STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Circuit Court No. 02-3223

v **Hon. Patricia Fresard**

KEVIN DESHAWN SYKES,

Defendant.

_____/

MOTION FOR NEW TRIAL UNDER MCL 770.1, OR IN THE ALTERATIVE SUCCESSIVE MOTION RELIEF FROM JUDGMENT UNDER MCR 6.502(G)(2)

NOW COMES Defendant herein, KEVIN DESHAWN SYKES, by and through his counsel, PHILLIP D. COMORSKI, and prays this Honorable Court to grant this Motion, and in support thereof, Mr. Sykes states as follows:

1. Defendant Kevin Deshawn Sykes was convicted in the 3rd Judicial Circuit Court for the County of Wayne, of 2 counts of assault with intent to commit murder, felon in possession of a firearm, and felony firearm contrary to MCL 750.83, MCL 750.224f, and MCL 750.227b, and was sentenced on July 24, 2002 as a habitual offender to 39-70 yrs for each assault charge, 2-7 yrs for the felon in possession of a firearm, and 2yrs for the felony firearm charge to run consecutive.

3. Mr. Sykes is confined at the Earnest C. Brooks Correctional Facility, Muskegon, Michigan. Inmate No. 419543.

4. Mr. Sykes was represented at trial by attorney Randall Upshaw. On post-conviction, Mr. Sykes was represented by attorneys Craig A. Daly and Rita Young.

5. On March 26, 2004, the trial court held a Evidentiary Hearing by order of the Court of Appeals to determine if counsel was ineffective for failing to call, locate, and produce an alibi witness. On April 22, 2004, the Honorable Patricia Fresard denied the defendants motion for a new trial based on his counsel failing to call and produce his alibi witness, stating: "I just don't have enough evidence at this hearing to find trial counsel ineffective."

6. On September 21, 2004, the Court of Appeals affirmed Mr. Sykes' conviction and sentence (Docket No. 245256), and the Supreme Court denied leave to appeal pursuant to a standard order (Docket No. 127395).

7. Mr. Sykes filed a petition for writ of Habeas Corpus in the United States Eastern District of Michigan. On September 30, 2009 the court denied the petition. *Sykes v Wolfenbarger*, 2009 U.S. dist. LEXIS 90322, 2009 WL 13199898. The Sixth Circuit Court of Appeals affirmed the district court. *Sykes v Wolfenbarger*, 2011 U.S. APP. LEXIS 23345 (6th Cir. Mich., 2011).

8. In 2016, Mr. Sykes filed a Motion For Relief From Judgement pursuant to MCR 6.500, which was denied on December 12, 2016.

9. The Court of Appeals denied leave to appeal on August 24, 2017 (Docket No. 338845), and the Supreme Court denied leave to appeal on February 4, 2019 pursuant to a standard order (Docket No. 156583). Reconsideration was denied on July 2, 2019.

10. Mr. Sykes brings this pleading as a Motion for New Trial pursuant to MCL 770.1. A defendant alleging a wrongful conviction in the State of Michigan, but who failed to secure a release on appeal, must resort to MCL 770.1 and MCR 6.500, *et seq*. MCL 770.1 allows, as a matter of criminal procedure, the trial court to grant a new trial to a defendant for any cause, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

11. MCL 770.1 reflects a legislative policy determination by the State of Michigan because it allows the trial court to grant relief "when it appears to the court that justice has not been done." This language establishes that the legislature intended MCL 770.1 to empower trial courts to prevent miscarriages of justice. Contrary to MCR 6.500, MCL 770.1 stands as a substantive ground for relief independent of any provided by Michigan Court Rules. The State of Michigan passed MCL 770.1, into law to correct wrongful convictions within the state of Michigan, by providing for substantive relief from judgement from the trial court. Statutes passed into law in the State of Michigan may not be overridden by Court rules. *McDougall v Shanz*, 461 Mich 15, 27 (1999) ("it cannot be gainsaid that this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law. Rather, as is evident from the plain language of art 6, § 5, this Court's constitutional rule-making authority extends only to matters of practice and procedure." [citing *Shannon v Ottanwa Circuit Court Judge*, 245 Mich 220, 222-223 (1928)]. Therefore, by providing courts with a substantive ground for relief "when it appears to the court that justice has not been done," MCL 770.1 stands as a substantive law independent of the Court Rules. A Court of record may always "grant a motion for a new trial for good cause shown. See MCL 770.2(4).

12. Mr. Sykes submits that MCR 6.500. more specifically, MCR 6.502(G)(2), is a more restrictive doctrine, for example, a court cannot grant relief if the defendant fails to meet MCR 6.508(D)(1)(2) and (3). Furthermore, a defendant cannot appeal the denial or the rejection of a motion filed under MCR 6.502(G)(2). See MCR 6.502(G)(1) which states in part: "A defendant may not appeal the denial or rejection of a successive motion."

13. MCL 770.1 expressly authorizes a trial court to grant a new trial when it determines that justice has not been done, and it grants that authority expressly in situations in which such relief

cannot otherwise be granted "by law." It is a clear statement from the legislature that a judge ought to be able to grant a new trial to ensure justice is done under even when other sources of law cannot support that relief. The use of the word "may" makes clear that such a power is discretionary. MCR 6.500 is a procedural rule that does not give judge's the latitude to grant relief "when it appears that justice has not been done." While MCR 6.431 and MCR 6.500 et seq provide the procedural framework by which trial courts may grant new trials before and after the appellate process, respectively, they do not supersede MCL 770.1, a substantive statute passed by the legislature, therefore the court rules must yield to the statute.

14. Both the state and federal court systems have recognized the necessity of waiving procedural bars to protect the wrongfully convicted. Mr. Sykes submits that in light of the Michigan Supreme Court granting leave on the issue of whether a defendant can obtain relief under MCL 770.1 and the Supreme Court's decision reversing the Michigan Court of Appeals and reinstating the trial court's finding in *People v Swain*, 499 Mich 920 (2016) (which did in fact find that the defendant in *Swain* was entitled to relief under MCL 770.1), this Honorable Court should make a finding on Mr. Sykes' motion pursuant to MCL 770.1 instead of MCR 6.500.

15. In the alternative, if this Court decides not to entertain Mr. Sykes' motion pursuant to MCL 770.1, Mr. Sykes requests that the motion be considered under MCR 6.502(G)(2).

16. **ISSUES I-V:** The defense was mistaken identification and/or tainted identification. Mr. Sykes had an alibi defense that was not properly presented at trial, which would have shown the jury that Mr. Sykes was in West Virginia at the time of the shooting. Years after the trial, the Michigan Innocence Clinic discovered the identity of the actual shooter -- a man named Masada King, who confessed in an affidavit. Additional newly discovered evidence obtained in 2021 and

2024 -- ***after*** King's confession -- bolsters King's confession, severely impeaches the prosecution's theory of the case, and shows a pattern of systemic DPD corruption.

17. **ISSUE VI:** Mr. Sykes is entitled to relief on his claim that his attorney was ineffective in connection with the plea-bargaining process because the performance of counsel fell below an objective of reasonableness where he failed to provide competent professional guidance to the prisoner regarding his sentence exposure, based on, inter alia, the mandatory state sentencing guidelines. The prosecutor made a offer for 12-35 yrs, plus 2. Attorney Upshaw informed Mr. Sykes that the prosecution would not be able to prove AWIM because the victim was shot below the waist, and that the guidelines would not exceed 160 months. See, (Sentencing Transcript, p 19).

18. **ISSUE VII:** Mr. Sykes is entitled to resentencing where his sentence is based on inaccurate information, and judicial found facts making the sentence invalid based on a retroactive change in law, and newly available evidence. Appellate attorney Rita Young advised defendant not to file this sentencing issue during his 6.500 motion which was ineffective assistance of counsel. (See enclosed letter). The firearm report was discovered in the FOIA request which shows that OV2 was inaccurately scored (there was no evidence that Mr. Sykes possessed or used a short-barreled rifle or a short-barreled shotgun, as required by MCL 777.32(1)(c), and the firearm report reflects the opposite conclusion). The Court of Appeals also acknowledged that OV19 was improperly scored in this case, but refused to grant a resentencing due to the fact that the guidelines range was unaffected) (See, Issue VI for related argument). PRV 3 was also inaccurately scored, as Mr. Sykes only has one juvenile adjudication.

19. **ISSUE VIII:** Mr. Sykes is entitled to a pursuant to *People v Posey*, 512 Mich 317 (2023), where the Supreme Court struck the first sentence of MCL 769.34(10) to the extent that it

rendered sentences within the sentencing guidelines range unreviewable. The Court overruled part of *People v Schrauben*, 314 Mich App 181 (2016), as well as all other decisions that required appellate courts to affirm a within-guidelines sentence on appeal. Mr. Sykes did not previously argue in his direct appeal that his sentence was unreasonable because, at the time of his direct appeal, MCL 769.34(10) required sentences that fell within the sentencing guidelines range to be affirmed (which is what the Court of Appeals did in Mr. Sykes' appeal of right). This left him without the ability to seek judicial review of the reasonableness of his sentence, both during his direct and previous collateral appeals.

20. Mr. Sykes is also entitled to an evidentiary hearing to develop a record for his new evidence regarding his actual innocence. See, *Taylor v Motton*, 366 F3d 992 (6th Cir. 2004); *Brady v Maryland*, 373 US 83 (1963); *People v Johnson*, 502 Mich 541 (2018).

21. The "good cause" requirement can be met in alternative ways: (1) this Court could waive the "good cause" requirement of subrule (D)(3)(a), if "there is a significant possibility that Mr. Sykes is innocent of the crime." MCR 6.508(D)(3), and (2) prior appellate counsel was unaware of the newly discovered evidence discussed in affidavits, the new law announced in recent cases, and FOIA, since these items came to light well after Mr. Sykes's trial and appeals were concluded.

22. Under MCR 6.508(D)(3)(b), Mr. Sykes suffered "actual prejudice." A miscarriage of justice occurs when a defendant is actually innocent but stands convicted. *Smith v Murray*, 477 US 527, 537 (1986)(whether constitutional error served to "pervert the jury's deliberations concerning the ultimate issue"); *Kuhlmann v Wilson*, 477 US 436, 454, n.17 (1986)(allowing successive habeas petition on grounds of "ends of justice"). Additionally, an invalid or illegal sentence is just as egregious, and is more common, than the conviction of an innocent person.

RELIEF REQUESTED

WHEREFORE, Defendant Kevin Deshawn Sykes asks this Honorable Court:

A. Order the Prosecutor to answer the allegations of this Motion;

B. Grant an Evidentiary Hearing to expand the record;

C. Grant a new trial, vacate his convictions and order Mr. Sykes's immediate release, or grant a resentencing.

Respectfully submitted,

S/Phillip D. Comorski

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_____/

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

PHILLIP D. COMORSKI, being first duly sworn, deposes and says that he is the principal attorney for the Defendant in the within matter.

Further, that Affiant has read the foregoing as subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those matters, he believes them to be true.

S/Phillip D. Comorski
PHILLIP D. COMORSKI (P46413)

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BRIEF IN SUPPORT

The conviction arises from the shooting that involved Police Officer Vicki Yost, who was shot in the lower right calf, and Officer Melonie Taylor who was the partner of Officer Vicki Yost. The incident occurred on December 29, 2001, at a bar in Detroit. The prosecutor claimed that Mr. Sykes allegedly shot a rifle at two Detroit police officers, wounding Officer Yost. It was the prosecution's contention that Mr. Sykes pointed an assault rifle at the officers and shot Yost in the leg before escaping on foot. The defense was mistaken identification and/or a tainted identification. Indeed, Mr. Sykes had an alibi defense that was not properly presented at trial, and that but for ineffective representation, the jury would have been privy to the fact that he was in West Virginia at the time of the shooting.

Years after the trial, the Michigan Innocence Clinic discovered the identity of the actual shooter -- a man named Masada King, who confessed in an affidavit. Additional newly discovered evidence obtained in 2021 and 2024 -- ***after*** King's confession -- bolsters King's confession, and severely impeaches the prosecution's theory and shows a pattern of systemic DPD corruption.

STATEMENT OF FACTS

Adonis Davis, the uncle of Antonio Davis who was a co-defendant, testified that Antonio drove a white Ford van in December of 2001 (T, Vol II, p 104).[1] Davis identified a photograph of the van, Exhibit 1 (T, Vol I, p 105). Antonio was driving the van in the early morning hours of December 29, 2001. The prosecutor then questioned Davis about the non-appearance of Antonio at trial and whether someone related to Mr. Sykes approached him in the hallway (T, Vol I, p 106). The defense unsuccessfully moved for a mistrial on the grounds that the prosecutor was attempting to improperly show that Mr. Sykes was attempting to intimidate witnesses through friends (T, Vol I, p 108-109).

Davis had known Mr. Sykes for ten years (T, Vol I, p 110). Earlier in the evening of the 29th, Davis met Antonio at his house (T, Vol I, p 111). He alleged that Mr. Sykes was at the house and was wearing light blue jeans and a beige coat (T, Vol I, p 113). After midnight, Davis was at Page's Palace where he claimed he saw Antonio and Mr. Sykes (T, Vol I, pp 113-114). Davis testified that he did not see Mr. Sykes get into Antonio's van (T, Vol I, p 116). At around 12:45 a.m., Davis left the bar and dropped off Adonis Finney, his nephew, on Goddard Street (T, Vol I, p 118). At around 1:30 a.m. on Mackay Street, Davis saw the police surrounding Antonio's van (T, Vol I, pp 118-119, 130). The police arrested Davis and he gave a statement the next day, stating that when he left the bar, Antonio and Mr. Sykes were still at the bar (T, Vol I, pp 119-120). The prosecutor questioned

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[1] The Trial Transcripts will be referred to as follows:

Vol I -- June 24, 2002
Vol II -- June 25, 2002
Vol III -- June 26, 2022
Vol IV -- June 27, 2002

Davis about his other nephew Adonis Finney, asking if he had failed to appear and whether he was a "friend and associate of Kevin Sykes," to which Davis answered "yes" (T, Vol I, p 120).

Deborah Hester, an employee of Page's Palace, testified that on December 29th at around 1:30 a.m., a man entered the bar with a gun and stood there, so she went to get her boss (T, Vol I, p 156). The man was wearing a beige jacket with a fur collar, armed with a long gun he was carrying straight down by his side (T, Vol I, p 157). The man said he was "looking for his people. Hester never made "face contact" with this person and could not identify him. (T, Vol I, p 159).

Robert Howard, also an employee, had just got off work at about 1:40 a.m. and was helping close the bar when he was approached by Hester who said a man with a long coat had an assault rifle under it (T, Vol I, p 160). Howard walked to the door and saw a young man holding an assault rifle with a clip under his coat (T, Vol I, p 161). Howard called 911 on his cell phone and told them what he saw (T, Vol I, p 162). The man with the gun was wearing a beige coat with a hood and fur around the collar (T, Vol I, pp 162-163). Howard could not identify the man because he did not get a good look at him (T, Vol I, pp 163-164). He described the man as a black male, 20 to 30 years old, five ten, 160 to 170 pounds, medium complexion (T, Vol I, p 164). Howard saw a second man standing in the doorway with the other man, acting like he had something under his coat (T, Vol I, p 165).

Officer Frank Srnter overheard a radio run of a man in Page's Palace with a shot gun (T, Vol I, p 169). As his vehicle approached from the north, Senter saw people scattering all through the area and Lt. Yost and her partner exiting their vehicle (T, Vol I, p 171). Senter heard shots but could not see who the shooter was (T, Vol I, pp 170-171). Senter then saw a person standing pointing a gun in the direction of Yost and her vehicle. The man wearing black pants with a tan coat and a fur collar. Subsequently, Senter testified the perpetrator did not have a fur collar on (T, Vol II, pp 27-

28). Senter identified Mr. Sykes as the man with the gun (T, Vol I, p173). As Senter aimed his gun at Mr. Sykes, Yost called "officer down" and he focused his attention on her. Senter went to Yost who was hopping on one leg (T, Vol I, p 174). Senter looked toward the alley where the gunman had run while Yost put information over the radio about the van (T, Vol I, p 175). Senter later saw Adonis Finney in a car but did not identify him as the shooter. (T, Vol I, pp 175-176, 190).

On cross examination, Senter said he was traveling southbound on Dequindre when he saw Yost's vehicle stopped in front of the bar (T, Vol I, p 180). As she exited her vehicle, Senter was getting out of his car (T, Vol I, p 181). The man with the gun was on the sidewalk south of Officer Senter and Stender Street (T, Vol I, p 183). People were running everywhere, including between Senter and the gunman (T, Vol I, p 184). By the time Senter got to Yost, the gunman was gone (T, Vol I, p 185). Senter said it was dark outside (T, Vol I, p 186). When Senter wrote his police report, he did not describe a gunman or his clothing at all and Senter saw the gunman's face only for two seconds (T, Vol I, p 188-189, 193). Fifteen minutes after the incident, Senter allegedly saw Mr. Sykes at a BP Gas Station hiding behind the door of a car from a fifty feet distance (T, Vol I, p 191; T, Vol II, p 12). However, he never put this in his first police report, claiming he was distraught and angry (T, Vol II, p 9). Nor did he put in his first report that he had observed the shooter or anyone with a weapon (T, Vol II, pp 9-10). When Senter allegedly saw Mr. Sykes at the gas station, he did not broadcast the information but kept driving because he wanted to go home (T, Vol II, p 14). Senter and his partner drove off, leaving Mr. Sykes at the gas station (T, Vol II, p 17).

Lt. Vicki Yost was assigned as the shift boss for midnights at the 11th Precinct (T, Vol II, pp 33-34). At 1:45 a.m. there was a radio dispatch about a man with a gun at the bar (T, Vol II, p 35). Yost was in plain clothes in a semi-marked vehicle, and as she approached the bar, she saw Officers

Collier and Senter exit their vehicle with their weapons drawn (T, Vol II, p 36). Yost saw Mr. Sykes about to enter a white van (T, Vol II, pp 36-37). As Mr. Sykes turned back, Yost allegedly saw an assault rifle down his right pants leg (T, Vol II, p 38). Yost exited her car, pulled her gun and as she announced, "drop that," Mr. Sykes raised the rifle and shot (T, Vol II, p 40). Yost was standing on the driver's side reaching over the roof in the direction of Mr. Sykes (T, Vol II, p 41). Hearing six to ten shots, Yost ducked and ran to the back of her car (T, Vol II, p 42). Her partner stayed faced down in the police car (T, Vol II, p 43). Yost broadcasted over the radio that shots were fired, and she had been hit in the right calf (T, Vol II, pp 44-45). As she looked back over her vehicle, she claimed she saw Mr. Sykes fleeing eastbound on Stender. As the van began to leave, Yost got the license plate number and broadcasted it over the air (T, Vol II, p 48). She saw a scout car pursue the van as she put a description of the shooter over the radio (T, Vol II, p 50). She described the shooter as a black male, 30's, six feet, medium to stocky build wearing a tan jacket, black pants and black skull cap. She did not know if the coat had a hood or fur on the collar (T, Vol II, pp 71-72). Upon arriving at Detroit Receiving Hospital, it was determined Yost suffered a through and through gunshot wound to her right calf (T, Vol II, p 52). At a subsequent photo lineup, two days after the incident, Yost identified Mr. Sykes saying, "I think it's no. 2" (T, Vol II, pp 61-63, 78-79). Yost wrote no police report (T, Vol II, p 64). At the time of the shooting, there were at least thirty to forty people outside (T, Vol II, p 82).

Jennifer Colthirst was the attorney at the photographic show up (T, Vol II, pp 88-89). On December 30, 2001, Officer Senter made an "immediate identification" of Mr. Sykes, within two minutes (T, Vol II, p 92). On December 31st, Yost also made an identification, stating "I think it's no. 2, the shooter, that shot at me" (T, Vol II, p 94). The only photograph in the array where the

person was "looking all goofy, head-cocked to the side, mouth wide open" was Mr. Sykes, making his photo stand out (T, Vol II, p 103).

Melanie Taylor, the partner of Lt. Yost, testified that they responded to the radio dispatch and as they approached the bar, she saw people running out of the bar (T, Vol III, pp 8-9). She saw a man about to enter a van and Lt. Yost asked the man to see his hand, announcing her presence (T, Vol III, p 10). Then shots rang out. The man had raised his arm holding a weapon (T, Vol III, pp 11-12). As the gun was pointed in her direction, she ducked by lying face down on the seat (T, Vol III, pp 12-13). Taylor heard shots strike the police vehicle (T, Vol III, p 15). When she exited the car, she noticed Yost had been shot (T, Vol III, p 20). Taylor also noticed the shooter running on Stender and he was wearing a tan coat with a fur collar, dark pants, and dark shoes (T, Vol III, pp 22-23, 35). Within twenty minutes, she was shown a person she said was not the shooter (T, Vol III, pp 26, 40). She made no in-court identification. According to Taylor, it was dark in the area where the shooter was standing (T, Vol III, p 32). Since it was dark, she could not see the shooter's facial features (T, Vol III, pp 35-36).

Evidence Technicians took pictures, recovered a 9 mm. handgun in a van, saw a police vehicle with its spotlight on and numerous suspected bullet holes, a large pool of blood west of the vehicle and six spent 7.62 X 39 cartridges east of Dequindre and Stender Streets (T, Vol III pp 4-52).

On January 11, 2001, the Detroit Police planned with the Clarksburg Police Department in West Virginia to extradite Mr. Sykes to Michigan (T, Vol III, pp 64-65). Mr. Sykes arrived in Detroit on January 24, 2001 (T, Vol III, p 66).

The parties stipulated that the police found an AK-47 in a dumpster on Lumpkin Street in Detroit and the shell casings found at the scene were fired from that weapon (T, Vol III, p 73-74).

A search for fingerprints on the rifle, clip and shell casings was negative (T, Vol III, p 74). No physical evidence connected Mr. Sykes.

Officer Sheila Daniel saw a van stop on Mackay Street and the driver exited the van and entered a house (T, Vol III, p 75). The driver of this van was Antonio Davis (T, Vol III, p 76). Davis escaped out the rear of the house (T, Vol III, p 77). Adonis Finney was described as a black male, 29, 155 pounds, black hair, medium complexion, wearing a tan leather jacket with a fur collar, blue jeans and tan boots, similar to the description of the shooter (T, Vol III, p 89).

The defense called Felicia Thompson, who was at the bar the night of the shooting, along with her god-sister, Shanika Moore. Ms. Thompson decided to leave because she saw a man at the door with a gun. She stated that the man with the gun was not Mr. Sykes (T, Vol III, pp 106-108.)

JURY VERDICT AND SENTENCE

The jury convicted Mr. Sykes of two (2) counts of assault with intent to murder, MCL 750.83; possession of a firearm by felon, MCL 750.224f; and felony firearm, MCL 750.227b. On July 24, 2002, the Court imposed sentences of 39 - 70 years, concurrent on the assault convictions, a concurrent 2 - 7 years on the felon in possession conviction, and the mandatory 2-year consecutive term for the felony firearm conviction. Mr. Sykes was sentenced as a second habitual offender.

APPELLATE HISTORY

After the trial, Mr. Sykes obtained an affidavit from alibi witness Dawnetha Washington, which indicated that Mr. Sykes was in Clarksburg, West Virginia, between December 26, 2001, until his arrest in January 2002. According to Ms. Washington, she was prepared and ready to testify on Mr. Sykes' behalf, but his trial counsel never called her as a witness. Based on Ms. Washington's contentions, appellate counsel moved for a remand and to file a motion for a new trial. On February

19, 2004, the Michigan Court of Appeals granted Mr. Sykes' motion to remand pursuant to MCR 7.211(C)(1), indicating that, "this matter is REMANDED to the trial court for an evidentiary hearing and decision as to whether defendant appellant was denied the effective assistance of counsel." *People v Sykes*, Docket No. 245256.

On March 26, 2004, and April 22, 2004, respectively, the trial court held an evidentiary hearing with testimony from trial counsel Upshaw, private investigator Terrance Cook, and Ms. Washington. At the conclusion of the hearing, the trial court was not persuaded that a new trial should be granted.

Mr. Sykes then returned to the Michigan Court of Appeals, where his conviction and sentences were affirmed. *People v Sykes,* No. 245256 WL 2102010 (Mich. Ct. App. Sept. 21, 2004). Subsequently, on May 31, 2005, the Michigan Supreme Court denied leave to appeal. *People v Sykes*, 472 Mich 917 (2005).

On September 30, 2009, the United States District Court Judge Lawrence P. Zatkoff, denied Mr. Sykes' counseled petition for habeas corpus relief. *Sykes v Wolfenbarger*, No. 2:06-cv-12146, 2009 WL 3199898. However, the Sixth Circuit granted a certificate of appealability on three issues: (1) whether the prosecution engaged in misconduct; (2) whether Sykes received ineffective assistance of counsel; and (3) whether testimony based on reports by officers not present at the trial violated the Confrontation Clause of the Constitution.

On November 21, 2011, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision to deny habeas relief. *Sykes v Wolfenbarger*, 448 F.App'x 563 (6th Cir. 2011). On October 2, 2012, the United States Supreme Court declined to grant certiorari. USSC No. 11-10266.

ORIGINAL MOTION FOR RELIEF FROM JUDGMENT BASED ON NEWLY DISCOVERED EVIDENCE

In 2014, the Michigan Innocence Clinic (MIC) launched an investigation into Mr. Sykes' claim of innocence. During a comprehensive investigation, the identity of the real perpetrator who committed the crime that Mr. Sykes stands convicted of confessed to the crime. On June 29, 2015, Masada "Soup" King, unequivocally exculpated Mr. Sykes. **(Appendix: A).** Additionally, the MIC discovered that Felicia Dyer identified King as the shooter, but that she was too afraid to implicate him during Mr. Sykes' trial because she was scared for her safety. **(Appendix: B).**

Based on this exculpatory information, Mr. Sykes filed a motion for relief from judgment, arguing "that newly discovered evidence of actual innocence requires this Court to grant Mr. Sykes post-conviction relief." On December 12, 2016, this Court issued and Order and Opinion denying relief from judgment under the erroneous pre-*Johnson*[2] analysis by opining that, "this Court finds that the affidavits presented by defendant do not make a different result probable on retrial." (Opinion denying motion, p 9).

This Court made a credibility determination without first holding an evidentiary, which the Michigan Supreme Court concluded was error in *Johnson*. See, *Johnson, supra* at 566-567 ("[I]f a witness is not patently incredible, a trial court's credibility determination must bear in mind what a reasonable juror might make of the testimony, and not what the trial court itself might decide[.]" *Id*. at 568. This Court denied relief without first hearing the testimony from the witnesses, under oath, that would have exonerated Mr. Sykes, which the *Johnson* Court determined to be in error.

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[2] *People v Johnson*, 502 Mich 541 (2018).

NEWLY DISCOVERED EVIDENCE THAT POST-DATES PRIOR MOTION

(1) Teddy Davis Affidavit

Teddy Davis signed an affidavit indicating that Adonis Davis was his first cousin. Prior to the shooting at Page's Palace, Adonis told Teddy on several occasions, that he hated Mr. Sykes and if the opportunity presented itself, he would kill Mr. Sykes. Adonis believed that Mr. Sykes' cousin killed Adonis' brother, Johnnie Davis. Teddy also maintained that he had an intense feud with Mr. Sykes prior to the incident at Page's Palace. Teddy and Adonis discussed the circumstances of Adonis' testimony in the instant case. Adonis admitted that he was drunk inside Page's Palace at the time of the shooting and never saw the actual shooting. It is Teddy's contention that because Adonis hated Mr. Sykes so much, "I cannot imagine that Kevin Sykes would have been hanging out at Adonis Davis's house on the night of the Page's Palace shooting." **(Appendix: C)**

(2) Affidavit of Tyrone Deshawn Moore

In his affidavit, Tyrone Deshawn Moore indicated that he was at Page's Palace with some friends, but not with Mr. Sykes, contrary to police reports. He maintains that he did not see the shooting, did not hear any gunshots, did not see any police cars, did not sign any police statements, and never implicated Mr. Sykes as being a shooter. He adamantly disputes signing any statements that implicate Mr. Sykes or anyone else at Page's Palace. After viewing the witness statements that the police claimed he signed, Moore maintained DPD forged his signature. **(Appendix: D)**

(3) Affidavit of Tyrone Michel Moore

In his affidavit, Tyrone Michel Moore indicated that Chanika Moore is his niece, that he does not know Mr. Sykes or Masada King, was not at Mr. Sykes' trial, had never been to Page's Palace, and does not have any information about the trial or a shooting. **(Appendix: E)**

(4) Affidavit of Michael Reed

In his affidavit, Michael Reed indicated that he saw King in the bar arguing with some people in what appeared to be an intense conversation (based on their hand gestures). As King proceeded to leave the bar, Mr. Reed heard multiple gunshots coming from the outside. **(Appendix: F**)

(5) Affidavit of Richard Davis

In his affidavit, Richard Davis maintains that he accompanied King at Page's Palace Bar on the night in question. At some point after their arrival, King said he had to go back out to the car, so Davis and another friend proceeded to the bar to get some drinks. Minutes after King walked out the door, Davis said he heard gunshots. It was a chaotic atmosphere with people running and screaming. Subsequently, Davis and others that apparently attended the bar were arrested and transported to the homicide section at 1300 Beaubien. According to Davis, the detectives referred to him as a suspect. **(Appendix: G**)

(6) Affidavit of Lashawn Vines

In her affidavit, Lashawn Vines asserts that her and Mr. Sykes was in a relationship and lived together with her three children in West Virgina in 2001. Vines' birthdate is December 22, 1976. Vines and Mr. Sykes spent her birthday together in West Virginia on December 22, 2001, and he was in West Virginia up until the time he got arrested in early 2002. Vines didn't testify on Mr. Sykes' behalf about his whereabouts because Child Protective Services threatened to take her children away from her if she continued to encounter Mr. Sykes or the criminal proceedings.[3] **(Appendix: H)**

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[3] Ms. Vines' affidavit is not newly discovered under the definition of *Cress*. However, it is newly available and should be considered holistically with all the other pieces of evidence, especially when considering Mr. Sykes' innocence.

(7) FOIA Material (Officer Wendy Collier's police report)

Wendy Woods submitted a FOIA request regarding the December 29, 2001, incident at 6 Mile and Dequindre involving Kevin Sykes. The request was granted on January 31, 2017, and on March 2, 2017, DPD disclosed the 563-page file under FOIA No. A16-05398. Among the file was a report by Officer Wendy Collier, which severely contradicts Officer Senter's version of events. Officer Collier noted in her report that seconds after they arrived on the scene, she heard shots fired and when she took cover, she fell and fractured her right finger. The unknown perpetrator then fled the scene in an unknown direction and Officer Senter transported Officer Collier to the hospital. **(Appendix: I**)

(8) Officer Senter's convictions for crimes involving theft and dishonesty

In 2011, Officer Senter pleaded guilty to uttering and publishing, forgery, and false pretenses -- all crimes involving theft and dishonesty. See, Wayne County Circuit Court Case No. 11-010939-01-FH. **(Appendix: L)**

"If the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States v Agurs*, 427 US 97, 113 (1976). Here, good cause from actual innocence or from an alleged constitutional violation can show that a fundamental miscarriage of justice occurred. See, *McQuiggen v Perkins*, 569 US 383 (2013). Clearly, the interest in insuring compliance with state procedural rules cannot outweigh the interest of preventing a conviction if a defendant has been wrongfully convicted.

ARGUMENT I

SUPPRESSION OF OFFICER WENDY COLLIER'S POLICE REPORT VIOLATED *BRADY V MARLYAND*, 373 US 83 (1963).

The prosecution has a federal constitutional duty to provide exculpatory evidence to a criminal defendant. *Brady v Maryland*, 373 US 83 (1963). The suppression of favorable evidence that is material to the question of guilt or punishment violates due process, irrespective of the good or bad faith of the prosecution. *Brady v Maryland*, 373 US at 87. The obligation to disclose extends equally to impeachment evidence. *United States v Bagley*, 473 US 667, 676 (1985). The evidence at issue need not be specifically requested by defense counsel. *United States v Agurs*, 427 US at 107-110. Nor does *Brady* require a defendant to show that he could not have independently obtained the alleged *Brady* material through further investigation of his own. *People v Chenault*, 495 Mich 142, 155 (2014). The prosecution's duty to disclose extends to other agents acting on behalf of the government, including the police. *Kyles v Whitely*, 514 US 419, 437 (1995); see also, *Banks v Dretke*, 540 US 668, 696 (2004). Failure to disclose *Brady* material requires a new trial if there is a "reasonable probability" that the suppressed information could have led to a different result at trial. *Kyles v Whitely*, 514 US at 434. Good or bad faith is irrelevant, and "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles v Whitely*, 514 US at 437-438 (citation omitted).

To establish a *Brady* violation, a defendant must show: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material. *Chenault, supra* at 155. As will be explained below, the facts of this case clearly demonstrate that a *Brady* violation has affected the outcome of Mr. Sykes' case and therefore he is entitled to a new trial.

(A) <u>The prosecution suppressed evidence</u>.

Mr. Sykes indisputably satisfies the first element of the *Brady* test because the prosecutor, or its agent, suppressed evidence. Prior to trial, neither Mr. Sykes nor his trial counsel was aware that Officer Collier gave a different account of the incident in stark contrast to her partner, Officer Senter, who identified Mr. Sykes as the culprit **(Appendix: I).**

In 2016, many years after the conviction, Wendy Woods submitted a FOIA request for the DPD file pursuant to MCL 15.231. On January 31, 2017, the FOIA request was granted in part and denied in part. Subsequently, the 563-page DPD file was disclosed. Among the files was a report authored by Officer Collier that was suppressed during the trial. Notably, the suppression is consistent with DPD's historical unwritten policy of withholding favorable evidence from defendants during the time of Mr. Sykes's trial. The trial record is devoid of any mention of this document, and the transcripts reveal that Mr. Sykes's attorney was not privy to the important impeachment information as he indicated during closing argument that Officer Collier failed to make a statement—this is because the report was never disclosed. (T, Vol IV, p 53).

It is not clear whether the assistant prosecuting attorney assigned to Mr. Sykes's trial intentionally withheld the evidence. But this is a distinction without a difference. <u>See</u>, *Kyles v Whitely*, 514 US at 437-438. It does not matter whether the prosecutor who tried the case had personal knowledge of the undisclosed favorable information, because the prosecutor "has a duty to learn of any favorable evidence known to others acting on the government's behalf," including investigating officers. *Kyles v Whitely*, 514 US at 437.

Moreover, this Court can take notice that DPD has a history of suppressing material and favorable information related to homicide cases. In fact, Sarah Hunter conducted an extensive

investigation of DPD corruption[4] and uncovered shocking revelations that homicide detectives had a policy of intentionally withholding exculpatory evidence in what they referred to as "miscellaneous files." **(Appendix: J).** According to Ms. Hunter, former police officer Ritchie Harrison explained that a "miscellaneous file" was created for every homicide case and that in these files the police pick out every bit of evidence that is exculpatory as to the perpetrator they will seek a warrant for, and every other piece of evidence that is inconsistent with their theory of who did the crime, and they leave it in the miscellaneous file before presenting the case to the prosecutor's office for a warrant. Harrison told Ms. Hunter that no one knew about miscellaneous files except for people who work in Homicide. Other evidence strongly suggests that high-ranking officers at DPD resorted to "illegal tactics" in convicting and framing others by "hiding exculpatory evidence" and/or outright "destroying evidence." [5] It was within the police department's files that Mr. Sykes discovered Officer Collier's report. Based on the circumstances of discovery, or lack thereof, this document was not disclosed to Mr. Sykes before trial. Therefore, the first *Brady* prong has been satisfied.

(B) <u>The suppressed evidence is favorable</u>.

The suppression of favorable impeachment evidence can constitute a *Brady* violation. *Strickler v Greene*, 527 US 263, 281-282 (1999). Here, the second prong of the *Brady* test is met where Officer Collier's report directly contradicts her partner's testimony. At trial, Officer Senter

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[4] The Wayne County Prosecutor's Office Conviction Integrity Unit has exonerated over 30 individuals premised in large part, on DPD suppression of favorable evidence. <u>See</u>, *https://www.hourdetroit.com/political-topics/inside-the-wayne-county-prosecutors-unit-thats-exonerated-30-innocent-convicts-%E2%80%A8in-3-years/*

[5] Ritchie Harrison has made statements that he personally witnessed other officers in the section "shredding and destroying evidence." **(Appendix J, p 12).**

testified that as he approached the location, he saw people scattering through the area and simultaneously saw Lt. Yost and her partner exit their vehicle as gunshots erupted (T, Vol I, p 171). Officer Senter claimed he saw Mr. Sykes "aimed dead on the unmarked vehicle." (T, Vol I, p 172). Officer Senter maintained that he aimed his weapon towards Mr. Sykes but was unable to return fire because two civilians crossed his range of fire, and he decided to lean aid to Lt. Yost (T, Vol I, p 173). Senter also alleged that fifteen minutes after the shooting, he saw Mr. Sykes at a BP Gas Station hiding behind the door of a car from fifty feet away (T, Vol I p 191). In stark contrast however, Officer Senter's partner, Officer Collier, noted in her report that seconds after they arrived on the scene, she heard shots fired and when she took cover, she fell and fractured her right finger. The unknown perpetrator then fled the scene in an unknown direction and Officer Senter transported Officer Collier to the hospital. **(Appendix: I).** Had Mr. Sykes been provided with Officer Collier's police report, he could have utilized it as a powerful impeachment tool to discredit Officer Senter's already questionable testimony. Officer Collier's report is favorable because it clearly impeaches Officer Senter's version of events, thereby satisfying the second prong of the *Brady* test.

(C) <u>The withheld evidence is material</u>.

In evaluating the third prong of the *Brady* test, that the withheld evidence is material, the court should consider all of the evidence presented in the matter holistically. The *Brady* materiality prong is similar to that set forth in *Cress*[6] for the evaluation of whether newly-discovered evidence demands a new trial. *Cress* requires the Court to consider all of the evidence—old and new—to determine whether, with the addition of the proposed evidence, there is a reasonable probability of

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[6] <u>See</u>, *People v Cress*, 468 Mich 678 (2003).

a different outcome upon retrial. See, e.g., *Grissom, supra* at 311 (explaining that courts in this situation are to consider whether defendant has a reasonably likely chance of acquittal in light of the newly discovered evidence and in light of the evidence presented against defendant).

Failure to turn over favorable information to the defense requires a new trial if there is a reasonable probability that the suppressed information could have led to a different result. *Kyles v Whitely*, 514 US at 34. "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States v Agurs*, 427 US at 113. The verdict here was of questionable validity. Not only was there no physical evidence linking Mr. Sykes to the murder weapon or the crime scene, but the only eyewitness identification testimony was highly questionable.

Although Yost's in-court identification was assertive, at the lineup she was far from confident, stating, "I think its no. 2." Senter's alleged identification was even more unreliable. First, in neither of his police reports did he give a detailed description of the person he claimed to be Mr. Sykes. Officer Collier's suppressed report wholeheartedly contradicts just about everything Senter testified to, which may be the reason it was withheld from the defense. Indeed, Senter was a rookie officer with nearly two years on the force when this shooting occurred (T, Vol I, p 186), which explains why he either failed to provide a detail-specific police report or he flat-out lied to boost his ranking by securing a conviction by any means. To bolster Officer Senter's passion for fabrication, further investigation has revealed that in 2011 he pleaded guilty to Uttering & Publishing, Forgery, and False Pretenses, in Wayne County Circuit Court Docket No. 11-010939-01-FH. **(Appendix: J).** If Officer Senter had the gumption to commit crimes involving theft and dishonesty, then fabricating a nefarious false narrative to implicate Mr. Sykes was like taking candy from a baby.

Aside from Yost's and Senter's questionable identifications, the remaining evidence to sustain the verdict was anything but overwhelming. There was no physical evidence linking Mr. Sykes to the shooting and he had two witnesses that would have put him at least 364 miles away from the shooting, but for ineffective representation. Officer Taylor identified another individual as the shooter, essentially exculpating Mr. Sykes. Hence, the prosecution's proofs presented were minimal to say the least. Yost's and Senter's identification were therefore the centerpiece of the government's case and the only evidence that directly connected Mr. Sykes to the shooting.

With respect to identification testimony, in *United States v Brown*, 461 F2d 134, 145 (DC Cir 1971), Chief Judge Bazelon discussed the problems of eyewitness identification by stating that "[n]o other aspect of the accusatory process creates so much opportunity for miscarriage of justice for punishment of an innocent man." *United States v Brown*, 461 F2d at 145. "Unquestionably, identifications are often unreliable—perhaps consistently less reliable than lie detector tests, which we have in the past excluded for unreliability." *United States v Brown*, 461 F2d at 145, n.1. Erroneous eyewitness identification, many times given confidently in good faith, has led to the conviction and execution of innocent people charged with capital crimes.[7]

The suppression of Officer Senter's report—which was highly relevant and important impeachment evidence—directly contradicts both the content of Senter's identification testimony and his overall claimed certainty. The credibility of a witness is always at issue. Had it been disclosed before trial, defense counsel would certainly have cross-examined Officer Senter regarding its contents, and the jury would have been exposed to the glaring inconsistency in his statements.

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[7] See, Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan L Rev 91-172 (1987).

It is highly likely that disclosure would have changed the outcome of the trial. Had the jury been privy to information that the prosecution had in its possession, that Senter essentially fabricated his identification of Mr. Sykes, there is a substantial likelihood that the outcome of the trial would have been different. Without the prosecutor's only eyewitness identification, the case is exceptionally weak. See, *Smith v Cain*, 565 US 73 (2012). Therefore, Mr. Sykes is entitled to a new trial due to the suppression of a favorable impeachment tool.

ARGUMENT II

WHERE NEWLY DISCOVERED EVIDENCE OBTAINED *AFTER* THE PRIOR MOTION FOR RELIEF FROM JUDGMENT FROM RICHARD DAVIS AND MICHAEL REED, BOLSTERS MASSADA KING'S CONFESSION THAT HE SHOT LT. YOST, MCR 6.508(D)(2) DOES NOT BAR RELITIGATION BECAUSE THE NEW EVIDENCE IN IT'S TOTALITY DEMONSTRATES THAT MR. SYKES IS ACTUALLY INNOCENT.

The newly discovered testimony of Richard Davis and Michael Reed casts serious doubt on the prosecution's version of events leading to the shooting. Combined with King's confession exculpating Mr. Sykes, and with the already questionable identification upon which the convictions rested, a different result on retrial is probable, and Mr. Sykes is entitled to a new trial.

(A) The combined newly discovered evidence warrants a new trial.

A court may grant a defendant a new trial based on newly discovered evidence where: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692 (2003) (citations omitted).

(i) ***The evidence itself, not merely its materiality, is newly discovered.***

Whether evidence is newly discovered turns on whether the defendant knew of the evidence at the time of trial. *People v Rao*, 491 Mich 271, 281 (2012). Here, Reed's and Davis' affidavits are completely newly discovered. Mr. Sykes had no idea that Davis accompanied King at the bar, that Reed observed King in an argument prior to the gunshots, and that King confessed to the shooting. Neither Reed nor Davis was on the witness list, their names did not appear in the discovery material provided during the case, and their affidavits were sworn and signed in 2024, which is 22 years after the conviction. Clearly, the proffered testimony from Reed, Davis, and King are newly discovered under any definition.

(ii) ***The new evidence is not cumulative.***

The newly discovered evidence also satisfies the second *Cress* factor because it is not cumulative of the evidence presented at trial. Evidence is not cumulative if the "[d]efendant was unable to present evidence of the same kind to the same point at trial." *Grissom, supra* at 320 (citation omitted). See also, *People v LoPresto*, 9 Mich App 318, 325 (1967)(evidence is not cumulative where it "does not resemble any of the evidence presented in the trial of the case.").

The new evidence here runs contrary to everything that was presented at trial and is therefore the opposite of cumulative. The jury was never presented with any testimony that King admitted to being the shooter, that Reed and Davis saw King in the bar, that Reed observed King get into a heated argument with some other individuals, and that soon as King left the bar gunshots erupted. Accordingly, the introduction of this new evidence is not similar, or otherwise cumulative to, any other evidence presented at trial.

This necessarily satisfies the second prong announced in *Cress*.

(iii) ***Even exercising reasonable diligence, Mr. Sykes could not have produced the new evidence at trial.***

Reasonable diligence depends on the circumstances of the case. *Rao, supra* at 283. The purpose of such a diligence requirement is to avoid rewarding "carelessness, neglect, and gamesmanship, at the expense of thorough trial preparation and the finality of criminal judgments." *Rao, supra* at 284. Here, the absence of King, Reed, and Davis was not the result of "carelessness, neglect, [or] gamesmanship" by the defense. First, at the time of trial, Mr. Sykes did not know that King was the armed gunman that shot Lt. Yost. This information was only manifested through the efforts of the Michigan Innocence Clinic in 2015. Likewise, Mr. Sykes had no clue that Reed and Davis observed King on the night of the shooting and neither of these individuals were on the witness list. Just as the prosecution was not privy to this information, Mr. Sykes was not either.

Reasonable diligence could not have apprised trial counsel of this information because it had not materialized until 2015 and 2024, respectively. Therefore, the third *Cress* prong is satisfied.

(iv) ***The new evidence makes a different result probable.***

"In order to determine whether newly discovered evidence makes a different result probable on retrial, a trial court must first determine whether the evidence is credible." *People v Johnson*, 502 Mich 541, 566-567 (2018). "A trial court's function is limited when reviewing newly-discovered evidence, as it is not the ultimate fact-finder; should a trial court grant a motion for relief from judgment, the case would be remanded for *retrial*, not dismissal." *Johnson, supra* at 567. "In other words, a trial court's credibility determination is concerned with whether a *reasonable juror* could find the testimony credible on retrial." *Id*. "[I]f a witness is not patently incredible, a trial court's credibility determination must bear in mind what a reasonable juror might make of the testimony,

and not what the trial court itself might decide, were it the ultimate fact-finder." *Johnson, supra* at 568. In assessing credibility, the court may consider questionable aspects of proposed testimony, but must also consider aspects of reliability such as lack of a motive to lie. *Johnson, supra* at 570-571. When considering whether a different result is probable, a court must consider the evidence that was admitted at trial and the evidence that would be admitted on retrial. *Johnson, supra* at 571.

"[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Johnson, supra* at 576 n. 16, quoting *United States v Agurs*, 427 US at 113. The substance of Reed's King's and Davis's affidavits are supported by extrinsic indicia of reliability. Neither Reed, King, nor Davis has a motive to lie, as they all maintain they were not promised anything or coerced into signing their respective affidavits. Reed and Davis did not see the shooter and has no idea who fired the shots on the outside of the bar, so in all honesty, if they were trying to assist Mr. Sykes in obtaining a new trial, they truly could have identified King as the shooter, but they chose not to fabricate, which certainly weighs in favor of their inherent reliability. Not only does King have nothing to gain by confessing to the shooting, but he ostensibly places himself at risk by doing so. Additionally, King has a documented history of violence. In fact, nearly two years after King shot Lt. Yost, he killed Curtis Foster in a public area. See, *People v King*, Docket No. 257980. This pattern for violence in public areas is consistent with the type of villain who would shoot randomly at police officers. Under these circumstances, there is a reasonable probability of a different outcome on retrial. The central purpose of our justice system is to convict the guilty and free the innocent. *United States v Nobles*, 422 US 225, 230 (1975). In this case, the justice system failed. Although Lt. Yost mistakenly identified the wrong man, but King is willing to correct that wrong by taking responsibility for his actions.

(B) MCR 6.508(D)(2) does not bar relitigation of Masada King's confession.

Mr. Sykes is mindful that the court typically may not grant relief to the defendant if the motion . . . alleges grounds for relief which were ***decided against*** the defendant in a prior appeal or proceeding under this subchapter, ***unless*** the defendant establishes that a retroactive change in the law has undermined the prior decision . . . ." MCR 6.508(D)(2)(emphasis added). However, and as pertinent here, this court is not automatically precluded from considering King's confession in the context of a new claim for relief, because when considered together with Reed and Davis (and all the other post-trial evidence) creates a significant possibility of innocence. This rule against relitigating claims is essentially an acknowledgment of the law of the case doctrine, which provides that "an ***appellate*** court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433 (1996)(emphasis added). In other words, the law of the case doctrine only applies if the facts remain materially the same. *People v Phillips (After Second Remand)*, 227 Mich App 28, 32 (1997).

Here, the law of the case doctrine does not apply because the facts do not remain materially the same. Mr. Sykes relies on additional newly discovered evidence from Reed and Davis to bolster King's confession, and establish that he is actually innocent. Indeed, MCR 6.508(D)(2) explicitly provides that "for purposes of this provision, a court is not precluded from considering previously decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial, or if the previously decided claims, when considered together with the new claim for relief, create a significant possibility of actual innocence." Thus, review of King's confession—in conjunction with Reed and Davis—does not bar further litigation, and the law of the case doctrine is not applicable in this fact-specific-case.

(C) <u>This Court erred by relying on its own credibility judgment when it analyzed King's confession in the prior 6.500 motion, when the *Johnson* court made clear that the credibility assessment is for the jury, not the reviewing judge</u>.

In its adjudication of King's affidavit in the prior motion, the Court stated, "***this Court*** finds that the affidavits presented by defendant do not make a different result probable on retrial." <u>See</u> (Opinion and Order denying motion from relief from judgment, dated December 12, 2016). This was a fundamentally incorrect assessment according to *Johnson,* especially considering that this court made its decision without holding a hearing where it could properly assess the demeanor of the witnesses by live testimony. In *Johnson,* the court held that the trial court must not base its decision on whether the trial court would find the affiant credible, but rather, on whether a reasonable juror could find the affiant credible. *Johnson*, *supra* at 566-568. And, if a reasonable juror could find the testimony credible, the court must then "consider the impact of that testimony in conjunction with the evidence that would be presented on retrial." *Johnson*, *supra* at 571.

When properly utilizing the *Johnson* analogy, and reviewing the new evidence holistically from Reed, Richard Davis, Teddy Davis, King, Vines, Dyer, Tyrone Deshawn Moore, Officer Coller's report, and DPD's historic reputation for misconduct, Mr. Sykes is undeniably entitled to a new trial, or at a minimum an evidentiary hearing. Since the Court is tasked with determining "what a *reasonable juror* might make of the testimony, and not what the trial court itself might decide, were it the ultimate fact-finder," the Court cannot find these witnesses "incredible" without a hearing. *Johnson*, *supra* at 568.

ARGUMENT III

MR. SYKES IS ENTITLED TO A NEW TRIAL BASED ON THE NEWLY DISCOVERED IMPEACHMENT EVIDENCE FROM TEDDY DAVIS, TYRONE DESHAWN MOORE, TYRONE MICHEL MOORE, AND OFFICER SENTER'S CONVICTIONS FOR CRIMES INVOLVING THEFT AND DISHONESTY.

(A) Newly discovered impeachment evidence.

Our Supreme Court held that newly discovered impeachment evidence can require a new trial under the four-part *Cress* standard. *People v Grissom*, 492 Mich 296, 299-300 (2012).

(i) *Teddy Davis' affidavit.*

Teddy Davis signed an affidavit indicating that Adonis Davis was his first cousin. Prior to the shooting at Page's Palace, Adonis told Teddy on several occasions, that he hated Mr. Sykes and if the opportunity presented itself, he would kill Mr. Sykes. Adonis believed that Mr. Sykes' cousin killed Adonis' brother, Johnnie Davis. Teddy also maintained that he had an intense feud with Mr. Sykes prior to the incident at Page's Palace. Teddy and Adonis discussed the circumstances of Adonis' testimony in the instant case. Adonis admitted that he was drunk inside Page's Palace at the time of the shooting and never saw the actual shooting. It is Teddy's contention that because Adonis hated Mr. Sykes so much, "I cannot imagine that Kevin Sykes would have been hanging out at Adonis Davis's house on the night of the Page's Palace shooting." (**Appendix: C**).

(ii) *Tyrone Deshawn Moore's affidavit.*

In his affidavit, Tyrone Deshawn Moore indicated that he was at Page's Palace with some friends, but not with Mr. Sykes, Tony Davis, nor Mike Reed, contrary to police reports he has recently become privy to. He maintains that he did not see the shooting, did not hear any gunshots,

did not see any police cars, did not sign any police statements, and never implicated Mr. Sykes as being a shooter. He adamantly disputes signing any statements that implicate Mr. Sykes or anyone else at Page's Palace. Furthermore, the affidavit states:

> If the police claim that I gave them a statement regarding the events surrounding an incident that happened at Page's Bar, those statements are fabricated because I didn't see a crime. I never signed any witness statements, the only documents I recall signing were the property release forms.
>
> On April 3, 2024, I was shown a police statement that has the signature of the name Tyrone Moore signed at the bottom and dated for January 11, 2002, and January 11, 2002, and neither are my signatures.
>
> I never saw Mr. Sykes shooting; I didn't see him armed with a weapon and didn't see an AK assault rifle lying on the floor of a van. Detective Barbara Simmons [sic] told me that Mr. Sykes was in the bar, and she kept asking me about Tony Davis. I never told any detectives that I went to the bar with Mr. Sykes or that I saw him shooting a gun. Detective Simons [sic] (and other Detectives) never really asked me if I heard or saw anything from that night. Instead, Detective Simons [sic] told me what happened and tried coercing me to agree with their scenario.
>
> Any witness statements in connection with Mr. Sykes' case that purport to be my signature are forged.

(Appendix: B).

Tyrone Deshawn Moore maintained that he never made a statement implicating Mr. Sykes and never signed any statements implicating anybody. Although he was present at Page's Palace on the date in question, he left before any shooting, and he didn't see Mr. Sykes that night. In 2024, when presented with a copy of a statement that purports to be his, Tyrone Deshawn Moore denied making that statement, and his documented signature does not line up with the obvious forged signature.

What's more troubling is that Detective Barbara Simon tried coercing false information:

> Detective Barbara Simmons [sic] told me that Mr. Sykes was in the bar, and she kept asking me about Tony Davis. I never told any detectives that I went to the bar with Mr. Sykes or that I saw him shooting a gun. Detective Simons [sic] (and other Detectives) never really asked me if I heard or saw anything from that night. Instead, Detective Simons [sic] told me what happened and tried coercing me to agree with their scenario.

(Appendix: B).

These coercive techniques were common for Det. Simon in the 90's and early 2000's. She had a documented history of such misconduct which resulted in numerous wrongful convictions while employed at the Homicide Section, which is consistent with what Tyrone Deshawn Moore maintained she tried to do with him. **(Appendix: D).**[8] Although Detective Simon was not successful with coercing Tyrone Deshawn Moore's statement, it may explain why DPD forged his signature and concocted a statement implicating Mr. Sykes.

(iii) ***Tyrone Michel Moore's affidavit.***

In his affidavit, Tyrone Michel Moore indicated that Chanika Moore is his niece. He does not know Mr. Sykes or Masada King, was not at Mr. Sykes' trial, never been to Page's Palace, and does not have any information about the trial or the circumstances surrounding a shooting, contrary to the prosecution's contention at trial. (**Appendix: E).**

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[8] *People v Craighead*, Docket No. 356393. Mr. Sykes is not relying on *Craighead* as precedentially binding authority nor a proposition of law. Instead, the reference to *Craighead* is merely a factual finding premised on new evidence that manifested from at a state court evidentiary hearing that exposed DPD corruption—specifically from Detective Simon—who was referenced as committing similar misconduct in Mr. Sykes' case. Thereby, although *Craighead* is not controlling precedent, this Court may consider it instructive or persuasive. A copy of the unpublished opinion is attached hereto as **(Appendix: K)**. See, MCR 7.215(C)(1).

(iv) ***Officer Senter's official misconduct/criminal convictions.***

In 2011, Officer Senter pleaded guilty to Uttering & Publishing, Forgery, and False Pretenses, in Wayne County Circuit Court Docket No. 11-010939-01-FH. **(Appendix: L).**

(B) **Application of the *Cress*-Test.**

(i) ***The new impeachment evidence is itself newly discovered.***

In order for evidence to be newly discovered, the defense must have been unaware of the evidence at trial. *People v Dixon*, 217 Mich App 400, 409-410 (1996). Here, it is indisputable that Mr. Sykes was not privy at trial to the factual content displayed in the affidavits of Tyrone Deshawn Moore, Teddy Davis, and/or Tyrone Michel Moore. In fact, Tyrone Michel Moore doesn't even know Mr. Sykes; Davis and Mr. Sykes were not particularly friends, evidence that DPD forged a signature didn't materialize until Tyrone Deshawn Moore saw a copy of the forged statement in 2024, and allegations of Detective Simons misconduct didn't manifest until October 28, 2021, when the Michigan Court of Appeals upheld the trial court's order granting relief from judgement in *People v Mark Craighead*, Docket No. 356393. Finally, evidence of Officer Senter's criminal record occurred 9-years after Mr. Sykes' conviction. Since Mr. Sykes did not become privy to the substance of the collective new evidence until 2021 and 2024 respectively, he satisfies the first prong of *Cress*.

(ii) ***The new impeachment evidence is not cumulative.***

Evidence is not cumulative if the "[d]efendant was unable to present 'evidence of the same kind to the same point' at trial." *Grissom, supra* at 296, n. 41. This showing comes easy here. There was no testimony presented at trial that prior to the shooting at Page's Palace, Mr. Sykes and the Davis family were arch enemies and would never be hanging out together. Moreover, there was no testimony presented that the *real* Tyrone Michel Moore, Chanika Moore's uncle, had no information

about this case, did not know Mr. Sykes, and did not come to any of the trial proceedings. Additionally, there was no testimony presented about Officer Senter's crimes involving theft and dishonesty, nor any testimony presented that DPD forged Tyrone Deshawn Moore's statement implicating Mr. Sykes. Therefore, nothing about the proposed testimony is similar to anything presented at trial. In fact, it's a stark contrast.

(iii) ***The new impeachment evidence could not have been discovered at trial even using reasonable doubt.***

Here, Mr. Sykes does not, and did not, know Tyrone Michel Moore at the time of his trial. Secondly, and as indicated above, the family rivalry made it unlikely for Teddy Davis to testify as a defense witness, especially accusing his cousin (Adonis Davis) of falsely implicating Mr. Sykes. Third, Detective Simon's tactics were not publicly announced until 2021, and Officer Senter's convictions had not occurred until 2011. Even exercising reasonable due diligence, there is simply no way Mr. Sykes could have presented either of this evidence at trial. Similarly, Mr. Sykes had no idea that DPD fabricated Tyrone Deshawn Moore's statements, and the prosecution never produced him at trial—relying exclusively on Detective Vintevoghel's testimony. If the prosecution, with its unlimited resources, couldn't produce Tyrone Deshawn Moore to testify in court, Mr. Sykes could not have discovered this evidence at trial. As a result, this prong of the *Cress* test has been fulfilled.

(iv) ***The new impeachment evidence, considered together with the full record of this case, creates a reasonable probability of a different outcome upon retrial.***

A defendant is entitled to relief from judgment on the basis of newly discovered evidence where the new evidence creates a reasonable probability of a different outcome upon retrial. *People v Tyner*, 497 Mich 1001 (2015); *Cress, supra* at 692; *People v Clark*, 363 Mich 643, 647 (1961). When evaluating the fourth prong of *Cress*, the inquiry is a holistic one: the Court considers the full

weight of all the evidence, old and new, in determining whether there would be a reasonable probability of a different outcome upon retrial. See, *Johnson, supra* at 571 ("… the trial court must consider the evidence that was previously introduced at trial [and] the evidence that would be admitted at *retrial*"); *Cress, supra* at 692 (evaluating fourth prong collectively); *Grissom, supra* at 311 (courts are to consider "whether defendant has a reasonably likely chance of acquittal in light of the newly discovered evidence and in light of the evidence presented against defendant…").

"In order to determine whether newly discovered evidence makes a different result probable on retrial, a trial court must first determine whether the evidence is credible." *Johnson, supra* at 566-567. "A trial court's function is limited when reviewing newly-discovered evidence, as it is not the ultimate fact-finder; should a trial court grant a motion for relief from judgment, the case would be remanded for *retrial*, not dismissal." *Johnson, supra* at 567. "In other words, a trial court's credibility determination is concerned with whether a *reasonable juror* could find the testimony credible on retrial." *Id.* "[I]f a witness is not patently incredible, a trial court's credibility determination must bear in mind what a reasonable juror might make of the testimony, and not what the trial court itself might decide, were it the ultimate fact-finder." *Johnson, supra* at 568. In assessing credibility, the trial court may consider questionable aspects of proposed testimony but must also consider aspects of reliability such as lack of a motive to lie. *Johnson, supra* at 570-571.

Historically, newly discovered *impeachment* evidence has been disfavored as a basis for granting a new trial. *Grissom, supra* at 313. But courts have recognized that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v Illinois*, 360 US 264, 269 (1959). Therefore, a new

trial may be granted on the basis of newly discovered impeachment evidence if a "necessary exculpatory connection exists between the heart of the witness's testimony at trial and the new impeachment evidence." *Grissom, supra* at 318.

At the outset, DPD tainted the investigation, which consequently denied Mr. Sykes his fundamental rights to a fair trial. Indeed, DPD engaged in illegal tactics by forging Tyrone Deshone Moore's signature on two witness statements, one which directly implicated Mr. Sykes in the shooting at Page's Bar. To add insult to injury, the OIC essentially committed a fraud upon the court by making reference to a falsified statement which purported that Tyrone Deshawn Moore provided relevant information regarding the shooting (T, Vol III, p 104). And although the OIC was stopped just short of revealing the substance and content of the statement (due to trial counsel's vigorous contemporaneous objections), the jury was still left with a lingering assumption as to why counsel didn't want the statement introduced. This new evidence of fabrication undermines the confidence in the initial investigation and strongly suggests that the overall proofs relied upon at trial may have been tainted as well. To compound this egregious conduct, Detective Simon and Officer Senter have a DPD jacket of similar misconduct which in turn bolsters the new evidence of fabrication.

Had the jury heard from Teddy Davis, he would have discredited his own cousin's testimony that Mr. Sykes was hanging out over Antonio Davis's house and the two had accompanied each other at Page's Palace. Teddy Davis provided clear content as to why Antonio and Mr. Sykes would probably never be in the same vicinity because of the historical family rivalry. Adonis Davis not only placed Mr. Sykes at the crime scene, but he associated him with Antonio Davis, which consequently and circumstantially associated Mr. Sykes with the Ford van. When looking at all the new evidence in the record, a new jury would first become privy to King's confession, where he admits to shooting

the officer at Page's Palace. Consistent with King's confession, Dyer positively identified King as the shooter, not Mr. Sykes. Michael Reed and Richard Davis identified King as being in the bar on the night of the shooting, both claim that minutes after he walked out the bar the shooting erupted, and Reed observed King in an argument with other party goers prior to him walking out the bar.

Moreover, ballistic evidence was gathered from the crime scene, but nothing linked to Mr. Sykes. Antonio Davis was the person that fled from the police (out of a consciousness of guilt), not Mr. Sykes. Antonio Davis and Mr. Sykes were arch enemies and never would have accompanied each other. The defense would also present indisputable testimony from Vines placing Mr. Sykes in West Virginia before, during, and after the shooting, making it virtually impossible for him to be at two places at the exact same time. Lt. Yost, although trained to pay special attention to detail, admitted that she couldn't get a good look at the suspect's facial features because it was too dark outside and her identification from the photographic array was equivocal at best, and rookie officer Senter omitted even a basic description of the shooter when drafting his police report. Moreover, officer Senter's credibility is forever questionable due to his convictions—while still employed at DPD—for crimes involving theft and dishonesty.

When considering the totality of the circumstances holistically, the newly discovered evidence unquestionably creates a reasonable probability of a different outcome on *retrial*. Accordingly, this court should order a new trial or at minimal, hold an evidentiary hearing.

ARGUMENT IV

WHEN CONSIDERING ALL THE EVIDENCE —BOTH OLD AND NEW—MR. SYKES IS ENTITLED TO A NEW TRIAL BASED ON HIS FREESTANDING ACTUAL INNOCENCE CLAIM.

Mr. Sykes is entitled to relief on his freestanding claim of actual innocence, which is grounded in both the Michigan and the United States Constitution. Actual innocence can be a freestanding federal constitutional claim where the defendant can make a compelling showing of innocence. A prisoner has a recognized liberty interest in demonstrating his innocence with new evidence under state law. *District Attorney's Office v Osborne*, 557 US 52 (2009). United States Supreme Court precedent supports the view that a "fundamental miscarriage of justice occurs when the Defendant submits evidence that a constitutional violation has probably resulted in a conviction of one who is actually innocent." *Schlup v Delo*, 513 US 298, 324-325 (1995). Imprisonment of an innocent man also entails "cruel and unusual punishment" barred by the Eight Amendment to the Constitution. US Const Am VIII.

"Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.' *In re Winship*, 397 US 358, 372 (1970) (Harlan, J., concurring). In *Herrera v Collins*, 506 US 390 (1993), the Supreme Court assumed that a truly persuasive post-trial demonstration of actual innocence renders the execution of a person unconstitutional. While the Court has left open the question of whether a freestanding innocence claim can apply in non-capital cases, it is within this Court's discretion to interpret the Constitution and find such protection.

See, *Arizona v Evans*, 514 US 1, 8-9 (1995) (where U.S. Supreme Court has not authoritatively decided a constitutional question, "[s]tate courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution"). Mr. Sykes urges this Court to do so here because it is "fundamentally unfair" as a matter of procedural and substantive due process to punish an innocent person for a crime he did not commit, regardless of whether the person is sentenced to death or to life in prison. *Herrera v Collins*, 506 US at 398 (citation omitted) ("[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent.").

"To satisfy the 'actual innocence' standard, a defendant 'must show that it is more likely than not that no reasonable juror would have found [the defendant] guilty.'" *Schlup v Delo*, 513 US at 327. In *House v Bell*, 547 US 518, 536–537 (2006), the United States Supreme Court cautioned that a review of actual innocence requires consideration of "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under the rules of admissibility that would govern at trial." This standard does not require absolute certainty about the defendant's guilt or innocence, and less is required than would be to reverse on the ground of insufficient evidence. *House v Bell*, 547 US at 537-538. In *House*, the Supreme Court reversed a conviction despite acknowledging that some evidence of guilt remained. *House v Bell*, 547 US at 554. As stated by the *House* Court, the test balances the evidence of innocence against the reliability of the state's verdict to determine "whether it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." *Schlup*, 513 US at 314–315.

Mr. Sykes's evidence of actual innocence meets this standard. Here, the plethora of evidence demonstrates that Mr. Sykes is actually innocent based on: (1) King confessed to the shooting by using an AK-47, (2) King maintains that he did not know Mr. Sykes, and Mr. Sykes was not

involved, (3) King has no motive to confess to shooting a police officer, (4) King is a dangerous man already serving a life sentence for murder, (5) King has not been promised anything in exchange for his confession, (6) Dyer identified King as the shooter, which rings truth to King's confession, (7) Reed and Richard Davis both identified King in the bar, and both observed King leave out the bar and within minutes gun fire erupted, (8) prior to King walking out the bar, Reed observed King in a heated argument with other party goers, (9) Washington and Vines places Mr. Sykes in West Virginia on the date and time of the shooting, (10) DPD fabricated and forged Tyrone Deshawn Moore's police statement implicating Mr. Sykes, (11) DPD had a documented history of fabricating evidence, coercing witnesses, and withholding favorable information, (11) no physical evidence connects Mr. Sykes to this offense, (12) Yost's initial identification at the lineup was equivocal and at trial she admitted that it was too dark outside to describe the facial features of the suspect, (13) Officer Taylor identified someone other than Mr. Sykes as the perpetrator and she failed to identify Mr. Sykes at trial as the shooter, (14) the driver of the van, Antonio Davis, exited out the van and went into a house, then fled out the rear of the house according to Officer Daniel, (15) Officer Senter's credibility has been impeached with convictions involving theft and dishonesty, and (16) Mr. Sykes has never made any confessions and has always maintained his innocence.

Based on the foregoing, this Court should grant relief based on Mr. Sykes' standalone claim of innocence under the Michigan and United States Constitution.

ARGUMENT V

BASED ON THE UNIQUE CIRCUMSTANCES OF THIS CASE, THIS COURT SHOULD EXERCISE ITS DISCRETION AND GRANT A NEW TRIAL PURSUANT TO MCL 770.1 BECAUSE AN INJUSTICE HAS OCCURRED.

The trial court has the discretion to grant Mr. Sykes a new trial pursuant to MCL 770.1 even if his claims are otherwise procedurally barred or if the provisions set forth under MCR 6.500 have not been met. MCL 770.1 expressly authorizes a trial court to grant a new trial when it determines that justice has not been done, and it grants that authority expressly in situations in which such relief cannot otherwise be granted by law.[9] The provision is a clear statement from the Legislature that a judge ought to be able to grant a new trial to ensure justice is done even when other sources of law cannot support that relief. While MCR 6.431 and MCR 6.500 *et seq.* provide the procedural framework by which trial courts may grant new trials before and after the appellate process, respectively, they do not supersede MCL 770.1, a substantive statute passed by the Legislature. The authority of courts to act under MCL 770.1 ***in addition*** to the court rules is well recognized. See, e.g., *People v Lemmon*, 456 Mich 625, 634-635 (1998) (citing both MCL 770.1 and MCR 6.431 as a basis for a trial court to grant a motion for new trial). When looking at the totality of the circumstances: (1) King already confessed to the shooting at Page's Palace and he didn't implicate

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[9] MCL 770.2(1) provides that: "[I]n cases appealable as of right of in the court of appeals, a motion for new trial shall be made within 60 days after entry of judgment. However, because Mr. Sykes's case is not appealable as of right, his MCL 770.1 claim is not time-barred. Even if it was time-barred, MCL 770.2(4) permits a court to grant a new trial notwithstanding the time-bar "for good cause shown." As discussed previously, Mr. Sykes did not obtain the new evidence to support his claims until many years after his conviction; therefore, he has good cause for his failure to bring his claims earlier.

Mr. Sykes as his accomplice, (2) Dyer identified King as the shooter, (3) DPD forged and fabricated a statement attributed to Tyrone Deshawn Moore that falsely accused Mr. Sykes as the shooter, (4) the state suppressed a favorable police report, (5) DPD had a history of fabricating and coercing witness testimony in and around the same time Mr. Sykes was convicted in other cases, and (5) Vines and Washington placed Mr. Sykes in West Virginia at the time of the shooting, and no physical evidence links him to this offense. More importantly, one of the main identifying witnesses—Officer Senter—has been severely impeached with his convictions involving dishonesty.

This case reeks of an injustice. Hence, this Court may make a finding that, "[Mr. Sykes's] conviction cannot be allowed to stand." See, *People v Johnson*, 391 Mich 834 (1974) (holding that trial court acted within its discretion in granting a new trial under MCL 770.1, where the judge concluded he could not have found guilt beyond a reasonable doubt if the case had been tried by the bench); *People v Hampton*, 407 Mich 354, 372 (1979) (holding the trial judge acted within his discretion in granting a new trial under MCL 770.1 where he "determined upon the evidence that a reasonable mind might have a reasonable doubt").

Relief under MCL 770.1 does not mean that a defendant walks free; rather, it means that a new trial will be held, allowing the presentation of all of the evidence and the jury an opportunity to make a just determination about Mr. Sykes's guilt. For all of the reasons presented, justice has not been done in this case. This Court can and should remedy this injustice and grant Mr. Sykes a new trial under this legislative provision.[10]

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[10] The prosecution has argued in other cases that MCL 770.1 was abrogated by the court rules. And it is true that, in a 30-year-old footnote, the Court of Appeals once suggested that the Supreme Court's adoption of MCR 6.431 "superseded" the "statutory standards" of MCL 770.1. *People v McEwan*, 214 Mich App 690, n 1 (1995). The prosecution has argued the

same logic applies to motions for relief from judgment under MCR 6.508. This Court should decline to entertain this argument.

First, it goes without saying that a comment in a footnote is not a "holding" and is not binding on any other court, including this one. The footnote here only relates to MCR 6.431, and the *McEwan* opinion in which the footnote appears considers a wholly different factual scenario. But more importantly, the assertion that the Supreme Court can "supersede" a legislatively enacted statute by passage of a court rule that relates to the same topic, if that is what the Court of Appeals intended to proclaim, is simply wrong. The Michigan Supreme Court has itself held that it is not "authorized to enact court rules that establish, abrogate, or modify the substantive law." *McDougall v Schanz*, 461 Mich 15, 26-27 (1999). Nor can it, by passage of a court rule, supersede a statute enacted by the Legislature.

The Court is authorized to control the ***procedures*** to be followed in seeking relief under ***substantive*** law. And "in resolving a conflict between a statute and a court rule, the court rule prevails if it governs practice or procedure." *People v Strong*, 213 Mich App 107, 112 (1995). Both MCR 6.431 and MCR 6.508 are ***procedural*** rules, and neither provides a substantive ground for relief. In fact, when filing a motion under either court rule, a defendant needs to do two things: (1) first, he must demonstrate that he has complied with the appropriate procedure under the applicable court rule (i.e. he has met the requirements for consideration under MCR 6.508), ***and then*** (2) he must demonstrate that he is entitled to relief from judgment with a substantive claim (i.e. a due process violation, ineffective assistance of counsel, etc.). This much is obvious simply by reading MCR 6.508(D), which states that a "defendant has the burden of establishing entitlement to the relief requested," and then, instead of identifying what qualifies as "entitlement to the relief requested," it provides ***procedural*** hurdles that must be navigated.

MCL 770.1 is not a rule of practice or procedure—and this is made clear by the plain language of the statute: "The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs." Indeed, MCL 770.1 wholly lacks procedural language, and instead grants substantive authority to the trial court to grant relief either for another substantive violation ("any cause for which by law a new trial may be granted") or "when it appears to the court that justice has not been done." *Id*. Compare this language with the language of either MCR 6.431 or MCR 6.508—both of which prescribe rules for timing and formatting but defer the prescription of grounds for relief to other sources of substantive law. See, MCR 6.431 ("the court may order a new trial on any ground that would support appellate reversal of the conviction"); MCR 6.508 ("defendant [also] has the burden of establishing entitlement to the relief requested."). A claim for relief under MCL 770.1 must be raised ***through*** the procedures specified in either MCR 6.431 or MCR 6.508. These procedures do not render nugatory the substantive authority granted this Court by the Legislature in MCL 770.1.

(A) Appellate counsel rendered ineffective assistance for failing to investigate and discover the newly discovered impeachment evidence on direct appeal.

"[T]he test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel." *People v Uphaus*, 278 Mich App 174, 186 (2008). Again, to demonstrate ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness and that this performance prejudiced the defendant. *People v Kimble*, 470 Mich 305, 313-314 (2004). In the context of an ineffective assistance claim, prejudice can be shown when "there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Uphaus, supra* at 185. Here, it is the outcome on appeal that is relevant. *Uphaus, supra* at 187; *Howard v Bouchard*, 405 F3d 459, 485 (CA6, 2005) (explaining that failure to raise an issue is ineffective assistance if there is a reasonably probability that inclusion of the issue would have changed the result on appeal).

Appellate counsel is not required to raise claims of error that she deems fruitless, or to search out every possible claim of error in order to meet the constitutional standard. See, *People v Reed*, 449 Mich 375, 391-392 (1995). However, like trial counsel, appellate counsel has a duty to "to make reasonable investigations." *People v Trakhtenberg*, 493 Mich 38, 52 (2012). The question is "whether a reasonable appellate attorney could conclude" that the issue was not "worthy of mention on appeal." *Reed, supra* at 391; see also, *People v Brown*, 491 Mich 914, 914-915 (2012) (remanding for a new trial after finding appellate counsel ineffective for failing to raise obvious deficiencies of trial counsel on direct appeal).

Appellate counsel had a duty to investigate prior to filing the appeal as of right. Had retained counsel conducted a more extensive investigation, he could have raised these claims on direct

appeal, and the plethora of newly discovered evidence would have supported a *Brady* claim, *Cress* claim, alibi defense, and a standalone claim of innocence. The failure to investigate amounts to deficient performance under professional norms. Further, for the same reasons Mr. Sykes' motion for relief from judgment should be granted on the merits, the decisions of the appellate courts on direct review would likely have been different. Relief on this ground is merited, and further demonstrates that Mr. Sykes has met the "good cause" procedural barrier for filing a motion for relief from judgment under MCR 6.508(D)(3).

If this court finds that appellate counsel was ineffective, which essentially deprived Mr. Sykes of his fundamental due process right to a direct appeal, then it should issue an order for restoration of his appellate rights under MCR 6.428. See, *People v Byars*, 346 Mich App 554 (2023) (application of current version of court rule governing restoration of defendant's appellate rights was feasible and would not work injustice on parties).

(B) A testimonial record is necessary in this case to flush out evidence supporting Mr. Sykes' innocence claim. Therefore, this Court should hold an evidentiary hearing pursuant to MCR 6.508©.

The applicable court rules direct the trial court to "promptly examine the motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack." MCR 6.504(B)(1). If the trial court finds that the motion warrants consideration, the prosecution must be given an opportunity to respond. MCR 6.504(B)(4). Thereafter, the trial court may proceed with or without an evidentiary hearing, in accordance with MCR 6.508. Mr. Sykes contends that given the nature of his case regarding newly discovered evidence and the suppression of a critical impeachment document, this Court should hold an evidentiary hearing which would create a testimonial record in furtherance to support a basis for relief.

At the evidentiary hearing, Mr. Sykes will call several witnesses who can attest to not only his innocence, but pinpoint King, who committed the offense. For instance, King will testify that he was the shooter, and that Mr. Sykes was not an accomplice. Vines will testify that Mr. Sykes was in West Virginia at the time of the shooting. Teddy Davis will refute Adonis Davis' testimony. Tyrone Deshawn Moore will testify that DPD forged his signature on a statement that falsely accused Mr. Sykes of being involved in the shooting. Tyrone Michel Moore will testify that he had no knowledge about this case and didn't know Mr. Sykes. Reed will testify that he observed King in an argument inside the bar and within minutes of King walking out the bar, Reed heard an array of gunshots. Richard Davis will testify that he accompanied King to the bar and as soon as King walked outside the bar, Davis heard gunshots. Officer Senter and Detective Simon will be subpoenaed to testify about their misconduct while employed with DPD.

Thus, holding an evidentiary hearing would give this court an opportunity to decide the credibility of the witnesses. *Johnson*, supra at 541, 568. If so, the court can weigh the new evidence along with all of the evidence that would be entertained on retrial. In its analysis, the trial court must "bear in mind what a reasonable juror might make of the evidence, and not what the trial court itself might decide, were it the ultimate fact-finder." *Id.*; see also, *People v Hammock,* 506 Mich 870 (2011). It is here respectfully argued that this Court cannot find the new evidence and Mr. Sykes' proposed witnesses' testimony patently incredible without first permitting them to testify at a hearing. Mr. Sykes therefore respectfully requests that, if it deems it necessary before deciding the motion, this Court take the opportunity to consider the proffered testimony at an evidentiary hearing.

ARGUMENT VI

MR. SYKES IS ENTITLED TO AVAIL HIMSELF OF A PLEA OFFER TO A REDUCED CHARGE THAT INCLUDED A SENTENCE OF 12-35 YEARS, PLUS 2 YEARS, WHICH HE TURNED DOWN BASED ON LEGALLY ERRONEOUS ADVICE FROM HIS TRIAL COUNSEL, IN VIOLATION OF THE US SUPREME COURT CASE OF *Lafler v Cooper,* 566 US 156 (2012) AND *Missouri v Frye*, 566 US 134 (2012), WHICH WERE FOUND TO BE RETROACTIVE TO COLLATERAL MOTIONS BY THE COURT OF APPEALS IN *People v Walker (On Remand)*, 328 Mich App 429 (2019).

Meaningful representation by counsel includes the conveyance of any information regarding plea negotiations, including relaying all plea offers made by the prosecution, and the failure to do so constitutes ineffective assistance. *United States v ex. rel. Caruso v Zelinsky*, 689 F2d 435, 438 (CA3, 1982). Mr. Sykes maintains that he was denied the effective assistance of counsel during pretrial proceedings when his counsel provided him erroneous advice concerning a plea offer. When raising an ineffective assistance of counsel claim, the defendant must establish two elements to prevail on an ineffective assistance of counsel claim: deficiency and prejudice. *Strickland v Washington*, 466 US 668, 687 (1984).

Counsel renders deficient performance when he or she has "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US at 687. A court must consider "whether counsel's assistance was reasonable considering all the circumstances", *Strickland v Washington*, 466 US at 688, while indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v Washington*, 466 US at 689. If counsel is shown to have provided ineffective assistance, the reviewing court must then determine whether the Mr. Sykes was

prejudiced, which requires a showing 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.

The *Strickland* framework for evaluating counsel ineffectiveness applies to advice regarding whether to plead guilty. *Padilla v Kentucky*, 559 US 356 (2010); *Hill v Lockhart*, 474 US 52, 58-59 (1985). The deficiency portion of the test remains unchanged. Instead of focusing on the fairness of the trial, the prejudice component "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v Lockhart*, 474 US at 59. If a defendant pleaded guilty, then he or she "must show that there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." *Id*. If a defendant chooses to reject a plea offer, on the other hand, he or she must show a "reasonable probability that, but for his counsel's erroneous advice . . . he [or she] would have accepted the state's plea offer." *Magana v Hofbauer*, 263 F3d 542, 551 (CA6, 2001). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v Mirzayance*, 556 US 111, 123 (2009).

In this case, Mr. Sykes contends that, although there is no record of it because it occurred during off-the-record discussions with his lawyer, defense counsel informed him that the prosecutor made a offer for 12-35 years, plus 2, and at that time, Mr. Sykes wished to avail himself of the plea offer. Defense counsel, however, advised him to reject the offer, stating that the prosecution would not be able to prove AWIM because the victim was shot below the waist (Affidavit _____). Mr. Sykes further states that, had he known that he could insist on availing himself of the plea offer, he would have insisted on availing himself of the offer (Affidavit _____).

In *Lafler v Cooper*, 566 US 156, 164 (2012) and *Missouri v Frye*, 566 US 134 (2012), the United States Supreme Court held for the first time that where a defendant rejects a plea offer from the prosecutor as a result of the "ineffective advice" of defense counsel and the defendant is later convicted at trial, he or she may be entitled to relief under *Strickland v Washington*, 466 US 668 (1984). Since counsel gave Mr. Sykes erroneous legal advise, and counsel focused on that incorrect advise in advising Mr. Sykes not to accept the state's plea offer, such error is obviously deficient performance. See, *Padilla, supra* (noting that *Strickland*'s application to affirmative misadvice is settled); *Dando v Yukins*, 461 F3d 791, 798-799 (CA6, 2006)(finding an attorney rendered deficient performance when he provided advice that was "flatly incorrect"); *Maples v Stegall*, 340 F3d 433, 439 (CA6, 2003)(holding that providing "patently erroneous" legal advice is deficient performance); *Magana*, 263 F3d at 550 (holding that counsel's "complete ignorance of the relevant law under which his client was charged, and his consequent gross misadvice to his client regarding the client's potential prison sentence, certainly fell below an objective standard of reasonableness under prevailing professional norms"); *Blackburn v Foltz*, 828 F2d 1177, 1182 (CA6, 1987)("[defense counsel's] recitation of the law. . . was clearly wrong . . . and cannot be said to constitute reasonable strategy."); see also, *McAdoo v Elo*, 365 F3d 487, 499 (CA6, 2004)(stating that if counsel incorrectly advised the defendant about maximum prison sentence before a guilty plea, the defendant's "argument that his counsel's performance was deficient may have merit").

It is important to note that this is not a case where Mr. Sykes's counsel merely offered a prediction about the outcome of the trial. Counsel informed him that a AWIM conviction in ***would not*** happen if he took the case to trial. If something "could" happen, then it is possible, however unlikely -- if it "will not" happen, it is mandatory. This erroneous advice is ineffective assistance.

An attorney's failure to properly communicate a plea offer amounts to ineffective assistance. See, e.g., *United States v ex. rel. Caruso v Zelinsky*, 689 F2d 435, 438 (CA3, 1982). The right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial. *United States v Gordon*, 156 F3d 380 (CA2, 1998)(counsel breached duty to competently advise defendant regarding plea offer by grossly underestimating defendant's sentencing exposure); *Boria v Keane*, 99 F3d 492, 494-497 (CA2, 1997)(where attorney neglected to discuss advisability of accepting plea offer despite belief that proceeding to trial was "suicidal" and defendant received 20 years to life for drug charge following trial, counsel ineffective for failing to advise client to accept plea offer recommending sentence of one to three years); *United States v Day*, 969 F2d 39 (CA3, 1992)(counsel ineffective by failing to inform defendant of significant aspects of law relevant to decision whether to withdraw plea); *Toro v Fairman*, 940 F2d 1065, 1067 (CA7, 1991)(where counsel's investigation should have indicated to him that the evidence against defendant was strong, he was ineffective by advising defendant to proceed to trial, especially where defendant spoke no English and relied on counsel to guide him through criminal justice system); *Lewandowski v Makel*, 949 F2d 884 (CA6, 1991)(attorney's failure to recognize change in law which allowed defendant to be charged with first-degree murder after withdrawal of second-degree murder plea was ineffective); *Turner v Tennessee*, 858 F2d 1201, 1205 (CA6, 1988), *vacated on other grounds,* 492 US 902 (1989); *United States v ex. rel. Caruso v Zelinsky, supra*, 689 F2d at 438 (attorney's failure to communicate plea offer amounted to ineffective assistance); *Beckham v Wainwright*, 639 F2d 262, 265-266 (CA 5, 1981)(where attorney incorrectly assumed defendant could receive same sentence if found guilty after withdrawing plea, attorney was ineffective); *United States v Rodriguez*, 929 F2d 747, 752-753 (CA 1, 1991)(attorney's failure to

convey counteroffer to plea bargain and failure to provide adequate advice as to consequences of rejection of plea bargain constituted ineffective assistance).

Other state appellate courts have also followed this rule. See, e.g., *People v Curry*, 687 NE2d 877 (Ill 1997)(ineffective assistance found where counsel's recommendation to reject plea offer was based on erroneous understanding of sentencing law); *People v Blommaert*, 604 NE2d 1054, 1057-1058 (Ill App 1992)(attorney ineffective for incorrectly advising defendant regarding penalty for murder conviction, chance of receiving work release in prison, and possibility of losing parental rights to child, which caused defendant to reject plea bargain); *Williams v State*, 605 A2d 103 (Md 1992)(attorney ineffective for failing to advise defendant regarding mandatory sentence for conviction following trial on charged offense); *Commonwealth v Copeland*, 554 A2d 54, 61 (Pa Super1988); *Larson v State*, 766 P2d 261 (Nev 1988)(attorney's advice that defendant proceed to trial, based on attorney's tactical decision to further his own ambitions constituted ineffective assistance); *People v Alexander*, 518 NYS2d 872, 880 (Sup Ct 1987)(failure to advise client of plea offer constituted ineffective assistance of counsel); *State v James*, 739 P2d 1161, 1167 (Wash App 1987)(attorney ineffective by failing to advise defendant of plea offer); *State v Kraus*, 397 NW2d 671, 672-673 (Iowa 1986) (attorney's inaccurate legal advice on elements of criminal charge, which prompted defendant to reject plea bargain, qualified as ineffective assistance of counsel); *Lloyd v State*, 373 SE2d 1, 3 (Ga 1985)(failure to communicate plea bargain to defendant was ineffective); *State v Ludwig*, 369 NW2d 722, 726-728 (Wis 1985)(failure to communicate plea bargain in manner which made it clear defendant, not attorney had to decide whether to reject or accept plea offer); *Tucker v Holland*, 327 SE2d 388, 394-397 (W Va 1985)(failure to tender agreed-upon offer to court was ineffective); *Ex Parte Wilson*, 724 SW2d 72, 74 (Tex Ct Crim App 1984)(failure to inform

defendant about plea offer was ineffective); *State v Simmons*, 309 SE2d 493, 497-498 (NC App 1983)(attorney was ineffective by failing to communicate plea offer to client); *Commonwealth v Napper*, 385 A 2d 521 (Pa Super 1978)(attorney's failure to give client advice regarding relative merits of offer compared to chances at trial, where chances of acquittal weak, constitutes ineffective assistance of counsel).

The common theme in the above cases is that a defendant has the constitutional right to be ***reasonably*** informed of the direct consequences of rejecting a plea offer. *People v Curry*, 687 NE2d at 887, citing *United States v Day*, 969 F2d 39, 43 (CA 3, 1992) and *Beckham v Wainwright*, 639 F2d 262, 267 (CA 5, 1981). Thus, counsel must ensure that the accused's choice on the question of a guilty plea is an informed one, made "with full awareness of the alternatives, including any that arise from proposals made by the prosecutor." *In re Alvernaz*, 830 P2d at 754, citing1 ABA Standards for Criminal Justice, 4-6.2(a) & commentary. See also, *Hill v Lockhart*, 474 US at 56-57. Mr. Sykes's lawyer failed to inform properly advise him of the prosecution's plea offer, by giving him erroneous legal advice. After the offer apparently expired, Mr. Sykes went to trial, was convicted as charged, and received a substantially longer sentence than the one in the lapsed offer. Mr. Sykes has stated that, had he known that AWIM was possible, and that he could insist on accepting the offer over his counsel's contrary advise, he would have accepted the state's offer.

While the prosecutor may suggest that Mr. Sykes cannot show prejudice with his "own self-serving statement", there is no legal basis for a requirement that Mr. Sykes provide additional evidence. The Federal Courts have declined to create such a rule in the past, see, *Magana*, 263 F3d at 547, n.1; *Dedvukovic v Martin*, 36 F App'x 795, 798 (CA6, 2002), because to do so would contradict the rule that Mr. Sykes need only establish a "reasonable probability" that the result would

have been different. See, *Hill v Lockhart*, 474 US at 59. The prosecutor may also argue that the fact that Mr. Sykes did not assert his desire to plead guilty at a pretrial conference belies his post-conviction claim that he would have accepted the plea but for his attorney's bad advice. However, Mr. Sykes does not contend that he wanted to accept the plea offer despite counsel's advice; rather, he contends instead that he did not plead ***because*** his attorney ***misinformed*** him of the applicable law.

Mr. Sykes acknowledges that to prevail on a claim of ineffective assistance of counsel, he has the burden to demonstrate that a plea offer was made, that defense counsel failed to properly inform him of that offer, and that he would have been willing to accept the offer. In his affidavit, he states that he would have accepted a plea offer of the prosecutor and taken responsibility for the offense, as opposed to risking a guilty-as-charged verdict (which is what ultimately happened). Counsel's error directly led to Mr. Sykes rejecting the plea offer. Because Mr. Sykes would have pled guilty if aware of the actual consequences of going to trial, counsel's ineffectiveness was prejudicial, and Mr. Sykes must be permitted to avail himself of the offer at this time.[11]

[11] Because the exact nature of counsel's advice regarding the plea offer is not apparent from the record, a hearing is necessary. *People v Ginther*, 390 Mich 436, 443 (1973).

ARGUMENT VII

MR. SYKES IS ENTITLED TO A RESENTENCING BECAUSE SEVERAL OFFENSE VARIABLES WERE INCORRECTLY SCORED, WHICH RESULTED IN ARTIFICIALLY INFLATED SENTENCING GUIDELINES.

Sentencing courts must "refer[ ] to the record" when scoring the guidelines' sentencing variables. *People v Osantowski*, 481 Mich 103, 111 (2008). The record"includ[es], but [is] not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination . . . ." *People v Ratkov*, 201 Mich App 123, 125 (1993). The sentencing court "may [make] reasonable inferences arising from the record evidence." *People v Earl*, 297 Mich App 104, 109 (2012). All findings must be supported by a preponderance of the evidence. *Osantowski, supra* at 111.

In August of 1998, 1998 PA 317 was signed into law providing statutory Sentencing Guidelines for virtually all felony offenses committed on or after January 1, 1999. The offense at bar, assault with intent to murder, was included in the Statutory Sentencing Guidelines. In *People v Lockridge,* 498 Mich 358 (2015), our Supreme Court ruled that sentencing guidelines were constitutionally deficient to the extent that "the guidelines require judicial fact-finding beyond the facts admitted by the defendant or found by the jury to score offense variables . . . that mandatorily increase the floor of the guidelines minimum sentence range . . . ." *Lockridge, supra* at 364. The constitutional issue addressed by *Lockridge* was judicial fact-finding in conjunction with required application of those found facts for purposes of increasing a mandatory minimum sentence range.

To remedy this defect, the *Lockridge* Court held that the sentencing guidelines were now "advisory only" and that courts are no longer required to articulate substantial and compelling

reasons to depart from the sentencing guidelines range; rather, the sentence imposed must be reasonable. *Lockridge, supra* at 364-365; 391-392. See also, *People v Biddles*, 316 Mich App 148, 158 (2016). The Court severed or struck down portions of MCL 769.34(2) and (3) to the extent they provided that a sentence must fall within the applicable guidelines range and the sentencing court may only depart above or below the range for substantial and compelling reasons. The Court also provided a remedy of advisory guidelines to cure the constitutional error. For cases with judicial fact-finding that changed the recommended range and did not involve an upward departure, the defendant is entitled to a decision by the trial judge as to whether the sentence would change knowing the guidelines range is now advisory. *Lockridge, supra* at 395-397.

In this case, his sentence is based on inaccurate information, and judicial found facts making the sentence invalid based on a retroactive change in law, and newly available evidence. The firearm report was discovered in the FOIA request which shows that OV10 was inaccurately scored (there was no evidence that Mr. Sykes possessed or used a short-barreled rifle or a short-barreled shotgun, as required by MCL 777.32(1)(c), and the firearm report – as well as the testimony at trial – reflects the opposite conclusion). The Court of Appeals also acknowledged that OV 19 was improperly scored in this case, but refused to grant a resentencing due to the fact that the guidelines range was unaffected) (See, Issue VI for related argument). OV 6 was a judicially found fact, since the issue of premeditation was not submitted to the jury, and PRV 3 was also inaccurately scored, as Mr. Sykes only has one juvenile adjudication (PSI, pp 2-3).

(A) Prior Record Variable 3.

Mr. Sykes contends that this Court erred by assessing 25 points for PRV 3. PRV 3 is scored for prior high-severity juvenile adjudications. MCL 777.53(1). The sentencing court should assess

25 points when an "offender has 2 prior high severity juvenile adjudications." MCL 777.53(1)(b). Although defendant has one prior juvenile adjudication, he was discharged from the juvenile adjudication in 1999. Accordingly, the trial court erred by assessing 25 points for PRV 3, which should have been assessed 10 points. The adjustment alone reduces the PRV Level from E to D.

(B) Offense Variable 2.

"Points are assessed for OV2 when an offender possessed or used a weapon during the commission of a crime, and the amount of points assessed depends on the lethal potential of the weapon." *People v Jackson*, 320 Mich App 514, 524 (2017). MCL 777.32 lists the various number of points which should be scored depending on the type of weapon used. In this case, Mr. Sykes received 10 points for OV2 for "[t]he offender possessed or used a short-barreled rifle or a short-barreled shotgun." The firearm report that was discovered in the FOIA request, however, shows that OV2 was inaccurately scored, as there was no evidence that Mr. Sykes possessed or used a short-barreled rifle or a short-barreled shotgun, as required by MCL 777.32(1)(c). In fact, the firearm report and testimony at trial reflect the opposite conclusion. Accordingly, under MCL 777.32(1)(d), 5 points is the proper scored for OV2: "The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon."

(C) Offense Variable 19.

The Court of Appeals appeared to acknowledge that OV19 was improperly scored in this case, but refused to grant a resentencing due to the fact that the guidelines range was unaffected. *People v Sykes* (Unpublished *per curiam* Opinion, Docket No. 245256, p 5). This holding appears to be based on *People v Houston*, 261 Mich App 463, 473 (2004), *rev'd in part on other grounds* 473 Mich 399 (2005), as well as all other decisions, where it was traditionally held that resentencing

is unnecessary if the change in guidelines scoring would not change the recommended minimum sentence range. These holdings are now invalidated by *People v Posey*, 512 Mich 317 (2023), where the Supreme Court struck statutory language to the extent that it rendered sentences within the sentencing guidelines range unreviewable on appeal.[12]

The removal/reduction of the above points from the Prior Record and Offense Variables does not reduce the OV Level, but it does change the PRV Level from E to D. Accordingly, the correct sentencing guidelines' range for this D-VI offender is 171 to 356 months -- a significant difference. As a result, the 468-month minimum sentence is an actual departure from the sentencing guidelines range, and a resentencing is required.

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[12] See, Argument VIII, below.

ARGUMENT VIII

MR. SYKES IS ENTITLED TO A RESENTENCING, SINCE THE SENTENCE IMPOSED WAS BASED ON SENTENCING GUIDELINES THAT ARE NOW UNCONSTITUTIONAL PURSUANT TO OUR CONSTITUTION, AND BECAUSE THE SENTENCE WAS IMPOSED WHEN A STATUTE RENDERED HIS SENTENCE UNREVIEWABLE ON APPEAL.

Mr. Sykes asserted previously on his direct appeal that his sentence was invalid because of guideline scoring errors. Although the Court rejected Mr. Sykes's claim due to the fact that the guidelines range was unaffected, *People v Sykes* (Unpublished *per curiam* Opinion, Docket No. 245256, p 5), Mr. Sykes now maintains that he is entitled to a resentencing pursuant to new law that has been announced in *Posey, supra*, where our Supreme Court struck the first sentence of MCL 769.34(10) to the extent that it rendered sentences within the guidelines' range unreviewable on appeal. The Court overruled part of *People v Schrauben*, 314 Mich App 181 (2016), and any other decision that required appellate courts to affirm a within-guidelines sentence.

At the time of Mr. Sykes's sentencing, MCL 769.34(10) read as follows: "[i]f a minimum sentence is within the appropriate guidelines sentence range, ***the court of appeals shall affirm that sentence and shall not remand for resentencing*** absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." (emphasis added). During sentencing and on appeal, Mr. Sykes argued several sentencing guideline errors. Despite identifying potential scoring errors, the issue of the reasonableness of the sentence was not appealed to the Court of Appeals, because relief at that time was not available if the error did not change the sentencing guidelines range. See, *People v Francisco*, 474 Mich 82, 89 (2006). Since Mr. Sykes's minimum sentence term still fell within the applicable guidelines' range (before he made the PRV3

discovery), he did not make a constitutional appellate challenge to a sentence,[13] due to the fact that the Court of Appeals would have held that MCL 769.34(10) precluded appellate review, and that they were required to affirm. As stated above, on July 31, 2023, our Supreme Court corrected this anomaly in *Posey* and held that a defendant is entitled to challenge the proportionality and reasonableness of any sentence on appeal, even though a sentence within the guidelines' recommended range creates a rebuttable presumption that the sentence is proportionate.

After *Posey*, the sentencing guidelines remain highly relevant to sentencing decisions and that a within-guidelines sentence may indeed be disproportionate or unreasonable. While the defendant bears the burden of demonstrating that their within-guidelines sentence is unreasonable or disproportionate, a defendant may do so by "present[ing] unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Bowling*, 299 Mich App 552, 558 (2013). Notably, the sentencing guidelines range should be corrected to reflect a decrease from 225 to 468 months, to 171 to 356 months. In sentencing Mr. Sykes originally, this Court merely noted that he was "just an evil being . . . who's clearly a danger to society." (Sentencing, p 23). However, at no point did this Court explain why this necessarily warranted sentencing him to 39 years, and also failed to explain why this sentence was proportionate to the offense and the offender.

Although the guidelines are advisory and any sentence necessarily involves an exercise of the trial court's discretion, departure sentences have historically been subjected to greater appellate scrutiny than within-guidelines sentences, given that MCL 769.34(10) required appellate courts to

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[13] See e.g., *People v Powell*, 278 Mich App 318, 323 (2008) (MCL 769.34[10]'s limitation on review does not apply to claims of constitutional error); *People v Conley*, 270 Mich App 301, 316 (2006) ("It is axiomatic that a statutory provision, such as MCL 769.34[10], cannot authorize action in violation of the federal or state constitutions.").

affirm within-guidelines sentences outright. With the advent of *Posey*, this Court is now being asked to give its sentence the same level of scrutiny, and not sign off on any such sentence as reasonable and proportionate while paying little more than lip service to *Posey*'s mandate.

In this case, it is clear that there was no way one could judge the reasonableness of his sentence on direct appeal, since the courts did not operate within the legal framework described in *Lockridge* and *Posey* at that time. This Court should recognize that its judgment of sentence was a nullity, grant a resentencing under *Posey*, and then determine the reasonableness of the sentence imposed.

MR. SYKES IS ENTITLED POST-CONVICTION RELIEF

Michigan Court Rule 6.500 et. seq. provides an avenue for relief where "a judgment of conviction and sentence entered by the circuit court . . . [is] not subject to appellate review." The newly discovered evidence issue raised in this motion discloses defects lying at the heart of Mr. Cooper's conviction, defects which have not previously been exposed to appellate review. Both the state and federal court systems have recognized the necessity of waiving procedural bars to protect the wrongfully convicted. In this case, the cause requirements of MCR 6.508(D) can be met by alternative ways: (1) assuming that the cause and prejudice requirements apply here, the trial court could waive the "good cause" requirement of subrule (D)(3)(a), if the trial court concluded that "there is a significant possibility that the defendant is innocent of the crime." MCR 6.508(D)(3), and (2) the good cause requirement can be met, as prior appellate counsel was unaware of the newly discovered evidence.

To state the obvious, Mr. Sykes has filed multiple post-appeal actions. Nevertheless, Mr. Sykes' additional claims also rest on solid ground, and he can show both cause and prejudice under the Court Rule. First of all, the none issues in their present form have been presented to this or any other court. While he is aware of a certain judicial bias against "piecemeal litigation," as well as appellate dicta concerning the so-called "doctrine of finality", MCR 6.508(D)(3)(a) nevertheless permits the consideration of this type of motion for relief from judgment upon a showing of "good cause" for not having raised any issues previously.

The newly discovered evidence and *Brady* issues raised in this motion disclose defects lying at the heart of Mr. Sykes' conviction, defects which have not previously been exposed to appellate review. Both the state and federal court systems have recognized the necessity of waiving procedural

bars to protect the wrongfully convicted. Michigan Courts have waived procedural bars to avoid a miscarriage of justice. *People v Martin*, 393 Mich 145 (1974); *People v Gilbert*, 183 Mich App 741, 746-747 (1990); *People v Davis*, 181 Mich App 354, 355 (1989); *People v Calloway*, 169 Mich App 810, 818 (1988) and *People v Harris*, 95 Mich App 507 (1980), all of which stand for the proposition that when a defendant raises an outcome determinative constitutional issue, procedural bars are to be lifted to avoid wrongful convictions. Notably, the Legislature (MCL 769.26) has conferred authority on the Court to grant relief solely upon the finding of a miscarriage of justice. The statute imposes no other restrictions or limitations.

Although Mr. Sykes' direct appeal period has expired, the rule announced in *People v Posey* should be given full retroactive effect on collateral review in light of the fact that the ruling is on all fours with the issue now presented in Mr. Sykes's motion for relief from judgment. Under any retroactivity analysis,[14] *Posey* applies to Mr. Sykes because the decision did not announce a "new" rule. Therefore, whether this Court applies the stringent *Teague* test or the more lenient retroactivity analysis of *People v Hampton*, 384 Mich 669 (1971)[applying test of *Linkletter v Walker*, 381 US 618 (1965)], *Posey* is fully retroactive. The restrictive retroactivity analysis of *Teague* does not apply unless a decision has created a "new rule" of criminal law. A rule is new for federal retroactivity purposes "if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" *Graham v Collins,* 506 US 461, 467 (1993). Categorizing a rule as "new"

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[14] *Teague v Lane*, 489 US 288 (1989); *Beard v Banks*, 542 US 406 (2004); *Howard v United States*, 374 F3d 1068 (CA 11, 2004); *People v Hampton*, 384 Mich 669 (1971); *People v Kamin*, 405 Mich 482, 483 (1979); and *Lincoln v General Motors*, 461 Mich 483, 491 (2000).

or "old" requires a survey of the legal landscape at the time the conviction became final to determine whether then-existing precedent dictated the rule on which the defendant relies.

The United States Supreme Court has long recognized that a decision is not a new rule where it merely "applie[s] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." *Mackey v United States*, 401 US 667, 695 (1971). Accord, *Williams v Taylor*, 529 US 362, 381 (2000).

As explained in *United States v Johnson*, 457 US 537, 549 (1982):

> [W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

Yates v Aiken, 484 US 211 (1988) also illustrates this point. In *Yates*, the trial judge instructed the jury to apply a mandatory presumption of intent once the state proved certain elements of the offense. This burden-shifting instruction was held to violate due process in *Francis v Franklin*, 471 US 307 (1985), which was decided after Yates' conviction became final. The Supreme Court held that *Francis* applied to *Yates*, recognizing that *Francis* did not establish a new rule but was "merely an application of the principle that governed our decision in *Sandstrom v Montana*, which had been decided before Mr. Sykes' trial took place." *Yates*, 484 US at 217.

Similarly, in *Stringer v Black*, 503 US 222 (1992), the defendant received a death sentence based on a jury finding that the murder was "especially heinous, atrocious, or cruel." Later, the Court in *Maynard v Cartwright*, 486 US 356 (1988), and *Clemons v Mississippi*, 494 US 738 (1992), struck down an *identically-worded* death penalty aggravator because it was so vague and imprecise

that it violated the Eighth Amendment. The Court held that *Clemons* and *Maynard* applied to *Stringer* on collateral review. The Court noted that *Clemons* and *Maynard* were based on its prior holding in *Godfrey v Georgia*, 446 US 420 (1980), which had ruled that Georgia's "outrageously or wantonly vile, horrible and inhuman" aggravating factor was unconstitutionally vague. *Stringer v Black*, 503 US 229. The Court reasoned:

> [The death penalty aggravators in] Godfrey and Maynard did indeed involve somewhat different language. But it would be a mistake to conclude that the vagueness ruling in Godfrey was limited to the precise language before us in that case. In applying Godfrey to the language before us in Maynard, we did not "brea[k] new ground."

Stringer v Black, 503 US at 229-230.

It is readily apparent that *Posey* broke little new ground. Similar to *Stringer* and *Yates*, the Court in *Posey* neither announced nor issued an opinion that resulted in a new rule -- it merely applied settled precedent to a variant of facts.

Even under Michigan's traditional state retroactivity analysis, *Posey* is not a new rule. A new rule is made in Michigan where "clear precedent is overruled or when an issue of first impression whose resolution was not clearly foreshadowed is decided." *People v Sexton*, 458 Mich 43, 60-61 (1998); *People v Phillips*, 416 Mich 63, 68 (1982). As shown above, *Posey* was not a case of first impression. The decision was based on previous precedent. This Court cannot label *Posey* as "new rules" simply because the majority did not announce that in its decision.

Even if *Posey* could somehow be considered a "new rule ", the holding should still be applied retroactively. Under *Teague*, a "new rule" will be applied retroactively where one of two exceptions is met. First, the new rule must place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 US at 307. This

exception is not pertinent to the discussion at hand. Second, a "new rule" applies retroactively if it reflects "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v Parks*, 494 US 484, 495 (1990). To reach this level, a "new rule" must reflect procedure that is "central to an accurate determination of innocence or guilt." *Teague*, 489 US at 313.

Should this Court apply a traditional retroactivity analysis to this case, it must conclude that *Posey* is fully retroactive. In Michigan, there is a ***presumption*** of complete retroactivity of judicial decisions. *People v Neal*, 459 Mich 72, 80 (1998). "Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *People v Doyle*, 451 Mich 93, 104 (1996), quoting *Hyde v Univ. of Michigan Bd. of Regents*, 426 Mich 223, 240 (1986). The Court has employed the three-part test of *Linkletter v Walker, supra*, for retroactivity, which considers: (1) the purpose of the new rule; (2) the general reliance on the old rule, and (3) the effect of retroactive application of the new rule on the administration of justice. *Sexton, supra* at 60-61; *Kamin, supra* at 483; *Hampton, supra*. The final two factors of the above test are dispensed with when the rule at issue deals with a fundamental right designed to ensure the accuracy of the truth-finding process.

Full retroactivity of *Posey* is mandated under the first prong of the *Hampton-Linkletter* test without consideration of the final two factors. The purpose and importance of the *Wade* rule cannot be overstated. The right to have the jury consider the various counts from an accurate verdict form is among the most fundamental of rights. Moreover, having a sentence imposed without an avenue to appeal is fundamentally unfair such that it creates a structural defect. *Roe v Flores-Ortega*, 528 US 470, 483 (2000). Hence, the second and third prongs of the *Hampton-Linkletter* test either favor

full retroactivity or fail to rebut the presumption of retroactivity. When a decision overrules settled law, courts can expect more reasonable reliance upon the old rule than when the law was unsettled or unknown. *Sexton, supra* at 63-64. Because of this, "[j]udicial decisions are generally given complete retroactive effect unless the decisions are unexpected or indefensible." *Sexton, supra,* citing *People v Markham*, 397 Mich 530 (1976). The application of *Posey* may concededly carry costs and, possibly, revive prior appeals (like this case). But any resultant (and as of yet undetermined) cost must be weighed against the advantages of providing a just result in a trial, particularly when the case involves a capital offense (like this case).

Under MCR 6.508(D)(3)(b), Mr. Sykes has suffered actual prejudice. There is no greater prejudice in a conviction in this state than that which Mr. Sykes is suffering right now -- many decades of prison.

RELIEF REQUESTED

WHEREFORE, Defendant Kevin Deshawn Sykes asks this Honorable Court:

A. Order the Prosecutor to answer the allegations of this Motion;

B. Grant an Evidentiary Hearing to expand the record;

C. Grant a new trial, vacate his convictions and order Mr. Sykes's immediate release, or grant a resentencing.

Respectfully submitted,

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