STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff/Appellee

v.

RICKY RIMMER,

Defendant-Appellant

_____/

NOTICE OF FILING MOTION FOR RECONSIDERATION

To: Daniel G. Hebel

Assistant Prosecuting Attorney

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Detroit, MI 48226

Please take note that Defendant is filing with the Court the enclosed Motion for Reconsideration of the Court's March 1, 2024 Opinion and Order "**DENYING RECONSIDERATION"** of Defendant's Motion for Relief from Judgment. Under MCR 2.119F, no oral argument or responsive pleading is required on a Motion for Reconsideration and thus, the motion is not being scheduled for oral argument at this time, under the court's desires.

BARTON LAW, PLLC

By: _____

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Dated: March 1, 2024

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DEFENDANT-APPELLANT'S MOTION FOR RECONSIDERATION OF THE COURT'S FEBRUARY 9, 2024 OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

Now comes Defendant-Appellant Ricky Rimmer by and through counsel Darnell Barton and pursuant to MCR 2.119(F)(2) submits his motion for reconsideration of the Court's February 9, 2024 Opinion and Order Denying Defendant's Motion for Relief from Judgment, in the above-captioned matter. In support of his motion, Defendant states as follows:

1. Defendant filed a Motion for a New Trial/Motion for Relief from Judgment Pursuant to MCL 770.1, MCR 6.500, *in pro per.*
2. On or about August 9, 2022, present counsel filed a notice of appearance of counsel.
3. The Court ordered the prosecutor to respond to Defendant's motion. Counsel was not served with the order.

4. On October 21, 2022 (three days after the Court's order), Valerie Newman, Director of the Wayne County Conviction Integrity Unit, submitted a Proposed Order for a stay to allow the Conviction Integrity Unit to investigate the case. The same day, the Court issued the order to stay. Defense counsel again was not served with this order.
5. Once defense counsel became aware of these orders, counsel strongly objected to the order to stay, whereas the court reversed the order to stay and ordered the prosecutor to respond.
6. On July 17, 2023, the Wayne County Prosecutor's Office responded to the motion.
7. On August 2, 2023, Defendant filed a response to the prosecutor's answer.
8. The Court adjourned this matter approximately 10 – 12 times.
9. On February 9, 2024, the Court issued a very confusing order with the following heading:

> **"ORDER AND OPINION DENYING RECONSIDERATION OF MOTION FOR RELIEF FROM JUDGMENT, INCLUDING PROSECUTOR'S RESPONSE."**

It appears that the Court was also applying MCR 2.119(F)(2) when the Court stated in the heading, "including Prosecutor's response." MCR 2.119(F)(2) states, "No response to the motion may be filed, and there is no oral argument, unless the Court otherwise directs."

10. The issue at hand is that Defendant did <u>not</u> file a motion for reconsideration; rather, Defendant filed a Motion for a New Trial Pursuant to MCL 770.1/Motion for Relief from Judgment under MCR 6.500. Defendant now seeks reconsideration of that February 9, 2024 ruling for the reasons stated in this motion, which is timely filed pursuant to MCR 2.119(F)(1).
11. The Court made a palpable error at law when the Court failed to make an independent

finding of law—where the Court adopted incorrect aspects of the prosecutor's brief as a report and recommendation, denying Defendant due process of law. Adopting incorrect legal theories in the prosecutor's brief cannot be a substitute for the Court's duty to impartially assess the case. The Court has discretion in its decision-making process and may consider various legal arguments and evidence presented by both parties before rendering a ruling. The People's motion eluding to an "untimely" filing is flatly incorrect: "The trial court's stated bases for denying the motion were that the motion was 'untimely,' and 'defendant has been released from prison and/or parole has been terminated, therefore this matter is moot. MCR 6.502 does not contain a deadline by which motions for relief from judgment must be filed." *People v. Suttles*, 505 Mich. 1038, 941 N.W.2d 645 (2020).

Here, the Court's complete adoption of the prosecutor's brief word for word does not compute with the case law that contradicts The Court's adoption of the prosecutor's brief caused this Court to make the following palpable mistakes of law.

Palpable Error I: <u>*Brady vs. Cress*</u>

The Court erred when it conflated defendant's *Brady* claim with *Cress*, where on February 8, 2024, this Court was reversed by the Michigan Court of Appeals for committing the same error.[1] Defendant raised a claim of newly discovered *Brady* evidence. The Court reviewed the claim under *Cress*. The Court stated in part that:

> "Defendant continues by stating the facts of the case, in his opinion. Defendant concludes his argument by asserting that the prosecution has incorrectly stated, cited or relied upon outdated provisions of court rules and attempts to mislead the

[1] *People v Ballinger*, ___NW2d___; 2024 Mich. App. LEXIS 1047, at *1 (Ct App, Feb. 8, 2024)(" The trial court erred in two distinct respects. First, in analyzing defendant's argument under *Cress...)*

> court. Defendant argues that the prosecutor failed to research the concurring opinion and refused to conclude that important aspect as it would contradict its assertions." *Opinion and order of February 9, 2023, at 7.*

As stated, on February 8, 2024, the Court of Appeals reversed this Court on the same issue. *See Defendant's brief in support of Motion for Reconsideration;*

> More importantly, the categorical rule described by the trial court is fundamentally inconsistent with our Supreme Court's later binding decision in *People v Rao*, 491 Mich 271, 283-284; 815 NW2d 105 (2012) (holding that, "under *Cress*, when a defendant is *aware* of evidence before trial, he or she is charged with the burden of using *reasonable diligence* to make that evidence available and produce it at trial," and further holding "that what constitutes reasonable diligence in producing evidence at trial depends on the circumstances of the case")

People v Ballinger, ___NW2d___; 2024 Mich. App. LEXIS 1047, at *2 (Ct App, Feb. 8, 2024).

Lastly, this Court has conflated Brady and Cress claims. *See People v Milton*, 506 Mich 999; 951 N.W.2d 332 (2020) (McCoRmAcK, C.J., concurring) ("Though *Brady* claims and *Cress* claims are often intertwined, trial courts must address each claim separately.") *Id*. at *2.

Palpable Error II:

The Court erred when it conflated MCR 6.502(G)(2) with *Cress.*

In its February 9, 2024 ruling, the Court stated: "Any admissible newly-discovered evidence is evaluated under the test established in *People v. Cress,* 468 Mich 678, 672 (2003)." *Opinion and Order of 2/9/24.* MCR 6.500 is the vehicle for a defendant to bring substantive legal claims; the claim need not be newly discovered evidence. It could be a *Brady* claim, ineffective assistance of counsel claim, prosecutorial misconduct claim, instruction claim, any claim—the

claim need not reach a constitutional level. On the other hand, *Cress* is simply the Michigan standard governing newly discovered evidence. However, when at the initial stages of pleadings under MCR 6.502(G)(2), the employment of *Cress* means that the defendant's claim is dead upon arrival, due to the *Cress* discoverability prong (diligence), because the diligence prong of *Cress* could not be met. Thus, *Cress* undermines *Brady* and *Chenault,* which do not contain a diligence requirement.

In discussing Defendant's "new evidence," this Court, in adopting the prosecution's erroneous recommendation, stated that Defendant's motion was nothing more than a combination "of arguments based on 'speculation,' 'conspiracy' theories mixed with two 'affidavits.'" *Opinion and Order of February 9, 2024,* at 4. The Court went on to dismiss the new evidence on the *Cress* diligence standard: "Not only is the nature of recantation testimony untrustworthy, so is the waiting period. Defendant was convicted in 1976. Both McDonnel and Jordan provided affidavits in 2021. Thus, these two witnesses waited 45 years before suddenly remembering that defendant was not involved in the robbery. As such, there is nothing credible about either affidavit." *Opinion and Order of February 9, 2024*, at 4. Clearly, the Court used *Cress* diligence to reject Defendant's new evidence.

Palpable Error III:

The Court erred in adopting the prosecution's erroneous position on MRE 609.

The Court stated in its opinion and order:

> "Furthermore, the exception found in MRE 609 is obviously inapplicable because it requires a conviction and the two specific instances of conduct that the defendant is discussing are acquittals. The mere face that two officers involved in the Defendant's case were acquitted of charges in unrelated trials was not evidence of any kind in this case, Similarly, that evidence could not have been

> introduced to attack their character. Accordingly, the people did not suppress anything. *Opinion and Order of February 9, 2024, pg 6.*

Here, the Court and prosecution has asserted MRE 609; however, Defendant contends that MRE 608(a) applies as the officers' reputation for having a character for untruthfulness was paramount as they were the only non-recanting witnesses to testify against Defendant. Charges that do not result in conviction are not governed by MRE 609. Moreover, charges that do not result in conviction are admissible for impeachment and bias. *People v. Layher*, 464 Mich. 756, 757-58, 631 N.W.2d 281, 282 (2001); also *See Defendant's Brief in Support of Motion for Reconsideration.*

Further, *Layher* confirms the impeachment evidence was necessary and admissible at trial:

> We granted leave limited to whether the trial court erred so as to require reversal in allowing the prosecutor to cross-examine a defense witness concerning a prior charge for which he was acquitted. We conclude that the overly broad holding of *People v Falkner,* 389 Mich. 682, 695; 209 N.W.2d 193 (1973), which states "no inquiry may be made regarding prior arrests or charges against" a witness that did not result in a conviction, is inconsistent with precedent and with the approach to the admission of evidence that we have followed since the adoption of [*758] the Michigan Rules of Evidence. **2** We hold, consistent with existing precedent and the Michigan Rules of Evidence, that a trial court may allow inquiry into prior arrests or charges for the purpose of establishing witness bias…

See *Layher*, supra, at 757-58.

12. The Court also made several palpable factual errors.

Palpable factual error I.

The Court's adoption of the prosecution's brief as its opinion has respectfully caused the Court to misrepresent the facts. The following statements from the Court's factual fundings are alarming:

> "Furthermore, Defendant's claim that McDonnel was a Police agent is made up by Defendant. There was no suppression, everything that happened between McDonnel and the police was put on the record at trial. If Defendant's attorney wanted to used it in any fashion, he could have used it. But unlike Defendant, trial counsel was educated in the law and understood that merely because one suspect agrees to call another suspect for the police, does not mean that the first suspect magically becomes a police agent."
>
> "Therefore, Defendant is not entitled to relief based on the people's failure to produce acquittal records or the made-up assertion that one of the co-defendant's co-conspirators was a police agent. Neither of these claims has any legal merit." *Opinion and Order of February 9, 2024.*

Here, stating that "everything that happened between McDonnel and the Police was put on the record at trial" is factually inaccurate. McDonnel testified at Defendant's trial, and he also testified outside the presence of Defendant's jury at Jordan's *Walker* hearing. There, McDonnel informed the trial judge that he was over at Larry Smith's house when Smith and Sgt. James Harris called and asked him to come to the police station. McDonnel was never asked what the conversation was about between himself, Sgt. Harris and Smith. Years later, McDonnel attested to an affidavit, and for the first time he disclosed the conversation between himself, Sgt. Harris and Smith. Specifically, that:

(a) Harris told him and Smith that Defendant Rimmer had killed Smith's little brother.

(b) Smith's little brother and McDonnel were best friends.

(c) Sgt. Harris and Smith had him to set Jordan up so Sgt. Harris could arrest him.

(d) Upon Jordan's arrest, Sgt. Harris took Jordan and McDonnel to the police station and placed both of them in a room where Larry Smith was waiting.

(e) Sgt. Harris told the three of them, Smith, McDonnel and Jordan to get their stories together on Rimmer.

Mr. Rimmer did not learn of this information until 2021 when McDonnel executed his affidavit. At trial, when asked if he knew any reason why Smith would be biased toward Mr. Rimmer—Sgt. Harris replied "No." Clearly, that was false as he (Harris) caused the bias when he lied and told Smith and McDonnel that Rimmer and Jordan had murdered Smith's little brother. The issue at hand is that Sgt. Harris wrote out each statement, and each statement was never testified to at trial by these witnesses. However, McDonnel denied that he told Sgt. Harris that Rimmer was the shooter, at trial. Larry Smith testified at the preliminary examination, however, not at trial before the jury. Outside the jury's presence, he testified that his preliminary examination testimony was false and that he only lied because Sgt. Harris told him that Rimmer had killed his brother. The trial judge refused to allow the jury to hear Smith's testimony and declared him unavailable, only after Smith testified before the judge did the court inform him of his Fifth Amendment rights, and asked Smith if he wanted an attorney. Mr. Jordan never testified at trial. Sgt. Harris took the stand and testified regarding each of these witnesses' statements.

Factual Legal Error II

The Court erred in finding that Sgt. Harris and Sgt. Haidys prior misconduct was not material.

On Page 6 of its Opinion and Order, the Court stated:

> "Evidence is not material when its absence creates a trial that that has a verdict worthy of confidence. *People v. Chenault,* 495 Mich 142, 157 (2014). In other words, material evidence must be able to impact the verdict of the trial. Accordingly, evidence that is inadmissible is not material under *Brady." Opinion and Order of February 9, 2024.*

Here, as stated supra, impeachable evidence of a witness is admissible, just not under the straw man example the prosecution utilized (MRE 609). Moreover, the OCurt of Appeals ruled:

> In order to establish a *Brady* violation, a defendant need only demonstrate that the government suppressed evidence that is both favorable to the defendant and material."). Indeed, a defendant raising such a claim of error on collateral review satisfies the "good cause" requirement under MCR 6.508(D)(3) by simply demonstrating that the evidence was suppressed by the government. *People v Christian*, 510 Mich 52, 81; 987 NW2d 29 (2022) ("[T]he prosecution suppressed the transcript. That suppression was an 'external factor' that prevent[ed] appellate counsel from raising a *Brady* violation on direct appeal[.]"). For those reasons, the trial court erred by applying the *Cress* "due diligence" standard to defendant's claim of *Brady* error.

People v Ballinger, at *3.

Thus, as in *Ballinger*, the apparent *Brady* violation in Mr. Rimmer's case satisfies the "good cause" requirement under MCR 6.508(D)(3) by simply demonstrating that the evidence was suppressed by the government.

RELIEF REQUESTED

WHEREFORE, for the reasons stated in Mr. Rimmer's Motion for Reconsideration, he requests that this Honorable Court reconsider his motion under the proper legal parameters, conduct an evidentiary hearing and order a new trial.

Respectfully submitted,

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By: _____

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Dated: March 1, 2024