of Appeals and the Michigan Supreme Court both denied his claims "because the defendant ... failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." (See Appendix J & K). "Because the form orders in this case citing Rule 6.508(D) are ambiguous as to whether they refer to procedural default or denial of relief on the merits, the errors are unexplained. [This Court] must therefore look to the last reasoned state court opinion to determine the basis for the rejection of" Petitioner's claim. Guilmette v Howes, 624 F 3d 286, 291 (6th Cir. 2010). The last reasoned opinion was from the Wayne County Circuit Court Judge who held that:

> "All of the issues raised in defendant's current motion were raised, in one form or another, and rebuffed on direct appeal and/or in his first post-appeal motion. Accordingly, and since defendant does not make an accurate claim of a retroactive change in law, the defendant is not entitled to relief because of MCR 6.508(D)(2)(3)." (See Appendix L).

"M.C.R. 6.508(D)(2) is essentially a res judicata or law of the case rule, which prevents the relitigation in a post-conviction motion which have already been decided adversely against a defendant in a prior appeal," Stokes v Scutt, 821 F Supp 2d 989, 908 (E.D. Mich. 2011), and, therefore, "the state court d[id] not adjudicate the petitioner's claim on the merits" and this Court "can still hold an evidentiary hearing". Ballinger v Prelesnik, supra.

Next, while "brief orders citing Rule 6.508(D) in some cases refer to a petitioner's failure to meet his burden on the merits," Guilmette v Howes, 624 F 3d at 291, the trial court expressly invoked the procedural aspect of Rule 6.508(D)(3) and declined to reach the merits of Petitioner's claim and he is also entitled to an evidentiary hearing for this reason. Ballinger v Prelesnik, supra.

Indeed, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of indication or state-law

procedural principles to the contrary." Johnson v Williams, 133 S Ct 1088, 1094 (2013).

Also, as for Argument V(D)and VI which were raised on direct appeal in the 1990's, an evidentiary hearing held to make a determination as to whether these arguments can be equitably tolled is not barred. As the Court in Chavez v Florida, 647 F 3d 1057 (11th Cir. 2011) explained, the:

> "AEDPA does contain additional restrictions on a federal court granting an evidentiary hearing in a state prisoner's habeas proceedings. See 28 U.S.C. § 2254(e)(2); Cullen v Pinholster, US ____, 131 S Ct 1388, 1398, 179 L Ed 2d 557 (2011); see also Schriro, 550 US at 474, 127 S Ct at 1490 ("Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in determining whether an evidentiary hearing is appropriate."). Those additional restrictions do not, however, apply to the § 2254(d) statute of limitations tolling issues before us, because whether the statute is equitably tolled is a purely federal issue, which did not arise until Chavez's federal habeas petition was filed."

As for Argument V(D), an argument also raised on direct appeal in the 1990's, Petitioner asserts that the Michigan Court of Appeals' decision was an unreasonable determination of the facts. As explained in Argument V(D), the Michigan Court of Appeals had several items of evidence presented to it to factually support his claim but ignored this evidence in making its ruling. (See Appendix H, page 4). In Taylor v Maddox, 366 F 3d 992 (9th Cir. 2004), it was held that "if a state court makes evidentairy findings without holding a hearing and giving a petitioner an opportunity to present evidence, such findings clearly result in an 'unreasonable determination' of the facts." Id. at 1001. Because the Michigan Court of Appeals made an evidentiary finding without holding a hearing, it made an unreasonable determination of the facts and, as the Court in Caudill v Conover, 871 F Supp 2d 639, 647 (E.D. Ky. 2012) explained, Cullen v Pinholster "does not completely shut the door on further factual development if needed. If, after reviewing the extensive state court record, this Court determines that any of the claims adjudicated by the state

court were based on an unreasonable determination of the facts, § 2254(d) deference would not apply and new evidence can be considered."

For all of these reasons, Petitioner is entitled to an evidentiary hearing in this Court. In fact, "[w]here newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing." Townsend v Sain, 372 US 293, 317 (1963)(emphasis added). After such an evidentiary hearing, Petitioner asserts that he will have presented "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error," Schlup v Delo, 513 US at 316, and Petitioner asserts that his trial was not free of non-harmless constitutional error as is now addressed.

F. FREESTANDING CLAIM OF ACTUAL INNOCENCE

The Supreme Court of the United States has "not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence," McQuiggin v Perkins, 133 S Ct at 1931, and Petitioner argues that, in light of the compelling circumstances of this case detailed above, he has made out an exceptional case for which the Supreme Court to resolve this question.

ARGUMENT II

PETITIONER'S CONVICTION THAT WAS BASED ON PERJURED TESTIMONY VIOLATED HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

The right to a fair trial is guaranteed by the United States Constitution. United States v Matinez-Salazar, 528 US 304, 313 (2000); Bracey v Gramley, 520 US 899, 904-905 (1997). A refusal to grant a new trial based on newly discovered evidence violates the Due Process Clause of the Fourteenth Amendment, where the evidence is "so compelling that it would be a violation

of ... fundamental fairness ... not to afford a defendant a new trial...." Moore v Casperson, 345 F 3d 474, 491 (7th Cir. 2003). Moreover, "[t]he governments failure to correct testimony that it later learns is perjured is a[] Mooney-Napue violation." US v Houston, 648 F 3d 806, 814 (9th Cir. 2011), citing Mooney v Holohan, 294 US 103, 112 (1935) and Napue v Illinois, 360 US 264, 269 (1959).

Based on the affidavits and documents attached as exhibits in support of a colorable claim of actual innocence made in argument I, along with an examination of the facts in support of that argument as well, it is apparent that Petitioner was denied a fundamentally fair trial where Mr. Collins gave false testimony on the third day of trial implicating Petitioner and those exhibits and facts are hereby incorporated at this point into this argument.

The newly discovered evidence presented here is so compelling that it would be a violation of ... fundamental fairness ... not to afford [Petitioner] a new trial....," Moore v Casperson, 345 F 3d at 491, as Petitioner has established that the judge "probably would have acquitted [him] in the absence of the false testimony." United States v Moore, 54 F 3d 92, 99 (2d Cir. 1995). In fact, the judge sitting as the trier of fact considered all of Mr. Collins' testimony (T3, 174-176) and stated his belief that "Mr. Collins' testimony at times was very conflicting and down right lying to this Court." The judges' opinion here addressed Mr. Collins' testimony from the first day of trial as that which was disbelieved as he goes on to state that Mr. Collins "did tell this Court today as to the reasons as to why he lied two days ago in this courtroom." (T3, 176).

Had the judge known that Mr. Collins was coerced by homicide detectives from the Detroit Police to commit perjury on the third day of trial, the day he told the "Court ... the reason as to why he lied two days ago in this

courtroom," the testimony given "two days ago" on the first day of trial that exonerated Petitioner would have been the testimony accepted as true by the judge, Petitioner would have been acquitted, and "[t]he governments failure to correct testimony that it later learns is perjured is ... a Mooney-Napue violation." US v Houston, 648 F 3d at 814.

ARGUMENT III

PETITIONER WAS DENIED HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL WHERE THE PROSECUTOR KNOWINGLY USED PERJURED TESTIMONY TO OBTAIN A CONVICTION.

"A conviction obtained using knowingly perjured testimony violates due process, even if the witness's perjured testimony goes only to the credibility as a witness and not to the defendant's guilt." US v Houston, 648 F 3d at 814, citing Mooney v Holohan, 294 US at 112 and Napue v Holohan, 360 US at 269. The purpose of granting a new trial to a person who has been convicted with the use of perjured testimony is "not punishment ... for the misdeeds of a prosecutor but avoidance of an unfair trial to an accused." Arizona v Youngblood, 488 US 51, 63 (1988), quoting Brady v Maryland, 333 US 83, 87 (1963), and cases cited in Youngblood.

The "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Abdus-Samad v Bell, 420 F 3d 614, 625 (6th Cir. 2005), quoting Giglio v United States, 405 US 150, 153 (1972). It is thus well-settled that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v Agurs, 427 US 97, 103 (1976)(footnote omitted). "To prevail on such a claim, [Petitioner] must show (1) that the prosecution presented false testimony (2) that the prosecution knew was false, and (3) that was material." Akrawi v Booker, 572 F 3d 252, 265 (6th Cir. 2009)(cites and internal quotation marks

omitted).

The prosecutor knowingly used perjured testimony when he asked Mr. Collins at trial "is the only reason you are coming in and telling the Judge that you lied Monday morning merely because now you are facing potential charges?", and allowed Mr. Collins to respond, "No." (T3, 38). First, Petitioner must show that the prosecutor presented false testimony. Akrawi v Booker, 572 F 3d at 265. Search Results from the Michigan Department of States' Uniform Commercial Code Debtor Information file revealed that a LEIN was placed on Mr. Collins on August 25, 1992 for a parole violation (See Appendix O) less than a week before he first testified at trial on August 31, 1992. Mr. Collins gave testimony exonerating Petitioner on the first day of trial and he was immediately arrested on the perjury charges. (T3, 47-50). Mr Collins was recalled two days later and testified that he had lied on the first day of trial and that the testimony he gave implicating Petitioner during his preliminary examination was now the truth (T3, 36-40) and only a few days later, on September 5, 1992, the LEIN for the parole violation was recalled. (See Appendix O).

Ronald Giles, Petitioner's defense counsel, specifically stated in a letter to Petitioner sent after trial "that Mr. Collins was on ... parole, and was given a 'deal' in order to maintain his ... parole, after his testimony." (See Appendix M). He also stated in a post-trial affidavit that it was his recollection that, on the perjury charge, "Mr. Collins was released and not charged when he changed his testimony the following day." (See Appendix N, ¶ 5). Moreover, a Freedom of Information Act request to the Michigan State Police produced a criminal history on Mr. Collins verifying the fact that he was never charged with perjury. (See Appendix p)(See also Appendix Q). These facts demonstrate that the prosecutor presented false testimony when he

allowed Mr. Collins to respond "No" when asked if "the only reason you are coming in and telling this Judge that you lied Monday morning merely because now you are facing potential charges?" (T3, 38).

Second, Petitioner must show that the prosecution knew that this testimony was false. Akrawi v Booker, 572 F 3d at 265. The fact that Mr. Collins was released and not charged after he changed his testimony (See Appendix M, N, R & S) indicates the "tip of the iceberg" of the undisclosed deal. See e.g., United States v Shaffer, 789 F 2d 682, 690-691 (9th Cir. 1986). Additionally, defense counsel wrote Petitioner a letter after trial recalling that "Mr. Collins was on ... parole, and was given a 'deal' in order to maintain his ... parole, after his testimony." (See Appendix M).

It follows that the prosecutor knew Mr. Collins was committing perjury when he testified that he was not coming in and telling the Judge that he had previously lied because of the charges he was facing. (T3, 38). After all, Mr. Collins claimed that his testimony exonerating Petitioner on the first day of trial was given out of fear of death threats made on him and his family (T3, 38-40) but, despite his belief in these death threats (T3, 40), he makes the claim that he was promised nothing for his testimony (T3, 38, 50-51) yet mysteriously abandoned his fear for the life of his family and himself and gave testimony implicating Petitioner. He was then "released and not charged when he changed his testimony". (See Appendix N, ¶ 5)(See also Appendix M, O, R & S).

Third, Petitioner must show that this evidence was material. Akrawi v Booker, 572 F 3d at 265. "[E]vidence is 'material' ... where there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Cone v Bell, 129 S Ct 1769, 1783 (2009). Had the trial judge known that Mr. Collins was given "a 'deal' in

order to maintain his ... parole, after his testimony" (See Appendix M) and that he was to be "released and not charged when he changed his testimony" (See Appendix N, ¶ 5), the outcome would have been different. The trial judge was of the opinion that the entire case centered in and around Mr. Collins' testimony (T3, 101) and accepted his explanation for lying on the first day of trial (T3, 176) which was because of his belief in the alleged death threats made on him and his family. (T3, 38-40). Had the trial judge had knowledge that Mr. Collins' explanation for lying on the first day of trial was only given on the third day of trial after making agreements with the prosecutor and police, "there is a reasonable probability that ... the result of the proceeding would have been different." Akrawi v Booker, 572 F 3d at 265.

ARGUMENT IV

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WAS VIOLATED TO THE EXTENT THAT THE STATE FAILED TO DISCLOSE AGREEMENTS FOR MR. COLLINS' FAVORABLE TESTIMONY.

In Brady v Maryland, 373 US 83 (1963), the Supreme Court held that suppression of favorable evidence to the accused violates due process where evidence is material either to guilt or to punishment, irrespective of good or bad faith of the prosecution. "To establish that a Brady violation undermines a conviction, a convicted defendant must make each of these showings; (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the State suppressed the evidence, either willfully or inadvertently; and (3) prejudice ... ensued." Skinner v Switzer, 131 S Ct 1289, 1300 (2011). "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Kyles v Whitley, 514 US 419, 433 (1995), quoting United States v Bagley, 473 US 667, 685 (1985). The Supreme Court has further stated that:

> "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown where the government's evidentiary suppression 'undermines confidence in the outcome of trial.'" Kyles v Whitley, 514 US at 434, quoting United States v Bagley, 473 US at 678.

"[E]vidence of any understanding or agreement as to future prosecution would be relevant to ... credibility and the jury was entitled to know of it." Giglio v United States, 405 US 150, 154 (1972).

This argument entails three separate crimes for which undisclosed agreements were made with Mr. Collins for his favorable testimony. First, there was the perjury charge, the only one mentioned in court. (T3, 47). Second, there was the parole violation listed in the Michigan Department of States' Uniform Commercial Code Search Results Debtor Information. (See Appendix O). Third, there was the agreement not to charge Mr. Collins with the murder of Mr. Penn made by the Detroit Police. (See Appendix B, C, D & F).

Petitioner must first show that "the evidence at issue is favorable to [him], either because it is exculpatory, or because it is impeaching." Skinner v Switzer, 131 S Ct at 1300. The first component of the Brady test is satisfied because, as in Giglio, Petitioner discovered evidence that the government had failed to disclose a promise of dismissal of Mr. Collins' charges in exchange for testimony favorable to the prosecution at trial. "The evidence which [Petitioner] was convicted was entirely circumstantial" and there were "no eyewitnesses to the killing of Rodnell Penn." (See Appendix H, page 1). Furthermore, a directed verdict was denied because the trial judge found, "centering in around Curtiss Lindell Collins' testimony, ... that this prosecution has satisfied its burden of proof at this point in time." (T3, 101). Considering the circumstantial nature of the evidence and the importance placed on Mr. Collins' testimony, the "evidence of any understanding or

agreement as to future prosecution would be relevant to [Mr. Collins'] credibility and the ju[dge] was entitled to know of it." Giglio v United States, 405 US at 155.

Second, Petitioner must show that "the State suppressed the evidence." Skinner v Switzer, 131 S Ct at 1300. First, the prosecution suppressed the deal made with Mr. Collins to provide favorable testimony in exchange for the dismissal of the charges of perjury. Petitioner's trial lawyer stated in a post-trial affidavit that it was his recollection that, as for the perjury charge, "Mr. Collins was released and not charged when he changed his testimony the following day." (See Appendix N, ¶ 5). Moreover, a Freedom of Information Act request made to the Michigan State Police produced a criminal history on Mr. Collins verifying that he was never charged with perjury. (See Appendix R); (See also Appendix S).

Second, Search Results from the Michigan Department of States' Uniform Commercial Code Debtor Information file revealed that a LEIN was placed on Mr. Collins on August 25, 1992 for a parole violation (See Appendix O) less than a week before he testified on the first day of trial. When Mr. Collins gave testimony exonerating Petitioner, he was immediately arrested. (T3, 47-50). Mr. Collins was recalled two days later and testified that he had lied on the first day of trial and that the preliminary examination testimony was now the truth (T3, 36-40) and only a few days later, on September 5, 1992, the LEIN for the parole violation was recalled. (See Appendix O). Defense counsel's post-trial letter to Petitioner explains "his recollection that Mr. Collins was on ... parole, and was given a 'deal' in order to maintain his ... parole, after his testimony." (See Appendix M).

Third, the affidavits of Roy Burford, Emanuel Randall, Raymond Williams and Elton Carter provide evidence that the homicide detectives from the

Detroit Police had coerced Mr. Collins into an agreement to testify favorably in exchange for his not being charged with the murder of Mr. Penn. (See Appendix B, C, D & F). While it was the police, and not the prosecutor that made the agreement with Mr. Collins, this is of no consequence to Petitioner's argument as "the Brady disclosure requirement applies to relevant evidence in the hands of the police, whether the prosecutor[] knew about it or not." Akrawi v Booker, 572 F 3d at 263.

Finally, Petitioner must show that "prejudice ... ensued." Skinner v Switzer, 131 S Ct at 1300. This he can do as, had the trial judge learned of the undisclosed agreements, the outcome would have been different. The trial judge was of the opinion that the entire case centered in and around Mr. Collins' testimony (T3, 101) and accepted his explanation for lying on the first day of trial (T3, 176) which was because of his belief in the alleged death threats made on him and his family (T3, 38-40). Had the trial court had knowledge that Mr. Collins' explanation for lying on the first day of trial was only given after making agreements with the prosecutor and police, it would have put "the case in such a different light as to undermine confidence in the verdict." Kyles v Whitley, 514 US at 435.

ARGUMENT V

PETITIONER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL COUNSEL FAILED TO (A) INVESTIGATE AND CALL ROY BURFORD AND STEVE KONJA TO TESTIFY AT TRIAL, (B) QUESTION CURTISS COLLINS ABOUT HIS PENDING PAROLE VIOLATION AND WHETHER HE BELIEVED OR EVEN ONLY HOPED THAT HE WOULD SECURE IMMUNITY, A LIGHTER SENTENCE, OR ANY OTHER FAVORABLE TREATMENT FROM THE PROSECUTOR, (C) MOVE FOR THE SUPPRESSION OF MR. COLLINS' IN-COURT IDENTIFICATION OF PETITIONER, (D) OBJECT TO THE ADMISSION OF PETITIONER'S STATEMENT OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT, AND (E) DO ALL OF THE ABOVE WHICH, WHEN CONSIDERED CUMULATIVELY, DEMONSTRATE THAT PETITIONER WAS PREJUDICED BY COUNSEL'S ERRORS.

"The Sixth Amendment, applicable to the States by the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in

all prosecutions. The right to counsel is the right to effective assistance of counsel." Missouri v Frye, 132 S Ct 1399, 1404 (2012). "To establish ineffective assistance of counsel a defendant must show both deficient performance by counsel and prejudice." Premo v Moore, 131 S Ct 733, 739 (2011). To demonstrate deficient performance, Petitioner "must show that counsel's representation fell below an objective standard of reasonableness." Strickland v Washington, 466 US 668, 688 (1984). To demonstrate prejudice, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

ARGUMENT V(A)

Petitioner first asserts that his trial lawyer was ineffective for failing to call Roy Burford and Steve Konja to testify on his behalf at trial. Had his trial lawyer conducted a reasonable investigation, he would have discovered that Mr. Burford and Mr. Konja were at the party store at the same time that Mr. Collins claimed to have witnessed Petitioner in the store. (T3, 44, 52). Had Mr. Burford been called as a defense witness at trial, he would have testified that he never saw Mr. Collins or Petitioner in the store that night. (See Appendix B, ¶ 6 & 7). Had Mr. Konja been called to trial he would have testified that he is the owner of the party store where Mr. Collins claims to have witnessed Petitioner immediately prior to murdering Mr. Penn and that he never saw Mr. Collins in the store that night. (See Appendix E, ¶ 2).

It is well-established that "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v Washington, 466 US at 691. The duty to investigate derives from counsel's basic function, which is "'to make the

adversarial testing process work in the particular case.'" Kimmelman v Morrison, 477 US 365, 384 (1986), quoting Strickland v Washington, 466 US at 690. This duty includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence. Towns v Smith, 395 F 3d 251, 258 (6th Cir. 2005). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland v Washington, 466 US at 691. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v Flores-Ortega, 528 US 470, 481 (2000).

Mr. Collins testified that he was in the party store on Gray and Mack on January 17, 1992, at approximately 9:30 p.m., and saw Petitioner in the store as well. (T3, 38, 44, 52). It would have been reasonable for trial counsel to ask Sam who worked in the store that night, or to ask Steve Konja who owned the store and was also working that night, if they had information, or knew of anyone else that may have been in the store with information about the events of the evening in question. Had he done so, he would have came to find that Roy Burford was there talking to Sam from 8:00 p.m. until closing that night and that Mr. Burford never saw Mr. Collins or Petitioner in the store that night. (See Appendix B, ¶¶ 2, 3). Trial counsel would have also found that Mr. Konja was there that night and that he never saw Mr. Collins in the store either. (See Appendix E, ¶ 2).

While Andrew Smith did testify that he knew Mr. Collins and that he never saw him that evening, either at the party store or on the streets near the party store or the shooting scene (T2, 47-48), the testimony of Mr. Burford and Mr. Konja would have nonetheless corroborated Petitioner's version of the events and the Sixth Circuit has ruled that defense counsel may be

deemed deficient for failing to call witnesses whose testimony would corroborate the defendant's version of the events, and that such evidence is not merely cumulative. See Stewart v Wolfenbarger, 468 F 3d 338, 358-359 (6th Cir. 2007)(citing cases and holding that the testimony of two alibi witnesses was not cumulative to the defendant's own testimony); see also Workman v Tate, 957 F 2d 1339, 1345-1346 (6th Cir. 1992)(finding that the testimony of two defense witnesses, which would have corroborated certain witnesses' testimony and contradicted police officers' testimony, was not merely cumulative).

As discussed previously, there was relatively little evidence to support the guilty verdict to begin with and, "[i]n evaluating a claim of ineffective assistance of counsel, where there is relatively little evidence to support the guilty verdict to begin with, the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt." Dittrich v Woods, 602 F Supp 2d 802, 808 (E.D. Mich. 2009), citing Brown v Smith, 551 F 3d 424, 434-435 (6th Cir. 2008). Because this case centered on Mr. Collins' testimony (T3, 101), the neutral disinterested testimony of Mr. Burford and Mr. Konja would have created a "reasonable probability that ... the result of the proceeding would have been different." Strickland v Washington, 466 US at 694.

ARGUMENT V(B)

Search results from the Michigan Department of States' Uniform Commercial Code Debtor Information files reveal that a LEIN was placed on Mr. Collins on August 25, 1992 for a parole violation. (See Appendix O). This was less than a week before Mr. Collins testified on the first day of trial that he had lied under oath at Petitioner's preliminary examination because of coercive tactics employed by the homicide detectives from the Detroit Police. (T1, 39). Immediately after giving this testimony, Mr. Collins was arrested

for perjury. (T3, 47-50). Two days later, on the third day of trial, Mr. Collins returned and now claimed that the preliminary examination testimony was the truth. (T3, 36-40). He claimed that his testimony exonerating Petitioner given on the first day of trial was given out of fear of death threats made on him and his family. (T3, 38-40).

Apparently curious as to what had transpired between the first day of trial and the third day of trial to make Mr. Collins abandon his belief in the death threats made on him and his family (T3, 40) and to give testimony implicating Petitioner, Petitioner's trial lawyer made the strategic choice to question Mr. Collins about whether, after being arrested for perjury (T3, 47), if the arresting officers had made any promises to him such as promising not to charge him with perjury. (T3, 50-51).

But defense counsel failed to follow through on his strategy and to question Mr. Collins about whether he had any belief or even only a hope on his part that he would secure immunity, a lighter sentence, or any other special treatment concerning his pending parole violation. See Farakas v United States, 2 F 2d 644, 647 (6th Cir. 1924).

This was deficient performance, Strickland v Washington, 466 US at 688, as, only a few days later after testifying favorably for the prosecution, the LEIN for the parole violation was recalled on September 5, 1992. (See Appendix O). In fact, Petitioner's trial lawyer stated in a post-trial letter to Petitioner that it was his "recollection that Mr. Collins was on ... parole, and was given a 'deal' in order to maintain his ... parole, after his testimony." (See Appendix M).

Had Petitioner's trial lawyer brought out the "deal" that Mr. Collins' parole violation would be recalled after giving favorable testimony, the outcome would have been different. Strickland v Washington, 466 US at 694.

"[E]vidence of any understanding or agreement as to future prosecution would be relevant to [Mr. Collins'] credibility," Giglio v United States, 405 US at 155 and, considering the questionable nature of Mr. Collins' testimony discussed throughout this Brief, the trial judge would have found Petitioner innocent.

It is unclear where Petitioner's trial lawyer became aware of the "deal" either before or after trial. However, even if defense counsel became aware of the "deal" only after trial, he should have nonetheless brought out the fact that Mr. Collins was facing additional charges. Had he done so, the trial judge would have considered the fact that Mr. Collins was facing not only the perjury charge, but was also facing the parole violation and would have found it implausible that Mr. Collins had abandoned his belief in the death threats allegedly made on him and his family (T3, 40) without being promised any favorable treatment for his testimony (T3, 38, 50-51) in light of the multiple charges.

ARGUMENT V(C)

Due process protects the accused against the introduction of evidence that results from an unreliable identification obtained through unnecessarily suggestive procedures. Moore v Illinois, 434 US 220, 227 (1977). Whenever an identification is "[u]nnecessarily suggestive and conducive to irreparable mistaken identification," it must be suppressed. Stovall v Denno, 388 US 293, 302 (1967); Manson v Brathwaite, 432 US 98 (1977). Neil v Biggers, 409 US 188 (1972) "is, of course, the preeminent ruling on the subject of in-court identification challenged on the basis of suggestive pre-trial identification process." Mills v Cason, 572 F 3d 246, 250 (6th Cir. 2009). "To determine whether an identification procedure violates due process, courts first discern whether the procedure was impermissibly suggestive." Johnson v Warren, 344 F

Supp 2d 1081, 1090 (E.D. Mich. 2004).

Roney Fulton testified that Sgt. Kinney showed him and Mr. Collins "two pictures" (T2, 117) and Mr. Collins then told Sgt. Kinney that he recognized Petitioner. (T2, 124-125). Petitioner was in custody at this time, "[t]here was ample opportunity to conduct a traditional lineup," Biggers v Tennessee, 390 US 404, 407 (1968), and identification by photograph should not be used when a suspect is in custody. People v Strand, 213 Mich App 100 (1995). Mr. Fulton knew Mr. Collins was wanted by the police (T2, 125) and Mr. Collins was arrested (T2, 127) and gave a statement to police implicating Petitioner in the murder of Mr. Penn. (See Appendix S; NOTE: This statement was made under Curtiss Collins' alias, "Tony Smith", see T1, 33-34).

Petitioner submits that these facts demonstrate that Mr. Collins' identification was impermissibly suggestive. To be sure, Mr. Collins testified that homicide detectives from the Detroit Police had coerced him to lie and say that he saw Petitioner (T1, 39) and "[u]nnecessary suggestiveness generally depends upon whether the witness's attention was directed to a suspect because of police conduct." Howard v Bouchard, 405 F 3d 459, 469-470 (6th Cir. 2005).

Before Mr. Collins was allowed to testify when recalled on the third day of trial, Petitioner's trial "counsel's performance was deficient," Strickland v Washington, 466 US at 688, for failing to move for the suppression of Mr. Collins' in-court identification of Petitioner based on the police coercion described by Mr. Collins which demonstrated an unnecessarily suggestive procedure. At that point, the burden would have been shifted to the prosecutor to prove that the identification was reliable, independent of the suggestive procedure. United States v Wade, 388 US 218, 240 n. 31 (1967).

This the prosecutor would not have been able to do as Mr. Collins had

testified that he "didn't see nothing" (T1, 39), a fact supported by the evidence. Indeed, Officer Richardson testified that he could make out no more than the outline of his own body in a photograph admitted as People's Exhibit Number 13 showing him at the crime scene at about 9:45 to 10:00 in the morning taken at the party store (T3, 28-30) where Mr. Collins later claimed to have observed the crime take place. (T3, 64). Thus, it would have been in defiance of the realities of the physical facts of this case for Mr. Collins to have identified Petitioner from the same distance at night in a fairly dark area (T3, 21) by only a scar on the back of Petitioner's head. (T3, 64-65).

Petitioner has shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," Strickland v Washington, 466 US at 694, where the in-court identification would have been suppressed and the trial judge's decision to convict centered on Mr. Collins' testimony. (T3, 101).

ARGUMENT V(D)

In Kimmelman v Morrison, 477 US 365, 384 (1986), the Supreme Court stated that "the failure to file a suppression motion does not constitute per se ineffective assistance of counsel." The Court also indicated that an attorney's failure to timely file a suppression motion does not constitute ineffective assistance of counsel if the failure is due to strategic reasons. Id. at 384-385. Attorney strategy, however, must be sound. Id. at 384.

Petitioner was arrested on January 21, 1992 at 12:00. (See Appendix S). The only evidence that linked Petitioner to the crime was given by Mr. Collins (aka Tony Smith, see T1, 33-34), two days later. (See Appendix R). As evidenced by the testimony at trial, there was no evidence to support a finding of probable cause until Mr. Collins provided that probable cause with his statement two days after Petitioner was arrested and held incommunicado.

However, it was not until January 24, 1992, that a warrant for Petitioner's arrest was produced. (See Appendix T)

Petitioner's in-custody statement to police investigators (People's Exhibit #25; T1, 63-69) was made while he was held for four days on a warrantless arrest before being charged with any crime and taken before a magistrate. Petitioner contends that his arrest, without probable cause, and the delay in his arraignment on the murder charge were in violation of his Fourth Amendment rights. Petitioner's January 23, 1992 police statement was derivative of his illegal arrest, and that this statement should have been excluded as evidence at trial. Petitioner further contends that his trial lawyer's failure to challenge the validity of the arrest and his lawyer's failure to move to suppress Petitioner's statement amounted to ineffective assistance of counsel.

The Fourth Amendment of the United States Constitution prohibits unreasonable seizures of a person. An "arrest" is a particular kind of seizure to hold an individual to answer for a crime charged against him, Dunaway v New York, 442 US 200 (1979), and a warrantless arrest must be supported by probable cause. Beck v Ohio, 379 US 89 (1964).

Whether a warrantless arrest violates Fourth Amendment protections depends upon whether the facts and circumstances within the police officer's knowledge at the time of the arrest would warrant a reasonable belief that the suspect had committed or was committing an offense. Beck v Ohio, supra. Under both Michigan and Federal law, the Fourth Amendment right to be free from unreasonable seizures includes the protection against extended detention without just cause. The constitutional right to a prompt judicial determination of probable cause on a warrantless arrest is set forth under Michigan statutes:

MCL 764.13 provides that:

> "A peace officer who has arrested a person for an offense without a warrant shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the crime was committed, and shall present to the magistrate a complaint stating the charge against the person arrested."
>
> MCL 764.26 provides that:
>
> "Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed of his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer."

United States Supreme Court decisions have consistently held that the Fourth Amendment of the United States Constitution requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. Gerstein v Pugh, 420 US 103 (1975); Riverside v McLaughlin, 500 US 44 (1991). It has been held that evidence taken in violation of a defendant's Fourth Amendment right to prompt judicial determination of probable cause may be suppressed as fruit of the poisonous tree, Wong Sun v United States, 371 US 471 (1963), of the illegal arrest. Moreover, it has been held that an illegal arrest invalidates a subsequent statement given, even after proper Miranda warnings, unless the prosecution can clearly show that defendant's statement was freely given and was independent of the illegal arrest. Brown v Illinois, 422 US 603 (1975).

Petitioner's trial lawyer's performance was deficient and was not strategic as "no competent attorney would think a motion to suppress would have failed, which is the relevant question under Strickland." Premo v Moore, 131 S Ct at 741. Strickland prejudice is shown where the prosecutor was able to use Petitioner's inadmissible statement at trial (People's Exhibit #25) as evidence of "motive" and "knowledge" as to the killing of Mr. Penn. (T1, 63-69).

ARGUMENT V(E)

"The Sixth Circuit opined that '[w]hen determining prejudice, [courts] must consider the errors of counsel in total, against the totality of the evidence in the case.' Stewart v Wolfenbarger, 468 F 3d 338, 361 (6th Cir. 2006)." Robinson v US, 744 F Supp 2d 684, 693 (E.D. Mich. 2010). Petitioner asserts that, if individually these errors do not show prejudice under the second prong of the Strickland analysis, then when considered cumulatively these errors do demonstrate that prejudice.

ARGUMENT VI

PETITIONER'S CONVICTION SHOULD BE REVERSED BECAUSE THE EVIDENCE PRESENTED AT TRIAL FAILED TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT.

In this case, by bench trial verdict in the trial court, Petitioner was convicted of the crime of Murder, First Degree, MCL 750.316. In this appeal, Petitioner contends that the evidence presented at trial, when taken as a whole, failed to prove his guilt beyond a reasonable doubt. Specifically, that the evidence presented did not establish that Petitioner had taken the life of the deceased, Rodnell Penn. Second, that the evidence presented did not prove beyond a reasonable doubt each of the necessary elements of Murder, First Degree, MCL 750.316. And, that the People's evidence did not overcome Petitioner's alibi defense beyond a reasonable doubt.

It is a fundamental principle of our system of justice that an accused's guilt must be proven beyond a reasonable doubt. In re Winship, 397 US 358, 364 (1970); US Const, Amend XIV. Under Jackson v Virginia, 443 US 307 (1979), habeas corpus relief is appropriate based on insufficient evidence only where the court finds, after viewing the evidence in the light most favorable to the prosecution, that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. at 319. The Jackson standard must be applied "with explicit reference to the substantive

elements of the criminal offense as defined by state law." Id. at 324 n. 16. Petitioner contends that the prosecution failed to meet this burden and that the trial court judge's legal conclusions were not properly supported by factual findings supporting Petitioner's conviction.

In Michigan, first-degree murder is defined as:

> "Murder which is perpetrated by means of poison, lying in wait, or any other wilful, deliberate, and premeditated killing, or which is committed in the preparation, or attempt to perpetrate arson, criminal sexual conduct, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping, is murder in the first degree ..." MCL 750.316.

In order to establish the elements of Murder, First Degree, MCL 750.316, the prosecution must show that: 1) defendant caused the death of the deceased, 2) defendant intended to kill the deceased, 3) the intent to kill was premeditated, 4) the killing was deliberate, and 5) the killing was not justified, excused or done under circumstances that would reduce the offense to second-degree murder or manslaughter. For the crime of first-degree murder there must be actual, specific intent to take life and the intent must be deliberate and premeditated. People v Scott, 6 Mich 287, 293 (1859). Malice aforethought is an essential ingredient of this offense as the act which causes death, and the presumption of innocence applies equally to both ingredients of the crime. People v Martin, 392 Mich 533 (1974); See also People v Lyles, 100 Mich App 232 (1980); People v Morrin, 31 Mich App 301 (1971).

Petitioner contends that the evidence presented at trial failed to prove beyond a reasonable doubt that the death of Rodnell Penn was the result of first-degree murder. The Wayne County Medical Examiner's autopsy report (by Dr. Caoile) indicated that Mr. Penn died of multiple gunshot wounds, with large caliber non-jacketed slugs recovered from his body (T1, 11-14), and the stipulated firearms identification evidence (Police Officer Dragan, Detroit

Police crime lab) indicated that the two (2) slugs recovered from Mr. Penn's body were .38 caliber handgun ammunition fired from the same weapon. (Stipulation; T3, 72-75). While it is conceded that the People's proofs proved that Mr. Penn's death was the result of gunshot wounds and that slugs recovered from Mr. Penn's body came from the same handgun, Petitioner contends the circumstances surrounding Mr. Penn's death do not prove first-degree murder beyond a reasonable doubt. Indeed, Petitioner was found **not** guilty of the Possession of a Firearm During the Commission of a Felony charge (T3, 185) even though the prosecution's case was that the "killing was done by the defendant with a firearm, particularly a hand gun." (T1, 6). How could the trial judge have found that Petitioner killed Mr. Penn with a firearm when he was presented with insufficient evidence to find that he even possessed a firearm. Moreover, none of the People's witnesses testified as eyewitnesses to the actual shooting of Mr. Penn. (See Appendix H, page 1, where it was found that "[t]here were no eyewitnesses to the killing of Rodnell Penn"). People's witness Andrew Smith (T3, 35-50). Mr. Collins (T1, 16-58) & (T3, 36-92) and John Trammel (T1, 6-69) were the only witnesses who placed Petitioner in the general vicinity of the crime on January 17, 1992 before the shooting. Police Officer Turner (T1, 95-111) could only testify as to the events after police responded to the shooting on Gray Street. Witnesses Smith and Collins testified that they had seen Petitioner at the scene before the shooting, but neither of these prosecution witnesses witnessed the actual event; both men testifying that they heard several gunshots. Neither witness saw Mr. Penn being shot; neither saw who shot Mr. Penn; neither saw Petitioner in front of 3960 Gray Street where Mr. Penn had been shot; neither witness saw Petitioner at any time with any weapon; and neither witness could identify what conduct (by Mr. Penn or others) occurred immediately before the shooting death of Mr. Penn. Also, no prosecution witness could testify as to any threatening conduct

by Petitioner toward Mr. Penn before his death on January 17, 1992.

Under People v Martin, supra; People v Lyles, supra; and People v Morrin, supra, Murder, First Degree, MCL 750.316 requires proof beyond a reasonable doubt of a deliberate, premeditated act with malice aforethought. As no prosecution witness could directly testify as to what had occurred at the time of the shooting, and no admissible evidence was presented to substantiate the mens rea of the killing by prior conduct on the part of Petitioner in relation to Mr. Penn, the court's verdict of guilty under a first-degree murder charge is without evidentiary support. Where the evidentiary support was so lacking to sustain this charge, at most, the verdict should have been to a lesser form of homicide; Murder, Second Degree, MCL 750.317 or Manslaughter, MCL 750.321.

However, Petitioner contends that the prosecution evidence presented in his bench trial not only failed to establish beyond a reasonable doubt that he was guilty of the first-degree murder of Mr. Penn, but that the People's proofs failed to prove that Petitioner had committed any crime related to the death of Mr. Penn.

The People's evidence, when taken as a whole, could at best show that Petitioner was in the general area of Gray Street and Mack Avenue on Friday evening, January 17, 1992. The keystone of the People's case was witness Collins (T1, 16-58) & (T3, 36-92), and Petitioner contends that his trial testimony was so compromised by his demonstrated disregard of the witness oath as to lack the credibility required to sustain a criminal conviction. Even if Mr. Collins' testimony of the third day of trial were to be accepted, the evidence at best would show that Mr. Penn and Petitioner may have been together shortly before the shooting, and that Petitioner was running away from the general area after Mr. Collins had heard the sound of gunshots. (T3,

44-46). However, even Mr. Collins' testimony could not place Petitioner at the scene in front of 3960 Gray Street where Mr. Penn was killed.

The changed trial testimony of People's witness Collins (T3, 36-92) was also lacking in credibility based on other trial evidence presented by the People; evidence which brought into question Mr. Collins's ability to observe, and whether Mr. Collins was even at Mack and Gray at the time that Mr. Penn was murdered as he had claimed in his subsequent testimony.

Police Officer Randy Richardson (T2, 3-35), the police evidence technician who examined the crime scene testified that the party store at the corner of Gray and Mack, where Mr. Collins claimed to be standing when he witnessed the event, was about three hundred (300) to three hundred seventy five (375) feet away from the location of the body. (T2, 21-22). Officer Richardson also testified that the area where Mr. Penn was shot was fairly dark. (T2, 21). Thus, to be believed, one would have to accept the notion that Mr. Collins, standing well over the length of a football field, could identify a person in a dark area, running away from the direction where he was standing, with a claim that he saw a scar of that person's head. Petitioner contends that such testimony was so incredible that it could not sustain a rational verdict of guilt under the standard of Malcum v Burt, 276 F Supp 2d 664, 686 (E.D. Mich. 2003):

> "In examining claims of insufficiency of the evidence in habeas corpus, a federal court must presume that the [trier-of-facts'] findings in evaluating the credibility of the witness is correct and may ignore the testimony only when it finds it to be 'inherently incredible'. Such a finding may be made only where the testimony is 'unbelievable on its face'; i.e., could not have occurred under the laws of nature." (cite omitted).

Further, Mr. Collins' claim that he was really at the scene that Friday evening is contradicted by the testimony of three (3) prosecution witnesses; Andrew Smith (T2, 35-50), John Trammel (T1, 6-69) and Lucinka Gross. (T2, 50-59).

People's witness Mr. Trammel (T1, 60-69) testified, that he saw Petitioner on Gray Street among the spectators after the EMS and police arrived, but could not pinpoint the exact time (T1, 67) and did not testify to seeing Petitioner before the shooting incident. Mr. Trammel did not testify to seeing Mr. Collins at the scene of Friday evening.

People's witness Smith (T2, 35-50) testified that he saw "Goff" walking on Mack (T2, 35-36), before he went into the party store. Mr. Smith testified that he was in the store when he heard gunshots, then he went down the street to the shooting scene and saw Mr. Penn's body on the ground. (T2, 42-43). Mr. Smith specifically stated that he knew Mr. Collins, and that he never saw him that evening, either at the party store or on the street near the area of the crime scene (T2, 47-49); contradicting Mr. Collins' testimony.

People's witness Gross (T2, 50-59), the witness who first came upon Mr. Penn's body on Gray Street, testified that she came upon the body, then immediately went up Gray Street to the party store at the corner of Mack and Gray to call the police. (T2, 51-55). Ms. Gross testified that she didn't see anyone on the street. (T2, 57-59). She also testified that she knew Mr. Collins by the nickname "Kurt baby", but did not see him at anytime that evening (T2, 57-58); contradicting Mr. Collins' trial testimony.

Finally, the defense called two (2) witnesses: Raymond Williams (T3, 101-111) and Roney Fulton (T3, 111-128) who both testified that People's witness Collins was at Mr. Fulton's house on Corbett and not at Mack and Gray on Friday, January 17, 1992, when Mr. Penn was killed. Petitioner's trial lawyer also called two (2) other witnesses: Thomas Spells (T3, 129-147) and Vanessa Spells (T3, 147-155) who set forth an alibi defense that Petitioner was not on Gray Street at the time of Mr. Penn's death.

Under Michigan law, an alibi is established as a defense by the

testimony that the accused was somewhere else at the time the crime was committed. People v Mullane, 256 Mich 54 (1931). When the trial evidence sets forth an alibi, the prosecution bears the burden of overcoming this defense beyond a reasonable doubt, and if any reasonable doubt exists as to the accused's presence at the scene of the crime, the defendant should be acquitted. People v Loudenslager, 327 Mich 718 (1950); People v Burden, 395 Mich 462 (1975); People v Erb, 48 Mich App 622 (1973).

Defense alibi witness Thomas Spells testified that Petitioner was at his house from 6:00 to 7:00 in the evening of Mr. Penn's death, that Petitioner and him had left together between 9:00 and 10:00, and that they were at the scene of the crime amongst the spectators when police and EMS arrived. (T3, 129-132). The fact that Petitioner was in the crowd of spectators when the police and EMS arrived is verified by John Trammel (T1, 62-64) and Officer Turner. (T1, 95-98). Officer Sewell (T1, 90-91) and Lucinka Gross (T2, 51-53, 57-59) both testified that they did not see anyone when they arrived at the scene of the crime. The only witnesses who claimed to have seen Petitioner at the scene of the crime before Mr. Penn was killed were Mr. Collins and Andrew Smith. Of course, Mr. Collins claims both that Defendant was there at the time of the murder (T3, 44-46) and that he wasn't. (T1, 18-19). As discussed previously, his testimony was "inherently incredible" as the events which he claimed to have witnessed "could not have occurred under the laws of nature." Malcum v Burt, 276 F Supp 2d at 686. In fact, Mr. Smith (T2, 47-49) and Ms. Gross (T2, 57-58) both testified that they never saw Mr. Collins on Gray and Mack and Raymond Williams (T3, 101-111) and Roney Fulton (T3, 11-128) both testified that Mr. Collins was with them at Mr. Fulton's house on Corbett and not on Mack and Gray at the time of Mr. Penn's death. And while Mr. Smith claims to have seen Petitioner on Gray and Mack prior to the

death of Mr. Penn, he never saw Mr. Collins which also "could not have occurred under the laws of nature," Malcum v Burt, 276 F Supp 2d at 686, as Mr. Collins claims to have been right outside of the party store when he witnessed Petitioner running away from the scene of the crime. (T3, 64). Accordingly, the prosecution did not overcome Petitioner's alibi defense beyond a reasonable doubt, providing insufficient evidence of Petitioner's guilt.

ARGUMENT VII

THE INCONSISTENT VERDICT OF THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

In this case, the prosecution's evidence proved by the stipulated testimony of the Wayne County Medical Examiner (by Dr. Caolie) that Mr. Penn died as the result of gunshot wounds fired by a large caliber weapon using a non-jacketed ammunition. (T1, 11-14). By the stipulated testimony of firearms expert Police Officer Dragan (T2, 72-75), the People proved that the slugs recovered from Mr. Penn's body were fired from the same .38 caliber handgun. The autopsy report also showed that the close-range handgun firing was the sole cause of death of Mr. Penn. (T1, 11-14).

No witness ever testified to witnessing Petitioner in possession of firearm, including Mr. Collins. (T3, 44-46). The judge, sitting as the trier-of-fact, acquitted Petitioner of possessing a firearm because "[t]his Court has not seen a handgun. There have been no exhibit marked as a handgun". (T3, 185). The prosecution's case was that the "killing was done by the defendant with a firearm, particularly a handgun." (T1, 6).

Since Petitioner's guilt was determined by a judge rather than a jury, this inconsistent verdict was in violation of Petitioner's constitutional rights. United States v Maybury, 274 F 2d 899, 902-903 (2d Cir. 1960). This was clearly an inconsistent verdict as Petitioner could not have killed Mr.

Penn without a handgun when this was determined to be the cause of death. (T1, 11-14, 72-75). But the Michigan Court of Appeals held that:

> "Defendant also asserts that the court gave an inconsistent verdict. The trial court noted that defendant was charged with felony firearm based on the possession of a handgun. MCL 750.227(b); MSA 28.424(2). Because he was not persuaded beyond a reasonable doubt that a handgun rather than a sawed-off shotgun was used in the shooting, the trial court acquitted defendant on this charge. We find no reversible error in the trial court's failure to convict defendant of felony firearm as charged, yet find him guilty of first-degree murder." (See Appendix H, page 5).

Again, Petitioner was acquitted of possessing a firearm because "[t]his Court has not seen a handgun. There have been no exhibit marked as a handgun." (T3, 185). But there were also no sawed-off shotguns or exhibits of sawed-off shotguns. In fact, the only reference to a sawed-off shotgun came from the trial judge when he stated that "I don't know as a result of this close range firing that this was a saw-off rifle; what length of any gun might have been." Id. Accordingly, if there was insufficient evidence to find Petitioner guilty of possessing a handgun then it is even more the case that there was insufficient evidence to find him guilty of possessing a sawed-off shotgun as the firearm expert opined that it was a .38 caliber handgun that was the murder weapon. (T1, 72-75). Thus, the trial judge's verdict violated Petitioner's constitutional right against an inconsistent verdict. United States v Maybury, 274 F 2d at 904-906.

RELIEF REQUESTED

Therefore, Petitioner asks this Honorable Court to hold an evidentiary hearing and either release Petitioner unconditionally or to order a new trial.

Respectfully submitted,

Carl Hubbard #205988

Carl Hubbard #205988
Petitioner in Pro Se
Carson City Correctional Facility
10274 Boyer Road
Carson City, MI 48811-5000

Dated: October 22, 2013

STATE OF MICHIGAN)

)SS

COUNTY OF MOUNTCALM

AFFIDAVIT OF FACT

I Askia Hill Id ç331718, being duly sworn deposes and sayeth as followed:

1) The statement made in this affidavit is to the best of my said knowledge, true and If called upon as a "Witness". I can testify Competently, as to the truth of the statement made in this affidavit

2). I was on my way to the store on the corner of Gray & Mack on Janurary 17, 1992, when I was across the street in the vacant lot across the street from Uncle Peter's house. That is when I saw Mark Going arguing with somebody in the front of Uncle Peter's house. Then I saw the other guy turn his back and start to walk away from Mark Going.

3). Then I heard some gunshots fired and the guy arguing with Mark Going fell to the ground. Then Mark Going stepped over him and started shooting the guy again. Then he turned around and got in his car in front of Uncle Peter's house with some other guys sitting already in the car that was parked in front ofUncle Peter's house.

4) Then they drove the car down Gray Street, and this is when I turned around and ran back to my house. I live at Algonguin 4210, Detroit, Michigan ç 48215. I never told anybody what I seen that day is because I was afraid for my life and I didnt want any trouble with anybody in the neighborhood, because I have to live in that neighborhood.

5) So I kept silent about what I saw that night. I heard everybody saying that this guy name "Ghost" got charged with the murder/case shooting in front of uncle Peter's house on Gray street. I don't know Carl Hubbard (Ghost) personally, but I am willing to testify to what I saw that night , because I know he is "Innocent" of the crime of murder that he is in prison for now.

6). I Askia Hill state that I don't know Carl Hubbard Personally but I have seen him in the neighborhood and I can truly say that he was not the person that I seen shoot and kill this guy that night outside Uncle peter's house. It was "Mark Going", because I do remember the "Other guy" was "Tall" and was "wearing some kind of hood on his head because it was snowing outside. I know the difference between Mark Going and Carl Hubbard because I grew up with both of them in the neighborhood.

7). One thing for sure is that I can truly say and will never forget somebody got shot and killed that day and plus I remember everybody the next day was talking about the guy who got killed in front of uncle peter's house.

8). I Askia Hill ç 331718, state that I have not been promised anything, nor threaten to come forth with this information. I state that all above statements and facts within this affidavit are true, and If called upon to testify to the same in court of law. I will do so under oath, subject to the penalties of perjury.

Respectfully submitted:

A. Hill.

Askia Hill ç 331718
Carson City Correctional Facility: P.O. Box 5000
Carson City, MI 48811-5000.

Subscribed and Sworn to this day
1st day of February 2011
C. Schrausen:
Notary public

C. SCHRAUSEN
NOTARY PUBLIC, STATE OF MI
COUNTY OF IONIA
MY COMMISSION EXPIRES Jun 16, 2015
ACTING IN COUNTY OF

SWORN AFFIDAVIT OF ROY A. BURFORD

STATE OF MICHIGAN)

SS)

COUNTY OF MONTCALM)

AFFIDAVIT OF FACT

I ROY A. BURFORD #248543, being duly sworn deposeth and sayeth as followed:

1. The statements made in this affidavit are, to the best of my knowledge, true and if called upon as a witness, I can testify competently as to the truth of the statements made in this affidavit.

2. I was in the "SPECIAL K" party store on January 17, 1992 around 6:00 p.m. until closing, when I heard some shooting outside the store on Gray Street and Mack Avenue on Detroit's eastside.

3. I stepped outside for a moment and seen a car light down the street by "UNCLE PETER'S" house. Then I went back in the store and I finished talking to "SAM" and older guy works in the "Special K" party store which is owned by "STEVE" and "SAMIR".

4. Then this older black lady came in the store to cash a check told the store owner "STEVE" to call the police because there looks like a body is laying in the driveway of "UNCLE PETER'S" house.

5. Then "STEVE", the owner of the store, cashed the woman's check then called the police. The woman waited for a little while then she left the store. After she left the store I stepped outside and saw nothing but people standing around along with the police and an ambulance. The street was blocked off by the police car and other people.

6. I can testify that I know "CURTIS COLLINS" a.k.a. "CURTIS BABY" and that I never seem him on Gray and Mack Avenue the night of January 17, 1992 before the shooting occurred or after the shooting occurred. Plus I know "CURITS COLLINS" personally and he was never on Gray and Mack Avenue or in the "SPECIAL K" party store on the night of January 17, 1992.

7. I personally do NOT know "CARL HUBBARD" a.k.a. "GHOST", but I am willing to testify truthfully that I never seen him on Gray and Mack Avenue on January 17, 1992 or in the "SPECIAL K" party store the night of the shooting. This is because I

know him when I see him and he was NOT any of the people in the store that night. Further he lives in the neighborhood and I stay on Springle Street around the corner from "Special K" party store on Gray and Mack Avenue.

8. I am also willing to testify that I lived on Springle Street around the time of the shooting at "SPECIAL K" party store. I know "CURTIS COLLINS" personally and he told me he lied on "CARL HUBBARD" a.k.a. "GHOST" because Mr. Hubbard supposedly robbed him around 1986 and the police has something on him as well.

9. I remember that night because it was a snow storm and there were no buses running and everybody outside on Gray Street were walking around, plus I hustle up there all the time.

10. After "CARL HUBBARD" got convicted for the murder in front of "UNCLE PETER'S" house, everyone was saying that "MARK GOINGS" was the one who really killed the guy. This was due to "MARK GOINGS" believing that the victim had something to do with his brother "DARRYL GOINGS" murder on Gray Street. It was said these are the same people who was trying to rob and kill "DARRYL GOINGS" as well.

11. I ROY A. BUFORD #248543, state that I have NOT been promised anything, nor threatened to come forth with this information, and that all of the above statements and facts within this affidavit are true, and that if I am called upon to testify to the same in a Court of law, I will do so under oath and under the penalties of perjury.

Roy A. Buford #248543

Roy A. Buford #243543
Carson City correctional Facility
P.O. Box 5000
Carson City, MI 48811-5000

Subscribed and sworn to me.
this 9th day September 2011

NOTARY PUBLIC Laura Nelson

LAURA NELSON, Notary Public
State of Michigan
County of Montcalm
My Commission Expires December 13, 2012
Acting in the County of Montcalm

SWORN AFFIDAVIT OF EMANUEL RANDALL

State of Michigan)
ss
County of chippewa

I, Emanuel Randall, being duly sworn deposeth and sayeth as follows:

1. The statement made in this affidavit are, to the best of my knowledge, true and if called upon as a witness, I can testify competently as to the truth of the statement made in this affidavit.

2. I know for a fact that Curtis Collins was not on Gray street on the night of January 17, 1992 at the time of the murder.

3. Because we both was on the run for escape and living over (Big Ron) or/ Roney Fluton house 12882 Dickson & Corbet street, the same house that Curtis cut his telther off his leg, and we both stayed there while we was on escape.

4. We where both at the house getting high when Murphy or/ Raymond William came over and we all started a dice game myself Curtis & Big Ron that night wher well got a call from Heavey that someone got killed on Gray we all got into the car together to go over there to see who it was Heavey was at the store on Gray and Mack when he call us, and told us about the murder.

5. A couple days later we was walking on Mack & near Gray wher the police rode up on us with two pictures and asks did we know them? we said no ! but Curtis said I do and they took his name and address & phone number and gave him a card, and said that they will call him, and that night they came and arrested Curtis.

6. The word on the street was that Mark Going kill the guy found in front of Uncle Pete house on Gray, because he believed the guy kill his brother Dearl Going on the same street about a few weeks ago.

7. The whole neighbordhood knew and was talking about this, because who ever killed Dearl Going was trying to rob him but ending up killing him.

8. Everybody couldnt understand why Curtis baby or/ Curtis Collins lied on Ghost or Mr. Hubbard, he never would say, all he would say was that the police had something over his head and he had too.

9. I Emanuel Randall, state that I have not been promised anything , nor threatened to come forth with this information, that all the above statements and facts within this affidavit are true, and that if I am called upon to testify to the same in a court of law I will do so under oath, subject to the penalties of perjury.

Emanuel Randall

Emanuel Randall 512941
Kinross Corr. Facility
16770 S Watertower Drive
Kincheloe Michigan 49788

Subscribed and Sworn to me this
25th Day of June 2009

Notary Public

William H. Bonnee

William Herman Bonnee
Notary Public, State of Michigan, County of Chippewa
My Commission Expires on 3-24-2012
Acting in The County of Chippewa

State of Michigan)
)
)
)
County of Michigan)

Affidavit of Raymond williams of fact.

I, Raymond Williams, being duly sworn deposes and sayeth as follows:

1) The statement made inthis affidavit is the best of my knowledge, true and if called upon as a witness I can testify competently as to the truth of the statement made in this affidavit.

2) I, Raymond Williams, while being held in police custody at the Detroit Police Headquaters on the 9th floor Homicide Section between 8-31-92 until 9-2-92.

3) When I heard somebody crying in their cell, then I found out it was(Kurtis Baby) or Curtis Collins and I asked him what was wrong with him and he told me that the police officers Sgt. Joann Kenny and Sgt.Ronald Gale making him lie on (Ghost AKA) or Mr. Carl Hubbard in his murder trial September 2, 1992.

4) I told him don't lie on him because you are playing with a man's life. Then I told him to tell the truth No matter what! and whatever you do tell the truth Curtis, and don't lie on nobody for the police, because me and you know you wasn't on Gray & Mack Curtis! Then he told me Sgt. Joann Kenny Sgt. Ronald Gale was making him lie on (Ghost) or Mr. Carl Hubbard in his murder trial and if he did'nt they would make sure he would be charged with the murder case rather than (Ghost) or Mr. Carl Hubbard.

5) Mr. Curtis Collins admitted this to me during the time me and him was locked up together on the 9th floor of Homicide Sec. just before I went to testify on behalf of Mr. Carl Hubbard in his Murder trial in September 2, 1992

6) I never told anybody about what Curtis Collins told me or what happened while we were locked up in 1300 Beaubien on the 9th floor between 8-31-92 and 9-2-92until recently when I got in contact with Mr. Carl Hubbard between

the time of the end of 2010and 2011. then I revealed to Mr. Carl Hubbard what Mr. Curtis Collins had told me, and I'm willing to come to open court and testify to what Mr. Curtis Collins told me while we were locked up together and I am willing to take a polygraph test as well

7) Because Curtis Collins admitted to me he lied on the witness stand when he testified against (Ghost) or Mr. Carl Hubbard in his murder trial 9-2-92, and the reason why he lied was because Sgt. Joann Kenny and Sgt. Ronald Gale was going to put the murder case on him and charge him with the murder case as well.

8) I Raymond Williams State that I have not been promised anything, nor threatened to come forth with this information. I state that all the above statement and facts within this affidavit are true, and if called upon to testify to the same in the court of law. I will do so under the oath, subject to the penlties of perjury.

respectfully Submitted,

Raymond Williams
19165 Packard
Detroit, Michigan 48234

Subscribed and sworn to this

23 rd. day of May, 2011

Notary Public

SAMIR A. KONJA
Notary Public, State of Michigan
County of Oakland
My Commission Expires Apr. 1, 201
Acting in the County of Wayne

AFFIDAVIT OF RAYMOND WILLIAMS

COUNTY OF WAYNE)
) ss
STATE OF MICHIGAN)

Raymond Williams, being duly sworn, deposes and says:

1. That on October 2, 2011, I was discussing Mr. Hubbard's case with Steve Konja, the owner of the Special K party store.

2. He informed me that he was working on January 17, 1992, the night that Rodnell Penn was murdered. He told me that he knew Curtiss Collins but that he didn't see him in his store that night.

3. He informed me that, only if subpoenaed, would he testify to these facts.

Raymond Williams 1-9-2012

Subscribed and Sworn to this
9 day of JAN 2012

NOTARY PUBLIC

SAMIR A. KONJA
Notary Public, State of Michigan
County of Oakland
My Commission Expires Apr. 1, 2017
Acting in the County of Wayne

MICHIGAN RECORDERS COURT

DETROIT, MICHIGAN

UNITED STATES OF AMERICA Respondent/Appellee,	)	Case#159160 LC NO:92-001856
V.	)	
CARL HUBBARD Petitioner/Appellant.	)	

PERSONAL AFFIDAVIT OF ELTON CARTER

Comes Now, the affiant, after being duly sworn on his oath, hereby depose the following:

(1) That he is willing to testify before this Honorable court pertaining to the testimony given to him by Curtis Collins in the murder trial dated September 2, 1992 under the aforementioned case number indicated above against one Carl Hubbard.

(2) That Mr. Collins has admitted to me that the testimony he gave was forced upon him by the 5th Precinct of the Detroit Police Department.

(3) That Mr. Collins stated that if he did not agree to give the testimony that he gave, that he would receive the charges in the case rather than Carl Hubbard.

(4) That Mr. Collins also stated to me that he was willing to sign an Affidavit ADMITTING HIS PERJURY BUT WAS AFRAID THAT DETROIT POLICE DEPARTMENT WOULD FOLLOW THROUGH WITH THEIR THREATS.

(5) That Mr. Collins admitted to me that he was not at the scene of the crime during the time that the murder occured.

(6) That Mr. Collins was threatened and pressured into giving a false testimony by the Detroit Police Department.

(7) That only after Mr. Hubbard was found guilty of the murder did Mr. Collins came to him with this information.

(8) That in regards to the statements made to me by Curtis Collins, that I am willing to appear before this Honorable court to testify to it, in the open court.

Further, the Affiant Sayeth Naught.

Respectfully Submitted,

Elton Carter #07458-032
Elton, Carter# 07458-032

I certify that Elton Carter appeared before me on this 28 day of January, 2004 and affixed his signature on this two pages document in my presence.

1/28/04
Myron Blair, Case Manager
"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C 4004)"
Signature of B.O.P Official

Printed Name of B.O.P. Official

Dated this 28 day of January, 2004.

Elton Carter #07458-032

Notarized this 2nd day of Jan 2008
Penni L. Kotter, Notary Public
Sullivan County, Indiana
Commission Expires August 31, 2009.
Penni L. Kotter

DECLARATION OF CARL HUBBARD

I, Carl Hubbard, hereby certify the following facts:

1. I was unaware of the contents of Askia Hill's affidavit until sometime in January of 2011 when we had a chance encounter while incarcerated.

2. I was unaware of the contents of Roy Burford's affidavit until sometime in August of 2011 when we had a chance encounter while incarcerated and in October of 2011 after Mr. Burford had a conversation with Steve Konja.

3. I was unaware of the contents of Emanuel Randall's affidavit until sometime in June of 2009 when we had a chance encounter while incarcerated.

4. I was unaware of the contents of Elton Carter's affidavit until sometime in January of 2004 when he wrote me while I was incarcerated.

5. It was only through further conversations with Mr. Williams and a thorough discussion of my case with him that I was able to get the second affidavit from Raymomd Wiliams.

I certify under the penalty of perjury that the foregoing is true and correct. Executed on October 22, 2013.

Carl Hubbard

Carl Hubbard

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL LYNDELL HUBBARD,

Defendant-Appellant.

UNPUBLISHED
December 19, 1995

No. 159160
LC No. 92-001856

Before: Hood, P.J., and Saad and Thomas C. Yeotis*, JJ.

PER CURIAM.

Defendant, who waived a jury trial, appeals as of right from his first-degree murder conviction, MCL 750.316; MSA 28.548, and life sentence. We affirm.

The evidence upon which defendant was convicted was entirely circumstantial. There were no eyewitnesses to the killing of Rodnell Penn, who died of multiple gunshot wounds to the head and back, some of which were determined to have been the result of close-range firing.

Defendant first argues that an evidentiary hearing should be held to determine whether the recall of a witness for the prosecution and his later trial testimony was coerced. This issue raises a question of law, which we review de novo. Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 80; 467 NW2d 21 (1991); People v Connor, 209 Mich App 419, 423; 531 NW2d 734 (1995).

At trial, the prosecution's key witness, Curtis Collins, denied being at the party store at Gray Street and Mack Avenue, near where the victim's body was found. Collins also testified that he did not see defendant near the time that the victim was killed. The prosecutor responded to this testimony with Collins' preliminary examination testimony.

During the preliminary examination, Collins testified that he was in the party store and saw both defendant and the victim in the store. Collins left the store before defendant and the victim, and when Collins was a short distance outside of the store he heard gunshots. Collins turned and saw defendant standing near the victim's body, and he then observed defendant running away from the scene.

When asked why his trial testimony differed from that at the preliminary examination, Collins indicated that he had been pressured by authorities to give certain testimony at the preliminary examination. Collins was on escape status for removing a tether, and testified at trial that the police told him that they would ensure that he would receive a maximum sentence for being an escapee if he did not testify as they wanted. According to Collins, the preliminary examination testimony was untrue and he was not at the scene when the shooting occurred.

After testifying at trial, Collins was arrested for perjury. Two days later, he was recalled as a witness. At this time, Collins indicated that his earlier trial testimony had been a lie and his preliminary

*Circuit judge, sitting on the Court of Appeals by assignment.

examination testimony was a truthful rendition of the facts. He testified that he lied in court at trial because he had received threats on his life regarding his testimony identifying defendant. Collins testified that he did not change his trial testimony because he had been arrested, but that he wished to tell the truth. He believed that he would still be charged with perjury after he left the court.

Prosecutorial intimidation of witnesses is strongly condemned. People v Stacy, 193 Mich App 19, 25; 484 NW2d 675 (1992). A prosecutor's attempts to intimidate a witness from testifying, if successful, amount to a denial of the defendant's constitutional right to due process. People v Canter, 197 Mich App 550, 569; 496 NW2d 336 (1992). Clearly, the same should hold where the prosecution attempts to intimidate a witness to fashion untruthful testimony. A remand may be ordered where it is necessary to develop a testimonial record to support an argument that a witness was wrongfully intimidated. Stacy, supra at 25.

In this case, defense counsel cross-examined the witness as to the reasons for his change in testimony. Although the witness had been arrested, there is no indication from the witness' testimony that he was intimidated or coerced into testifying. Defendant has failed to provide any factual support for his claim that the witness' testimony was coerced. We find no error.

Next, defendant argues that the admission of Collins' preliminary examination testimony was improper as inadmissible hearsay. Because Collins' preliminary examination testimony was admitted pursuant to MRE 801(d)(1)(A) as prior inconsistent statements given under oath, subject to penalty of perjury, and was subject to cross examination at the time it was given, there was no error in its admission at trial.

Further, according to defendant, the use of Collins' statement to police was improper impeachment because no foundation was made. We find no error. Defendant's failure to object to the admission of the statement precludes appellate review absent manifest injustice. People v Stimage, 202 Mich App 28, 29; 507 NW2d 778 (1993). Moreover, Collins' photograph was attached to the statement, and although he denied signing it using his alias of "Tony Smith," Collins admitted the statement was his. Our refusal to review this argument does not result in manifest injustice.

Defendant further argues that the prosecution knowingly presented Collins' false testimony or allowed that false testimony to stand uncorrected. Even if a prosecutor has not solicited false testimony, if it presented and is allowed to stand uncorrected, a defendant's right to due process is offended. Canter, supra at 568. Where there is a reasonable likelihood that false testimony affected the verdict, failure to correct it requires reversal. Id. In this case, although defendant presented inconsistencies in Collins' testimony and conflicts with the testimony of defendant's witnesses, defendant has provided no evidence that Collins' testimony was false. Although Collins changed his testimony, there was no suggestion that the prosecutor was aware that Collins would change his story before he testified. Because there is no evidence supporting defendant's claim, we find no error.

According to defendant, the prosecution erred in admitting a second statement made by Collins to the police after his first day of testimony and when he was recalled and recanted his prior testimony. We find no merit in this argument because no such statement was admitted into evidence.

Defendant next asserts that he was denied effective assistance of counsel. Specifically, defendant argues that his trial counsel was deficient in failing to (1) to move to suppress his statement; (2) to object to evidence of defendant's connection to the drug trade; (3) to object to the prosecution's recall of a witness and not requesting a hearing regarding the prosecution's intimidation of the witness; and (4) to object to the introduction of exhibits from a prior criminal case against defendant.

There are two prongs to the test to determine whether a defendant was given effective assistance of counsel. The defendant must first "show that counsel's performance fell below an objective standard

of reasonableness, and [then demonstrate] that the representation so prejudiced the defendant as to deprive him of a fair trial." People v Pickens, 446 Mich 298, 302-303; 521 NW2d 797 (1994), adopting the standard set forth in Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant must also overcome the presumption that the trial counsel's actions might be considered sound trial strategy. People v Tommolino, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant's untimely motion in this Court for remand for a hearing pursuant to People v Ginther, 390 Mich 436; 212 NW2d 922 (1973), was denied because he failed to submit an affidavit or make an offer proof as required by MCR 7.211(C)(1)(a). Our Court has the discretion under MCR 7.211(C)(1) to determine if it would be appropriate to remand because the issue is either one which must first be decided by the trial court or one for which a record must be developed. People v Hernandez, 443 Mich 1, 14-15; 503 NW2d 629 (1993). Because a claim asserting ineffective assistance of counsel generally requires the development of a record, Id. at 15, n 22, this Court properly exercised its discretion in denying defendant's motion for remand where he failed to submit an affidavit or offer proof of facts in support of his claim.

In the present appeal, defendant has again failed to make an offer of proof that his trial counsel was ineffective. However, to the extent that he has argued the matter, we will review the issue based on the record before us. People v Johnson (On Reh), 208 Mich App 137, 142; 526 NW2d 617 (1994).

Because we find no error with regard to the recalling of the prosecution's witness, defendant has failed to establish that his counsel was ineffective based on that claimed error. Defendant next argues that his counsel was deficient for failing to object to evidence of defendant's involvement in drug trafficking. Because the trial court has the discretion to admit evidence, we review its ruling on admissibility for an abuse of discretion. People v Davis, 199 Mich App 502, 516; 503 NW2d 457 (1993). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court relied in making its decision, would conclude that the ruling was not justified. People v Taylor, 195 Mich App 57, 60; 489 NW2d 99 (1992).

Evidence of other crimes is admissible if (1) relevant to an issue other than the character of defendant or his propensity to commit the charged crime; (2) relevant to an issue or fact of consequence at trial; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. People v VanderVliet, 444 Mich 52, 74-75; 508 NW2d 114 (1993). We find that any objection by defendant's counsel to the introduction of evidence regarding defendant's drug dealing and his association with the victim in the drug trade would have been futile because it was offered to show defendant's motive for the crime pursuant to MRE 404(b). The testimony of witnesses indicated that defendant and the victim were both involved in the sale of drugs, and that the victim sold drugs for defendant. When defendant spoke to an officer at the scene, his comment to the officer was interpreted by the officer to indicate that the victim's death was drug-related. The prosecution used all of these facts to develop the theory that defendant had a motive for killing Penn. This is a permissible use of such evidence, and therefore had defendant's counsel objected, his objection would properly have been overruled. Therefore, defendant's claim of ineffective assistance of counsel on this basis must fail.

Next, defendant argues that his trial counsel was ineffective because he failed to object to, and in fact stipulated to, the admission of evidence regarding the dismissal of an earlier murder charge against defendant for failure of essential witnesses, one of which was Penn, to appear at trial. The parties stipulated as to the content of the testimony that would be given by the prosecutor of the previous murder charge. In addition to the dismissal of the prior murder charge, that prosecutor would have testified that Penn had testified against defendant at that previous preliminary examination. The prosecution in the instant case asserted that this evidence was indicative of defendant's intent and motive. The introduction of this evidence meets the test under VanderVliet, supra. We find that had defendant objected to its admission, the court would have allowed it in. Thus, we find that defendant has failed to demonstrate that his counsel was ineffective on this basis.

Defendant also asserts that his trial counsel was ineffective for failing to object to the validity of his arrest and to the admissibility of his statement to police. In support of his argument regarding his arrest, defendant refers to matters not contained within the lower court record. Because, as we have indicated above, our review of defendant's claim of ineffective assistance of counsel is limited to the record before us, we may not consider this evidence. Our review of the lower court record reveals no evidence pertaining to the alleged illegality of defendant's arrest. Therefore, we find no merit in defendant's claim that his counsel's failure to challenge the validity of his arrest constituted ineffective assistance of counsel.

Defendant raises his argument that his statement should not have been admitted for the first time on appeal. While review of this issue would normally be precluded, we will review constitutional questions. People v Heim, 206 Mich App 439, 441; 522 NW2d 675 (1994). In addition, however, defendant failed to object below to its admission and in fact stipulated to its admissibility. Therefore, this issue is not preserved for appeal and we decline to review this issue absent manifest injustice. Stimage, supra at 29. In light of defendant's failure to present facts or offer proof to demonstrate that his exculpatory statement was unconstitutionally obtained we find no manifest injustice would result in our failure to further review this issue.

Defendant argues that the trial court erred in failing to grant his motion for directed verdict because the prosecution failed to present sufficient evidence to prove each element of murder beyond a reasonable doubt. As an initial matter we note that where, as here, the credibility of witnesses is at issue directed verdict is inappropriate. People v Herbert, 444 Mich 466, 474; 511 NW2d 654 (1993). Although witnesses gave conflicting testimony, it was for the trier of fact, here the court, to assess and weigh their credibility and we give special deference to that credibility determination. People v Vaughn, 186 Mich App 376, 380; 465 NW2d 365 (1990).

To review a claim of insufficiency of the evidence, this Court must consider the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have concluded that the essential elements of the crime were proven beyond a reasonable doubt. People v Hurst, 205 Mich App 634, 640; 517 NW2d 858 (1994). The crime of first degree murder requires proof of an intentional killing with premeditation and deliberation. People v Saunders, 189 Mich App 494, 496; 473 NW2d 755 (1991). Premeditation and deliberation may be inferred from the circumstances. People v Buck, 197 Mich App 404, 410; 496 NW2d 321 (1992). To determine whether there was premeditation or deliberation, the court may consider the prior relationship of the parties, the defendant's actions before the killing, the circumstances of the killing, and the defendant's conduct following the killing. Id.

We find that the evidence presented, viewed in a light most favorable to the prosecution, was sufficient to support the prosecution's case. A witness saw defendant with the victim just prior to the killing and observed him fleeing the scene immediately after gunshots were heard. No other person was seen in the immediate area. This evidence was viewed together with the evidence that the victim was a key witness in an earlier dismissed murder charge against defendant, the evidence of defendant and the victim's involvement together in selling drugs was indicative of defendant's motive. Premeditation and deliberation can be inferred from these circumstances as well as the location of the close-range gunshot wounds, which were in Penn's back and head. We conclude that the prosecution presented sufficient evidence to prove each element of first-degree murder beyond a reasonable doubt.

The next argument presented by defendant is that the trial court's decision was not adequately supported by factual findings and legal conclusions and that by finding defendant guilty of murder but not guilty of felony firearm, the trial court rendered an improper, inconsistent verdict. Defendant argues that the trial court failed to indicate that defendant's alibi defense was overcome by evidence proved beyond a reasonable doubt. We disagree.

When a defendant waives his right to trial by a jury, the court must make a finding of facts and state its conclusions of law. MCR 6.403. The trial court's factual findings are sufficient so long as it is apparent that the court was aware of the issues involved and correctly applied the law. People v Legg, 197 Mich App 131, 134; 494 NW2d 797 (1992). Specific findings of fact on each element of the crime are not required. Id. We need not remand for failure to make specific findings of fact where it is clear that the court was aware of and resolved the factual issue and if further explanation would not facilitate review on appeal. Id. at 134-135.

The trial court here generally set forth the facts of this case and stated its conclusions of law. Although the court did not specifically address defendant's defense of alibi, by concluding that defendant committed the crime it is clear that the court rejected the defense. Our review of the trial court's findings and conclusions leads us to the conclusion that the court was fully aware of the issues before it and correctly applied the law.

Defendant also asserts that the court gave an inconsistent verdict. The trial court noted that defendant was charged with felony firearm based on the possession of a handgun. MCL 750.227(b); MSA 28.424(2). Because he was not persuaded beyond a reasonable doubt that a handgun rather than a sawed-off shotgun was used in the shooting, the trial court acquitted defendant on this charge. We find no reversible error in the trial court's failure to convict defendant of felony firearm as charged, yet find him guilty of first-degree murder.

Finally, defendant argues that the trial court denied him his constitutional right to trial by jury by failing to obtain a valid waiver of that right. Defendant asserts that the trial court did not properly question him regarding the voluntary relinquishment of his right to a jury trial. We disagree. This question of law is reviewed de novo. Connor, supra at 423.

A trial court must ensure that a defendant understands the right to a jury trial and that the right is voluntarily waived. People v Shields, 200 Mich App 554, 560-561; 504 NW2d 711 (1993). The court rules provide:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. [MCR 6.402(B).]

Defendant and his attorney completed a waiver form and the court questioned the defendant. The court specifically asked defendant whether he had signed the "Waiver of Trial by Jury" form, to which defendant answered in the affirmative. Defendant also answered the court's questions regarding whether defendant had discussed his constitutional right to a jury trial with his attorney and whether he understood he had that right. Defendant indicated that he had discussed the matter and understood his rights. Finally, the court asked defendant if he correctly understood that defendant was choosing to have a trial not before a jury but rather before the judge, who would then make the decision. Defendant told the judge that that was correct, and the court accepted his waiver. We find that the record indicates that the court's direct questioning of defendant satisfied MCR 6.402(B) and that defendant voluntarily waived his right to a trial by jury.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad

Judge Yeotis not participating.

Judge Kathleen McDonald said she was outraged that police charged Thoanchelle Taylor with murder without "a scintilla of evidence," as the judge put it.

"If I have ever seen a case where the police have manufactured the facts, this is one," McDonald said. "I have never had facts as egregious as this case."

Taylor spent 130 days in the Wayne County Jail before the judge threw out the case.

Veteran Homicide Sgt. Joann Kinney testified that she had Taylor locked up as a witness for days without charges against her and said there was no standard procedure as to how long witnesses could be held without being arrested.

Kinney also admitted threatening to take Taylor's children away if she did not cooperate, an admission that shocked Judge MacDonald.

Criminal lawyers also are critical of the Detroit Police practice of letting officers write out question-and-answer statements, as in the Pouncy case.

"Every modern department in the country records witness or suspects' statements on videotape," said Mark J. Kriger, a Detroit lawyer. "It only makes sense because it protects the integrity of the process on both sides."

You can reach Norman Sinclair at (313) 222-2034 or nsinclair@detnews.com.

You can reach Ronald J. Hansen at (313) 222-2019 or rhansen@detnews.com.

CONFESS

Continued from Page 1A

Deputy Chief Michael Hall, in charge of the Headquarters Bureau, strongly denied that the department obtains confessions improperly.

"We have no confessions being taken under coercion," said Hall, who nevertheless acknowledged that federal authorities had expressed concerns about one drug case. "To paint a broad stroke and say because of one case (there is a problem), doesn't mean we are coercing confessions."

Police spokeswoman Paula Bridges acknowledged there were high-level meetings last March and September with Green, the chief federal prosecutor in Detroit, concerning the detention of prisoners without warrants.

She said the department had no way of knowing if allegations of coerced confessions are part of the current Justice Department scrutiny.

Green declined to comment.

There are, however, several cases that have raised questions about police practices involving confessions.

A case of coercion?

In a highly publicized case last fall, federal investigators still are trying to determine how detectives convinced Michael Gayles, a learning-disabled 16-year-old, to sign three separate false confessions that he killed J'nai Glasker, 12, last August.

Brian Kutinsky, a Southfield lawyer who has filed a $20-million lawsuit against the city on behalf of the family, said the family has been notified that federal investigators are examining the case.

In six recent lawsuits involving questionable confessions examined by The News, the city paid several hundred thousand dollars in damages, most in confidential agreements, to people who said their statements were coerced.

In testimony in one murder case, a veteran homicide detective said she believed there was no standard procedure for how long police could hold someone without charges, and she admitted to intimidating a witness by threatening to take her children away.

In the Gayles case, "the police manufactured the confessions," Kutinsky said. "With his learning disability, he couldn't have articulated those confessions. They had him sign a waiver giving up his constitutional rights that he couldn't understand."

Scope of federal inquiry

■ In addition to examining how Detroit police get confessions and statements, federal investigators are looking at the department's policies, practices and its [illegible] deadly [illegible] force. The probe began in December and is expected to [illegible] about a year.

■ Detroit Mayor Archer asked for the investigation in September after a groundswell of public outrage about shootings by officers. The U.S. Justice Department chose to expand the probe beyond that issue.

Department under fire

■ Last May, the force was criticized over how it investigates shootings by its officers. The investigations are often inadequate and geared toward clearing them of wrongdo[ing], a study of court records by The Detroit News found. Investigators for the department focus on justifying the shootings rather than determining what happened, and their conclusions often vary little from the officers' accounts, say former police executives and attorneys.

■ Last month, the department was hit with several lawsuits charging that it conducts illegal dragnets to round up friends and witnesses in murder investigations in an effort to nab the killers.

■ Also last month, a team of about six federal investigators found wholesale problems with how Detroit police handle prisoners who have medical illnesses, drug addictions or are injured.

tioned the minors, as state law requires. The law says that if a parent or guardian cannot be located, police must contact the Juvenile Court immediately, a requirement Stevenson later admitted he did not know.

The next day, Stevenson had Pouncy and Bliss brought back to headquarters. This time, Bliss' 18-year-old brother accompanied him. Stevenson later testified that he called Bliss' mother, but she refused to come. She testified she was never called.

Bliss was kept in a squad room most of the afternoon until Stevenson obtained a second question-and-answer statement written out by the detective and signed by Bliss.

This time, Bliss said he and Pouncy were approached by an intoxicated man who asked for cocaine. They took him to the abandoned house, where Pouncy pulled his pants down and ordered the man to perform a sex act. Bliss said the man refused. Then, Pouncy pulled out a pistol and shot the victim three times, Bliss said.

Pouncy, who was five feet tall and weighed just over 100 pounds, tied the man up and carried the corpse outside to the Dumpster, Bliss added.

Missing links

Stevenson obtained a murder warrant based on the statement, admitting in court that he did no further investigation.

Police could not link Pouncy to the victim or the gun, nor did police follow up on a neighbor's claim of hearing a woman talking loudly and people running from the house to a car just as the fire broke out. Moreover, the man was

"These cases are not just about money," Kutinsky said. "Hopefully, by bringing those lawsuits we can accomplish something worthwhile by getting the police to do the right thing."

Another settlement

In another murder case in which the city ultimately paid a five-figure settlement in 1995, a Wayne County Circuit Court judge harshly criticized Detroit police for locking up a mother of two children as a witness and illegally holding her until her 10-year-old daughter and 6-year-old son implicated her in the death.

Judge Kathleen Mc[illegible] was outraged that [illegible] Theauchelle Taylor with "a scintilla of evidence." [illegible]

"If I have ever seen [illegible] police have manufacture[d] [illegible] is one," McDonald sa[id] [illegible] had facts as egregious [illegible]

Taylor spent 30 d[ays] [illegible] County Jail before the [illegible] the case. [illegible]

A veteran Homicide [illegible] testified that she had [illegible] a witness for days [illegible] against her and said [illegible] dard procedure as to [illegible] es could be held with[out] [illegible]

Kinney also adm[itted] [illegible] to take Taylor's chi[ldren] [illegible] did not cooperate. [illegible] shocked Judge Mac[illegible]

Criminal lawyers [illegible] the Detroit Police [illegible] officers write out q[illegible] statements, as in th[illegible]

"Every modern [illegible] country records w[illegible] statements on vide[o] [illegible] Kriger, a Detroit la[wyer] [illegible] sense because it p[illegible] of the process on [illegible]

You can reach No[illegible] (313) 222-2034 or nsinclair@detnew[illegible]

You can reach Ro[illegible] (313) 222-2019 or rhansen@detnew[illegible]

(4)

(3)

(2)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

People of the State of Michigan

Vs.

Case No. 92-1856-01

Carl Hubbard,

Defendant /

OPINION & ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court
Held in the Frank Murphy Hall of Justice
On March 15, 2012
PRESENT: Honorable Michael M. Hathaway
Circuit Court Judge

About 20 years ago defendant was convicted after a waiver trial of first degree murder and later sentenced to natural life without parole. In an unpublished *per curium* opinion dated December 19, 1995, the Michigan Court of Appeals affirmed defendant's conviction and sentence. His delayed application for leave to appeal to the Michigan Supreme Court was denied on October 28, 1996. In July 2007 defendant filed a motion to expand the record and for an evidentiary hearing, all of which requested post-appeal relief. That motion was denied on March 18, 2009 by Wayne County Circuit Judge James Chylinski. Defendant now files a motion for relief from judgment under MCR 6.502.

All of the issues raised in defendant's current motion were raised, in one form or another, and rebuffed on direct appeal and/or in his first post-appeal motion. Accordingly, and since defendant does not make an accurate claim of a retroactive change in law, the defendant is not entitled to relief because of MCR 6.508(D)(2)(3). Accordingly defendant's motion is summarily denied under MCR 6.504(B)(2).

March 15, 2012
Date

Hon. Michael M. Hathaway

Ronald Giles
Attorney At Law

January 27, 1998

Carl Hubbard #205988
Saginaw Correctional Facility 12-170
9625 Pierce Road
Freeland, MI 48623

Dear Mr. Hubbard:

I received your letter dated January 21, 1998. Currently you have all the information that I have in regards to your file, which I have sent to you previously. I have no additional written documents or information.

In regards to the perjury charge against Mr. Curtis Collins, alias Tony Smith, it is my recollection that on the first day of his testimony, when he changed his testimony to be different from that given during the preliminary examination, once he left the courtroom he was arrested in regards to perjury. He was held in the police station overnight. He agreed to change his testimony back to the original version and he was never officially charged with perjury. As a result, there is no written documentation in regards to this matter as to Mr. Collins (Smith).

It is also my recollection that Mr. Collins was on probation or parole, and was given a "deal" in order to maintain his probation or parole, after his testimony. Again, if there is anything documented on this subject, it would be in the papers I sent you. But if I remember correctly, that was brought out during the trial and should be in the transcript.

Other than the foregoing information, I have nothing else that I can add. I don't see how I can assist you any further as I have given you everything that I have in relation to your file.

Very truly yours,

Ronald Giles

RG:dg

1575 E. Lafayette • Suite 209 • Detroit, MI 48207 • Office (313) 259-4742 • Fax (313) 259-5314

STATE OF MICHIGAN)
)
COUNTY OF WAYNE)

AFFIDAVIT OF FACTS

I, RONALD GILES, being first duly sworn, deposes and says:

1. I represented Mr. Carl Hubbard in his Bench Trial in Recorder's Court for the City of Detroit, wherein he was charged with First-Degree Murder.

2. In my representation of Mr. Hubbard there came a time during the testimony when the Prosecution called one Curtis Collins to the witness stand.

3. That on cross-examination of Mr. Collins, he drastically changed his testimony and according to my recollection, testified contrary to his testimony at the preliminary examination.

4. That Mr. Collins was arrested and detained following his trial testimony.

5. To the best of my information and belief, Mr. Collins was released and not charged when he changed his testimony the following day.

6. That Mr. Collins' testimony was especially critical to the Judge's verdict of guilt against Mr. Hubbard.

I declare under penalty of perjury that the statements made herein by me are true and accurate to the best of my knowledge, information and belief.

Affiant further sayeth not.

Ronald Giles (P38107)

Subscribed to and sworn before me
on June 15, 2000
Notary Public, Wayne County, Michigan

DOROTHY J. GILES
NOTARY PUBLIC WAYNE CO., MI
MY COMMISSION EXPIRES May 27, 2003

MICHIGAN DEPARTMENT OF STATE
UNIFORM COMMERCIAL CODE
LANSING, MICHIGAN 48918

SEARCH RESULTS

DATE 4/12/97 TIME ACCOUNT NUMBER

DEBTOR INFORMATION

A998157148
CURTIS COLLINS
8747 PURITAN
DETROIT MI 48238

REQUESTOR INFORMATION

COPIES REQUESTED

FILING NUMBER	DATE/TIME OF FILING	DOCUMENT TYPE	PARTY CODE	MICROFILM LOCATION
S-332/1	01/19/92	LEIN	WCSD	C-233A
R-5442	03/10/92	RCALL	WCSD	C-233-A1
S-523/1	08/25/92	LEIN	DPD	C-233-A2
R-7635	09/05/92	RCALL	DPD	

END DATA

MDOC-ESCP-HOLD

RECALL-LEIN

MDOC-PVV-OA1
DPD-CR/HOLD

RECALL-LEIN
RECALL-LEIN

This is what the LEINS show over that period of time...
WSSD is Wayne Cty Sher. Dept.
DPD is Detroit Pol. Dept.
You have an Escape from MDOC LEIN, a Parole Vio. LEIN, and CR/Hold which is the LEIN and hold on the case 92-1856 we asked for... in the letter.

As you can see, that LEIN was pulled on 9-05-92, either after he testified or

after the case....

JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

COL. PETER C. MUNOZ
DIRECTOR

DEC 2 0 2007

MS LINDA HUBBARD
14052 CARLISLE ST
DETROIT, MI 48205-1205

RE: CR-2032-08 COLLINS, CURTIS

Dear MS HUBBARD:

The Department of State Police has received your request for certain information and has processed it under the provisions of the Michigan Freedom of Information Act (FOIA), P.A. 442, of 1976, as amended.

The records you have requested have been:

☐ Granted.

☒ Granted in part and denied in part. Portions of your request are exempt from disclosure based on provisions set forth in the Act. (See comments on the back of this letter.) Under the FOIA, Section 10 (a copy of which is enclosed), you have the right to appeal to the head of this public body or to a judicial review of the denial.

☐ Denied. (See comments on the back of this letter.) Under the FOIA, Section 10 (a copy of which is enclosed), you have the right to appeal to the head of this public body or to a judicial review of the denial.

☐ Your request for photographs has been sent to the Michigan State Police Photo Lab. The Photo Lab will contact you regarding the cost for processing your request.

Please pay the amount of $ -0- to the address below. The check or money order should be made payable to the STATE OF MICHIGAN. To ensure proper credit, please enclose a copy of this letter with your payment. Once we receive payment the documents will be mailed to you.

If you have questions concerning this matter, please feel free to contact our office at the address below, and enclose a copy of this correspondence.

Sincerely,

Linda Ortiz

Linda Ortiz
Assistant FOIA Coordinator
Michigan State Police

DENIAL OF RECORDS:

Denial is based on the following provision(s) of the Freedom of Information Act. MCL 15.243, Sec. 13(1). (All that apply will be checked.)

☐ (a) Information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
☐ telephone number(s) ☐ address(es) ☐ date(s) of birth ☐ physical characteristics, ☐ driver license number(s)
☐ other _____

☐ (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure would do any of the following:
- ☐ (i) Interfere with law enforcement proceedings.
- ☐ (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication
- ☐ (iii) Constitute an unwarranted invasion of personal privacy.
- ☐ (iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.
- ☐ (vi) Endanger the life or physical safety of law enforcement personnel.

☐ (d) Records or information specifically described and exempted from disclosure by statute.
Statute: _____

☐ (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action.

☐ (n) Records of law enforcement communication codes, or plans for deployment of law enforcement personnel, that if disclosed would prejudice a public body's ability to protect the public.

☐ (s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do any of the following:
- ☐ (i) Identify or provide a means of identifying an informer.
- ☐ (ii) Identify or provide a means of identifying a law enforcement undercover officer or agent or a plain clothes officer as a law enforcement officer or agent .
- ☐ (viii) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informer.
- ☐ (ix) Disclose personnel records of law enforcement agencies.

☐ (u) Records of a public body's security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public body.

☐ (w) Information or records that would disclose the social security number of any individual.

☐ Your request is denied under the authority of Section 13(1)(a) above. However, if you provide a notarized, signed release of information from the individual to whom the records pertain, you will receive that information to which the individual signing the release is entitled.

☒ To the best of the Department's knowledge, information, and belief, under the information provided by you or by any other description reasonably known to the Department, the public records do not exist within the Department.

We donot have any records on a perjury charge.

☐ Based on the information you provided, we are unable to locate any records pertaining to the incident you described. In order for us to continue processing your request, please comply with the following items. To ensure proper handling of your request, please include a copy of this letter with your response.
- ☐ Specific location (i.e. city, county.)
- ☐ Michigan State Police incident number
- ☐ Names of those involved in the incident
- ☐ Specific dates (i.e., date of incident)
- ☐ Name of driver and their birth date or driver license number
- ☐ Date of birth

☐ The report you have requested has not yet been completed and filed. Please resubmit your request in 30 days.

Additional Comments:

ICHAT Internet Criminal History Access Tool
Michigan State Police

Michigan.gov
The Official State of Michigan Website

Search Results - Printer Friendly Format

Data Searched on: Close Print

Last Name	First Name	Middle Initial	DOB	Race	Sex	More Criteria
COLLINS	CURTIS	L	8/15/1972	Unknown/Other	Male	

Based on the information provided, the following is a certified result of the search as of 12/12/2007 8:29 AM

Important: Information Contained in this Record

THE RECORD RESULTS PROVIDED HERE ARE BASED ON A COMPUTER MATCH AS EXPLAINED ON THE ICHAT HOME PAGE. THE ICHAT SYSTEM HAS LIMITATIONS THAT MAY CAUSE FALSE POSITIVES OR FALSE NEGATIVES. PLEASE REVIEW THE RESULTS CAREFULLY AND DO NOT TAKE ADVERSE ACTION BASED SOLELY ON THIS RECORD. IF YOU CANNOT DETERMINE THAT THESE RESULTS DO NOT BELONG TO THIS INDIVIDUAL, AND THE INDIVIDUAL IS DISPUTING THE RECORD, PLEASE PROVIDE THAT INDIVIDUAL WITH A COPY OF THIS REPORT AND OFFER THAT INDIVIDUAL THE OPPORTUNITY TO PERFORM A RECORD CHALLENGE BY SUBMITTING FINGERPRINTS. THIS IS EXPLAINED AT THE BOTTOM OF THIS PAGE.

NOTE: Highlighted fields indicate the record is not an exact match.

MICHIGAN CRIMINAL HISTORY RECORD INFORMATION MEETING DISSEMINATION CRITERIA
FOR SID: 1593896H AS OF 12/12/2007

NAM: COLLINS,CURTIS LENLLEE
[redacted] SEX: M DOB: 08/15/1972 SID: 1593896H
HGT: 505 WGT: 140 HAI: BLK FBI: 13761NA2
EYE: BLK POB: MI III: MICHIGAN ONLY
DLN: MNU:
PRN: 217891
CIZ:

AFIS PRINTS AVAILABLE: YES
PALM PRINTS AVAILABLE: YES
PHOTO AVAILABLE: YES

SCAR/MARK/TATTOO: SC LF ARM

ADDITIONAL IDENTIFIERS AND COMMENTS:

NAM: COLLINS,CURTIS COLLINS,CURTIS LENELL
COLLINS,CURTIS L COLLINS,CURTIS LENLLEN