STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

THELONIOUS DESHANE-EAR SEARCY,

Defendant-Appellant.

MSC Case No. 160384
Court of Appeals Case No. 349169
LC Case No. 04-012890-01-FC
Wayne County Circuit Court
The Honorable Timothy M. Kenny

DEFENDANT-APPELLANT'S BRIEF ON APPEAL FOLLOWING REMAND BY THE SUPREME COURT

EXHIBITS

PROOF OF SERVICE

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STATEMENT OF THE QUESTION PRESENTED

I. Did the trial court abuse its discretion by substituting its own judgment, ignoring both a recent confession and corroborating forensic evidence exculpating Defendant Thelonious Searcy of a 2004 murder for which he was convicted, and denying Defendant-Appellant's Motion for Relief from Judgment?

Defendant/Appellant answers "Yes"

Prosecution/Appellee answers "NO"

The Trial Court would answer "NO"

STATEMENT OF JURISDICTION

Defendant Thelonious Searcy appeals from the Wayne County Circuit Court's Opinion and Order dated December 3, 2018, denying Searcy's Motion for Relief from Judgment in which he sought a new trial based on newly discovered evidence (**Exhibit 1**). This Court previously denied Searcy's Application for Leave to Appeal. In an Order dated March 18, 2020, the Supreme Court remanded this matter for consideration as on leave granted (**Exhibit 2**). This Court has jurisdiction over the instant appeal pursuant to MCR 7.203 and MCR 7.205.

STATEMENT OF FACTS

In May 2005, Defendant Thelonious Searcy was convicted in a trial by jury for the first-degree murder of Jamal Segars in violation of MCL § 750.316, assault with intent to murder in violation of MCL § 750.83, and felony firearm in violation of MCL § 750.227b. Defendant was sentenced to life in prison without the possibility of parole. The Court of Appeals affirmed Defendant's conviction and sentence. *People v Searcy*, Dkt No 263347 (2006), *lv denied*, Mich S Ct Dkt No 132762 (2007).

Segars' murder took place on September 4, 2004 near Detroit City Airport during a large gathering known as the "Black Party." At trial, the prosecution proceeded on the theory that Searcy actually intended to murder DeAnthony Witcher, but mistakenly murdered Segars instead. The prosecution argued that Searcy was upset at Witcher over a nominal debt of $500 or $600. To support its theory, the prosecution argued that Witcher and Segars drove identical silver Corvettes. Accordingly, the prosecution's entire case and theory rested upon the testimony and credibility of Mr. Witcher as its star witness to support its theory of "murder by mistaken identity."

In 2015, Vincent Smothers, a well-known hitman and contract killer, confessed to Segars murder and drafted several affidavits (and letters) confessing to the crime (**Exhibits A, B, C, C1, D, E, F, G**). Based on Smother's confession, Searcy filed a *pro se* motion for relief from judgment pursuant to MCR 6.502 asserting his entitlement to a new trial based on newly discovered evidence. The trial court conducted an evidentiary hearing during which it heard from numerous witnesses and admitted several exhibits.

During the evidentiary hearing, Smothers waived his Fifth Amendment privilege and

testified, over the advice of his counsel, that he committed the 2004 murder of Jamal Segars during a botched robbery (**Ex AA**, Evid Hrg 3/19/18, Tr 4-5, 7-8). Smothers provided numerous details of the murder, the crime scene, and even provided details that were heretofore unknown **and not part of the record**. The details of Smother's confession, including the type of murder weapon that was used, were supported by forensic evidence that was withheld from the defense. Not only was such corroborating forensic evidence withheld from the defense, but furthermore the jury was lied to in response to a key question asked by the jury during deliberations about the caliber type of bullet that killed the victim.

In response to the jury's question, the trial court instructed the jury that the bullets taken from the deceased victim were too deformed to determine the caliber. This was incorrect; a recent reexamination of a mislabeled evidence envelope revealed that it was a .40 caliber bullet that killed Segars which matches up with Smothers' testimony. At trial, the prosecution presented evidence that a .45 caliber handgun was found in the apartment where Defendant was arrested (months after the murder). Thus, the .45 caliber gun presented at trial as the murder weapon tied to Searcy couldn't have been gun that killed Segars. The Officer in Charge of the original Segars' murder investigation, Sgt. Anderson, admitted as much during the evidentiary hearing (**Ex DD**, Evid Hrg 5/15/18, Tr 51).

Despite the overwhelming evidence of Defendant's innocence, the trial court denied Defendant's motion for relief from judgment (**Ex 1**, Opinion). The trial court's reasoning is wholly unpersuasive and utterly fails to explain away the exculpatory forensic evidence that was withheld from the defense and which forensic evidence squarely supports Smother's confession.

On May 31, 2019, Defendant filed with the Court of Appeals his Delayed Application for Leave to Appeal, the prosecution filed its brief in opposition, and Defendant filed his Reply Brief. On October 9, 2019, a non-unanimous panel of the Court of Appeals denied Defendant's Application for Leave to Appeals (**Exhibit 3**). Searcy then filed with the Supreme Court his Application for Leave to Appeal, and on March 18, 2020, the Supreme Court remanded this matter for consideration as on leave granted (**Exhibit 2**). Defendant now files his instant Brief on Appeal asking this Court to vacate the trial court's decision denying his motion for a new trial.

ARGUMENT

I. The trial court substituted its own judgment and thus abused its discretion in denying Defendant's motion for relief from judgment where there was more than a reasonable probability that Defendant would have been acquitted in light of Smothers' recent confession to Segars' murder, and where the recent confession was corroborated by forensic exculpatory evidence that was withheld from the jury during Defendant's original trial.

A. Standard of review

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for new trial. *People v Johnson*, 502 Mich 541, 564 (2018)(citing *People v Cress*, 468 Mich 678 (2003)). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *Id* (quoting *People v Franklin*, 500 Mich 92, 100(2017)).

A trial court's factual findings are reviewed for clear error. MCR 2.613(C). Clear error occurs only if the reviewing court is left with a definite and firm conviction that the trial court made a mistake. *Id.* Moreover, an appellate court need not refrain from scrutinizing a

trial court's factual findings nor may an appellate court tacitly endorse obvious errors under the guise of deference. *People v McSwain*, 259 Mich App 654, 683 (2003).

As set forth herein, the trial court abused its discretion by denying Defendant's motion for relief where there was newly discovered forensic evidence that exculpated Defendant and which was withheld from the jury during Defendant's original trial.

B. Standard for granting a motion for relief

Under MCL § 770.1, the court "may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs." MCR 6.508(D)(3)(b) provides the Court with the authority to grant relief upon a showing of "actual prejudice" which means that:

> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal; or
>
> (ii) [omitted]
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case[.]

MCR 6.508(D)(3)(b)(i), (iii).

Defendant asserts that, in light of the testimony and evidence presented during the evidentiary hearing coupled with the original trial, he is entitled to relief under both subsections (i) and (iii) as set forth above in addition to the statutory grounds provided for under MCL § 770.1.

To the extent that the trial court rejected Defendant's motion for relief from judgment,

it did so by substituting its own judgment and drawing inferences that went well outside the record evidence. The Supreme Court's recent decision in *Johnson* makes clear that the trial court's reasoning and decision was an abuse of discretion.

C. Newly Discovered Evidence

Defendant's entitlement to relief is premised upon two pieces of newly discovered evidence: (1) the confession of Vincent Smothers; and (2) newly discovered forensic evidence regarding a bullet taken from the body of the murder victim which does not match the murder weapon presented at trial. As to the forensic bullet evidence, not only is such evidence newly discovered, but such evidence also appears to have been deliberately withheld from the defense and, worse yet, misrepresented to the jury in response to a crucial question during its deliberation. Each of these subjects are discussed in greater detail below, and each warrant relief from this Court.

1. Smothers' confession is corroborated by a myriad of documentary and testimonial evidence showing that Defendant was wrongfully convicted and thus suffered "actual prejudice."

The most convincing and powerful exculpatory evidence of Searcy's innocence is the confession of Vincent Smothers. Smothers testified, over the advice of his counsel and having waived his Fifth Amendment privilege, that he committed the murder of Jamal Segars. In both his numerous written statements and affidavits as well as his in-court testimony, Smothers provided numerous factual details about the murder and his involvement that are confirmed by both the documentary and testimonial evidence.

2. Smothers identified the victim and provided a motive.

For starters, Smothers knew the date, time, and location of the murder, the identity of

the victim (who Smother's says was known as "Q") and perhaps more important, provided a motive for his actions. In particular, Smothers testified that he had been tracking Segars for months trying to rob him because, according to Smothers, Segars was a well-known "dope boy" from the Buffalo projects who was getting money "for real" (Defendant's **Exhibit A**, pg 2; **Ex B**, pg 1; and **Ex C**, ¶ 2, Affidavits of Smothers); **Ex AA**, Evid Hrg Tr 9 (testifying that he knew Segars as a drug dealer).

During the evidentiary hearing, Michigan State Police Officer Corriveau provided further corroboration of Smothers' confession in that Corriveau testified that Smothers, a known hitman "was very particular on planning homicides" and that "he took a long time" and "[h]e would stalk his victims." **Ex BB**, Evid Hrg 3/26/18, pg 10. When he provided that information about Smothers, Corriveau didn't seem to know that Smothers' affidavits were actually consistent with Corriveau's description. See **Exhibits A, B, and C** (Smothers describing how he had been tracking Segars for "6 months . . . tracking they every move."). Accordingly, Corriveau unwittingly provided further corroborating evidence to support the veracity of Smothers' confession.

At trial, there was no mention of Segars' drug-related activities. Defendant's **Exhibits H and I** confirm that Segars was, in fact, a convicted drug dealer who was sentenced to 121 months in federal prison. Thus, Smothers' statements regarding his knowledge of the victim are confirmed by documentary evidence that was never part of the trial record.

3. Smothers' testimony regarding the bullet trajectory of his shots fired at Segars matches, precisely, the autopsy report.

Smothers' testimony is also supported by the autopsy report and testimony of Wayne

County Medical Examiner Dr. Carl Schmidt. In particular, Smothers described how he and his accomplice Jeffrey Daniels approached Segars' Corvette from the back and Smothers began shooting at Segars with a .40 caliber handgun (**Ex AA**, Evid Hrg 3/19/18, Tr 11-12)("Myself and Jeff, we were walking up on the back of the car, and I noticed that [Segars] saw us in the rear-view mirror, and before he could get a chance to do anything, I fired through his back and then walked around to the [driver's] side of the car."). Smother's written statements/affidavits also detail his foot-pattern approaching Segars vehicle and the direction of his fatal shots (**Defendant's Exhibit A, B, and C**).

Dr. Schmidt's testimony confirms the accuracy of Smothers' statements about the bullet trajectory. Dr. Schmidt testified at trial that there were gunshots to the back of Segar's body, including one shot to the back of the head, and that the trajectory of the other shots were "from left to right." (**Ex GG**, Vol III, Jury Trial Tr 158, 162). Schmidt's testimony provides factual support for Smothers' detailed confession.

4. Smothers' provided extensive factual detail of the murder scene.

According to private investigator Scott Lewis, Smothers contacted him via letter in or about July 2016 again confessing his involvement in Segars' murder. Afterwards, Lewis interviewed Smothers via phone during which Smothers provided a nearly 20-minute detailed confession of the murder (Defendant's **Exhibit D**, audio recording of Scott Lewis's interview with Smothers, also available at www.youtube.com/watch?v=aQZrwajFlno)[1]. Following Lewis's interview with Smothers, Lewis sent a map of the murder scene to Smothers, and

1 The Court can listen to the nearly twenty-minute long interview of Smothers during which he provides a host of details about the murder.

Smothers accurately marked on the map where he shot Segars, as well as the separate routes that he and Jeffrey Daniels took returning to Daniels' car after the shooting (**Exhibit C**, pg 3, map with markings).

Smothers' written statements are also filled with rich detail of the murder scene that would only be known by the killer. Smothers' describes how, after shooting Segars, an unmarked black "Crown Victoria" police car responded to the scene. He describes how the unmarked police car crashed into a "Burgundy Maranda [sic]" which caused the airbags to deploy in the police car. Smothers details how a white officer then got out of the police car and began firing shots. Smothers believed that the driver of the police car may have been injured. Each of these details is supported by other documentary evidence. For example, a police report written by one of the responding officers, Shawn Stallard, confirms that his police car did, in fact, crash into a burgundy Mercury Marauder while responding to the scene of the murder. **Exhibit V**. At trial, DPD officer Micah Hull, who was riding in the police car, further confirmed that their airbags went off as a result of the crash with the marauder. **Ex GG**, Jury Trial Vol III, pg 107-11.

If the jury had heard Smothers' confession, along with these details of the murder scene, then Defendant could have provided factual support for Smother's statements. Collectively, this newly discovered evidence would have, more likely than not, changed the outcome of the trial and resulted in a verdict of not-guilty. *See People v Grissom*, 492 Mich 296 (2012).

5. Smothers' testimony regarding the type of weapon has now been confirmed by newly discovered forensic evidence.

Additionally, the newly discovered forensic evidence relating to the type of bullet removed from Segars' body substantially undermines the jury's verdict. In particular, Defendant offered into evidence a newly discovered DPD evidence report that reflects a conflicting evidence tag showing that the same piece of evidence was both a .9 mm shell casing and a .40 caliber bullet fragment. **Exhibit K**, pg 2. Notably, Exhibit K, pg 2 reflects that a 9mm shell casing was recovered from the scene of the murder and logged as evidence tag no. E071916-042. The prosecution brought to the evidentiary hearing this evidence envelope which was labeled both as a 9 mm shell casing and a .40 caliber bullet fragment.

Given the discrepancy, the lower court ordered that the envelope be opened and examined by the Michigan State Police Crime Lab in the presence of Defendant's forensic firearm expert. Upon further examination, the envelope contained a .40 caliber bullet fragment that was taken from Segars' body and then received by police from the Wayne County medical examiner (**Ex BB** Evid Hrg 3/26/18, pg 55-56). On its face, this evidence (**which had never been produced to the defense nor discussed at trial**) exculpates Searcy.

Smothers testified that he shot Segars with a .40 caliber handgun, while his accomplice Jeffrey Daniels had a .45 caliber handgun (Ex AA, Evid Hrg, Tr 11-12). According to Smothers, Daniels also fired his weapon at least once in the air, but Smothers wasn't certain how many additional shots Daniels may have fired. *Id* at 12-13. Consistent with Smothers' testimony, DPD evidence technicians recovered from the scene of the murder several shell casings including both .40 and .45 caliber casings.

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2 This same evidence tag no. E071916-04 was shown at trial as containing a .40 caliber "metal jacket bullet." See Defendant's Exhibit J.

Importantly, however, is the fact that the shell casings recovered on, or directly surrounding, Segars' Corvette were .40 caliber casings, while the .45 caliber shell casings were collected in the parking lot of the corner store near where the police car and marauder collided, and from where witnesses (Boatright and Jeffries) indicated the police were firing their weapons (**Ex Z**). A handwritten police report taken from the scene indicates, precisely, the type and location of the spent bullet casings:

> You see a 2004 Corvette w/dr[iver] door open. You see a spent casing (40 calib) on the rear deck [of the Corvette]. There's several gun shot holes on the dr[iver] side rear, going through the vehicle and into the rear of the driver seat and out. There's several shots in the head rest. There's (2) spent casing on the pass. Seat. []. Behind the vehicle you see a lot of spent casings. The first set to the rear are all 40 calib. You go across the street from that, right next to the party store. You see (5) more spent 45 calib casings. (**Exhibit Z**)

Knowing now that the bullet recovered from Segars' body was a .40 caliber, and the shell casings directly surrounding the Corvette were .40 caliber casings, this evidence directly corroborates Smothers' statements and testimony about the type of weapon he confessed to using to shoot and kill Segars.

Not only is this forensic evidence consistent with Smothers' statements, but also such evidence would have had a significant impact on the outcome of the trial. The gun that was tied to Searcy was a .45 caliber, whereas the bullet removed from Segars' body was a .40 caliber. There could be no better example of exculpatory evidence.

6. Smothers' confession is also supported by the testimony of Marzell Black.

Smothers' testimony is further corroborated by other evidence. For instance, Marzell Black testified that he had grown up in Detroit with Smothers and knew him as a friend (Ex

BB, Tr at 38). Black testified, without hesitation and without any incentive, that Smothers confessed to him years ago to the murder of Segars by Detroit City Airport. According to Black, the murder was, at the time, a big event that was talked about in the community and there was talk that the police had the wrong guy. **Ex BB**, Tr 39 (Black testifying that "later on [the murder] rocked the City that somebody got nabbed for it who actually didn't kill the person.").

Black said Smothers confessed his responsibility for Segars' murder "probably in 2009" while Black and Smothers were codefendants in another case. *Id* at pg 39-40. Black believes his conversation with Smothers took place "in the county" while the two men were "commuting back and forth from court." *Id* at 40. According to Black, Smothers acknowledged that there "was a guy that didn't commit the murder that was in the joint" and that Smothers further said that he "was going to work on trying to free him." **Ex BB**, Tr at 40.

Black further testified that he didn't know Searcy and that the information "wasn't important" to him at the time of Smoothers' confession. Black knew Searcy only by the nickname of "Skinny man" and later he crossed paths with Searcy in prison at which time Black told Searcy about Smothers' confession and that he didn't feel any pressure nor was he threatened by anyone to disclose Smothers' statements. *Id.* at 41-42.[3]

Black's testimony also dispels the testimony given by Officer Corriveau who testified that he had an "**impression** that [Smothers] had been threatened or his family had been

3 Black signed two affidavits both of which were consistent with his testimony during the evidentiary hearing. **Exhibits M and N**.

threatened" to confess to Segars' murder (**Ex BB**, Evid Hrg, 3/26/18, pg 8). Despite his "impression" that Smothers had been threatened or coerced into confessing, Corriveau had no evidence whatsoever to support his "impression." He didn't have any written notes or recordings from his conversation with Smothers (Ex BB, Tr 17-18) and admitted that he didn't conduct any investigation whatsoever into whether Smothers had, in fact, been threatened or coerced. *Id* at 21.

Corriveau further testified that Smothers orally recanted his confession, which Smothers did not deny. According to Smothers, he did so only because he was told by the investigating officers that his confession to the Segars murder would delay the release of Davontae Sanford who was also wrongfully convicted of several murders for which Smothers had also confessed his involvement (**Ex AA**, Evid Hrg 3/19/18, Tr 49-50). Smothers never formally recanted his multiple written confessions to the Segars murder, and in fact appeared in Court, waived his Fifth Amendment privilege, and confessed in great detail and explained his prior conversation with Corriveau. The fact that the investigating officers tried to pressure and coerce Smothers to retract his confession to the Segars murder should carry no weight given the overwhelming corroborating circumstances.

Nor did Corriveau conduct any type of investigation into the veracity of Smother's statements regarding the details of the murder scene, the type of weapon used, Smother's purported motive for killing Segars, or any other facts related to Smother's confession. **Exhibit BB**, Tr at 15-19. Given all of the corroborating evidence supporting Smothers' statements, including facially exculpatory forensic evidence, the Court should dismiss out-of-hand Corriveau's self-serving "impression" that Smothers was threatened or coerced. Black's

testimony also dispels the prosecution's half-hearted assertion that Smothers was paid or compensated for his confession to the Segars murder. And, perhaps more important, the prosecution's theory of a pay-off is also at odds with Corriveau's assertion that Smothers was threatened. -Was Smothers threatened or paid off? These are diametrically opposed theories, neither of which have any support from the record.

Finally, Marzell Black's testimony dispels both of the prosecution's unsupported theories that Smothers was either paid off or threatened. Black testified that Smothers confessed to him years ago while the two were engaged in idle conversation which would be entirely reasonable given their long-standing friendship. Moreover, Black testified that Smothers' confession to him was really "no big deal" and that he didn't really think much about it at the time (**Ex BB**, Tr at 43). The most important aspect of Blacks' testimony was that his conversation with Smothers occurred years before Smothers formally confessed to the murder.

7. There is newly discovered evidence tending to show that the prosecution's star witness may have received a *quid pro quo* of leniency in exchange for his cooperation and testimony against Searcy.

In addition to Smother's confession and the newly discovered forensic evidence, there is further evidence that was withheld from Searcy at the time of his trial relating to the prosecution's star witness, DeAnthony Witcher. Having presented no motive or connection whatsoever between Searcy and Segars, the prosecution's entire case and theory rested upon Witcher's testimony and credibility as its star witness to support its theory of "murder by mistaken identity."

Via a Freedom of Information Act request, Defendant discovered that on November 18, 2004, Witcher was arrested by Detroit Police Officer Micah Hull for carrying a concealed weapon (**Exhibit Q**, Witcher Arrest Report 11/18/04). At the time of his arrest, Witcher was driving a blue 1998 Chevy Corvette which was stopped for speeding[4]. Hull obtained consent from Witcher to conduct a pat down and search of the vehicle at which time Hull discovered a 9mm handgun "protruding from the rear of the passenger seat." **Exhibit Q**. Witcher was conveyed to Detroit's Ninth Precinct where he was booked on the CCW charge and bonded out.

On November 30, 2004, the same day that Mr. Searcy was arrested for the murder of Jamal Segars, the CCW case against Witcher was "closed" with a notation that "P.A. . . warrant denied." (**Exhibit R**, Warrant Denial). Defendant's trial commenced before the Wayne County Circuit Court on May 2, 2005 during which the prosecution offered the testimony of both Officer Hull and Witcher. At no time did Hull, Witcher, or the prosecutor disclose or make any mention whatsoever of Witcher's arrest by Hull.

During trial, however, defense counsel specifically asked Mr. Witcher if he had ever been arrested or convicted of a crime for being dishonest to which Witcher responded "no." **Ex GG**, Trial Tr Vol III, pg 88). Thereafter, the defense sought to question Witcher about his gun and whether he had a permit to carry it to which the prosecution objected. The trial court sustained the prosecution's objection by indicating that the question had been asked and

4 At trial, the prosecution's theory was that Witcher and Segars had silver "twin" identical corvettes. However, at the time of Witcher's arrest on November 11, 2004, he was driving a blue corvette. These facts further undercut the prosecution's entire theory in this case.

answered (**Ex GG**, pg 98). This prevented the defense from exploring the facts regarding Witcher's November 2004 arrest involving the CCW charge.

Defendant asserts that, by withholding from the defense relevant impeachment evidence regarding Witcher, the prosecution violated *Brady v Maryland*, 373 US 83 (1963) where the Supreme Court held that the prosecution has a duty to furnish to the defense any exculpatory evidence related to guilt. *See also Kyles v Whitley*, 514 US 419, 437 (1995)(extending Brady's duty to disclose evidence known by police officers). Brady's reasoning also applies to impeachment evidence against prosecution witnesses. *Giglio v United States*, 405 US 150 (1972); *see also People v Anderson*, 44 Mich App 222 (1982)("The prosecution must be imputed with knowledge of facts which are known to its chief investigative officers."); *People v Cassell*, 63 Mich App 226 (1975). Here, the prosecution never disclosed to the defense relevant impeachment evidence regarding its star witness. Not only did the prosecution fail to furnish such evidence, but they actively sought to conceal it at trial by objecting to defense counsel's cross examination on the subject.

In *People v Grissom*, 492 Mich 296 (2012), our Supreme Court found that newly discovered impeachment evidence may constitute grounds for a new trial where the evidence is material, not cumulative, and couldn't have been discovered at trial using reasonable diligence. Under the facts here, Defendant is entitled to relief on this basis given the prosecution's failure to furnish such impeachment evidence and, more importantly, he objected to defense counsel's cross examination at trial, thus preventing the information from being revealed.

The most obvious inference to be drawn from these facts is that Witcher was offered some form of leniency and/or an agreement not to be prosecuted in exchange for his cooperation and favorable testimony in this matter. To be exact, Witcher's testimony was both key and crucial to the prosecution's entire case against Defendant. Against this backdrop, the Court should carefully consider the timeline of events:

- 9/5/04 – Segar is murdered near Detroit City Airport; Officer Hull responds to the scene of the murder
- 11/18/04 – Witcher was arrested by Officer Hull for carrying a concealed weapon; Witcher is taken to 9th Precinct, booked on the charges and later bonded out
- 11/30/04 – Searcy is arrested at his grandmother's house
- 11/30/04 – a warrant request for Witcher is "denied" without any documented justification despite the existence of probable cause
- 5/2/05 – Defendant's trial begins in Wayne County Circuit Court; the prosecutor advises the Court that Mr. Witcher has expressed "a reluctance to testify . . . because he doesn't want to be a snitch." (Trial Tr Vol I, pg 120).
- 5/4/05 – Witcher testifies on behalf of the prosecution; never mentions anything related to his 11/18/04 arrest by Officer Hull
- 5/4/05 – Officer Hull testifies on behalf of the prosecution; never mentions anything related to his 11/18/04 arrest of Witcher.

Such evidence relating to Witcher's November 18, 2004 arrest and the subsequent denial of the arrest warrant are highly relevant to whether the prosecution and/or members of the Detroit Police Department violated Defendant's rights under *Brady v Maryland*, 373 US

83 (1963) and *Giglio v United States*, 405 US 150 (1972) which hold that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule [of Brady]."

It is well established under both the United States and Michigan Constitutions that the prosecution must disclose any type of *quid pro quo* or agreements of leniency with a prosecution witness, whether formal or otherwise, in exchange for the witness's cooperation or testimony. *People v Chenault*, 495 Mich 142 (2014).

Based on the above, there is a strong inference that Witcher was given some form of leniency in exchange for his cooperation with law enforcement. The sequence of the relevant dates reveals that although Witcher was arrested for a gun charge on 11/18/04, his warrant request was "denied" and his case "closed" without explanation on 11/30/04, the same day that Defendant was arrested. On the face of the arrest record, there was probable cause to conduct a search of Witcher's vehicle and he consented to the same.

In this instance, there is evidence which strongly points to the conclusion that Witcher received some form of lenience, whether from the prosecution or from law enforcement, for his continued cooperation and testimony against Defendant. Witcher's arrest record firmly establishes his culpability for a gun related charge, and yet the gun charge simply vanished on the same day that Defendant was arrested.

Ultimately, it should be up to a jury on retrial to decide what weight, if any, to give to these facts surrounding Witcher's arrest and the subsequent dismissal of his gun charge (on the same day as Searcy's arrest). Having suppressed from Defendant the above facts, and without having disclosed any agreements for leniency or other similar *quid pro quo* between

Witcher and the prosecution and/or law enforcement, the jury was never apprised of such relevant information. Nor was Defendant afforded the opportunity to effectively cross-examine and/or impeach the credibility of either Witcher or Hull.

For this reason, Defendant is entitled to relief under MCR 6.508 as well as MCL 770.1. In reviewing Defendant's motion for relief from judgment, it was not the function of the trial court to weigh the competing evidence and determine culpability as if it were sitting as the fact-finder. Rather, it was the function of the court to determine whether Defendant was prejudiced by the errors described herein, and whether the outcome of the trial may have been different if the newly discovered evidence were presented to the jury.

In concluding that "a reasonable jury could not find Vincent Smothers' testimony credible at a retrial[,]" the trial court utterly failed to employ the standard set forth in *Johnson* and instead substituted its own judgment and, in some instances, simply made up facts that are "not rooted in anything in the record." *Johnson*, 502 Mich at 569. A closer look at the trial court's conclusions reveal the infirmity of its decision.

8. Newly discovered evidence provides reason to doubt the reliability of the police investigation.

In addition to proving that Smothers' testimony is indeed reliable and ought to be considered, it is also clear that the word of the investigating officers is not as reliable as they would have us believe. This is particularly visible with regard to their treatment of what happened the night of the murder itself.

A witness at the scene, Latasha Boatright, provided a written statement in which she also indicated that, after the police car crashed with the burgundy marauder, she saw the

passenger of the police car exit the crashed-vehicle and begin shooting (Defendant's **Exhibit U**, Boatright statement, pg 1-2). During the preliminary examination, Boatright testified that she saw the police shooting despite the fact that the police were denying that they had fired their weapons (**Ex KK**, Prelim Hrg Tr 12/21/04, pg 72-73). Another witness at the scene, Kimberly Jeffries, also confirmed that she believed the police officers had fired their weapons. (**Ex KK**, Prelim Hrg, Tr, pg 26). Thus, despite the officers' denials of discharging their weapons, there are two witnesses who support Smothers' claim that the police did, in fact, fire their weapons.

There is also evidence that may shed light on the reasons why the responding officers denied discharging their weapons. There are witness statements and other documentary evidence suggesting that the police may have fired their weapons at the burgundy marauder and may have fatally struck an occupant of that vehicle. According to a memorandum written by an attorney for the City of Detroit's Legal Department, there was a second shooting fatality at the time of Segars' murder that has, until now, never been disclosed.[5]

Specifically, Ms. Kathy Christian, Assistant Corporate Counsel for the City of Detroit's Law Department, authored a memorandum to Sgt William Anderson, who served as the Officer-in-Charge of the Segars murder investigation. In the memo, Christian indicates

5 Ms. Christian's memo was obtained from the City of Detroit in response to a subpoena sent by the undersigned counsel in preparation for the evidentiary hearing on Defendant's motion for a new trial (**Ex S**). It should be noted, however, that the prosecution's file relating to the Searcy case is 'missing' and has been since "probably before" 2009-2010, according to the original prosecutor Patrick Muscat. **Ex CC**, Evid Hrg, 5/9/18, pg 25-28. Accordingly, it is impossible to know what documents, if any, are contained within the prosecutor's file relative to Christian's memo or the facts raised therein.

that, per her telephone conversation with Sgt Anderson of October 1, 2004, she understood that a police "squad car" was responding to a call at Withhorn and Connor on September 5, 2004, and that police car was then involved in a crash with another vehicle whose driver was "ducking" to avoid gun shots, and further that the man's wife who was in the car was fatally shot (**Exhibit T**, Christian memo). Christian was confirming that there was, at that time, a video recording of the events.

Christian's memo contains several handwritten notes and initials which were identified during the evidentiary hearing by Sgt Anderson as belonging to Lt McCalister and Lt Ventavogel. (**Ex DD**, Evid Hrg, 5/15/18, pg 31)(identification by Sgt Anderson of the initials contained on Exhibit T). The handwritten notes on the memo indicates that DPD wouldn't release a copy of the video "due to ongoing inv[estigation] per Lt. McCalister." The note is signed by initials "Lt. V." (**Exhibit T**).

When asked during the evidentiary hearing about Christian's memo, Sgt Anderson indicated that he had no recollection of seeing such memo (despite the fact that Christian specifically noted having a telephone conversation with him on October 1, 2004). Anderson also asserted that Christian's memo doesn't seem to relate to the Segars murder investigation and that while he was there on the night of the murder, he wasn't aware of any second fatality.

The prosecution then offered documents purporting to reflect the murders/homicides in the City of Detroit during the time in question and focused on the fact that there wasn't a second shooting fatality listed on the night of Segars murder. Sgt Anderson admitted however, that the documents presented only show murders in the City of Detroit and do not include murders/homicides that may have been reported in other jurisdictions. Anderson further

acknowledged that, according to a police report, the burgundy marauder, after colliding with the police car, fled the scene. **Exhibit V**.

Accepting at face value the information set forth in the police report that the marauder fled the scene, the documents offered by the prosecution about murders in the City of Detroit does not rule out the possibility of a second fatality given that the fatality may have been reported in a jurisdiction other than the City of Detroit.

Christian's memo is significant for two reasons. First, it was never produced or disclosed so as to allow the defense to investigate the claims raised therein relating to a second fatality. As such, the memo undermines the overall integrity of the investigation as well as the forensic evidence relating to what types of weapons may have been fired at the scene of Segars' murder. Other documentary evidence reflects that there may have been three different types of weapons; a .40 caliber, a .45 caliber, and a 9mm. See **Exhibit K**.

Given the various discrepancies in the forensic evidence, it appears entirely plausible that there were multiple shooters on the night of Segars' murder, including the police officers who responded to the scene. These undisclosed facts would have cast serious doubt on the jury's verdict, especially given that the jury wanted to know, specifically, what caliber-type bullet killed Segars. On this most important question, the prosecution misled the court, and in turn the jury, to believe that it was impossible to discern the type of caliber bullet that killed Segars – *information that was clearly false*.

Had the jury known that there were possibly three shooters at the scene of the murder, that a second fatality had occurred around the same time as Segars' murder, and that the bullet that struck Segars was a .40 caliber while the gun presented at trial and tied to Searcy was a

.45 caliber, it would have, more likely than not, resulted in reasonable doubt and thus an acquittal of the charges against Defendant. This is especially true when these additional facts are viewed in the context of the prosecution's theory at trial that Searcy, alone, was responsible for Segars' death.

Moreover, the fact that there is documentary evidence of a second fatality that, until now, has never been disclosed, gives rise to multiple questions about potential police misconduct including, possibly, to conceal the fact that the police may have caused a second fatality at the scene. There is support for this theory in Boatright's statement in which she indicates that the police, after crashing into the marauder, were "shooting at the driver." (**Exhibit U**, pg 2).

While Boatright's statement may be subject to some varying interpretations, it wouldn't make sense to infer that the police were "shooting at the driver of the Corvette" (i.e., Segars). The more logical inference to be drawn from Boatright's statement is that the police began "shooting at the driver" of the marauder that struck the police car. This inference is further supported by the police report that indicates that the marauder "struck the [police] crew's veh[icle] head on and then fled loc[ation] [eastbound]. **Exhibit V**.

These facts suggest that the police were, at that time, unaware of who was involved in the shooting and, after getting struck by the marauder, assumed the marauder must have been involved in the crime. Plus, after the marauder struck the police car, it fled the scene and likely further fueled the officers' suspicions about whether the driver and/or occupants of the marauder were involved in the crime. As the record shows, there is reasonable support for such a theory, and Defendant would have been well within his right to raise these issues at

trial to undermine both the police investigation and the prosecution's theory against him Had Defendant been given the opportunity to raise these relevant facts in the original trial, he may have been absolved of any guilt and acquitted.

Equally significant about Christian's memo is the fact that if there was a second fatality as indicated in the memo, Defendant, nor anyone else, was investigated or charged with the crime. Certainly, the prosecution would have charged Defendant with this second fatality if it believed that there was evidence sufficient to support the charge. The fact that Sgt Anderson and his investigating officers had reason to believe there was a second fatality and yet did nothing to investigate or recommend charges for same undermines the prosecution's case against Defendant as the sole shooter. With evidence of multiple shooters and two fatalities, the investigating officers would have been subject to strenuous cross examination which would have severely undercut the prosecution's theory and case against Defendant.

9. Newly discovered forensic evidence (that was suppressed by the prosecution at trial) regarding a bullet taken from the victim exculpates Defendant and supports relief under both MCR 6.508(D)(3)(b)(i) and (iii).

Defendant further asserts that he is entitled to relief under MCR 6.508(D)(3)(b)(i). In particular, the prosecution's suppression from the jury of the type of bullet that was removed from Segars' body constitutes an irregularity "so offensive to the maintenance of a sound judicial process that [Defendant's] conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(iii).

At trial, the prosecution presented evidence of a .45 caliber handgun that was seized from the apartment in which Mr. Searcy was arrested (months after the crime). The prosecution then offered the testimony of its (since discredited) forensic firearms examiner

Kevin Reed, who testified that the weapon found in the apartment where Searcy was arrested was the weapon that fired the .45 shell casings at the scene of murder (**Ex HH**, Vol IV Trial Tr 41, 44). Given that there were, at least, two types of weapons fired at the scene of the murder, the jury sent out a question during its deliberations asking "what type of caliber … bullet was found in the deceased." **Ex II**, Trial Trans Vol V, May 6, 2005, pg 89, ln 5-13. In response, the prosecution provided information to the trial court that it could not discern the type of caliber bullet, an assertion that has proven to be utterly false in light of the recent re-examination of the evidence.

The trial court proceeded to advise the jury, "[a]fter speaking with the attorneys," that the bullets that were recovered from the deceased were too deformed to be able to identify what gun it came from **or what caliber it came from**." (**Ex II**, Trial Tr Vol V, pg 89)(emphasis added). There is no doubt now that the information conveyed to the jury was both incorrect and misleading. The prosecution and the Officer-In-Charge, Sgt William Anderson, either knew, or should have known, that this key material, exculpatory evidence was purposefully withheld from the jury.

To the extent that the prosecution may now argue that the defense had this information about the .40 caliber bullet fragment available to it, the record contradicts such an assertion. In particular, the evidence tag in question was logged as a 9mm shell casing. **Exhibit K**. The same evidence tag was later presented at trial as containing a .40 caliber "metal jacket bullet." **Exhibit J**. But when the actual evidence envelope was recently opened and examined, it contained a .40 caliber bullet fragment. When asked if he could explain this discrepancy, Mr. Dave Balash, a highly qualified and respected firearm forensic expert (**Exhibit O,** Balash

CV), testified that "[t]here is no possible way you can confuse the two of those." **Exhibit CC**, Evid Hrg Tr 5/9/18, pg 8.

Mr. Balash further testified that mistaking a 9mm shell case and a .40 caliber bullet fragment would be like "confusing a cherry and a watermelon." *Id* at 15. Balash explained that "one was from the morgue [the .40 caliber bullet fragment] [and] one would not have come from the morgue [the 9mm shell casing]." *Id* at 15. Balash went on to explain that "[a] bullet [fragment] is normally recovered from an object or from a person" while "you will find [a] fired cartridge case at a crime scene." *Id* at 16. Sgt. Anderson agreed with Balash's assertion and testified that, based on the inventory evidence log, Defendant's Exhibit K, he would have reason to believe that there was a 9 mm shell casing that was collected at the scene of Segars murder **Exhibit DD**, Evid Hrg Tr, 5/15/18, pg 45-46. Furthermore, Sgt Anderson reluctantly acknowledged that the type of bullet removed from Segars' body (i.e., a .40 caliber) could not have come from the weapon introduced at trial and tied to Searcy (i.e., at .45 caliber). **Ex DD**, Evid Hrg Tr, 5/15/18, pg 50-51.

When asked about the fact that the evidence envelop contained two tags, one listing a 9 mm shell casing and the other listing a .40 caliber bullet fragment, Balash opined that "[t]he only reasonable explanation that I have is they were reading material from one tag that actually was a nine millimeter fired cartridge case, and it got placed on a .40 S&W fired bullet from an autopsy. I suspect they were reading it [9 mm shell casing] from somewhere[.]" **Exhibit CC**, Tr at 17-18. Clearly, the investigating officers were given the .40 caliber bullet fragment from the Wayne County medical examiner's office.

As has been previously established, the gun tied to Searcy does not match the bullet

pulled from Segars' body. Standing alone, this newly discovered is more than sufficient to warrant a new trial. Additionally, such evidence meets the 'actual innocence" standard that "it is more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt." *People v Swain*, 288 Mich App 609, 638 (2010)(quoting *Schlup v Delo*, 513 U.S. 298, 327 (1995); *see also House v. Bell*, 547 U.S. 518, 536-37 (2006)(holding that "actual innocence" standard does not require absolute certainty about the defendant's guilt or innocence."). Here, not only was this exculpatory evidence withheld from the defense at the time of trial, but also the jury was incorrectly advised that it was *impossible* to discern the caliber type of bullet found in the deceased. The prosecution bears full responsibility for providing misleading and inaccurate information to the jury in response to its question, which false information no doubt impacted the jury's finding of guilt

The facts surrounding the conflicting evidence tag also raise serious concerns regarding the accuracy of the police investigation. For example, the DPD evidence report reflects that a .9 mm shell casing was found at the scene of the murder. **Exhibit K**. The prosecution offered the testimony of Ms. Patricia Little who attempted to characterize this discrepancy as a typo or data-entry error, perhaps related to the fact that the DPD began using a new evidence tracking system (and intimating that maybe it was incorrectly entered after the implementation of the DPD's system). However, Little admitted that the evidence inventory list, Exhibit K, was dated September 2004, and accordingly Little admitted that someone had logged into evidence the .9 mm casing as far back as the time of the murder. Accordingly, the discrepancy couldn't have been related to the implementation of a new evidence software system in 2009. **Exhibit DD**, Evid Hrg Tr 5/15/18, pg 14-17.

In conclusion, the facts surrounding Smothers' testimony serve not only to demonstrate his reliability, but also to undermine a key element of the prosecution. Newly discovered evidence therefore casts a compelling twofold doubt on Searcy's conviction.

D. The trial court's credibility determinations and factual findings cannot be upheld under *Johnson*.

Despite all of the corroborating evidence set forth above to support Smothers' confession, the trial court nevertheless rejected out-of-hand the newly discovered evidence presented and concluded that "a reasonable jury could not find Vincent Smothers' testimony credible at a retrial." (**Ex 1**, Opinion, pg 6). In so doing, the trial court failed to adhere to the Supreme Court's cautionary instruction in *Johnson* that "[a] trial court's function is limited when reviewing newly discovered evidence, as it is not the ultimate fact-finder[.]". *Johnson* at 567.

In *Johnson*, the Supreme Court emphasized that "if 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*, 502 Mich at 568. In short, a witness's testimony must be "patently incredible" in order to be reasonably discounted by a jury. It has already been made clear that Smothers' testimony was, in fact, credible – or at the very least, it was not patently incredible.

The trial court's credibility determinations regarding Smothers' confession were an attempt to predict what a jury *would* find on retrial, instead of determining what a jury *could* find compelling., The trial court made its own premature value judgment based on the following premises, which range from misguided to flat-out wrong:

- that Smothers admitted and pled guilty to 11 murders between 2004 and 2006, but did not admit to Segars' murder;

- that in "his interview with the Michigan State Police, and with his defense counsel present, Smothers recanted an affidavit admitting the murder of Jamal Segars."

- that "Smothers indicated to the State Police that he was incarcerated in the same prison with defendant Searcy and that Searcy had made comments to Smothers that Searcy had friends on the outside who had been watching Smothers' wife and children."

- that Smothers' testimony at the evidentiary hearing was inconsistent with Smothers' modus operandi in other cases.

- that Smothers' claim that he "gave his weapons to" his accomplice Jeffrey Daniels "is not believable."

- that Smothers' claim that he confessed to Marzell Black wasn't believable because, according to the trial court, "an individual such as Vincent Smothers would[n't] feel comfortable and free to admit another homicide[.]

- that the information provided by Smothers was "readily identifiable from discovery material available to defendant Searcy and, therefore, available to Smothers since the two were, for a period of time, in the same correctional facility."

Here, the trial court utterly failed to consider whether a reasonable juror *could* find credible Smothers' confession. Instead, the trial court simply substituted its own judgement for that of the fact-finder. This is made abundantly clear in the trial court's reasoning. For instance, the trial court thought Smothers' confession lacked credibility based on the fact that Smothers, a hired contract killer, confessed to eleven other murders between 2004 and 2006 but failed to confess to the Segars' murder. So what? The fact that Smothers admitted responsibility to numerous other murders does not make his instant confession any less credible. To the contrary, a reasonable juror could easily conclude that Smothers' past conduct and murderous behavior support his instant confession. The fact that the trial court reached an opposite conclusion simply goes to show that the issue is, at a minimum, debatable,

among reasonable jurors.

In the record below, there was nothing patently incredible about Smothers' confession so as to allow the trial court to reject it out-of-hand. Had the prosecution presented evidence that Smothers was, for instance, in California at the time of the Segars' murder, such evidence might very well render Smothers' confession "patently incredible." But there was no such evidence presented at any time during the extensive evidentiary hearing from which to infer that Smothers' confession was "patently incredible." All the aforementioned reasons for rejecting this confession are highly speculative and are considerations which ought to be evaluated by a jury on retrial – not preemptively rejected by the trial court in the context of a motion for new trial.

A closer reading of *Johnson* illustrates well this point. In *Johnson*, the defendant was convicted of the 1999 murder of Lisa Kindred who was shot while in her vehicle with her three children; a newborn, her two-year old daughter Shelby, and her eight-year old son Charmous Skinner ("Skinner"). Johnson was implicated in the shooting by, among others, his codefendant Burnette who had offered inconsistent versions of the events in question. Johnson testified on his own behalf and was later found guilty of first-degree felony murder after a bench trial.

Years after his conviction, Johnson filed a fourth motion for relief from judgment claiming that there was newly discovered evidence from Skinner who could attest that Johnson wasn't the shooter. The trial court denied Johnson's motion and the Court of Appeals affirmed the denial. The Supreme Court, however, remanded the matter for an evidentiary hearing to determine whether Johnson was entitled to a new trial based on the newly

discovered evidence. *People v Johnson*, 497 Mich 897, 855 (2014).

During the evidentiary hearing following remand, Skinner testified that he was eight years old at the time of his mother's murder, that they had gone to a drive-in movie that evening to see "Life" and then stopped by a relative's house afterwards where Lisa's husband had gone inside the house for a while. Skinner testified that while he was originally seated in the back of his mom's minivan and he moved up to the front seat; his mom had gotten out of the van to go ask her husband to hurry up, and when she returned Skinner saw a man behind her. Skinner was able to provide a description of the man and testified that the man's face was visible even though it was dark because the dome light of the van was turned on. Skinner then heard a gunshot and the driver's side window shattered, his mom got into the car and drove off to the nearest gas station where she later collapsed. Skinner was never interviewed by any police officers nor did he talk with his family about what he saw that night.

In denying Johnson's fourth motion for a new trial, the trial court found Skinner's testimony to be incredible for the following reasons. First, the trial court opined that Skinner could not have witnessed the shooting because he would have been asleep after coming back from the movie. Second, the trial court concluded that even if Skinner hadn't been asleep, he "wouldn't have been capable of seeing anybody outside", much less be able to pick out details regarding facial hair. Third, the trial court questioned Skinner's overall credibility based on his perjury conviction. Lastly, the trial court noted that a significant amount of time had passed since the shooting and that Skinner couldn't remember the name of his teacher or the school he attended and thus found it "hard to believe that Skinner would be able to remember what the shooter looked like[.]". *Johnson* at 562. Having made these credibility

determinations, the trial court concluded that it could not find "any reasonable probability that there would be a different result in this case, even if Mr. Skinner was allowed to give testimony in regard to this matter, nothing." *Id* at 563. The Supreme Court granted leave and vacated the lower courts' opinions.

In reversing the trial court's decision denying Johnson relief, the Supreme Court noted that "[a]n abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *Id* (citing *People v Franklin*, 500 Mich 92, 100 (2017)). The *Johnson* Court further noted that it reviews a trial court's factual findings for clear error which occurs if "the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Id* at 565 (citing *People v Douglas*, 496 Mich 557, 592 (2014)). In reviewing the record from the evidentiary hearing, the *Johnson* Court found that the trial court improperly substituted its own judgment in place of what a reasonable juror may have found.

In particular, the *Johnson* Court faulted the trial court's factual determination that Skinner couldn't have witnessed the shooting because the boy would have been asleep after going to the drive-in movie. "Nothing in the record suggested that Skinner had been asleep beyond the trial court's mere speculation that the movie 'Life' would certainly put a child to sleep." *Johnson* at 568. As the *Johnson* Court properly noted "the trial court's factual finding was not rooted in anything in the record" such that it was clearly erroneous.

The *Johnson* Court found further fault in the trial court's own disbelief that Skinner was able to provide a description of the shooter and doubted that Skinner would have been able to see the shooting "due to the position of [his mother's] body." *Id* at 569-70. As to these findings, this Court noted that "[a]lthough it is appropriate for a trial court to take into account

such weaknesses in a witness's testimony, the trial court failed to determine whether a reasonable juror might conclude that Skinner is nonetheless credible with regard to the facts at issue here." *Id* The same holds true here.

In this case, the trial court openly stated its disbelief at Smothers' testimony that he gave the Segars' murder weapon to his accomplice. **Ex 1**, Opinion, pg 7 ("The claim the alleged killer would turn over his weapons to someone who mysteriously turns up dead weeks after the homicide is not believable."). Like the examples highlighted from *Johnson*, this is a blatant example of the trial court simply substituting its own judgment in place of that of a reasonable juror. It is entirely plausible that, on retrial, a reasonable juror could very well infer that Smothers gave his gun to his accomplice in order to exculpate himself and inculpate his accomplice, in the event they were discovered. In other words, a juror is just as likely to accept Smothers' testimony that he turned over his murder weapon to his accomplice (to set him up for the possible fall). Either way, there is nothing "patently incredible" about Smothers' testimony that he gave his gun to his accomplice.

There are other striking examples of how the trial court impermissibly substituted its own judgment for that of a reasonable juror. For instance, the trial court found it was "unreasonable to believe an individual such as Vincent Smothers would feel comfortable and free to admit another homicide to an individual [Marzell Black] who had previously incriminated him in a contract killing."[6] Again, there is nothing "patently incredible" about

6 Black and Smothers were codefendants in the murder case of Rose Cobb, the wife of a prominent Detroit Police Officer. **Ex BB**, Tr at 38, 46. In that case, Black was offered a plea in exchange for his testimony against Smothers. **Ex BB**, Tr at 48.

Smothers' testimony that, years earlier, he had confided in Black as to his responsibility for the Segars' murder. To the contrary, Marzell Black testified at the evidentiary hearing, without hesitation, that he and Smothers grew up together and were friends. Thus, it is equally reasonable that Smothers would have confided in his friend, Marzell Black, especially since Black is the one who introduced Cobb to Smothers for purposes of the contract killing of Rose Cobb.

On the flip side, it was also improper for the trial court to simply cast aside Black's testimony. Black had no motive to lie. There was no convincing impeachment evidence presented to discount Black's testimony. Black testified he wasn't threatened in any way nor felt apprehension about testifying that Smothers had confided in him his responsibility for Segars' murder. Nowhere does the trial court offer any independent basis from which to conclude that Black's testimony was "patently incredible." See *Johnson*, 502 Mich at 570 ("A reasonable juror also could have credited the fact that [Black] lacked any motive to lie in this case.").

By way of comparison, the Supreme Court in *People v Cress*, 468 Mich 678 (2003) highlighted the types of examples that would render a third-party confession not credible. In *Cress*, the defendant was convicted of the murder of seventeen-year old Patty Rosansky. Defendant later moved for a new trial based upon the confession of Michael Ronning, an inmate in an Arkansas prison. While Ronning provided some details of the murder, many of his statements were squarely contradicted by the record. The trial court denied Defendant's motion for a new trial. The Supreme Court granted leave limited to the issue of "whether the defendant is entitled to a new trial on the basis that there is newly discovered evidence in the

form of a confession by another to the crime of which the defendant was convicted." 468 Mich at 691.

In affirming the trial court's denial of Cress's motion for a new trial, the Supreme Court noted "[a] false confession (i.e., one that does not coincide with established facts) will not warrant a new trial, and it is within the trial court's discretion to determine the credibility of the confessor." *Cress*, 468 Mich at 692 (citing *People v Simon*, 243 Mich 489, 494 (1928); *People v Czarnecki*, 241 Mich 696, 699 (1928)). The *Cress* Court then went on to note the types of factual findings that would render a confession not credible:

> Ronning's confessions sharply deviated from the established facts regarding the crime: (1) he stated that Rosansky did not struggle or resist, but the evidence at trial showed that she had defensive wounds and extensive bruising; (2) he stated that he strangled Rosansky, but the medical experts testified at trial that there was no evidence of strangulation and the cause of death was brain injury caused by blunt-force trauma to the head; (3) he stated that he hit Rosansky once with a round rock, while the medical evidence tended to show multiple blows with a linear, club-like object; (4) he did not mention the tree-limb pieces placed in Rosansky's throat; (5) he stated that Rosansky was almost completely naked, wearing only her socks, when in fact she had been found clothed from the waist up; (6) he stated that he 'specifically remembered' not having or being able to have intercourse with Rosansky and denied digitally penetrating her rectum, although the medical evidence showed evidence of forced anal penetration; and (7) he could not find the location where the body was found, even when that location was shown to him and despite the fact that he claimed that he left Rosansky's body in an area that he lived near as an adult. Further, it was not disputed that Ronning had an incentive to confess, and several witnesses testified that he admitted that he fabricated the confession. Finally, Ronning also refused to testify regarding any details concerning Rosansky's murder at the evidentiary hearing, thereby casting doubt on whether he would testify at a new trial. In light of the above inconsistencies between Ronning's confession and the established facts, the trial court did not abuse its discretion in deciding that Ronning was a false confessor and that his testimony (even presuming he would testify at a new trial) would not make a different result probable on retrial.

Cress, 468 Mich at 692-94.

The facts in this matter are markedly distinguishable from *Cress* where the Supreme Court upheld the denial of defendant's motion for a new trial based on a false confession. Unlike Ronning, Smothers did in fact testify at the evidentiary hearing despite his counsel's advice not to do so. And unlike Ronning, Smothers provided numerous details of the murder: the location, the type of murder weapon used (which we now know is supported by forensic evidence that was previously suppressed); a motive, his familiarity of the victim as a drug dealer (another fact that was unknown and not presented anywhere in the trial record); his knowledge of the unmarked police car being involved in a crash; he was able to identify the race of the police officers involved in the crash and testified that one of the officers gave chase and fired his weapon which fact was supported by other witness' testimony. Smothers, unlike Ronning, did not have any incentive to confess, but rather he did so against his penal interest given that he was confessing to a premediated murder which could carry a life sentence.[7]

In comparison to *Cress*, the trial court's credibility findings in this case are overtly flimsy and wholly unsupported by the record. Equally troubling is the trial court's finding that the details provided by Smothers were "readily identifiable from discovery material available to defendant Searcy, and therefore available to Smothers since the two were, for a period of time, in the same correctional facility." (**Ex 1**, Opinion, pg 7). This factual finding by the trial court stands on the same faulty footing as the trial court's decision in *Johnson*

7 Smothers is currently serving a 50-100 year sentence, which while a lengthy sentence, isn't a life sentence. Ex AA, Evid Hrg, 3/19/18, pg 43-44.

finding that Skinner would have been asleep after the movie and thus couldn't have witnessed the shooting. There is absolutely no record evidence that Smothers and Searcy ever had any contact whatsoever while incarcerated. The prosecutor never offered any such record evidence on this point. Like in *Johnson*, the trial court's conclusion that Smothers and Searcy must have shared and/or rehearsed a recitation of the events is a factual finding that "was not rooted in anything in the record" and should be rejected by this Court as impermissible fact-finding.

In fact, MDOC documents show that, contrary to the trial court's unfounded inference, Smothers and Searcy were housed <u>separately</u> while briefly confined in the Macomb Correctional Facility (MRF). To be exact, Smothers was housed in Level 4 Security while Searcy was housed in Level 2 (**Ex W**). As such, they would have been separated and segregated, <u>at all times</u>, during their brief overlapping confinement at MRF. Again, it should be noted that the prosecutor never presented this theory nor any evidence to support the trial court's fact-finding that Searcy and Smothers could have simply shared the information in prison. Consistent with *Johnson*, this Court should conclude that the trial court's factual finding in this regard is clearly erroneous.

Also without record support is the trial court's factual finding that "Searcy had made comments to Smothers that Searcy had friends on the outside who had been watching Smothers' wife and children." **Ex 1**, Opinion, pg 6. The trial court's "factual finding" regarding Smothers having been threatened comes from Officer Corriveau's unfounded "impression." In fact, when asked directly, Corriveau admitted that Smothers "didn't say he was threatened" but only that Corriveau "got the impression that he was." (**Ex BB**, Evid Hrg,

3/26/18, pg 20).

First and most importantly it should be noted that Smothers himself denied being bribed, coerced, promised, or threatened in any way to testify or confess to the Segars' murder (**Ex AA**, Evid Hrg 3/19/18, pg 40). In fact, Smothers wrote a letter to Searcy dated August 22, 2015 (which pre-dates each of his affidavits) in which Smothers admitted to killing Jamal Segars (**Ex C1**)("I found out you were locked up for a crime that I committed . . . I have more details that I can provide as well as an affidavit explaining my involvement."). As this evidence shows, the trial court's "factual finding" is without any bases in the record. Even accepting, *arguendo,* Corriveau's unfounded "impression," the record, at best, sets forth conflicting evidence in light of Smothers' testimony denying that he had been threatened to confess to Segars' murder. Either way, consistent with *Johnson* "if 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*, 502 Mich at 568.

In this instance, a jury (on retrial) should be permitted to weigh the competing testimony of Smothers against Corriveau in deciding whether to find Smothers' confession to be credible. It was not proper, however, for the trial court to have placed its hand on the scale of justice to decide that "a reasonable jury could not find Vincent Smothers' testimony credible at a retrial." Such a conclusion is far from clear, especially given the uncontroverted forensic evidence that supports Smothers' confession.

As to the newly discovered forensic evidence, the trial court simply cast aside such evidence as a byproduct of a computer entry error. But like its other factual findings, the trial

court's finding relative to the forensic evidence does not comport with the record. In particular, Defendant offered into evidence a newly discovered DPD evidence report that indicated there was a conflicting evidence tag showing that the same piece of evidence was both a .9 mm shell casing and a .40 caliber bullet fragment. See **Exhibit K**, pg 2. This same evidence tag no. E071916-04 was shown at Defendants 2005 trial as containing a .40 caliber "metal jacket bullet." See **Exhibit J**. Upon recent inspection of the evidence it was determined that the envelope contained a .40 caliber bullet fragment, and not a .9 mm shell casing.

During the evidentiary hearing, the prosecution offered the testimony of Patricia Little to explain away the discrepancy shown on the evidence tag. Little testified that the DPD property room began using a new computer system and that, perhaps, the evidence tag listing the .9 mm shell casing was simply a product of a data-entry error (**Ex DD**, Evid Hrg 5/15/18, pg 17). The trial court accepted this fact in deciding that this piece of newly discovered evidence wouldn't have affected the trial. See **Ex 1**, Opinion, pg 8 ("A reasonable jury would conclude the contents was a .40-caliber bullet fragment and the property room had made a labeling error.").

In reaching this conclusion, however, the trial court completely ignored the fact that the date of the DPD inventory list is September 16, 2004 (the date of the initial investigation immediately following Segars' murder). Little then testified that the "new" DPD computer systems were implemented in 2009 and 2015 (**Ex DD**, Evid Hrg, pg 16-17). Given that the DPD inventory list which contains the entry for a .9 mm shell casing is dated September 2004 and the new computer system wasn't implemented until 2009 or 2015, it is impossible to

conclude, as the trial court did, that the discrepancy was caused by the new computer system. Little agreed with this assertion, but then left open the possibility that the error was made in 2004. *Id* at 17. While this is possible, the fact remains that the envelope contained a .40 caliber bullet fragment taken from Segars' body, a fact that was suppressed at trial even in direct response to the jury's question.

The prosecution's explanation of this discrepancy is further undermined by subsequent events surrounding the prosecution's forensic examiner at trial Kevin Reed. Reed's forensic work has since been discredited and served as one of the bases in closing the Detroit Crime Lab as set forth below. The record confirms that Reed served as one of the prosecution's forensic experts at trial in this matter. On cross-examination, Little testified that the possible discrepancy with the bullet could have been made by "whoever examined the actual item in this package when it was examined, whoever did the laboratory analysis." (**Ex BB**, Evid Hrg, 3/26/18, pg 63). The following exchange brings Reeds' involvement into sharper focus:

Q – So you cannot explain how a nine millimeter shell [casing] was somehow changed into a .40 [caliber bullet fragment] on this trial Exhibit that was presented?

A – Only thing I can tell you, sir, in my experience the only person that can tell you that is whoever examined the actual item in this package when it was examined, whoever did the laboratory analysis.

Q – Whose name is on the laboratory analysis report as having received this evidence?

A – K. Reed. I don't know who that is.

[]

Q – Are you aware that as a result of Mr. Reed's testimony in cases that the Michigan State Police conducted an audit of the Detroit Police Department Crime Lab which led to the shutting down of that Crime Lab?

A – Well, I didn't read the book, sir. I'm aware of the situation though.

(**Ex BB**, Evid Hrg 3/26/18, pg 63-65). Mr. Reed's inaccurate forensics analyses is the subject of two separate books: BRENT E. TURVEY & CRAIG M. COOLEY, MISCARRIAGES OF JUSTICE, ACTUAL INNOCENCE, FORENSIC EVIDENCE, AND THE LAW pg 186 (2014), and BRENT E. TURVEY FORENSIC FRAUD, EVALUATING LAW ENFORCEMENT AND FORENSIC SCIENCE CULTURES IN THE CONTEXT OF EXAMINER MISCONDUCT, 145 (2013) (**Exhibits X and Y**).

As Mr. Turvey succinctly notes in Miscarriages of Justice:

> The ongoing scandal in the Detroit Police Department stems from events that began unfolding in 2007, involving Kevin Reed, a firearm and tool mark examiner for the Detroit Police Department Forensic Services Laboratory (DPFSL). Because of errors in an evidence report made by Officer Reed, Jarroh Williams pleaded no-contest to second-degree murder charges related to a 2007 shooting; he believed that all of the 42 shell casings discovered at the scene had been matched to a single gun – his. In fact this was not the case. Michigan State Police reviewed the case after a defense expert determined that two separate guns had been used, and they agreed with this independent finding.
>
> This case prompted an audit of the DPFSL by the Michigan State Police. It was eventually determined that 10% of the firearms examinations contained "significant errors" (MSP, 2008, p3), as well as 42% rate of noncompliance with laboratory practice standards (far below the 100% compliance requirement). It was also determined that the cost of a 10% lab error rate not only was unacceptable, but had a serious impact on the justice system.
>
> High-ranking officers agreed that the DPFSL suffered from "numerous errors made by multiple examiners," and that the errors found at the lab were "indicative of a systematic problem" (Patton, 2008). Consequently, the Detroit Police Department closed the entire lab and had it condemned. Its evidence-testing responsibilities were largely absorbed by the state police. By 2009, investigators had determined that at least 147 different cases required retesting, and defense attorneys had identified 30 more involving evidence that had been mishandled in some fashion.

TURVEY, MISCARRIAGES OF JUSTICE pg 186.

The import of Reed's now-discredited forensic work was also totally ignored by the trial court. When counsel attempted to press Ms. Little about the glaring discrepancy in this case (i.e., that the same piece of evidence was tagged as both a .9 mm shell casing and a .40 caliber bullet fragment), the trial court sustained the prosecution's objections and directed defense counsel to "move on" as the following colloquy shows:

> The Court – [in response to prosecution's objection]: In fact, Mr. Dezsi, just so that you know, I had the trial that ended up being the precipitating cause of that Crime Lab being shut down[.]"
>
> Defense Counsel – I'm aware, your Honor. Your Honor, the reason I'm asking the witness these questions is she indicated it could have been a key-in error, or it also could have been an error by the person who collected the evidence. We know that Mr. Reed's name as the individual who received the evidence, which inexplicably has become a .40 caliber [bullet fragment] on a document that was presented at trial when the source document shows that it's a nine millimeter.
>
> Court – I agree. I think you made your point. Let's move on.

Ex BB, Evid Hrg 3/26/18, pg 66-67. Despite this glaring factual inaccuracy, and despite Mr. Reed's involvement as the prosecution's forensic examiner at trial, the trial court simply cast aside these discrepancies and made a factual finding that "[a] reasonable jury would conclude the contents of the sealed envelope when examined were consistent with the contents of the original red evidence tag and inconsistent with the new property room label." (**Ex 1**, Opinion, pg 8).

As set forth above, the trial court's finding relative to the forensic discrepancy cannot be explained away by the fact that DPD began using a "new system" in 2009 or thereafter. The discrepancy is, in fact, revealed and demonstrated on the original source documents from 2004, and Ms. Little testified that "the only person that can tell you [about the discrepancy] is

whoever examined the actual item in this package when it was examined [or] whoever did the laboratory analysis" (**Ex BB**, pg 63) which in this case was Kevin Reed (**Exhibits J & L**).

The trial court also ignored the fact that the bullet casings that were in/on Segars' Corvette were .40 calibers. **Exhibit Z** ("you see a spent casing (40 calib) on the rear deck [of the Corvette], and more .40 caliber casings "to the rear" of the Corvette); **see also Ex FF** (Vol II Trial Tr 28-30)(Evidence Technician distinguishing between the .40 caliber shell casings found on Segar's Corvette as opposed to the .45 caliber shell casings found near the party store at Whithorn and Connor). The trial court completely ignored this record evidence when it invented its own facts.

In its Opinion, the trial court concluded that "[s]hell casings found in the immediate area around the scene of the murder matched the gun found at the defendant's arrest location." (**Ex 1**, Opinion, pg 9). The trial court's finding is not supported by the physical evidence; the bullet casings "on the rear deck" were .40 calibers, and the bullets immediately "to the rear" were also .40 calibers. The gun presented at trial as belonging to Searcy was a .45. There were no .45 caliber bullet casing in or on the Corvette, there were only .40 caliber casings.

The only .45 caliber casings found at the scene were "across the street from [the Corvette] right next to the party store [where] you see (5) more spent .45 calib casings." **Exhibit Z**. Now that it has been discovered that Segars was killed by a .40 caliber bullet, it is impossible to uphold the trial court's conclusion that the Searcy's gun was the murder weapon, a fact that the trial court wholly fails to acknowledge. Additionally, in rendering its conclusion that the "shell casings found in the immediate area around the scene of the murder

matched the gun found at the defendant's arrest location[.]" the trial court relies entirely on the now-discredited forensic opinion of Kevin Reed.

In light of this evidence, including the fact that Reed's forensic work has now been totally discredited as unreliable, a "reasonable juror" on retrial could very easily conclude that the newly discovered forensic evidence was intentionally withheld and suppressed from the defense for the purpose of suppressing the fact that Segars was shot with a .40 caliber bullet which, coincidentally, is consistent with Smothers' recent confession.

This Court should also take issue with the lower court's decision to ignore a newly discovered memo from assistant corporate counsel for the City of Detroit's Law Department that indicates a second gunshot fatality occurred in conjunction with the Segars' murder. As explained above, this memo was discovered only as a result of counsel's recent subpoena served on DPD in preparation for the evidentiary hearing (**Ex S**). The memo totally undermines the investigation into Segars' murder especially when viewed in context of the newly discovered forensic evidence. At a minimum, the memo supports Smothers' statements that the police were firing their weapons at the scene of the murder which is consistent with Boatright's testimony during the preliminary examination. The trial court completely ignored the import of the newly discovered memo by finding that it wasn't "substantiated by any other evidence[.]" (**Ex 1**, Opinion, pg 8).

The trial court's decision to ignore the newly discovered Christian memo is problematic for two equally compelling reasons. First, the memo was being offered to provide additional factual support for Smothers' statements. And again, the memo was never disclosed so it couldn't have been shared with Smothers as part of the discovery in this matter.

Second, Christian's memo offers additional support for the forensic evidence which suggests that there was two – possibly three- types of weapons fired at the scene of the murder (a .9 mm, .40 caliber, and a .45 caliber). **See Exhibits J, K, L**.

To the extent that the trial court rejected the Christian memo because it was "not substantiated" by any other evidence, the trial court's reasoning is inconsistent with *Johnson*. At this juncture, it is not the Defendant's burden to prove the truth of the assertions contained in Christian's memo. The question, rather, is whether the evidence is credible. *Johnson*, 502 Mich at 567. While the trial court seems to fault Defendant for failing to "substantiate" the memo, the trial court utterly fails to note that Christian's memo was written by an attorney for the Detroit Law Department, and was only recently produced by the City in response to a subpoena (**Ex S**). These facts, alone, should suffice for the instant purpose of deciding whether its contents bear credibility. Rather than considering these factors as to the reliability of the memo, the trial court improperly required Defendant to prove the truth of its contents. This is just one more example of the trial court's failure to apply the standards set forth in *Johnson*.

E. The newly discovered evidence makes a different result probable on retrial.

Having amply established the credibility of the newly discovered evidence, including Smothers' confession, the forensic bullet evidence, and Christian's Memo, the next task was for the trial court to decide whether such evidence would have produced a different result on retrial. Based on its erroneous credibility findings, the trial court improperly answered this question in the negative.

In particular, the trial court noted:

> [t]he case against Searcy includes four eye-witnesses who positively identified him as a shooter. He hid from the police in his grandmother's apartment at the time of his arrest. Shell casings found in the immediate area around the scene of the murder matched the gun found at the defendant's arrest location. Defendant Searcy's alibi and a series of alibi witnesses were rejected by the jury in the first trial. This evidence is balanced against Vincent Smothers' admission, the forensic evidence offered by David Balash, Marzell Black's testimony and the memo from the Detroit Law Department. The admission made by Vincent Smothers, as it applies to the Segars' murder, is not credible. The forensic evidence, evidence offered by Marzell Black and the City of Detroit memo are equally unconvincing.

(**Ex 1**, Opinion, pg 9). As extensively set forth above, the trial court's credibility determinations (and factual findings) fly in the face of the record evidence. So too does the trial court's conclusion that the newly discovered evidence wouldn't result in a different outcome on retrial.

Indeed, the prosecution's case against Searcy was shaky at best. The prosecution wasn't able to provide any motive whatsoever tying Searcy to Segars' murder. In the absence of a motive, the prosecution proceeded on the far-reaching theory that Searcy actually intended to murder another man named DeAnthony Witcher, but mistakenly shot Segars' instead. By proceeding on this theory, the prosecution was able to side-step providing any motive or evidence to connect Searcy to Segars. And it has now been confirmed that the caliber bullet that killed Segars didn't come from the gun that the prosecution presented at trial as tied to Searcy.

Against this backdrop, the trial court wholly ignored the fact that the jury specifically asked what type of weapon killed Segars. The jury's question, alone, entirely dispels the trial court's ruling that the newly discovered evidence would have no impact at retrial. The jury,

had it been told the truth (that the bullet from Segars' body was a .40 caliber) may very well have reached a different result as to Defendant's guilt. This is especially so given Smothers' confession which is supported by a myriad of evidence as laid out herein.

The Supreme Court noted as much in *Johnson* where it reversed the trial court's denial of defendant's motion for a new trial. Specifically, the *Johnson* Court noted that:"[w]hile consideration of Skinner's testimony alone would make a different result probable on retrial due to the weaknesses of the prosecutor's witnesses, this Court may also consider the evidence that would be presented at retrial[.]." The same holds true here where Smothers' confession, alone, casts grave doubt on Searcy's guilt.

Coupled with the newly discovered forensic evidence (which, importantly, it should be emphasized, was suppressed from Defendant during his initial trial), Smothers' confession should amply satisfy this Court that a different result is likely on retrial upon presentation of the newly discovered evidence.

Nor should the Court be persuaded by the trial court's reference to "four eye-witnesses who positively identified [Searcy] as a shooter." As the Innocence Project has correctly highlighted, "[m]istaken eyewitness identifications contributed to approximately 70% of the more than 350 wrongful convictions in the United States overturned by post-conviction DNA evidence." INNOCENCE PROJECT, EYEWITNESS MISIDENTIFICATION (http://www.innocenceproject.org/causes/eyewitness-misidentification/ (last visited May 12, 2019); *see also State v Delgado*, 188 N.J. 48, 60, 902 A.2d 888 (2006); State v Henderson: A Model for Admitting Eyewitness Identification Testimony, 84 U Colo L Rev 1257, 1260 (2013).

Here, the trial court failed to consider the totality of the prior trial evidence against the newly discovered evidence which included, first and foremost, Smothers confession supported by heretofore unknown forensic evidence regarding the caliber-type bullet that killed Segars. The trial court here placed undue weight on the eye-witness identifications and alibi witnesses presented at Searcy's trial, but failed to consider how that record evidence would be severely undermined in the face of newly discovered forensic evidence that matches up with Smothers' confession. The trial court simply ignored the pieces of newly discovered evidence that contradicted its own belief of guilt.

Nowhere does the trial court mention, reference, or address the fact that the bullet taken from Segars' body doesn't match Searcy's gun presented at trial. Nor does the Court mention anywhere in its analysis that the jury had specifically questioned what type of bullet was taken from Segars' body. Clearly, the jury had questions and doubt as to whether it could link up Searcy's gun to the type of weapon responsible for killing Segars. This evidence, coupled with what is now known about Witcher, could easily sway a jury on retrial to reach a different result.

CONCLUSION AND RELIEF REQUESTED

The trial court wholly failed to properly balance the original trial record against the newly discovered evidence when it denied Defendant-Appellant's motion for a new trial. Instead, the trial court committed the same palpable errors that were faulted by the Supreme Court in *Johnson*. Defendant-Appellant's entitlement to a new trial is amply established by this record.

For these reasons, the Court should vacate the trial court's opinion and remand this matter for a new trial.

Respectfully submitted,

Dated: March 27, 2020

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