STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT,
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Circuit Court No. 04-012890-01-FC
Honorable Timothy M. Kenny

THELONIOUS SEARCY,

Defendant.

The People's Post-Evidentiary Hearing Brief with Appendices A through D

(The People's Exhibits 1 through 19 will be submitted to this Court at the time of oral argument)

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The People's Rendition of the Facts

The People first incorporate by reference the facts set forth in their previously-filed People's Answer to Defendant's Motion for Relief from Judgment, which was filed with this Court on August 2, 2017, which essentially set forth the facts as the People saw them, based on the jury trial in this case.

What follows now is the People's rendition of the testimony and evidence that was introduced at the evidentiary hearing that occurred before this Court over the course of four (4) days.

Evidentiary Hearing

March 19, 2018

Vincent Smothers

Vincent Smothers testified that he did not go by any nicknames, although certain people did call him Vito (Evidentiary Hearing, 03/19/18, 7).[1] He testified that he was currently incarcerated at Ionia Maximum Correctional Facility (7).

Smothers testified that he knew Scott Lewis (8). Lewis took an affidavit from him regarding this matter, the matter being the murder of Jamal Segers (8). He (Smothers) was the person who murdered Jamal Segers (8). This occurred on September 5, 2004 at City Airport, on Conner (8). The reason that he killed Segers was because he (Smothers) was trying to rob him (Segers) (9). He knew Segers to be a drug dealer (9). When asked how he knew this, Smothers responded that "[p]retty much everybody knows the drug dealers in the City" (9). There was a party at City Airport

[1] In the telephone call that is the subject of People's Exhibit No. 4, Smothers refers to himself as Vito. when talking to a person to whom he seems to be related.

that night, and he was not intending to go to the party, but he went anyway, and Segers just "happened by" while he (Smothers) was out there (9). He went because that was where you could bump into all the drug dealers in one night (10). He had no idea, however, that Segers was going to be there (10). Again, Segers just happened to be there (10). He went there with Jeffrey Daniels (10). They got to City Airport in Daniels' Lumina, which Daniels, who was driving, parked on the side of a gas station off Conner (10).

When asked when it was that he decided the he was going to kill Segers, Smothers responded that that happened when he got to the back of Segers' car (10). Daniels was with him when he approached Segers' car (11). Both he and Daniels had weapons that night; he had a .40 caliber handgun, and Daniels had either a .40 caliber or a .45 caliber (11). Segers was not alone in his vehicle, a Corvette; there was a passenger, another black male (11). He could not really describe this other person height-wise, because the person was sitting down in the Corvette, which sat kind of low (11-12). What he could say was that the other guy was a bigger guy (12).

As he and Daniels walked up to the back of Segers' car, he saw Segers look in his rearview mirror (12). Before Segers got a chance to do anything, he fired into Seger's back (12). Then, he walked to the driver's side of Segers' vehicle and shot Segers from the side, with the shots being fired from left to right (12). He fired about eight (8) shots from his .40 caliber handgun (12). He knew that Daniels fired his weapon as well, but he did not know who Daniels was shooting at (12-13). Segers had money in his hand, and, after he shot Segers, he grabbed the money out of Segers' hand (13). He then went back to Daniels' car, going in back of the gas station, to where Daniels' car was, behind the gas station (13). Daniels also came back to the car (Daniels' car), but he came from

Conner in front of the gas station to the car (13). He got to the car first, and Daniels got there some 30 seconds later (15).

There was an unmarked police car out there (13). This unmarked police car had pulled up just as he (Smothers) was getting to Segers' car (13). The undercover police car had come from Six Mile towards Gratiot, attempting to turn on the street that they were on, and the undercover vehicle ended up crashing into a Marauder (13-14). The crash caused the driver's side airbag in the police vehicle to go off (14). It looked like the driver of the police vehicle could not get out, but the passenger of the police vehicle did get out (14). He believed that the passenger of the police vehicle fired shots at Daniels (14). Daniels was not hit (14).

After he and Daniels got to Daniels' car, they left and went to a liquor store on Gratiot, where he gave Daniels the gun that he had (15). They then went their separate ways (15). Daniels was killed a couple of weeks later (15). His understanding was that Daniels was killed trying to sell fake drugs (16).

There were thousands of party-goers at the party that night (15). Some of the people were going into the party, and others were driving around (16). Traffic was at a standstill up and down Conner (16). Segers' vehicle was not moving at all when he and Daniels approached it (16).

Until now, he had not come forward to tell anybody about his involvement in Segers' murder (16-17). He did talk to other inmates about it (17). And he may have told Marzell Black, a person who he was friends with, about it (17). He signed affidavits about his involvement, but he was not sure how many (18). He identified Defense Exhibit A as an affidavit that he signed on December 10, 2015 (18-19). Although he was not the one who drafted this affidavit, the information contained in it was accurate (19). He did not recall who drafted this affidavit (19). This affidavit was a

paraphrasing of what he had talked about to the person who he did not remember (19). He identified Defense Exhibit B as an affidavit that he himself drafted and signed on December 27, 2015 (20). Finally, he identified Defense Exhibit C as an affidavit that he signed on December 21, 2016, which was an affidavit sent to him by a private investigator (20). Attached to the affidavit was a map that showed where the murder took place and the route that he and Daniels took to get to back to Daniels' car (20-22). Daniels' car was parked on Findlay, behind the gas station (22-23). The private investigator who sent him the affidavit (Defense Exhibit C) was Scott Lewis (25). Prior to that, Lewis had interviewed him over the phone, while he (Smothers) was at the Macomb Correctional Facility (25). This interview or conversation was recorded (25). The recorded interview was played in court and the whole of it appears at pages 26 to 40 of the March 19, 2018 transcript.

On continued direct examination, Smothers reiterated that nobody offered him anything in exchange for his testimony (40). That is, nobody from Searcy's family had offered him any money (41). In fact, he did not know any of them, had never talked to any of them (41).

On cross-examination, Smothers reiterated that this was an attempted robbery (44). He expected to get money from Segers because he was in a car and the car could not move because of the traffic, and most people who had a gun stuck in their faces would reach into their pockets and give you the money (44). He got a few hundred dollars from Segers, who had this money in his left hand, driving around with it like that (44).

He reiterated that he never saw the driver of the police vehicle ever get out of the police vehicle (45). The passenger got out (45). The passenger did not chase after Jeffrey Daniels (45). Rather, the passenger opened fire (45). He did not see anybody chasing after Daniels (45). Daniels was about three car lengths away from the back of the Corvette, going towards the car that they (he

and Smothers) had come in (45-46). When the passenger of the police vehicle fired shots at Daniels, the passenger was standing by the crashed police car (46).

Smothers reiterated that as far as he knew, Daniels just shot up in the air, and that he just shot one time (47). He reiterated that Daniels had a .45 caliber handgun (47). When asked if he was aware that around seven (7) .45 caliber shell casings were found around the scene, Smothers responded that he would not be surprised (47).

Smothers testified that the reason he was coming forward with his admission was because prison was hard enough for a guilty person, and it was twice as hard for a person who was innocent (480). That was why he had come forward in the Davontae Sanford case (48). He was asked if in the course of being investigated relative to his involvement in the case that Davontae Sanford had been convicted of, he had been interviewed by a couple of Michigan State police officers (48). He responded that he was interviewed by two or three (48). Smothers acknowledged that in the course of his interview with the Michigan State Police officers, he was asked about an affidavit that he had signed in relation to this case (49). When asked if he ever retracted his affidavit in this case, Smothers responded that he did (49). When asked why he retracted his affidavit, Smothers responded:

> A Davontae, they – I was under the impression that Davontae wouldn't be able to get out with this Affidavit that I submitted because the Michigan Innocence Clinic had it. So they needed something to take to Kim (Kym) Worthy to be able to say that it wasn't valid. So that way, Davontae wouldn't be able to get out, and it wouldn't hold him up.

(49-50).

Smothers clarified that he was told that if he did not retract his affidavit in this case, that would start a whole new investigation into this case, which would, in turn, hold up Davontae from getting out (50-51). When asked why that was, Smothers responded:

> A I didn't make it up. He said – I wasn't the one who said he wouldn't be able to get out. So I wouldn't be able to tell you why he wouldn't be able to get out.
>
> THE COURT: Who told you that?
>
> WITNESS SMOTHERS: The investigators.

(51).

Smothers acknowledged that there was another interview relative to the Davontae Sanford case that he had with a Michigan State police officer, that being Sergeant Corriveau (52). He acknowledged that in that interview, he said to Sgt. Corriveau, "Well, I'm not sure how familiar you are with any of my other cases, to which Corriveau responded, "A little bit," after which he told Corriveau, "They all took time because I tended to take precautions to avoid other people being there to avoid or to know or as much as I could before, you know, trying to, trying to do it." In other words, he took precautions that no other people would be around when he executed his contract hits (52). When asked if there were not thousands of people around at the City Airport scene, Smothers responded that this was not a contract hit (53).

Smothers was asked about his statement to Scott Lewis about knowing Thelonious Searcy's reputation on the streets (53).[2] He was asked what Searcy's reputation was on the streets (54). He responded that he knew Searcy as a robber (54).

Smothers reiterated that the reason that he retracted his affidavit in this case was because he was told that if he did not, this would be a hindrance to Davontae Sanford obtaining his freedom (55).

Scott Lewis

Scott Lewis testified that he had been a journalist for 34 years, and for the last 16 years of the time, he had been an investigative reporter (Evidentiary Hearing Transcript, 03/19/18, 55). In 2013, he became a private investigator (55). He did quite a bit of work for prison inmates, both privately and on a pro bono basis for the Michigan Innocence Clinic (56).

He testified that in July of 2016, he received a letter from Defendant, in which Defendant expressed that he had been wrongly convicted of a crime (56). He was then contacted by

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[2] In his interview with Scott Lewis, Smothers was asked this question and gave this response:

> Q Did you know Thelonious Searcy before you were incarcerated or otherwise?
>
> A I knew of his reputation. You know, like I say, you hear people's names, you know, when you running the streets. And so just like I say, he got a complicated name. So, now he's an actual name. So I had never met him, not that I, you know, probably never been anywhere at the same time as him that I know of that I can –

(Evidentiary Hearing Transcript, 03/19/18, 36).

Defendant's grandmother, Edna Richardson, in October of 2016 (56). Defendant's grandmother asked him to go into the prison and do a video deposition of one Vincent Smothers (56). The grandmother told him that this Smothers had confessed to committing the crime that her grandson had been convicted of, and she wanted him to inteview Smothers, get the details of his account, draft an affidavit, and send it to Smothers in prison for Smothers to sign and get notarized (57). He told the grandmother that he could not do a video deposition, but he could interview Smothers by phone and record the conversation (67).

He called the prison where Smothers was housed, and arranged with the warden to talk to Smothers by telephone (68). His telephone conversation with Smothers took place on November 18, 2016 at 10:40 a.m., and he recorded the conversation (68). He testified that the conversation that was played in court was the conversation he had with Smothers and recorded (68). On the same day as his interview with Smothers, he drafted an affidavit and mailed it to Smothers along with a Google map (69). He identified Defense Exhibit C as the affidavit that he drafted (69). The map that he sent to Smothers was blank; that is, it had no markings on it (70). Smothers sent those materials back to him and he gave the original to Defendant's grandmother (70).

March 26, 2018

Christopher Corriveau

Christopher Corriveau testified that he was a detective sergeant with the Michigan State Police, Special Investigation Section (Evidentiary Hearing Transcript, 03/26/18, 4-5). He testified that he had been a Michigan State Police trooper for 20 years and a detective sergeant for six (5).

During the course of his occupation as a detective sergeant, he was assigned to assist the Wayne County Prosecutor's Office in a case of alleged perjury committed by William Rice, a former

Detroit Police Homicide detective, the allegation being that Rice had committed perjury in the case involving Davontae Sanford (5). In the course of investigating the Sanford case, as it pertained to Rice, he had occasion to come into contact with Vincent Smothers (5). He interviewed Smothers on August 13, 2013 (5). His purpose in interviewing Smothers was to ascertain whether he had had any involvement in the quadruple homicide that had occurred on September 27, 2007 at 19741 Runyon in Detroit (6). Smothers, at that time, provided a full accounting of his involvement and that of his accomplice, Ernest Davis, in these homicides (6).

Subsequent to that, he was part of the team of Michigan State Police detectives that was asked by the Wayne County Prosecutor's Office to investigate the case of Davontae Sanford (6). During his and his team's involvement in that investigation, it came to his attention that Smothers had signed an affidavit in which he took credit for a murder that had occurred at City Airport in September of 2004, that being the murder of Jamal Segers (6). They received this affidavit from the Michigan Innocence Project (6). They made contact with Smothers along with his attorney (6-7). He had interviewed Smothers on several occasions, and had also reviewed Smothers' written statements, relative to all of the homicides that, by then, Smothers had been convicted of (7). He found Smothers to be a fairly well-spoken individual, which was why he found his affidavit about the City Airport murder to be peculiar (7). The affidavit had a lot of grammatical errors and misspellings with a lot of slang terms (7). He asked Smothers about the affidavit and Smothers said that he had not written the affidavit, but he had signed it (7). He asked Smothers if the affidavit was true, letting Smothers know that they did not believe it to be true, and Smothers admitted that the affidavit was not true, that he had signed it at the behest of Thelonious Searcy (7-8). When he asked Smothers why had had signed the affidavit, Smothers did not give a specific reason (8). He

(Sgt. Corriveau) got the impression that he (Smothers) or his family had been threatened, or that Searcy was a gang member in prison, and it would be to his benefit to do something for Searcy (8). Present when Smothers admitted the untruth of the affidavit were Smothers, his attorney, and Detectives Neal Donahue and Pat Roddy (8).

He never told Smothers that if he did not recant his affidavit regarding the City Airport murder, this would hinder the Davontae Sanford investigation (9). Nor did anybody in his presence tell Smothers this (9). Nor did he or anybody in his presence say anything whatsoever to give Smothers the impression that if he did not recant his affidavit about the City Airport murder, this would hinder the Davontae Sanford investigation (9).

Sgt. Corriveau reiterated that the affidavit about the City Airport murder was not consistent with how Smothers spoke (9). Smothers was fairly articulate, and the affidavit was not (9-10). Furthermore, he, as he said, had interviewed Smothers on a number of occasions, and from those interviews, he learned that Smothers was very particular on how he planned homicides, how he would take a long time in doing so, and how he would stalk his victims (10). None of his murders were spur-of-the-moment killings, as the murder at City Airport appeared to be (10).

On cross-examination, Sgt. Corriveau was asked if it were not true that in his affidavit about the City Ariport murder, Smothers said that he had been tracking Segers' movements for months and that they finally caught him at City Airport (11). Corriveau acknowledged that was what the affidavit said (11).[3] Sgt. Corriveau was asked if he ever went through the affidavit with Smothers

[3] It will be recalled that Smothers testified that there was a party at City Airport that night, and he was not intending to go to the party, but he went anyway, and Segers just "happened by" while he (Smothers) was out there. He went because that was where you could bump into all the drug dealers in one night. He had no idea, however, that Segers was going to be there. Again, Segers just happened to be there.

to verify any of the details; he responded that he did not (13). Neither he nor his team investigated anything in relation to the City Airport murder (13). They just took Smothers' word that the affidavit was untrue (13-14). He did not take any steps to verify what Smothers was saying, that the affidavit was untrue, because what Smothers had told them in the past had always been consistent (14).

Corriveau testified that it was his recollection that Smothers had said that Searcy told him that he had friends on the outside and that they had seen his (Smothers') wife and children playing (20). Her reiterated that it was his impression that Smothers felt threatened (20-21). When asked if he took any steps to investigate any alleged threats, Corriveau responded that he asked Smothers if he wanted to be moved, and Smothers said to wait a while because Searcy knew that he (Smothers) was meeting with them (Corriveau and the other detectives) (21). He (Corriveau) waited several weeks and then had Smothers moved (21).

At the meeting where Smothers recanted his affidavit, Smothers indicated that he would do another affidavit recanting his admission to the City Airport murder, but they never got one (22-23).

Antoinette Segers

Antoinette Segers testified that she was Jamal Segers' girlfriend when he was convicted of a drug offense in Minnesota in 1993 (Evidentiary Hearing Transcript, 03/26/18, 24-25). She married him on April 13, 1994 (25). When Segers was released from federal prison, he lived in a halfway house for three months and then lived with her (25). After he was released, Segers became a mortgage banker (26). To her knowledge, he was not selling drugs (26).

On cross-examination, the witness testified that she married Segers when he was in prison in Milan (23). She reiterated that at the time of his murder, Segers was not a drug dealer (29).

Discussion relative to People's Exhibits

At this juncture, the People moved to admit People's Exhibits 2, 3, and 4 (Evidentiary Hearing Transcript, 03/26/18, 31). The People explained that People's Exhibit No. 2 was a transcript of a *Walker* hearing relative to a confession that Vincent Smothers had made to Detroit Police Homicide Detective Ira Todd, regarding the murder of Rose Cobb, in which Smothers, at the *Walker* hearing acknowledged giving Todd a nine-page statement, in which he also apologized to the victims of all of his other murders (31-32). The People noted that the purpose of moving to admit the *Walker* hearing transcript was to authenticate Smothers' nine-page statement to Ira Todd (the People's argument being that Smothers' acknowledgment of the statement authenticated it). People's Exhibit No. 3 was the nine-page statement itself (33) and Exhibit 4 was a CD recording of a telephone call purportedly made by Smothers (on which the caller identifies himself as "Vito."). This Court indicated that it would take the admission of People's Exhibits 2, 3, and 4 under advisement and would issue a written Order (36). Exhibit 4 was ruled admissible on May 15 (Evidentiary Hearing Transcript, 05/15/18, 59). By oversight on the People's part, there was no ruling as to Exhibits 2 and 3 (the People will argue in the Argument portion of this Brief why they are admissible).

Marzell Black

Marzell Black testified that he knew Vincent Smothers (Evidentiary Hearing Transcript, 03/26/18, 38). Smothers had been his co-defendant in the case of the murder of Rose Cobb (38). He had known Smothers from the eastside since he was 12 years old (38). He knew that Smothers went by the nickname Vito (38).

He was asked if he ever talked to Smothers about the murder that had occurred at City Airport (38). He responded that he did not talk to Smothers about it (39). What it was was that when he and Smothers were going through their ordeal relative to the murder of Rose Cobb, Smothers mentioned to him that there were a couple of guys in prison who were innocent, and one of them pertained to the City Airport murder, and the other one was Davontae Sanford (39). He was not sure where he and Smothers were when they had this conversation, but it may have been in the County Jail (40). He thought that the conversation occurred sometime in 2008 or 2009 (40). It was in 2008 or 2009 that Smothers was unburdening himself by confessing to a bunch of homicides, so he (Smothers) just felt comfortable telling him (42).

When he ended up crossing paths with Defendant in prison, he told Defendant that his "rappey" (Smothers) was "supposed to did that situation." (41). He identified Defense Exhibits M and N as affidavits that he signed on March 14, 2017 and March 17, 2017 (43).

On cross-examination, Black testified that he believed that the conversation that he had with Smothers about the City Airport murder was after the preliminary examination that he and Smothers were present for relative to the Rose Cobb murder (46). He acknowledged that at that preliminary examination, his confession was admitted into evidence (46). When asked if in that confession, he implicated Smothers in the Rose Cobb murder, Black responded that Smothers himself confessed, so he did not have to implicate Smothers (47). Black acknowledged that he made a statement on April 20, 2008, and that in that statement, he said that he put Smothers and David Cobb together for the purpose of murdering Rose Cobb (48). In that statement, however, he referred to Smothers as Vito (48). He acknowledged giving a second statement on June 2, 2010, in which he actually referred to Smothers as Vincent Smothers (49). Both statements were admitted at the Rose Cobb

preliminary examination (48). The Rose Cobb preliminary examination with Defendants Vincent Smothers and Marzell Black was admitted, over objection, as People's Exhibit No. 5 (52).

Patricia Little

Patricia Little testified that she was an investigator in the Wayne County Prosecutor's Office, and had been so employed for two years (Evidentiary Hearing Transcript, 03/26/18, 53). Prior to that, she had been a detective in the Detroit Police Homicide Division (53). As a detective in the Homicide Division, she had become familiar with Detroit Police evidence tags and how they were marked (53). And she was also familiar with the workings of the Detroit Police Evidence/Property Room (53).

She testified that she had been asked the previous week to collect from the Detroit Police Evidence Room the envelope bearing evidence tag E07191604, which she did on Friday, March 23 (54). The envelope had a white evidence tag on it describing the contents of the envelope as being a 9 millimeter shell casing (54). She explained that when she went to pick up the evidence envelope, the property officer made up the white tag for their new system (54-55). The evidence envelope had a red tag underneath the white tag, which was the original evidence tag (55). The red tag indicated that the piece of evidence contained in the envelope had come from the Wayne County Medical Examiner's Office, collected by Officer Glenn (55-56). The red evidence tag also indicated that the evidence was taken from Jamal Segers (56). And the red evidence tag indicated that what the evidence was was a bullet taken from the chest (56).

Investigator Little opined that the reason that the red tag indicated that the evidence was a bullet obtained from the Wayne County Medical Examiner's Office and that the white tag indicated that it was a nine millimeter shell casing was likely due to a key-in error that was made when the

evidence was logged into the Evidence Room under the old system (57-58). That was why when she obtained it to bring to court, which required a white tag to be out on it, the white tag said 9 mm shell casing, since that was how it had been logged in originally.

On cross-examination, Investigator Little testified that she did not know what was actually in the evidence envelope, since the envelope was sealed (58). Investigator Little was asked if police officers carried 9 mm handguns in 2004 (61). She responded that she did not know, but she had carried a 40 caliber handgun (61).

At the close of Investigator Little's testimony, this Court took possession of the evidence envelope with evidence tag E07191604 and turned it over to the Sheriff's Department for safekeeping for purpose of having the sealed evidence envelope opened and its contents analyzed by the Michigan State Police (66). Counsel for Defendant asked that his own expert be allowed to be present, to simply observe, when the State Police opened and analyzed the contents of the envelope.

May 9, 2018

David Balash

David Balash testified that he was an independent firearms examiner (Evidentiary Hearing Transcript, 05/09/18, 5). Prior to that, he had been a firearms examiner with the Michigan State Police (5-6).

Mr. Balash testified that he was present when evidence tag 07191604 was opened at the Michigan State Police Crime Lab on April 4, 2018 (6-7). A representative from the Prosecutor's Office was present as well (7). The evidence was in a sealed envelope (9). The evidence was

opened by Michigan State Police forensic personnel, was examined, and then repackaged in the same evidence envelope (9). He took photographs of the contents of the envelope (9).

The evidence inside of the envelope was a full metal-jacketed fired .40 caliber S and W bullet (10).

On cross-examination, Mr. Balash identified People's Exhibit No. 7 as a photograph of the evidence envelope that was opened (18). He identified People's Exhibit No. 8 as a photo of the opened evidence envelope with a smaller envelope next to it (19). He identified People's Exhibit No.9 as a close-up photograph of the smaller envelope, on which was written the name of the deceased, Jamal Segers, with Dr. Schmidt's name also on there, with the date of the autopsy, 9/6/04, and "chest" written on there (19). The smaller envelope also indicated that the bullet was handed over to the Wayne County Medical Examiner's Office Investigator (19). He acknowledged that all of this indicated that the bullet contained in the smaller envelope had come from the Medical Examiner's Office and had been obtained at the time of the autopsy (19-20). He acknowledged that the smaller envelope had been contained in the larger evidence envelope (20). Finally, he identified People's Exhibit 10 as a photograph of a damaged full-metal jacketed bullet that looked like the bullet that had been in the smaller envelope, which was in turn contained in the larger evidence envelope (20-21).

Patrick Muscat

Patrick Muscat testified that he had been employed as an assistant prosecutor with the Wayne County Prosecutor's Office for 25 years (Evidentiary Hearing Transcript, 05/09/18, 23). He was currently a deputy chief in the Special Prosecutions Division (23). He was the lead prosecutor in the case against Defendant (23).

Mr. Muscat was asked if, at trial, he was able to establish a motive for Defendant to kill Jamal Segers (23-24). Mr. Muscat responded that his theory of the case had been that Defendant fired at a car thinking that it was DeAnthony Witcher in the car, when in fact it was Jamal Segers in the car (24). Mr. Muscat was asked if he knew that Jamal Segers had been a federally convicted drug dealer (24). Mr. Muscat responded that he was probably aware of that at the time of trial (25). When asked if that was disclosed at the time of trial, Muscat responded that it was not, but he believed that there had been hearings delving into what defense counsel could argue and go into on cross-examination of witnesses (25).[4]

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[4] In fact, during voir dire at Defendant's jury trial, his then counsel, Robert Mitchell, said to the jury, "Now tell me this. This is going to be regretfully, like most homicides in Detroit, there may be a little drug background. You understand me?" (Jury Trial Transcript, Vol I, 72-73). Then, outside the presence of the jury, there was this colloquy:

> MR. MUSCAT: Judge, I know that we can deal with this now, or we can deal with it later, but it's not – I don't know of any evidence of narcotics being in this case. Maybe I'm mistaken or missed a fact, but the victim that was killed in this case was a case of mistaken identity. He had been in prison before.
>
> There were no narcotics recovered from his car that I'm aware of. So, I'm a little concerned about what Mr. Mitchell thinks he can bring up in terms of evidence because it's got to be hearsay if it's not based on physical evidence.
>
> The victim's convictions would only be relevant in some type of self-defense possible scenario. So at some point, I think he has to put a theory on the record that we have to discuss.
>
> I trust Mr. Mitchell when he says he won't mention it in his opening.
>
> MR. MITCHELL: If I say I won't, I won't. You know that.

(Footnote continues on next page)

Mr. Muscat was again asked about his theory of mistaken victim identity. He testified that as DeAnthony Witcher had testified at his investigative subpoena proceeding at some point prior to the trial, he (Witcher) and Defendant had had an ongoing dispute, and he (Witcher) was in the same area as Segers driving a Corvette that was a twin of the one that Segers was driving (28-29). Mr. Muscat was asked, if he were shown a record of Witcher's arrest that had him driving a blue Corvette, whether that would nullify his theory of mistaken identity (29-30). Muscat responded that it would not, because Witcher had testified at trial that his car had been painted (30).

Mr. Muscat was asked about DeAnthony Witcher's arrest and whether he had been aware that Witcher had been arrested roughly two months after the murder in this case, on November 18, 2004 (30). Mr. Muscat responded that he did not recall being aware of Witcher's arrest at the time of Defendant's trial (30). Mr. Muscat was shown a Detroit Police Crisnet report pertaining to Witcher's November 18, 2004 arrest (31). He testified that the Crisnet report was turned over to Defendant's trial counsel prior to trial, as evidenced by the fact that Defendant's trial counsel asked

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> THE COURT: I think what we will do, Mr. Muscat, I will leave it to both sides. If either side feels that it is appropriate to introduce the subject matter of narcotics, either use or trafficking as it applies to either the deceased, the defendant, or any witness in this particular case, I'll require that the attorneys bring it to my attention, and we will argue it outside the presence of the jurors before I rule on it.
>
> (Jury Trial Transcript, Vol I, 117-118).

Witcher at trial about a blue Corvette (31-35).[5] [6] Mr. Muscat was asked if Witcher was given any kind of deal to cooperate or testify for the prosecution in Defendant's trial (36). Mr. Muscat responded that he was not (36). Muscat testified that Witcher was given use immunity for his testimony and that fact was placed on the record (36).[7]

Mr. Muscat was then shown Defense Exhibit R, which he described as a one-page document that appeared to be a computer printout which referenced the Crisnet report pertaining to Witcher's November 18, 2004 arrest for CCW (37). Muscat acknowledged that Defense Exhibit R indicated that the case of Witcher's November 18, 2004 CCW - pistol in motor vehicle arrest was closed on November 30, 2004 (38). Mr. Muscat was asked if he was aware whether the police offered Witcher any sort of leniency to get him to cooperate by dropping the CCW charge (40). Muscat

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[5] The Crisnet report indicated that Witcher was arrested driving a blue Corvette.

[6] At trial, Defendant's trial counsel asked Witcher these questions and received these responses:

> Q (by Mr. Mitchell continuing) Can you answer this yes or no? Listen to my question. Do you own a silver or gray Corvette as of –
>
> A I do not own it, but it's a family car, yes.
>
> Q Do you own or possess a blue Corvette?
>
> A It's the same car. It's been painted.
>
> Q Royal blue?
>
> A The same car. It's been painted.
>
> (Jury Trial Transcript, Vol III, 99).

[7] See (Jury Trial Transcript, Vol II, 103-105).

responded that the record did not reflect that, inasmuch as the CCW - pistol in motor vehicle charge was presented to the Prosecutor's Office and the warrant request was denied for lack of sufficient evidence (40). Mr. Muscat was then shown Defense Exhibit S, which was the warrant denial (40). The document indicated that the CCW warrant request for Witcher was denied because the vehicle in which Witcher was arrested and in which the gun was found was not his vehicle (42).[8]

Mr. Muscat was asked if he was aware that there was a second fatality on the night of Jamal Segers' murder, in the area of where Segers' body was found (46). He responded that he was not (47). He was then shown Defense Exhibit T, which he described as an internal memorandum between a Detroit Corporation Counsel attorney and the Detroit Police (47-48). He indicated that the memo was written by Assistant Corporation Counsel Kathy Christian to Detroit Police Sergeant William Anderson (48). Mr. Muscat was then asked to read the whole of the document into the record, part of which was as follows:

> It is my understanding that the squad car was responding to a call at Whithorn and Conner on September 5th, 2004. As they arrived, an unnamed man, who was in a car, was being shot at by someone outside the car, an unnamed man was ducking so he wouldn't be shot. As he drove off, and because he was ducking, this unknown man hit the police car that was responding to the call with his vehicle. It is my understanding that the unnamed man's wife, who was in the car with him, was fatally shot.
>
> (49-50).

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[8] Defense counsel's question insinuated that the reason that the warrant against Witcher was denied was because the vehicle in which the gun was found was not his was inconsistent with his (Muscat's) theory at trial, "but you presented that theory that it was his car at trial . . ." (42).

Again, Witcher testified at trial, "I do not own it, but it's a family car, yes."

On cross-examination, Mr. Muscat was given People's Exhibit No. 12 to look at, and he identified it as being comprised of two pages, the Investigator's Report pertaining to DeAnthony Witcher's November 18, 2004 arrest and the form signed by Assistant Prosecutor Kathleen McClory denying the warrant on November 19, 2004 (the day after Witcher's arrest) (55-56).

Mr. Muscat testified further that Witcher had testified at an Investigative Subpoena proceeding prior to Defendant's trial, a transcript of which Defendant's trial counsel had received (57). This testimony occurred on September 9, 2004 (obviously before Witcher's arrest on November 18, 2004) (57). Muscat testified that he believed that the testimony that Witcher gave at the investigative subpoena proceeding was consistent with his testimony at trial (57). The investigative subpoena hearing transcript was received into evidence as People's Exhibit No. 13 (60).

Finally, Mr. Muscat identified People's Exhibit No. 14 as a letter sent to Defendant's then appellate counsel by the Prosecutor's Office's Conviction Integrity Unit, in which it indicated that the firearms evidence in this case was re-examined by the Michigan State Police, which issued its findings in a report (61). As pertained to DPD evidence tag E07191604, the State Police found it to be a fired metal jacket fragment (61).

May 15, 2018

Patricia Little (recalled)

Patricia Little was recalled to the stand. She reiterated that she went to the Detroit Police Evidence room to retrieve People's Exhibit No. 6[9] (Evidentiary Hearing Transcript, 05/15/18, 5). She was present at the Michigan State Police Crime Lab when this evidence item was opened, and she took photos (5). She identified People's Exhibit No. 8 as a photo depicting the evidence

[9] Evidence tag envelope E07191604.

envelope that was opened with a tan envelope beside it, which was inside of the larger envelope (6-7). People's Exhibit No. 9 was a photo of the tan envelope that was contained in the larger envelope (7). Written on the tan envelope was the number 04-08114, "deceased, Jamal Segers, black, age 30, sex male" (7). And the tan envelope had the names of two doctors on it: Dr. Schmidt and Dr. Gupta, and the date of the autopsy: 9/6/04 (7). Finally, the tan envelope said, "chest," and that the bullet was handed to the Wayne County Medical Office's investigator (7). People's Exhibit 10, also a photo, was of a bullet that had come out of the tan envelope (7). Exhibit 11 was a close-up photo of the bullet (8).

Investigator Little reiterated that when she went to retrieve People's Exhibit 6, the white tag that was now on the evidence envelope was not on it (8). The person in charge of the Evidence Room put that white tag on it (8). Initially, the evidence envelope had a red tag on it (8-9).

She was then, subsequent to the opening of People's Exhibit No. 6, asked to retrieve from the Detroit Police Evidence room the evidence envelopes with the following evidence tags: E07191504, E07191704, and E07191804 (9-10). She identified these as People's Exhibits 12, 13, and 14 respectively (10).[10] Each of these had a red evidence tag (10). The red tags for E07191504 and E07191704 described the contents as a bullet taken from the chest, and E07191804 described the contents as a bullet from the neck (10).

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[10] These three envelopes were mistakenly marked as People's Exhibits 12, 13, and 14, due to this writer's failure to keep track of his exhibits. People's Exhibits 12, 13, and 14 already exist. Thus, the People have marked the three evidence envelopes as People's Exhibits 12-a, 13-a, and 14-a, to keep the sequence of the later exhibits (15 through 19), intact.

William Anderson

William Anderson testified that he had been a Detroit police officer for 31 years (Evidentiary Hearing Transcript, 05/15/18, 21). He testified that he was currently assigned to the 9th Precinct (21). He had formerly been assigned to the Detroit Police Homicide Unit from 2001 to 2008 (21).

Sgt. Anderson testified that he was involved in the investigation of the homicide that occurred at City Airport on September 5/6, 2004 (21-22). He was one of the investigators who responded to the scene (22). He identified People's Exhibit No. 15 as a copy of the Investigator's Report in this case, which had been assigned the Detroit Police Homicide number 04-289 (22). The Investigator's Report listed Thelonious Searcy as the defendant (2). Searcy was not in custody at the time that the Investigator's Report was prepared (23).

He was shown People's Exhibit No. 16 and identified it as an Interoffice Memorandum written by Kathy Christian, Detroit Law Department Assistant Corporation Counsel, and addressed to him (23). He testified that he did not recall ever receiving this memo (23). He testified that the memo referenced Detroit Police Homicide No. 04-289 and pertained to a FOIA request (23). He was asked to read the following pertinent language from the memo:

> It is my understanding that the squad car was responding to a call at Whithorn and Conner on September 5th, 2004. As they arrived, an unnamed man, who was in a car, was bing shot at by someone outside the car, an unnamed man was ducking so he wouldn't be shot. As he drove off, and because he was ducking, this unknown man hit the police car that was responding to the call with his vehicle. It is my understanding that the unnamed man's wife, who was in the car with him, was fatally shot.

He testified that the above did not sound like the facts of this case, to the extent that the memo talked about an unnamed person, a person in a car, and his wife, and the wife being fatally shot (24-25). He and his crew were at the scene for quite some time and were not aware of there being any other fatality than the one that they were investigating, and certainly no fatality of a woman (25).

Finally, Sgt. Anderson testified that in the Detroit Police Homicide Unit, a book was kept of every homicide occurring within a given year (25-26). Each homicide would be assigned a Detroit Police Homicide number (26).

On cross-examination, Sgt. Anderson acknowledged that a police report prepared by one of the police officers who were at the scene indicated that the unmarked police vehicle in which the officers were riding was involved in a collision with another vehicle (29), and that that other vehicle fled (35). Sgt. Anderson also acknowledged that the memo did not indicate that the person who apparently actually received the memo, that being Lieutenant Ventavogel, ever responded to Ms. Christian's memo as far as correcting her about the facts of the case, that there was no female fatality (31-33). Sgt. Anderson reiterated that he knew of no second fatality, and he had spent several hours at the scene, interviewing witnesses (33-34).

Sgt. Anderson was asked if he was aware that there were witnesses who said that the police shot at the fleeing vehicle, the Marauder (36). Sgt. Anderson was shown the written statement of Latasha Boatright, wherein she said that the police shot at the driver, that being apparently the driver of the Marauder (36-40). Sgt. Anderson responded that there was no physical evidence that the officers discharged their weapons, and had there been, there would have been another team brought in to investigate shots fired by officers (42). He was asked if there was any reason why a lawyer

with the City of Detroit Legal Department would make up facts about a second fatality (43). Sgt. Anderson responded that Ms. Christian had not been a witness, so that she must have gotten her information second- or third-hand (43).

On redirect examination, Sgt. Anderson was asked to read the trial testimony of Latasha Boatright, wherein she testified that she had assumed that the police were firing (52-54).

Prior to the close of proceedings on May 15, 2018, this Court stated, in pertinent part:

> THE COURT: All right. Let me just summarize the side-bar discussion that we've had.
>
> I've indicated that with regards to the homicide book, for want of a better term, for 2004, I'm going to leave it to both sides to make contact with the Detroit Police Department Homicide Section. One can only imagine that there is a book, whether it's an actual journal type book as it was in the old days or whether that's electronic, I don't know. But we'll leave it to the parties to find that particular book and the date of this homicide.
>
> My expectation is that through efforts, I think both sides ought to be able to enter a stipulation as to what, if anything, that book or journal would indicate for the date of Mr. Segers' death, also it reflecting any other deaths or homicides that occurred on that date.
>
> (56-57).

Stipulation

On May 24, 2018, the parties entered into a Stipulation wherein it was stipulated and agreed by and between the parties hereto that the People's Exhibits 18 (comprised of pages 18-a through 18-c) and 19 (comprised of pages 19-a through 19-h) be admitted into evidence relative to the evidentiary hearing on Defendant's Motion for Relief from Judgment (this document was electronically filed with this Court on May 24, 2018).

Argument

This Court ordered an evidentiary hearing based on the in pro per "Motion for New Trial Pursuant to MCL 770.1/MCR 6.502(G)(2)," filed by Defendant, to which Defendant had attached two things: (1) a copy of a letter that Vincent Smothers had sent to Defendant, dated August 22, 2015, and (2) an affidavit signed by Smothers, dated December 27, 2015.[11] In Smothers' letter to Defendant and in his December 27, 2015 affidavit, Smothers takes credit for the murder of Jamal Segers and the assault of Brian Minner that occurred in the late night/early morning of September 5/6, 2004. Obviously, then, the focus of the evidentiary hearing ordered by this Court was whether Smothers' admission to the murder and assault of Brian Minner warranted a new trial.[12]

During the course of these proceedings, Defendant found new evidence that he argued supported a claim that DeAnthony Witcher, who, it was the prosecution's theory at trial, was the intended victim, was given consideration for his trial testimony that was not disclosed to the defense prior to or at trial, that being that Witcher was arrested for CCW - pistol in a motor vehicle, on November 18, 2004, and that the charge was dismissed in exchange for his trial testimony.

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[11] MCL 770.1 would not apply, in any event, inasmuch as the Court of Appeals has made clear that MCR 6.500 et. seq. is the exclusive means to challenge a conviction in Michigan once a defendant has exhausted the normal appellate process. *People v McSwain,* 259 Mich App 654, 678; 676 NW2d 236 (2003), quoting *People v Watroba,* 193 Mich App 124, 126; 483 N.W.2d 441 (1992).

[12] The People do not dispute that, as this Court found, that Defendant met the threshold of MCR 6.502(G)(2), inasmuch as the letter he received from Smothers and Smothers' affidavit of December 27, 2015 appear to have come into existence after the In Pro Per Motion for Relief from Judgment which Defendant filed with this Court on January 14, 2015, and which was denied by this Court by Opinion and Order of July 2, 2015.

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. *People v Cress,* 466 Mich 678, 692; 664 NW2d 174 (2003). Furthermore, newly discovered evidence must be admissible to warrant a new trial. See *People v Grissom,* 492 Mich 296, 324; 821 NW2d 50 (2012) (Marilyn Kelly, J., concurring) ("[T]o potentially effect a different result on retrial and thereby satisfy the fourth *Cress* factor, the newly discovered evidence must be admissible."); *People v Darden,* 230 Mich App 597, 606; 585 NW2d 27 (1998); *People v Smith,* unpublished opinion per curiam of the Court of Appeals, decided October 10, 2006 (Docket No. 262379), p 6; *People v Gourlay,* unpublished opinion per curiam of the Court of Appeals, decided March 3, 2009 (Docket No. 278214), p 8 (copies of these two unpublished opinions are attached as **Appendices A-1** and **A-2**); and see *United States v Stromberg,* 179 F Supp 278, 279-280 (SD NY,1959) (defendant's motion for a new trial based on newly discovered evidence must be denied because newly discovered evidence was not admissible, and thus, could not possibly produce a different result at a new trial), and *United States v Salameh,* 54 F Supp 2d 236, 297 (SD NY, 1999) ("Inadmissible at trial, it cannot possibly be said that this alleged new evidence 'would probably lead to an acquittal.' "); *Commonwealth v Wright,* 469 Mass 447, 462; 14 NE3d 294, 310 (2014) ("To evaluate the newly discovered evidence, we determine whether this additional evidence would be admissible and whether, in view of the evidence actually admitted at trial, it would cast real doubt on the justice of the conviction in the minds of a reasonable jury.").

I. Vincent Smothers

In considering newly discovered evidence, a trial court should not only consider the materiality and relevance of the evidence, but any inconsistencies in the evidence. *Jones v State,* 709 So 2d 512, 521-522 (Fla, 1998).

A. Inconsistencies as to Smothers' various statements as to how he learned about Defendant

Vincent Smothers' testimony at the evidentiary hearing has been set forth in the foregoing People's Rendition of the Facts. In his testimony, Smothers takes credit for the shooting of Jamal Segers, describing the shooting, essentially, as a street robbery gone bad. Indeed, as Smothers tells it, he was going to rob Segers, who he (Smothers) knew to be a drug dealer (and so, would presumably have a lot of money, and who was, in fact, waving money around in his hand), and so, when Segers "happened by," Smothers approached the Corvette that Segers was in. As Smothers tells it, he saw Segers looking in his rearview mirror, and before Segers could do anything, he opened fire on Segers and grabbed the money our of his hand.

The first question is: how did the ball get rolling that led to Smothers admitting to the murder of Segers and in the process exonerating Defendant? Smothers wrote Searcy a letter on August 2, 2015, in which Smothers told Searcy, "I have discovered your case while searching through cases in the law library about prosecutorial misconduct. Upon reading your case I found out you were locked up for a crime I committed." A reading of the Court of Appeals' Opinion in Defendant's case (a copy of which is attached as **Appendix B**), reveals that there was no issue of prosecutorial misconduct in Defendant's appeal, and so the People fail to see how Smothers could happened upon the Opinion by researching prosecutorial misconduct (the words "prosecutorial misconduct" appear

nowhere in the Opinion). In any event, this account of how Smothers happened upon Defendant's case is not consistent with what Smothers told Scott Lewis:

> And so for the longest probably, you know, since I have been locked up, I had been hearing about this particular incident. This was not the only thing I heard about, but anyway I was hearing about this particular incident.
>
> And so I had actually started this whole process that we going through now before I ended up coming here.
>
> That when I came here, the actual guy that was locked up for it was here. Jeff ended up actually getting killed like a couple of weeks after it happened. So, you know, his part in it is –
>
> Q So the guy that's locked up, his name is Thelonious Searcy?
>
> A That sounds about right.
>
> Q So how did you find out that he was charged with the crime?
>
> A I been at several prisons where people who knew him, who really knew him, and actually I didn't know that was his name, you know, because I know street names.
>
> Q So did somebody tell you that this person was incarcerated for the murder?
>
> A What happened was I was talking to – I'm not sure if you're familiar with the way all that stuff go, but you kind of make friends with people or be cool with people, and you get to talking, you, y'all get to sharing situations.
>
> And so, in the process of doing that, I was telling somebody about this situation, and they didn't know him. They knew somebody who knew him. So it was a direct link. But they told somebody else that they know like hey, you know everybody calls me Vito. Vito was talking about this, you know, like I know who locked up for it.

And so, that's how I ended up connecting with that guy, ended up telling him everything that happened and all that stuff.

Q How did you connect with him?

A We were in the same prison.

Q So you actually spoke with him?

A Who are you speaking of?

Q The person that's incarcerated for the murder of Jamal Segers, Thelonious Searcy?

A No. No. This was, like I say. This was a while ago. I ended up actually seeing – he actually ended up being here when I got here though.

Q Okay. Searcy was there?

A Right. Correct.

Q So, how did you find out his name, and how did you contact him to let him know that you had committed the crime? That's where I'm a little confused.

A Like I say, technically, I still don't know his name. I knew his name Searcy, but the whole, he have a complicated name. I know his, like I say, I know his street name.

(From the interview with Scott Lewis) (Evidentiary Hearing Transcript, 03/19/18, 33).

In the affidavit drafted by Scott Lewis, Smothers says, "When I got in prison after the murder, I heard through other inmates that a person I knew as "Skinny Man" was locked up for the murder of Jamal Segers (the affidavit drafted by Scott Lewis and signed by Smothers is attached as **Appendix D**).

B. Smothers' affidavits

Following Smothers' "discovery" of Defendant serving time for the murder that he (Smothers) had committed, Smothers signed an affidavit on December 10, 2015, which had been drafted by a person whose name he did not recall, a fact which, in and of itself, the People submit, makes this affidavit highly suspect. The affidavit drafted by the other person contains a number of misspellings, grammatical errors, and street slang, which a reading of Smothers' testimony along with other letters he apparently wrote to Wayne County Prosecutor Kym Worthy and Governor Snyder (although these letters are undated), and the interview that he had with Scott Lewis, demonstrate that this is simply not how Smothers talks or writes (Smothers appears to be a fairly articulate person). And while the poor writing style of the December 10, 2014 affidavit could be attributed to the ignorance of the drafter of the affidavit, the fact is that Smothers signed an affidavit on December 27, 2015, which he testified that he drafted himself, and this affidavit is identical to the poorly drafted one of December 10, 2015, with all the same misspellings, poor grammar, and street slang (the December 10, 2015 and the December 26, 2015 affidavit are attached as **Appendices C-1** and **C-2**). Finally, Smothers signed an affidavit dated December 21, 2016, which was drafted by Scott Lewis (again, this affidavit is attacehd as **Appendix D**).

i. Inconsistencies between the first two affidavits and the third affidavit

There are a number of inconsistencies between the first two affidavits (the December 10, 2015 and the December 27, 2015 affidavit), which, again are identical, and the affidavit drafted by Scott Lewis and signed by Smothers. In the first two affidavits, Smothers says that he and Daniels got to the scene of the black party at City Airport in Daniels' black Lumina and that *Daniels* parked *his* (Daniels') black Lumina on Findley, and that after the shooting, he (Smothers) fled back to

Daniels' car. In the affidavit drafted by Lewis, but signed by Smothers, Smothers says that *he* (not Daniels) was driving, and that after the shooting her returned to *his* (Smothers') car (at the evidentiary hearing, Smothers testified that it was Daniels' black Lumina and Daniels was driving).

In the first two affidavits, Smothers says that the police officer who got out of the passenger side of the unmarked police vehicle shot at Daniels. In his affidavit drafted by Lewis, Smothers says that this officer fired at both of them (Daniels and Smothers) (in his first two affidavits, Smothers says that it was as he was getting into Daniels' car that the undercover police vehicle crashed into the burgundy "Maranda" – so, according to this account, the police would not have been shooting at him (Smothers)).

ii. Inconsistencies between Smother's first two affidavits and his evidentiary hearing testimony

There are a number of inconsistencies between Smothers' first two affidavits and his testimony at the evidentiary hearing. In his first two affidavits, Smothers says that he had been tracking the movements of Segers and his brother for six months ("I had been on these boy's trail for 6mths. strait, tracking they every move.") and that "[a]fter tracking these boy's moves for month's, we caught "Q" by his self . . ." These statements suggest that Smothers and Daniels tracked Segers to the black party, and knew that Segers would be there. At the evidentiary hearing, however, Smothers testified that there was a party at City Airport that night, and he was not intending to go to the party, but he went anyway, and Segers just "happened by" while he (Smothers) was out there. He went because that was where you could bump into all the drug dealers in one night. He had no idea, however, that Segers was going to be there.

iii. Inconsistencies between Smothers' affidavits and testimony at the evidentiary hearing, on the one hand, and the testimony and evidence at trial

There were inconsistencies between the affidavits and Smothers' testimony at the evidentiary hearing on the one hand and the evidence that was presented at trial.

In all of his affidavits and in his testimony at the evidentiary hearing, Smothers states that after the undercover police vehicle collided with the other vehicle, the driver of the police vehicle never got out of the vehicle. At trial, however, the driver of the police vehicle, that being Detroit Police Officer Micah Hill, testified that after the crash, he saw a person running so he gave chase (this was after he had heard shots fired). Obviously, then, the driver of the police vehicle, that being Officer Hull, did get out of the police vehicle. Detroit Police Officer Shawn Stallard testified at trial that he was in the front passenger seat, and two or three seconds after the crash, he got out and started running eastbound on Whithorn because Officer Hull was running in that direction, which testimony corroborates that the driver of the police vehicle got out of the police vehicle.

At the evidentiary hearing and in his affidavits, Smothers says that the passenger of the undercover police vehicle did get out, which is, of course, consistent with what Officer Stallard said. But Smothers testified that the passenger of the police vehicle fired shots at Daniels but never left the side of the police vehicle. Officer Stallard testified, on the other hand, that he did give chase, running after Officer Hull who was apparently running after somebody.

In his affidavits, Smothers states that after he and eventually Daniels got back to Daniels' car, they left, and he sped down Findley, where the car was parked, to Gunston, and from Gunston to Gratiot, and then to a liquor store. Smothers likewise testified at the evidentiary hearing that they

drove to Gunston and then to Gratiot. Officer Hull testified, on the other hand, that he saw the shooter get into a vehicle that was facing eastbound on *Whithorn*, and then the vehicle sped away.

Finally, in his affidavits and in his testimony at the evidentiary hearing, Smothers testified that the police fired shots, whether the shots were fired at Daniels only, as Smother testified at the evidentiary hearing and stated in his first two affidavits, or at both Daniels and him (as he states in the affidavit drafted by Scott Lewis). There was testimony at trial, however, from all three police officers, who were in the undercover vehicle, that none of them fired their weapons.[13]

iv. Inconsistencies between Smothers' affidavits and testimony and his prior statement to Detroit Police Homicide Detective Ira Todd

What is rather apparent from reading Smothers' various affidavits and his testimony was that this was simply going to be a street robbery, but it went bad.

In his statement to Detroit Police Homicide Investigator Ira Todd (People's Exhibit No. 3), Smothers was asked these questions and gave these responses:

> Q How does it feel to be a hit man?
>
> A Prior to Cobb's wife, it wasn't as tough, all the rest were dope dealers.
>
> Q Why did you take David Cobb's contract?
>
> A Beside the money, my family + wife were involved, I had marzell on my back.
>
> Q And dope house robberies?

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[13] The question whether the police did discharge their weapons became a sub-issue at the evidentiary hearing. The implication is, obviously, that if any one of the police officers did discharge his weapon, this would corroborate Smothers' testimony, but if no police officer discharged his weapon, this would be a fact, another fact, the People submit, that refutes Smothers' testimony. The People will address this sub-issue infra.

A Plenty, about 10 in Detroit, nobody kill (sic) in that.

Q How many street robberies?

A Me none, Charles and Medbury St. Guys were good for that.

(People's Exhibit No. 3, page 9 of 9).[14]

Not only is this statement important for what it says, that Smothers did not do street robberies, it is important for what it does not say. In this statement, it is clear that Smothers wanted to unburden his conscience for his murders, all of which he said were for money, all of which occurred in 2007. The first he said was the State Fair murder. He made no mention of the City Airport murder.

v. Smothers recanted his affidavit

Michigan State Police Detective Sergeant Christopher Corriveau testified that in the course of investigating a case against former Detroit Police Homicide Detective William Rice, and in investigating the Davontae Sanford case, at the behest of the Wayne County Prosecutor's Office, he interviewed Vincent Smothers on a number of occasions. While investigating the Sanford case, his team received an affidavit from the Michigan Innocence Clinic, who were representing Sanford,

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[14] The People introduced this Exhibit, People's Exhibit No. 3, and asked that it be admitted. This Court indicated that it would take the question of its admission into evidence under advisement. Prior to the close of these proceedings, the People neglected to ask the Court for its decision as to admissibility. The People submit that People's Exhibit No. 3 is admissible in that it impeaches Smothers' testimony. In other words, it is admissible impeachment evidence. See *People v Hallaway,* 369 Mich 265, 276; 205 NW2d 451 (1973) ("Prior inconsistent statements are not admissible to prove the truth of the thing said. They are offered, rather, to prove that the inconsistent statement was in fact made irrespective of its truth for the purpose of impeaching contrary testimony from the witness stand.").

purportedly signed by Smothers admitting to a murder at City Airport in 2004. Smothers was questioned about the affidavit and retracted it.

At the evidentiary hearing, Smothers acknowledged that he did retract the affidavit, but only because the Michigan State Police detectives told him that if he did not retract it, this would hold up the Davontae Sanford investigation. Sgt. Corriveau refuted that.

vi. Marzell Black

The defense called Marzell Black to the stand to testify at the evidentiary hearing. Black testified that when he and Smothers were going through their ordeal relative to the murder of Rose Cobb, Smothers mentioned to him that there were a couple of guys in prison who were innocent, and one them pertained to the City Airport murder, and the other one was Davontae Sanford. He was not sure where he and Smothers were when they had this conversation, but it may have been in the County Jail. He thought that the conversation occurred sometime in 2008 or 2009. It was in 2008 or 2009 that Smothers was unburdening himself by confessing to a bunch of homicides, so he (Smothers) just felt comfortable telling him.

When he ended up crossing paths with Defendant in prison, he told Defendant that his "rappey" (Smothers) was "supposed to did that situation." He identified Defense Exhibits M and N as affidavits that he signed on March 14, 2017 and March 17, 2017 (43).

On cross-examination, Black testified that he believed that the conversation that he had with Smothers about the City Airport murder was after the preliminary examination that he and Smothers were present for relative to the Rose Cobb murder (46). He acknowledged that at that preliminary examination, his confession was admitted into evidence (46). When asked if in that confession, he implicated Smothers in the Rose Cobb murder, Black responded that Smothers himself confessed,

so he did not have to implicate Smothers. Black acknowledged that he made a statement on April 20, 2008, and that in that statement, he said that he put Smothers and David Cobb together for the purpose of murdering Rose Cobb. In that statement, however, he referred to Smothers as Vito. He acknowledged giving a second statement on June 2, 2010, in which he actually referred to Smothers as Vincent Smothers. Both statements were admitted at the Rose Cobb preliminary examination. The Rose Cobb preliminary examination with Defendants Vincent Smothers and Marzell Black was admitted, over objection, as People's Exhibit No. 5.

The People's position is that it is doubtful that Smothers would have made any admission to Black about any murder, especially after the preliminary examination, inasmuch as Black implicated Smothers in two confessions that were admitted at the preliminary examination for both Black and Smothers, at which both were present. Of course, Black testified that Smothers himself confessed, so he did not have to implicate Smothers. The fact is, however, that Smothers did try to have his own confession suppressed (see People's Exhibit No. 4 (transcript of Smothers' *Walker* hearing).[15]

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[15] People's Exhibit No. 2, like People's Exhibit No. 3, was an exhibit that the People introduced and asked to be admitted into evidence, and that this Court took the question of its admissibility under advisement. And as is the case with People's Exhibit No. 3, the People neglected to ask this Court for a ruling as to admissibility. The People submit that People's Exhibit No. 2, which is a transcript of a *Walker* hearing, in which Smothers challenged the admissibility of his confession in the Rose Cobb murder case, is admissible for a variety of reasons. First, it is a court record, and this Court can take judicial notice of its own records. Second, as the People argued when they moved for the exhibit's admission, it authenticates that the nine-page statement that Smothers gave to Ira Todd is his own statement (at the *Walker* hearing, Smothers acknowledged giving Todd a nine-page statement, in which he also apologized to the victims of all of his other murders) (see People's Exhibit No.2, 40-41; 4251-52, which are paper-clipped and yellow-highlighted). See *Howard v Kowalski,* 296 Mich App 664, 677; 823 NW2d 302 (2012) (one criterion for admissibility of a prior inconsistent statement is that the witness actually made the prior statement).

Finally, the People are cognizant that affidavits that he signed on March 14, 2017 and March 17, 2017 were admitted into evidence at the evidentiary hearing as Defense Exhibits M and N. In Defense Exhibit N, Black avers:

> The firearm the Detroit Police found at the time of Searcy's arrest belonged to my co-defendant Vincent Smothers. This firearm was used in the homicide that took place on Sunday September 5th, 2005, at the city airport.
>
> Vincent Smother's a.k.a. Vito gave this firearm to his co-defendant in this case, name Jeffrey Daniels.

Black did not testify to the above at the evidentiary hearing. And although the above is contained in his affidavit that was admitted at the evidentiary hearing in this case, Black's affidavit would not be admissible at a trial; only his testimony would be. See e.g. *State v Sheppard,* 100 Ohio App 399, 408; 128 NE2d 504, 510 (1955) ("The sole purpose of an affidavit offered to support a motion for a new trial on the ground of newly discovered evidence is to inform the trial court of the substance of the evidence claimed to be newly discovered which will be presented at a new trial if one is granted. It is never intended as a method to reconsider the evidence introduced at the trial of the case for the purpose of impugning the soundness of the verdict brought by the jury."). Furthermore, Black states as a fact, as if the information came from Smothers, that the firearm found at the time of Searcy's arrest belonged to Smothers. Smothers did not say what happened to the firearm that he allegedly gave to Daniels.

II. The question whether any of the police officers discharged their weapons

As The People noted in footnote 13, the question whether the police did discharge their weapons became a sub-issue at the evidentiary hearing. The implication is, obviously, that if any

one of the police officers did discharge his weapon, this would corroborate Smothers' testimony, but if no police officer discharged his weapon, this is a fact, another fact, the People submit, that refutes Smothers' testimony.

As support for his assertion that at least one police officer discharged his weapon, Defendant points to essentially three things: (1) a 9 mm. shell casing found at the scene and placed on evidence tag E07191604; (2) the statement of Latasha Boatright; and (3) the Interoffice memorandum of Detroit Assistant Corporation Counsel Kathy Christian.

a. Evidence envelope E07191604

When evidence envelope E07191604 was logged into evidence, it was listed as a 9 mm. shell casing, which purportedly would have been recovered from the scene (as any shell casing would be). On the Detroit Police Laboratory Analysis sheet, however, it was described as a .40 caliber bullet.

Patricia Little, an investigator with the Wayne County Prosecutor's Office, obtained the evidence envelope from the Detroit Police Evidence/Property Room. She testified in court at the evidentiary hearing that the original evidence tag attached to this evidence envelope, which was a red tag, described the contents as a .40 caliber fired bullet taken from the chest. When the evidence envelope was released to her, the evidence/property officer placed a white tag over the red tag; the white tag described the contents as a 9 mm. shell casing. To resolve this discrepancy, this Court ordered that the evidence envelope, which was sealed, be opened by the Michigan State Police Crime Lab personnel and its contents examined by the Crime Lab personnel. That procedure was effectuated. What was found inside the evidence envelope was a smaller envelope, on which was written the name of the deceased, Jamal Segers, with Dr. Schmidt's name also on there, with the date

of the autopsy, 9/6/04, and "chest" written on there. This smaller envelope contained a full metal-jacketed fired .40 caliber S and W bullet.

As a matter of fact, as Assistant Prosecutor Patrick Muscat testified at the evidentiary hearing, this was not the first time that the contents of E07191604 were analyzed by the Michigan State Police. At the evidentiary hearing, Mr. Muscat identified People's Exhibit No. 14 as a letter sent to Defendant's then appellate counsel by the Prosecutor's Office's Conviction Integrity Unit, in which it indicated that the firearms evidence in this case was re-examined by the Michigan State Police, which issued its findings in a report (61). As pertained to DPD evidence tag E07191604, the State Police found it to be a fired metal jacket fragment (61).

As proof that E07191604 has always contained a .40 caliber fired bullet, which had not somehow been nefariously switched for a 9 mm. shell casing, the People introduced Detroit Police evidence envelopes with evidence tags E07191504, E07191704, and E07191804,[16] all of which contained, according to their respective evidence tags, spent .40 caliber fired bullets taken from the body of Jamal Segers at the time of the autopsy. The People submit that it stands to reason that because E07191604 was in the middle of the sequence of evidence envelopes that contained fired bullets taken from the body of Jamal Segers, E07191604 also contained, and always did contain, a .40 caliber fired bullet taken from the body of Jamal Segers at the time of the autopsy.

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[16] Again, these three envelopes were mistakenly marked as People's Exhibits 12, 13, and 14, due to this writer's failure to keep track of his exhibits. People's Exhibits 12, 13, and 14 already exist. Thus, the People have marked the three evidence envelopes as People's Exhibits 12-a, 13-a, and 14-a, to keep the sequence of the later exhibits (15 through 19), intact.

b. The statement of Latasha Boatright

At the evidentiary hearing, Defendant introdued the statement of Latasha Boatrighht, which was admitted without objection. Boatright said in her statement:

> A I was standing in the parking lot on the south side of the store. The store is at Whithorn and Conner. My friend who was driving a Marauder (burgundy) turned out (sic) the parking lot of the store. As he turned onto Conner, I heard shooting and he took off. By that time, I saw the shooter standing in the middle of the street. He about (sic) ten feet from the Vet and he began shooting at the Vet. The police was stuck in traffic. I guess they were trying to find out where the shooting was coming from. By that time, the Marauder and the police car hit. The guy was up on the Corvett (sic) still shooting into it. The passenger jumped out and ran. The driver was still in the Vet. *The police started shooting at the driver. I only saw one officer, the passenger, shooting.* The shooter ran to the sidewalk, and people in the parking lot started running away from him. I had backed up into the parking lot. I see him coming. I run through the alley. When I come out the alley on Whithorn, I saw him come around the corner onto Whithorn. He crossed the street toward my house. I had ran next door. I turned to go back to see what had happened at the car. That's when I saw the shooter and four other guys helping him get away. They walked pass (sic) my house. I saw the gun in his right hand by his inner leg. The shooter was in the middle. One guy on his right, two were on his left, and one was in back of him. I heard the shooter, "I told that motherfucker I was going to get him." The other guy say, "Come on, come on." One of the policeman (sic) ran down the street, but his partner told him to come back.

(Italics added).

At Defendant's jury trial, Latasha Boatright testified as follows:

Q (by Mr. Muscat continuing) Did you know the defendant? I will refer to him as the defendant. Did you know him prior to this incident?

A No, I did not.

Q And you saw him shooting into the car pointing at the vehicle, the Corvette?

A Yes, I did.

Q Do you know how many shots he fired?

A No, not really, but he had to let every bullet off in his gun.

Q So there were a lot of shots?

A Yes.

Q Thank you. What did the person do? What did the defendant do after you saw him shoot into the car?

A He walked around and continued to shoot, and it was other gunshots –

Q Did you see who was doing that shooting? Did you see the person that was doing that shooting?

A The other shooting?

Q Yes.

A No. I assume it was the cops.

Q Did you ever see who it was though?

A No.

(Jury Trial Transcript, Vol II, 100-101) (People's Exhibit No. 17).

And on cross-examination, Boatright testified:

Q Now you said something about the police. Do you remember your statement? You mentioned the police?

A I thought the police were shooting?

Q Well, yes.

A Yes.

Q Is that right?

A Yes, I did because I heard two – it was two different gunshots. Boom, boom, boom, boom, boom, boom, boom, boom, boom, boom. And then it was like some more.

(Jury Trial Transcript, Vol II, 143-144) (People's Exhibit No. 17).

As can be seen, Boatright clarified her statement at trial as far as whether the police discharged their weapons. The People would note that Boatright's written statement does corroborate Officer Hull's trial testimony that he chased after the shooter, which Smothers said did not happen. Boatright's written statement, where she states that she heard the shooter say, "I told that motherfucker I was going to get him" also corroborates Witcher's trial testimony that Defendant had vowed to get him, and it disputes Smothers' testimony that indicated that this was a robbery gone bad.

c. The Interoffice Memorandum of Detroit Assistant Corporation Counsel Kathy Christian

The Interoffice Memorandum written by Kathy Christian, Detroit Law Department Assistant Corporation Counsel, which referenced Detroit Police Homicide No. 04-289, and pertained to a FOIA request, contained the following pertinent language:

> It is my understanding that the squad car was responding to a call at Whithorn and Conner on September 5th, 2004. As they arrived, an unnamed man, who was in a car, was bing shot at by someone outside the car, an unnamed man was ducking so he wouldn't be shot. As he drove off, and because he was ducking, this unknown man hit the police car that was responding to the call with his vehicle. It is my understanding that the unnamed man's wife, who was in the car with him, was fatally shot.

The defense theory is/was that the bullet that killed the wife of the driver of the Marauder was one fired by the police.

As noted in the foregoing People's Rendition of Facts, Sgt. Anderson testified that in the Detroit Police Homicide Unit, a book was kept of every homicide occurring within a given year, and each homicide would be assigned a Detroit Police Homicide number. Upon hearing that testimony, this Court concluded the proceeding by stating:

> [THE COURT]: I've indicated that with regards to the homicide book, for want of a better term, for 2004, I'm going to leave it both sides to make contact with the Detroit Police Department Homicide Section. Oen can only imagine that there is a book, whether it's an actual journal type book as it was in the old days or whether that's electronic, I don't know. But we'll leave it to the parties to find that particular book and the date of this homicide.
>
> My expectation is that through efforts, I think both sides ought to be able to enter a stipulation as to what, if anything, that book or journal would indicate for the date of Mr. Segers' death, also it reflecting any other deaths or homicides that occurred on that date.

On May 24, 2018, the parties entered into a Stipulation wherein it was stipulated and agreed by and between the parties hereto that the People's Exhibits 18 (comprised of pages 18-a through 18-c) and 19 (comprised of pages 19-a through 19-h) be admitted into evidence relative to the

evidentiary hearing on Defendant's Motion for Relief from Judgment (this document was electronically filed with this Court on May 24, 2018).

The People submit that People's Exhibits 18 and 19 do not show any female fatality as a result of gunshot wounds for the time period of September 5/6, 2004. The People assert that the explanation for what Ms. Christian stated in her memo is that she was simply mistaken about the facts of the case.

III. The question whether DeAnthony Witcher was given some kind of consideration from the prosecution or police for his testimony that was not disclosed to the defense

During the course of the evidentiary hearing in this case, the topic of DeAnthony Witcher's November 18, 2004 arrest for CCW - pistol in a motor vehicle surfaced. Witcher was never charged with this offense. Defendant is claiming that because Witcher was arrested for CCW-pistol in motor vehicle and was never charged, the most obvious inference is that Witcher was offered some form of leniency and/or agreement not to be prosecuted in exchange for his cooperation and favorable testimony in this case, which was never disclosed to the defense at trial. As ammunition for this argument, the defense relied, of course, on the fact that Witcher was never charged after his November 18, 2004 arrest, and also on what appeared to be a Detroit Police computer readout, which suggested that the warrant relating to DeAnthony Witcher's arrest was denied November 30, 2004, the very day that Defendant was arrested.[17]

[17] The document does not actually say that the warrant was denied on November 30, 2004. It simply shows that the Detroit Police closed out their file on the case on November 30, 2004.

The People acknowledge that the Detroit Police computer readout gives some fuel to Defendant's argument that Witcher was offered some form of leniency and/or agreement not to be prosecuted in exchange for his cooperation and favorable testimony in this case.

To rebut the inference that Defendant draws, the People presented three pieces of evidence.

The first is what was received into evidence as People's Exhibit No. 12, which is comprised of two (2) documents, a warrant request denial form and the Investigator's Report pertaining to DeAnthony Witcher's November 18, 2004 arrest. As can be seen, the warrant request was denied on November 19, 2004 (the day after Witcher was arrested) by Assistant Prosecutor Kathleen McClorey (now retired) due to insufficient evidence.

The second piece of evidence that the warrant was *not* denied as part of some consideration for Witcher's testimony at trial is the fact that Witcher gave testimony at an investigative subpoena proceeding at the Prosecutor's Office on September 9, 2004, which was consistent with his trial testimony, and which occurred over two months prior to his November 18, 2004 arrest. A copy of the Investigative Subpoena testimony transcript was received into evidence as People's Exhibit No. 13.[18]

The third piece of evidence was the testimony of Assistant Prosecutor Patrick Muscat, who was the lead trial attorney for the prosecution on the case. He testified at the evidentiary hearing that what consideration was given to Witcher for his testimony was use immunity, and that was all, which testimony is supported by the trial court record (see Jury Trial Transcript, 05/04/05, 103; 104-105).

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[18] The trial record indicates that this Court, as well as Defendant's trial counsel, had a copy of this transcript (Motion Transcript, 04/20/05, 3-4).

Finally, to infer that there was consideration granted to Witcher in the form of any CCW pistol in motor vehicle charge not being lodged in exchange for his testimony would be contrary to the presumption of regularity. The People are fully aware that "[u]nder MCR 6.201(B)(5), a prosecutor has a duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony." *People v Bosca,* 310 Mich App 1, 32; 871 NW2d 307 (2015), quoting from *People v McMullan,* 284 Mich App 149, 157: 771 NW2d 810 (2009). Accordingly, it would have been prosecutorial misconduct not to disclose any agreement that Witcher would not be charged with CCW motor vehicle in exchange for his testimony. But there is no evidence that that occurred, just Defendant's innuendo. The presumption of regularity provides that "[m]erely because the records are unavailable does not give rise to a presumption of entitlement to an automatic reversal." But rather "[d]oubts should be resolved in favor of the integrity, competence and proper performance of their official duties by the judge and the State's attorney. * * * If any presumption is to be indulged it should be one of regularity rather than of irregularity." This presumption of regularity has been recognized in Michigan. *People v Iacopelli,* 141 Mich App 566, 568; 367 NW2d 837 (1985).

IV. Conclusion

As noted previously, for a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. As to requirement (4), various courts have stated that the newly discovered evidence should be considered in juxtaposition to the evidence actually

admitted at trial. *United States v Martinez-Mercado,* 261 F Supp 3d 293, 306 (D Puerto Rico, 2017); *Wyatt v State,* 78 So 3d 512, 523 (Fla, 2012) (The court must considered all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial).

In their Answer to Defendant's Motion for Relief from Judgment, filed on August 2, 2017, the People made a number of observations about the evidence at trial, and they will repeat them here:

Four People identified Defendant as the shooter, or one of the shooters. And when members of a task force that conducted arrests of suspects in homicide cases went to the apartment of Defendant's grandmother in Clinton Township, to effectuate Defendant's arrest, Defendant was found hiding in the bedroom closet. And after Defendant was forcibly extricated from the bedroom closet, a weapon was found on top of the dresser in that bedroom which turned out to be one of weapons used in the murder.[19] See e.g. *Foley v Commonwealth,* 425 SW3d 880, 888 (Ky, 2014) ("Therefore, upon consideration of the Nixon report as a whole, in juxtaposition with the strong eye-witness and circumstantial evidence presented at trial by the Commonwealth, including the effort to cover-up incriminating evidence of the crime, we are not persuaded that the 'new evidence' is 'of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted.' ").

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[19] Of course, Defendant's grandmother, Edna Richardson, testified that she came into possession of this weapon when Jeffrey Daniels brought her home one day and left the weapon in her apartment. She testified that this was sometime in August of 2004. And she testified that she called Daniels asking him to come and get his gun, but before he had a chance to do that, he was killed. If as Edna Richardson said, Daniels left this gun in her apartment in August, and never did retrieve it from her, he would not have had the weapon on September 5, 2004.

Relief

Wherefore, the People respectfully request that this Honorable Court deny Defendant Motion for Relief from Judgment/Motion for New Trial.

Respectfully submitted,

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Dated: June 15, 2018

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT,
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Circuit Court No. 04-012890-01-FC
Honorable Timothy M. Kenny

THELONIOUS SEARCY,

Defendant.

The People's Appendix A

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STATE OF MICHIGAN
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THE PEOPLE OF THE STATE OF MICHIGAN,

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The People's Appendix A-1

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC SMITH,

Defendant-Appellant.

UNPUBLISHED
October 10, 2006

No. 262379
Wayne Circuit Court
LC No. 04-012130-02

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), four counts of assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant to life in prison for the murder conviction, 25 to 50 years in prison for the assault convictions, two years in prison for the felony-firearm conviction, and one to five years in prison for the felon-in-possession conviction. We affirm.

I. MRE 404(b) Evidence

Defendant argues that the trial court abused its discretion in admitting evidence of two prior incidents during Rail Shelman's direct examination. We disagree. The decision to admit certain other acts evidence under MRE 404(b) "is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

A prosecutor may not introduce evidence of other crimes, wrongs, or acts in order to prove a defendant's character or propensity for criminal behavior. MRE 404(b). However, the evidence may be admissible to prove motive, opportunity, intent, preparation, scheme, or plan. MRE 404(b)(1). We must consider the following factors: 1) whether the prosecutor offered the evidence for something other than a character or propensity theory; 2) whether the evidence is relevant under MRE 402; 3) whether the probative value of the evidence is substantially outweighed by unfair prejudice under MRE 403; and 4) whether a limiting instruction was requested and provided under MRE 105. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

A. Prior Eye Contact

Defendant's argument regarding making eye contact with Shelman at a gas station is misplaced. Even if looking at someone strangely and creating worry or nervousness constitutes a crime, wrong, or act, "MRE 404(b) permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *People v Watson,* 245 Mich App 572, 576; 629 NW2d 411 (2001), quoting *People v Starr,* 457 Mich 490, 496; 577 NW2d 673 (1998). Defendant has failed to identify any impermissible inference between his character and the conduct of looking at someone strangely. Therefore, the trial court did not abuse its discretion in admitting the challenged evidence.

B. Prior Shooting

Shelman also testified that defendant fired gunshots at a car in which Shelman was a passenger on a previous occasion. The trial court did not require the prosecutor to provide a basis for the admission of this evidence during Shelman's testimony when defendant objected, but after defendant moved for a mistrial, the prosecutor asserted that the evidence demonstrated motive. Rather, this evidence demonstrates intent because that incident is very similar to the shooting in the instant case. Both involve Shelman riding in one car and defendant riding in another car while firing gunshots at the car in which Shelman was a passenger. Therefore, the evidence that defendant fired a gun at Shelman under similar circumstances demonstrated that defendant intended to fire a gun at Shelman in the instant case.

All elements of a criminal offense are "in issue" when a defendant pleads not guilty. *Crawford, supra* at 389. Evidence of the prior shooting constitutes similar misconduct, which "is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Knox, supra* at 510, quoting *People v Sabin (After Remand),* 463 Mich 43, 63; 614 NW2d 888 (2000). However, relevant evidence must be related to a fact that is of consequence to the action. *Id.* at 57. Because the evidence of the prior shooting makes it more likely that defendant possessed a gun and fired gunshots at Shelman than it would be without the evidence, it was relevant. MRE 401; MRE 402.

The probative value of the evidence was not outweighed by the danger of unfair prejudice under MRE 403. Unfair prejudice occurs "when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Thomas Brown testified that he saw defendant and Andre Haliburton fire multiple gunshots into Anthony Harris's car because Haliburton wanted to "go get these people on Dresden." Cedric Davis testified that defendant talked about killing "[t]he guys on Dresden" and referenced the shooting in a rap song. Davis had seen defendant with a 40-caliber handgun, and Brown believed that defendant had used a 40-caliber handgun, which was consistent with five shell casings recovered from the scene. Defendant showed Ellen Conley a gun the morning after the shooting. As is discussed above, the evidence supplies intent for the shooting because it explains why defendant would shoot at this group of people.

Defense counsel requested a limiting instruction regarding the prior shooting incident with Shelman, and the trial court instructed the jurors that if they believed the evidence, they

might only consider it "as it tends to show that the Defendant may have had a reason to commit the crime that he is on trial for." Because the evidence was offered under a motive theory and fulfilled an intent purpose, it was relevant and more probative than prejudicial, and the trial court provided a limiting instruction, the trial court did not abuse its discretion in admitting it.

II. Prosecutorial Misconduct

Defendant contends that the prosecutor committed misconduct when she suggested that defendant was a member of a gang and repeatedly referred to his association with the "Runyon boys." We disagree. Because defendant objected on different grounds during Antwon Munlin's cross-examination and failed to object during the prosecutor's opening statement or closing argument, this issue has not been properly preserved for appellate review. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002); *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). We therefore review these claims for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999); *Ackerman, supra* at 448.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Abraham, supra* at 272-273. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

It is well recognized that "the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs." *Dawson v Delaware*, 503 US 159, 163; 112 S Ct 1093; 117 L Ed 2d 309 (1992). However, evidence showing that the defendant and a witness were members in the same gang is sufficiently probative of the witness's possible bias toward the defendant to warrant its admission. *United States v Abel*, 469 US 45, 49; 105 S Ct 465; 83 L Ed 2d 450 (1984).

Black's Law Dictionary (8th ed) defines the term "gang" as "[a] group of persons who go about together or act in concert, esp. for antisocial or criminal purposes." Defendant grossly mischaracterizes the prosecutor's remarks during her opening statement and closing argument. Throughout the trial, the prosecutor never once used the word "gang" or made any references to gang activity or "rival gangs." The prosecutor merely stated that the Runyon boys were a group of people who did not get along with a group of people known as the Dresden boys. Dresden and Runyon are streets located six blocks apart in Detroit. There was no evidence that the people in Harris's car had any weapons, retaliated against defendant in any way, or associated with one another for criminal purposes.

Munlin, who produced defendant's rap CD recording, claimed to be part of the Runyon boys with defendant. However, Munlin had never heard of Harris and had never seen defendant with Haliburton. If the Runyon boys were a gang and Harris was member of a rival gang, it follows that Munlin would presumably know who Harris was. Similarly, if Munlin, Haliburton,

and defendant were all members of the same gang, it follows that Munlin would probably have seen defendant and Haliburton together. Therefore, the evidence does not support defendant's argument that the prosecutor's remarks constituted an innuendo or implication that defendant was a member of a gang. The prosecutor's references to the Runyon boys did not constitute misconduct and did not prejudice defendant.

Further, no error requiring reversal will be found if the prejudicial effect of the prosecutor's improper conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The trial court twice instructed the jury that the attorneys' statements and arguments are not evidence, and jurors are presumed to follow the trial court's instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

III. Hearsay

Defendant claims that the trial court improperly admitted Brown's police statement. We disagree. The decision whether to admit evidence will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, the decision whether to admit evidence often involves a preliminary question of law, which is reviewed de novo. *Id.* A question regarding the admissibility of evidence under a particular rule of evidence is a question of law that we review de novo. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004). To the extent that defendant alleges prosecutorial misconduct, this issue is unpreserved and will be reviewed for plain error affecting substantial rights. *Carines, supra* at 762-763; *Ackerman, supra* at 448; *Rodriguez, supra* at 30.

MRE 801(c) provides that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." During Brown's direct examination, the prosecutor questioned him about his plea agreement and refreshed his memory regarding the date he turned himself in to the police. Brown testified that he told the police that defendant and Haliburton were with him at the time of the shooting. Contrary to defendant's argument, Brown never testified that he told the police that defendant was one of the shooters. Therefore, defendant's argument is misplaced, and we will proceed under the assumption that defendant is challenging Brown's testimony that he told the police that defendant and Haliburton were with him on the night of the shooting.

Although defendant does not specifically articulate his argument, he appears to argue that the prosecutor improperly impeached Brown with his prior statement to the police. This argument is also misplaced. The prosecutor did not impeach Brown; rather, she used his police statement to refresh his memory about the date that he turned himself in to the police. Further, defendant misrepresents the record when he asserts that Brown's police statement was entered into evidence. Defense counsel's hearsay objection at trial belies this assertion: "that would be referring to a hearsay document that's not in evidence[.]"

Although not addressed by either party on appeal, MRE 801(d)(1)(C) applies. MRE 801(d)(1)(C) provides that, if a declarant testifies at trial and is subject to cross-examination about the statement, his statement identifying a person after perceiving him is not hearsay. *People v Malone*, 445 Mich 369, 371; 518 NW2d 418 (1994). Brown was subject to cross-examination when he testified at trial that he told the police that defendant and Haliburton were

with him on the night of the shooting. Because Brown identified defendant and Haliburton after perceiving them, this statement is not hearsay and was properly admitted at trial.

Even if Brown's testimony regarding his statement to the police is hearsay, its admission was harmless. Earlier in his direct examination, Brown testified that he was in the car with defendant and Haliburton, and the prosecutor asked him who started the shooting. Brown replied, "I don't know who started shooting, but I seen [sic] both of them shoot." Because Brown had already testified about his direct observation regarding the substance of the challenged statement, any error in its admission was harmless. *People v Sykes,* 229 Mich App 254, 265; 582 NW2d 197 (1998).

Defendant also asserts that the prosecutor improperly argued impeachment evidence as substantive proof of guilt. However, Brown's police statement was used to refresh his memory regarding the date he turned himself in to the police; it was not used for impeachment. Moreover, defendant does not provide any transcript references to support this assertion. An appellant may not simply announce a position or assert an error and leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Further, even if the prosecutor relied on Brown's police statement, any error would be harmless because Brown testified at trial about his direct observation regarding the substance of his police statement.

IV. Witness Intimidation By A Third Party

Defendant argues that the trial court abused its discretion in admitting evidence that defendant's cousin assaulted Davis by starting a fistfight and firing a gunshot at him the weekend before he testified. We disagree.

Evidence of a defendant's threat against a witness is generally admissible to show the defendant's consciousness of guilt. *People v Sholl,* 453 Mich 730, 740; 556 NW2d 851 (1996); *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). In *People v Clark,* 124 Mich App 410, 412-413; 335 NW2d 53 (1983), this Court held that evidence that a third party threatened a witness was admissible for the limited purpose of explaining a prior inconsistent statement. However, admission of evidence that a third party offered a witness a bribe to alter his testimony may be prejudicial if credibility is at issue and the jury may infer that the defendant was responsible for the bribe. *People v Culver,* 280 Mich 223, 226; 273 NW 455 (1937).

In the instant case, the prosecutor offered the evidence of the assault to explain Davis's reluctance to testify. There was no evidence connecting defendant to the assault, and familial relationship alone does not achieve this purpose. There was no evidence that defendant's cousin assaulted Davis at defendant's request, or that defendant approved or expected his cousin to assault Davis on his behalf. Therefore, the evidence was not more prejudicial than probative. MRE 403.

Further, a cautionary jury instruction will protect a defendant from any prejudice created by the admission of a third-party threat. *Clark, supra* at 412-413. The trial court instructed the jury that it may not consider the evidence as evidence of defendant's guilt, and jurors are

presumed to follow the trial court's instructions. *Matuszak, supra* at 58. Therefore, the trial court did not abuse its discretion in admitting the evidence that defendant's cousin assaulted Davis.

V. Newly Discovered Evidence And Defendant's Motion For A New Trial

Defendant argues that Brown's affidavit constitutes newly discovered evidence that warrants a new trial. We disagree. A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *People v Cress,* 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Mechura,* 205 Mich App 481, 483; 517 NW2d 797 (1994). The question whether a statement is against the declarant's penal interest is a question of law that we review de novo. *People v Barrera,* 451 Mich 261, 268; 547 NW2d 280 (1996).

Defendant did not discover that Brown claimed to have given false testimony until Brown prepared his affidavit. Therefore, the evidence was newly discovered. Because it was the first assertion that Brown gave false testimony, it was not cumulative. During Brown's cross-examination, defense counsel attacked his credibility. Therefore, defendant could not have discovered or produced evidence that Brown was lying at trial.

To warrant a new trial, the newly discovered evidence must be admissible. *People v Darden,* 230 Mich App 597, 606; 585 NW2d 27 (1998). When a declarant is unavailable, MRE 804(b)(3) provides an exception to the hearsay rule contained in MRE 801 if the statement subjects the declarant to criminal liability. When Brown asserted his Fifth Amendment right against self-incrimination, he became unavailable within the meaning of MRE 804. *People v Meredith,* 459 Mich 62, 65-66; 586 NW2d 538 (1998). Because Brown averred that he had given false testimony at defendant's trial, his statements subjected him to criminal liability for perjury. Therefore, defendant is required to show corroborating circumstances that clearly indicate the trustworthiness of Brown's affidavit. MRE 804(b)(3); *People v Bowman,* 254 Mich App 142, 148; 656 NW2d 835 (2002).

Defendant has not identified any evidence that affirmatively or directly corroborates Brown's affidavit. He merely asserts that Brown's plea agreement provided him with a motive to lie, that he and Brown were not incarcerated at the same facility, and that he did not solicit the affidavit that Brown drafted. However, the evidence introduced at trial was inconsistent with Brown's affidavit. Harris and Carl and Anthony Laster all testified that they saw three people in the car from which the gunshots were fired, contrary to Brown's affidavit. Carl and Anthony Laster observed gunshots being fired from both windows on the passenger side of the car. Brown believed that defendant had used a 40-caliber handgun, which was consistent with five shell casings recovered from the scene. Davis heard defendant brag about shooting some guys on Dresden, and he had seen defendant with a 40-caliber handgun.

At trial, Brown denied that he had lied in his police statement, and his trial testimony—that he drove the car while defendant and Haliburton shot at Harris's car—was consistent with his police statement. It therefore follows that any conversation with Haliburton about whether anyone would believe that Haliburton was the only shooter would have occurred before Brown made his police statement. However, Brown approached the police before he learned that he was being investigated for the shooting. Therefore, it is highly unlikely that Haliburton "directed" Brown to provide false testimony because of concerns about whether the jury would believe that

Haliburton was the only shooter. Further, Brown's affidavit contains no mention of his police statement; he refers exclusively to his trial testimony and the jury. Accordingly, defendant has failed to show corroborating circumstances that clearly indicate the trustworthiness of Brown's affidavit, and the affidavit was properly excluded. Therefore, the trial court did not abuse its discretion in denying defendant's request to admit Brown's affidavit or in denying defendant's motion for a new trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT,
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Circuit Court No. 04-012890-01-FC
Honorable Timothy M. Kenny

THELONIOUS SEARCY,

Defendant.

The People's Appendix A-2

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH RICHARD GOURLAY,

Defendant-Appellant.

UNPUBLISHED
March 3, 2009

No. 278214
Washtenaw Circuit Court
LC No. 06-000877-FH

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of child sexually abusive activity, MCL 750.145c(2), two counts of using a computer to communicate with another to commit child sexually abusive activity, MCL 750.145d(2)(f), two counts of distributing or promoting child sexually abusive material, MCL 750.145c(3), two counts of using a computer to communicate with another to commit distribution of child sexually abusive material, MCL 750.145d(2)(d), third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a), and soliciting a child for immoral purposes, MCL 750.145a. The trial court sentenced defendant to concurrent prison terms of 6 to 20 years for the child sexually abusive activity and using a computer to communicate with another to commit child sexually abusive activity convictions, 3 to 7 years for the distributing or promoting child sexually abusive material convictions, 4 to 10 years for the using a computer to communicate with another to commit distribution of child sexually abusive material convictions, 5 to 15 years for the CSC conviction, and 145 days for the soliciting a child conviction. Defendant appeals as of right his convictions and sentences. We affirm defendant's convictions, vacate his sentences, and remand for resentencing.

I. Basic Facts

Justin Berry, at the age of 13, obtained a web camera, which he soon used to broadcast pornographic images of himself over the Internet. Berry also created his own website, the "justinscam" website, which he used to broadcast the images.

Defendant, who owned Chain Communications, a web hosting company, contacted Berry, informing Berry that he was watching Berry over the Internet. Defendant and Berry began to communicate on a daily basis. They talked about computers, but Berry also informed defendant that he wanted to take his website to "the next level." He wanted to place his website

with a web hosting company and he wanted the website to have a members-only section. Defendant and Berry discussed different ideas for the new website.

In January 2002, the new website, the "JFWY" website, was created. The purpose of the website was to allow Internet viewers to watch Berry engage in pornographic acts. Chain Communications hosted the website. Defendant registered the domain name, created a members-only section, and programmed the website with a JAVA applet, which provided a near live streaming image. According to Berry, defendant watched the images broadcasted over the website.

In the spring of 2003, Berry moved into an apartment, which he set up with several web cameras so that his Internet viewers could watch him day and night. Berry discussed the apartment and the cameras with defendant. He also informed defendant that he was going to create a new website, the "mexicofriends" website. The purpose of this website was also to allow Internet viewers to watch Berry engage in pornographic acts. Chain Communications hosted the website, and defendant registered the domain name, created a members-only section, and programmed the website with the JAVA applet.

Defendant denied knowing that Berry was broadcasting pornographic images of himself over the JFWY and mexicofriends websites. He believed that the JFWY website was a "rouse." Berry explained to him that the website only contained pictures of Berry in "suggestive" poses and that the website's name stood for "just f****** with you." With the website, Berry "was just f****** with those pedophiles on the [I]nternet who thought they could get child pornography." When Berry created the mexicofriends website, defendant was led to believe that the website would only contain pornographic images of Berry's Mexican friends. When defendant learned that the website had pornographic images of Berry, he believed that Berry was over the age of 18.

II. 47 USC 230

Defendant argues that the trial court erred in failing to instruct the jury on federal law, 47 USC 230 (§ 230), and how it relates to whether defendant could be convicted of the pornography offenses. Specifically, defendant argues that the jury should have been instructed that he could not be convicted of the pornography offenses unless it found that he actually contributed to the creation of the child pornography. The jury also should have been instructed, defendant claims, that an Internet service provider does not create pornography by providing bandwidth or by providing technical or artistic assistance. This unpreserved claim of instructional error is reviewed for plain error affecting defendant's substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003).

Pursuant to § 230, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 USC 230(c)(1). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 USC 230(f)(3). An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services

offered by libraries or educational institutions." 47 USC 230(f)(2). There is no dispute that Berry was an information content provider for the JFWY and mexicofriends websites and that defendant, acting as Chain Communications, was an interactive computer service provider.

Plaintiff claims that defendant was not entitled to a jury instruction on § 230 because the federal statute only provides immunity from civil liability. There is language in federal civil cases that could suggest Congress only intended to protect interactive computer service providers from civil liability. See, e.g., *Zeran v America Online, Inc*, 129 F3d 327, 330-331 (CA 4, 1997) ("Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages."). However, because the federal courts in those cases were not required to address whether § 230 provides immunity from a criminal prosecution, we do not find the statement from *Zeran* and other similar statements persuasive on the issue. Rather, to determine whether § 230 applies to criminal prosecutions, we look to the language of the statute. See *Walters v Nadell*, 481 Mich 377, 381-382; 751 NW2d 431 (2008) ("When interpreting a federal statute, [o]ur task is to give effect to the will of Congress . . . . To do so, we start, of course, with the statutory text.") (internal quotations and alterations omitted).

In § 230, Congress specified the effect the statute was to have on state laws:

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. *No cause of action may be brought and no liability may be imposed under* ***any*** *State or local law that is inconsistent with this section.* [47 USC 230(e)(3) (emphasis added).]

Undefined statutory terms should be afforded their common, generally accepted meaning. *People v Williams*, 256 Mich App 576, 581; 664 NW2d 811 (2003). The term "'[a]ny' means 'every; all.'" *Nat'l Pride At Work, Inc v Governor*, 481 Mich 56, 77; 748 NW2d 524 (2008), quoting *Random House Webster's College Dictionary* (1991). Accordingly, the phrase "any State or local law" includes civil and criminal laws. Thus, because Congress intended that no liability may be imposed under a state criminal law that is inconsistent with § 230, we reject plaintiff's argument that § 230 does not apply to criminal prosecutions.

Before trial, defendant moved to quash the pornography charges on the basis that they were "specifically preempted and exempted from state prosecution" by § 230. The trial court denied the motion to quash. It held that § 230 did not preempt the prosecution of the pornography offenses because MCL 750.145c was consistent with § 230. Defendant does not challenge the trial court's ruling on the motion to quash. He provides no argument that, based on the elements of MCL 750.145c(2) and (3), criminal prosecutions and resulting convictions for either crime would be inconsistent with § 230. Because the trial court held that MCL 750.145c was not inconsistent with § 230, and because defendant does not challenge this ruling, we find no plain error in the trial court's failure to sua sponte instruct the jury on § 230.

Nonetheless, defendant also claims that he was denied the effective assistance of counsel because counsel failed to request a jury instruction on § 230. Defendant argues that such an instruction was necessary because the prosecutor argued, and suggested through witnesses, that a failure to monitor and censor for child pornography triggered criminal liability.

To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). A reasonable probability is one sufficient to undermine confidence in the outcome. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel is presumed to have provided effective assistance, and the defendant bears a heavy burden to prove otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Because the trial court did not hold a *Ginther*[1] hearing on defendant's claim of ineffective assistance, our review is limited to facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Jury instructions must include all the elements of the charged offenses and must not exclude any material issues, defenses, and theories that are supported by the evidence. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Even if the instructions are imperfect, there is no error if the instructions fairly represented the issues to be tried and sufficiently protected the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007).

The immunity afforded to an interactive computer service provider by § 230 is broadly construed. *Universal Communication Sys, Inc v Lycos, Inc*, 478 F3d 413, 419 (CA 1, 2007). However, the immunity only applies when the information has been provided by another information content provider. *Id.* In other words, "an interactive computer service provider remains liable for its own speech." *Id.* Content distributed over the Internet is not the speech of the interactive computer service provider if the provider was only responsible for the general features and mechanisms of the service. See *id.* at 420; *Carafano v Metrosplash.com, Inc*, 339 F3d 1119, 1124-1125 (CA 9, 2003); *Ben Ezra, Weinstein, & Co, Inc v America Online Inc*, 206 F3d 980, 985-986, (CA 10, 2000). In addition, mere notice of the content is not enough to make the content the speech of the interactive computer service provider. *Universal Communication Sys, Inc, supra* at 420.

To convict a defendant of child sexually abusive activity, a prosecutor is required to prove that the defendant "*persuade[d], induce[d], entice[d], coerce[d], cause[d], or knowingly allow[ed]* a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material." MCL 750.145c(2) (emphasis added).[2] The statute does not define the six emphasized words. The common, generally accepted meaning of a term may be ascertained by consulting a dictionary. *People v Perkins*, 473 Mich 626, 639; 703 NW2d 448 (2005). To "persuade" means "to prevail on (a person) to do something, as by advising or

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] MCL 750.145c(2) also imposes criminal liability on persons "who arrange[] for, produce[], make[], or finance[] . . . any child sexually abusive activity or child sexually abusive material" and persons "who attempt[] or prepare[] or conspire[] to arrange for, produce, make, or finance any child sexually abusive activity or child sexually abusive material." See *People v Adkins*, 272 Mich App 37, 41; 724 NW2d 710 (2006). Defendant was not charged with these activities.

urging." *Random House Webster's College Dictionary* (1992). To "induce" means "to lead or move by persuasion or influence, as to some action or state of mind." *Id.* To "entice" means "to lead on by exciting hope or desire; allure; tempt; inveigle." *Id.* To "coerce" means "to compel by force or intimidation." *Id.* Pursuant to these definitions, when a person persuades, induces, entices, or coerces another, the person is actively and intentionally attempting to bring about a particular action or result. However, the definitions of "cause" and "allow" do not necessarily have the actively and intentionality elements that are contained in the definitions of the other four words. To "cause" means "to be the cause of; bring about." *Id.* To "allow" means "to give permission to or for; permit," "to let have," "to permit by neglect or oversight." *Id.* But, the term "allow" is preceded by the word "knowingly," which this Court has stated is a synonym for "intentionally." *People v Maynor*, 256 Mich App 238, 241; 662 NW2d 468 (2003), aff'd on other grounds 470 Mich 289 (2004). Moreover, when words are grouped together, the words are to be given related meaning. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005). In accordance with this rule of statutory construction, we construe the terms "cause" and "knowingly allow," as used in MCL 750.145c(2), to include that actively and intentionally requirements that are contained within the definitions of "persuade," "induce," "entice," and "coerce." Consequently, a criminal prosecution, and a subsequent conviction, of MCL 750.145c(2), requires proof that the defendant actively and intentionally took action directed toward a child to engage the child in a sexually abusive activity for the purpose of producing child sexually abusive material.

Because MCL 750.145c(2) requires this intentional action, a conviction of MCL 750.145c(2) is not inconsistent with § 230. An interactive computer service provider, by providing bandwidth, by publishing content that was generated by an information content provider's use of the service's general features and mechanisms, or by knowing of the nature of the published content, has not taken an intentional action directed toward a child to engage the child in child sexually abusive activity. Accordingly, an instruction on § 230 was not necessary to avoid a conviction of child sexually abusive activity, MCL 750.145c(2), and using a computer to communicate with another to commit child sexually abusive activity, MCL 750.145d(2)(f), that was inconsistent with § 230. Thus, counsel was not ineffective for failing to request an instruction on § 230 as it related to MCL 750.145c(2) and MCL 750.145d(2)(f).[3]

To convict a defendant of distributing or promoting child sexually abusive material, MCL 750.145c(3), the prosecution is required to establish that (1) the defendant distributed or promoted child sexually abusive material, (2) the defendant knew the material was child sexually abusive material at the time of distribution or promotion, and (3) the defendant distributed or promoted the material with criminal intent. *People v Tombs*, 472 Mich 446, 465; 697 NW2d 494 (2005) (opinion by Kelly, J). The distribution or promotion of child sexually abusive material is not a strict liability offense; it requires proof of criminal intent to distribute or promote child

[3] Any prejudice resulting from the testimony of any witness suggesting that defendant was guilty if he knew that Chain Communications hosted a website that contained child pornography was cured by the trial court's instruction that the jury was to take the law as given by the trial court. A jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

sexually abusive material. *Id.* at 456-459 (opinion by Kelly, J.), 466 (opinion by Taylor, C.J.). This criminal intent includes the intent that others will discover or view the child sexually abusive material. *Id.* at 461 (opinion by Kelly, J.).

We can imagine a prosecution for MCL 750.145c(3) that would be inconsistent with § 230. Such a prosecution would be based on the theory that an interactive computer service provider distributes child sexually abusive material with the intent that it be seen by others when, after receiving notice of the material, keeps the material available to be viewed or discovered by others. However, the prosecution of defendant for distributing or promoting child sexually abusive material was not based on such a theory.

The prosecution of defendant was based on the theory that defendant, knowing that the purpose of the JFWY and mexicofriends websites was to allow Internet viewers to watch Berry engage in pornographic acts, was an active participant in the creation of the two websites. The prosecution produced substantial evidence to the jury to support its theory. For example, the prosecution presented evidence (1) that defendant knew Berry hosted his own pornographic website, that Berry wished to take this website, the justinscam website, to the "next level," and that the purpose of both the JFWY and mexicofriends websites was for others to see pornographic images of Berry, (2) that defendant hosted the two websites with Chain Communications and registered the domain names, (3) that defendant programmed the websites with the JAVA applet to create a near live streaming video image, (4) that defendant created the members-only sections for the websites, and (5) that defendant provided Berry with an advanced web camera when he visited Berry in Mexico. In addition, in online conversations, defendant told Berry that Berry should "milk the cam for all its worth," that Berry "got the money shots right before" Berry turned the web cam off, and that some high resolution images of the "money shots" would be nice in the website's members-only section. This was the same theory presented by the prosecution during closing arguments. In addition, defendant did not admit to knowing that Berry used the JFWY and mexicofriends websites to broadcast pornographic images of himself over the Internet. Rather, defendant testified that he believed the JFWY website only contained images of Berry in "suggestive" poses and that the mexicofriends website only contained pornographic images of friends of Berry. Because the prosecution of defendant for distributing or promoting child sexually abusive material, as tried and argued before the jury, was based on defendant's active involvement in the creation of the JFWY and mexicofriends websites,[4] and because defendant claimed that he did not know the content of the two websites, an instruction that defendant could not be convicted of MCL 750.145c(3) for providing bandwidth or for publishing material that Berry created using the general services and mechanisms provided by Chain Communications was not necessary in order to avoid a conviction that was inconsistent with § 230. Thus, counsel was not ineffective for failing to

[4] We note that, although defendant claims on appeal that he was merely providing standard web hosting duties to Berry for the JFWY and mexicofriends websites, there was no evidence presented at trial that many of the services defendant provided to Berry for the two websites, such as use of the applet, the creation of members-only pages, the technical assistance given to members of the two websites, and the registration of domain names, were provided for any of Berry's other websites or to other clients of Chain Communications.

request a jury instruction on § 230 as it related to distributing or promoting child sexually abusive material, MCL 750.145c(3), and using a computer to communicate with another to commit distribution of child sexually abusive material, MCL 750.145d(2)(d).

III. Motion for New Trial

Defendant argues that he is entitled to a new trial on the basis of newly discovered evidence. This newly discovered evidence includes PayPal payments from Kurt Eichenwald to Greg Mitchell, which were accompanied by notes suggesting that Eichenwald was downloading and paying for child pornography, and admissions from Eichenwald that he suffers from memory problems. Defendant maintains that, because the newly discovered evidence establishes that Berry and Eichenwald conspired to keep the PayPal payments hidden, the newly discovered evidence would have convinced the jury that the testimony of Berry and Eichenwald was motivated solely by the two men's greed.

To receive a new trial on the basis of newly discovered evidence, a defendant must show that "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal quotations omitted). "Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent an abuse of that discretion." *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). For the reasons articulated below, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

First, the motion for a new trial is grounded in much speculation. Defendant's conclusion that Berry and Eichenwald conspired to keep the PayPal payments secret is speculation. Eichenwald made the PayPal payments to Mitchell, and there is no evidence to suggest with any certainty that Berry knew of the payments. In addition, defendant's conclusion that, because of the timing of the $2,000 payment, Eichenwald may have commissioned the "Taylor video" is speculation, as is defendant's conclusion that Berry launched a new website, the "justinsfriends" website, in June 2005 to keep Eichenwald, "the big player," satisfied.

Second, evidence of the PayPal payments is not directly relevant to whether defendant committed the charged offenses. The PayPal payments had no connection to the JFWY and mexicofriends websites. Compare *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994) (granting the defendant a new trial because the newly discovered testimony would have provided corroboration of the defendant's theory of self-defense and there were many reasons to believe the testimony). In addition, evidence of the PayPal payments shows no direct bias by either Eichenwald or Berry against defendant. Rather, as acknowledged by defendant, the evidence of the PayPal payments only affects the credibility of Eichenwald and Berry. While the credibility of a witness is always relevant, *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995); *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995), when newly discovered evidence is useful only to impeach a witness, the evidence is deemed cumulative, *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977). Indeed, at

trial, defendant presented to the jury the theory that Eichenwald was, at all times during his investigation, motivated by greed.

Third, Eichenwald provided the story as to how Berry's pornographic endeavors were discovered. His testimony was minimally relevant to whether defendant committed the charged offenses. Thus, placing before a jury issues concerning whether Eichenwald was viewing and paying for child pornography and whether Eichenwald, because of his failure to take notes when he first decided to attempt to locate Berry or because of the effects of his epilepsy, forgot about the PayPal payments, could easily divert the jury's attention from the actual issue before it, whether defendant committed the charged offenses. If defendant were allowed to present and argue the newly discovered evidence as it was presented in his motion for a new trial, the issues concerning and relating to the PayPal payments would overshadow the issue of defendant's guilt. Pursuant to MRE 403, which permits a trial court to exclude relevant evidence on the basis that the evidence could result in confusion of the issues or mislead the jury, we are convinced that a trial court would, in some manner, restrict or limit the evidence defendant could present to show that Eichenwald and Berry conspired to keep the PayPal payments secret. Newly discovered evidence, to entitle a defendant to a new trial, must be admissible. *People v Darden*, 230 Mich App 597, 606; 585 NW2d 27 (1998).

Defendant also claims that the omission of evidence of Eichenwald's PayPal payments from trial denied him his constitutional right of confrontation. We disagree.

A defendant has a constitutional right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

> The right to confront one's accusers consists of four separate requirements: (1) a face-to-face meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor. [*People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001).]

A defendant does not have a constitutional right to a successful cross-examination. *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001).

Defendant cross-examined Berry and Eichenwald. No limitations were placed on his ability to cross-examine them. See *Ho, supra* at 189 ("If a defendant has been limited in his ability to cross-examine the witnesses against him, his constitutional right to confront witnesses may have been violated."). Defendant's argument is simply that, because he did not know of the PayPal payments, he was unable to successfully cross-examine Berry and Eichenwald. Because defendant did not have a right to a successful cross-examination, *Watson, supra*, defendant's right of confrontation was not violated.

IV. Accomplice Instruction

Defendant next claims that the trial court erred in denying his request to instruct the jury that Berry was an accomplice to the pornography offenses and that, because Berry was an

accomplice, his testimony should be closely examined. We disagree. The decision to give a cautionary accomplice instruction is within the trial court's sound discretion, and the trial court's decision whether to give such an instruction is reviewed for an abuse of discretion. *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005).

At trial, defendant requested the trial court to instruct the jury, pursuant to CJI2d 5.4, that Berry was an accomplice to the pornography offenses. The trial court denied the request on the basis that Berry was not an accomplice because, at the time of the conduct charged in the information, Berry was under the age of 18.[5] See MCL 750.145c(1)(b), which defines "child" as "a person who is less than 18 years of age." Consequently, the trial court also denied defendant's request to instruct the jury, pursuant to CJI2d 5.6, that Berry's testimony should be closely examined.

On appeal, defendant assumes that Berry was an accomplice to the pornography offenses and, therefore, argues that the trial court should have instructed the jury that it could only accept Berry's testimony after closely examining it. By assuming that Berry was an accomplice, defendant has failed to address the basis of the trial court's decision to refuse to instruct the jury pursuant to CJI2d 5.4 and 5.6. He has provided no argument that Berry, even though he was under the age of 18 when the crimes occurred, could be considered an accomplice to the pornography offenses. Because defendant has failed to address the basis of the trial court's ruling, we need not consider granting him the relief he seeks. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

Nonetheless, we do not believe that the trial court abused its discretion in refusing to instruct the jury that Berry was an accomplice to the pornography offenses. A person is an accomplice if he could be charged with the same offense the defendant is charged with committing. *People v Threkeld*, 47 Mich App 691, 696; 209 NW2d 852 (1973). The offense of "child sexually abusive activity focuses on protecting children from sexual exploitation, assaultive or otherwise[,] and . . . the purpose of the statute is to combat the use of children in pornographic movies and photographs, and to prohibit the production and distribution of child pornography." *People v Riggs*, 237 Mich App 584, 591; 604 NW2d 68 (1999) (internal quotations omitted). A child cannot consent to child sexually abusive activity. *People v Wilkens*, 267 Mich App 728, 737; 705 NW2d 728 (2005). It would be paradoxical to label Berry an accomplice to the pornography offenses where MCL 750.145c was for the protection of Berry and where Berry could not legally consent to the child sexually abusive activity or to defendant's distribution of the child pornography over the JFWY and mexicofriends websites. For this reason, the trial court chose a principled outcome by refusing to instruct the jury that Berry was an accomplice to the pornography offenses. *Babcock, supra*.

Even if the trial court abused its discretion in refusing to instruct the jury pursuant to CJI2d 5.4 and 5.6, defendant has failed to establish that the error was not harmless. Defendant has the burden to persuade this Court that it is more probable than not that the trial court's error

[5] The trial court granted the prosecutor's motion to amend the information to charge only conduct that occurred before Berry turned 18 years of age.

affected the outcome of the proceedings. *Young, supra* at 141-142. Berry's involvement with the JFWY and mexicofriends websites, along with his commission of other crimes, was revealed to the jury, his credibility was challenged by defendant during closing arguments, and the trial court instructed the jury on how to judge the credibility of witnesses. Under these circumstances, any error by the trial court was harmless. See *id.* at 143-144.

V. Joinder

Defendant argues that the trial court erred in failing to sever the pornography offenses and the CSC offense for separate trials. This unpreserved claim of error is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A prosecutor may file an information that charges a single defendant with any two or more offenses. MCR 6.120(A). However, "[o]n the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1)." MCR 6.120(C). Under MCR 6.120(B)(1), offenses are related if they are based on "the same conduct or transaction," "a series of connected acts," or "a series of acts constituting parts of a single scheme or plan."

Here, even if we were to conclude that the pornography offenses and the CSC offense were not related, because defendant did not move for a severance, the trial court was under no obligation to sever the offenses for separate trials. MCL 6.120(C). Consequently, defendant cannot establish plain error in not having these charges severed by the trial court.

Additionally, when a defendant does not move to sever offenses charged in one information, a trial court has the discretion, on its own initiative, to sever the charges "when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." MCR 6.120(B)(1). Factors to be considered by the trial court include "the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial." MCR 6.120(B)(2).

Consideration of the above factors would not require severance of the offenses. At the time of trial, Berry and his mother, who was also a witness, lived in Bakersfield, California. Accordingly, it was most convenient for Berry and his mother for the offenses to be joined for one trial. In addition, much of Berry's testimony, and specifically how his relationship with defendant began and was cultivated, would be required at trials for the pornography offenses and the CSC offense. Thus, joinder of the offenses conserved the resources of the parties and the court. Further, the evidence presented at trial was not voluminous or complex, minimizing the potential for confusion. Although defendant argues that joinder of the offenses was "uniquely" and "obviously" prejudicial to him because of the testimony of Tim Horn and Corey Blake, which was admitted as MRE 404(b) evidence to prove that defendant acted with a plan or scheme, neither Horn nor Blake were involved with the creation or maintenance of the JFWY and mexicofriends websites or with the websites' content. Horn and Blake were not linked to the websites. Thus, the jury would have encountered no trouble in not considering the testimony of Horn and Blake in deliberating on the pornography offenses. Based on these factors, the potential prejudice to defendant did not necessarily outweigh the benefits of a consolidated trial.

Thus, the trial court did not abuse its discretion by failing to sua sponte sever the pornography and the CSC offenses.

Defendant also claims that defense counsel's failure to move for a severance of the charges constituted ineffective assistance of counsel. We disagree.

In *People v Tobey*, 401 Mich 141, 151-152; 257 NW2d 537 (1997),[6] the Supreme Court, citing commentary from the ABA Standards Relating to Joinder and Severance, explained the three phrases contained in MCR 6.120(B)(1):

> "[S]ame conduct" refers to multiple offenses "as where a defendant causes more than one death by reckless operation of a vehicle". "A series of connected acts together" refers to multiple offenses committed "to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery". "A series of acts * * * constituting parts of a single scheme or plan" refers to a situation "where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank[.]"

The pornography offenses and the CSC offense were "a series of connected acts," MCL 6.120(B)(1)(b), because the pornography offenses aided in the accomplishment of the CSC. The conduct related to the CSC offense occurred in June 2002. On defendant's suggestion and encouragement, Berry attended Camp CAEN, and while attending the camp, Berry spent several hours with defendant and during those hours, defendant performed oral sex on Berry. Before June 2002, defendant had been watching Berry over the Internet and learned that Berry was interested in computers. Upon learning that Berry wanted to take his first website, the justinscam website, to "the next level," defendant discussed with Berry the new website and helped Berry setup and create the JFWY website. By helping Berry create the website, defendant strengthened his relationship with Berry. Berry believed that defendant was his friend. By having a strong relationship with Berry, defendant was able to convince Berry to attend Camp CAEN. Under these circumstances, the offenses were related because the pornography offenses aided in the accomplishment of the CSC. *Tobey, supra.*

Counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). A motion for a severance would have been properly denied. First, because the pornography offenses and the CSC offense were related, defendant did not have a right to a severance. Second, because the potential prejudice to defendant did not necessarily outweigh the benefits of a consolidated trial, the trial court would have properly exercised its discretion by denying a motion to sever. Accordingly, defendant has not established that a motion to sever would not have been futile.

Further, even if the charges were not related, we cannot conclude that counsel's failure to request a severance fell below an objective standard of reasonableness under prevailing professional norms. *Uphaus, supra.* A defendant must overcome a strong presumption that

[6] MCR 6.120 is a codification of the *Tobey* decision. *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690 (1992), modified in part on other grounds 441 Mich 867 (1992).

counsel's performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). This Court will not substitute its judgment for that of defense counsel regarding matters of trial strategy. *Id.* The decision whether to move for a severance of multiple offenses contained in one information is a matter of trial strategy. Here, defense counsel may have reasonably concluded that defendant had a better chance of obtaining an acquittal on all of the offenses in a trial before a single jury. "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Id.* at 61. Accordingly, defendant has failed to overcome the strong presumption that counsel's action in not requesting a severance of the offenses was sound trial strategy.

VI. Ineffective Assistance of Counsel

Defendant claims that defense counsel was ineffective for failing to investigate and to present expert testimony to explain the possibility that, as testified by defendant, someone else placed the three videos of Berry having sex with a prostitute on his hard drive. We disagree. Defendant raised this claim of ineffective assistance of counsel in his motion for a new trial, but because the trial court did not hold a *Ginther* hearing, our review of defendant's claim is limited to facts on the record. *Wilson, supra.*

The failure to reasonably investigate may constitute ineffective assistance of counsel, *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), but the defendant must show prejudice resulting from the failure to investigate, *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Failure to call a witness may also constitute ineffective assistance, but the defendant must show that the failure deprived him of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

Defendant has failed to identify what an investigation of his hard drive would have revealed regarding how the three videos came to be on the hard drive. Likewise, defendant has failed to indicate the substance of an expert witness's testimony. Defendant has, therefore, failed to establish that an investigation into his hard drive and the testimony of an expert witness would have supported defendant's testimony that someone other than him uploaded the three videos to his hard drive. Accordingly, defendant has failed to establish that counsel's failure to investigate the hard drive prejudiced him and that counsel's failure to call an expert witness deprived him of a substantial defense. Defendant was not denied the effective assistance of counsel.

VII. OV 11

Finally, defendant argues that he is entitled to be resentenced because the trial court erred in scoring 25 points for offense variable (OV) 11, MCL 777.41. We agree. A sentencing court has discretion in determining the number of points to be scored, provided that record evidence adequately supports the scoring. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). This Court will uphold a scoring decision for which there is any evidence in support. *Id.*

The number of points to be scored for OV 11 is determined by the number of "sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). 50 points are to be scored if "[t]wo or more criminal sexual penetrations

occurred;" 25 points are to be scored if "[o]ne criminal sexual penetration occurred;" and zero points are to be scored if "[n]o criminal sexual penetration occurred." MCL 777.41(1). The trial court scored 25 points for OV 11 because it found that defendant's sexual penetration of Berry, which was the basis of defendant's CSC conviction, arose out of the sentencing offense, which was defendant's conviction for child sexually abusive activity relating to the JFWY website.

Defendant's argument that the trial court's scoring of OV 11 violates his right to a jury as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) is without merit. Our Supreme Court has definitely ruled that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Regardless, there is no evidence in the record to support the trial court's scoring of OV 11. In *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006), the Supreme Court defined the phrase "arising out of" as used in MCL 777.41:

> [W]e have previously defined "arising out of" to suggest a causal connection between two events of a sort that is more than incidental. . . . Something that "aris[es] out of," or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen."

As already stated, the sentencing offense was the child sexually abusive activity conviction relating to the JFWY website. A person who "persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material" is guilty of child sexually abusive activity. MCL 750.145c(2). The sexual penetration occurred while Berry was with defendant in Michigan. There is no evidence in the record indicating that at the time of the sexual penetration, or even before or after the penetration, defendant was persuading, inducing, or enticing Berry to engage in a child sexually abusive activity for the purpose of producing child sexually abusive material. Accordingly, there was not a cause and effect relationship that was more than incidental between the sexual penetration and the sentencing offense. *Johnson, supra*. The trial court improperly scored 25 points for OV 11.

Because the trial court's scoring error altered the appropriate guidelines range, defendant is entitled to be resentenced. *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006). We, therefore, vacate defendant's sentences and remand for resentencing in accordance with a correct scoring of OV 11.

We affirm defendant's convictions, vacate his sentences, and remand for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT,
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Circuit Court No. 04-012890-01-FC
Honorable Timothy M. Kenny

THELONIOUS SEARCY,

Defendant.

The People's Appendix B

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THELONIOUS DESHANE-EAR SEARCY,

Defendant-Appellant.

UNPUBLISHED
October 26, 2006

No. 263347
Wayne Circuit Court
LC No. 04-012890-01

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to life in prison without parole for the first-degree murder conviction and to fifteen to thirty years in prison for the assault with intent to murder conviction, with the sentences to be served concurrently with each other and consecutively to a sentence of two years in prison for the felony-firearm conviction. We affirm.

Defendant contends that the trial court committed an error requiring reversal by administering oaths to the jurors in an improper order. He also claims that his trial attorney was ineffective for failing to notice and object to the error. These arguments are without merit. Indeed, while the "improper order of oaths" that defendant refers to is reflected in the original trial transcript, the court reporter filed an amended transcript demonstrating that the oaths were read in the proper order. Accordingly, there is no factual basis for defendant's arguments, and a reversal is unwarranted.

Defendant next argues that the trial court committed an error requiring reversal when it allowed the prosecutor to introduce evidence of ballistics testing that was completed after the trial began. We review a trial court's decision whether to admit evidence, including late-discovered evidence, for an abuse of discretion. *People v Katt,* 468 Mich 272, 278; 662 NW2d 12 (2003); *People v Callon,* 256 Mich App 312, 325-326; 662 NW2d 501 (2003). In deciding whether to admit late-discovered evidence, a court should balance the dual goals of discovery, which are to enhance the fairness of the adversary system and to ensure that judgments are based on a full presentation of the facts. *People v Burwick,* 450 Mich 281, 296-297; 537 NW2d 813 (1995). The preclusion of evidence is an extreme sanction reserved only for particularly egregious cases. *Id.* at 294; *Callon, supra* at 328. Generally, a continuance is the remedy of

choice if it affords the defendant an adequate opportunity to address the new evidence. See *Burwick, supra* at 298. Finally, a trial court generally may not be said to have abused its discretion by admitting late-discovered evidence unless a defendant can show that he was prejudiced by the decision. *Id.* at 295; *Callon, supra* at 328.

Here, a ballistics comparison revealed that a gun seized at the time of defendant's arrest discharged the .45 caliber casings found at the scene of the shootings for which defendant was convicted. The comparison test was not performed, however, until the first day of trial. Little explanation was provided for the tardiness of the test, and defendant does not cite bad faith on the part of the police. Defendant objected to the admission of the comparison, asserting surprise. The court acknowledged that the evidence was tardy but stated that, given the seriousness of the charges, the court would not exclude the evidence because it was important to the prosecutor's case. The court offered defendant the opportunity to secure a rebuttal expert and to present additional witnesses. Defense counsel decided not to exercise either option and did not request a continuance.

Defendant argues that even a continuance could not have cured the prejudice that resulted from the admission of the evidence. First, he claims that he had no opportunity during voir dire to gauge whether prospective jurors would automatically assume that defendant was guilty because he was arrested in close proximity to a gun that was linked to the shooting. The trial court clearly stated before voir dire began, however, that the ballistics testing was in the process of being conducted. Therefore, defense counsel could have requested a continuance *at that time*, but did not do so. Moreover, defendant simply has not demonstrated that he was prejudiced as a result of the allegedly inadequate voir dire questioning.

Second, defendant claims that his attorney's inability to address the ballistics match in his opening statement "likely created the impression that [he] had no answer to such evidence and embarrassed the defense no matter what argument defense trial counsel subsequently made." However, it is difficult to conclude that this situation created significant prejudice, given that the jury was aware that the testing did not occur until after trial began. Moreover, during his closing statement, defense counsel stressed the prosecutor's "audacity" in presenting such late evidence; he added this argument to his theory that defendant was framed. In addition, not only was the prosecutor similarly unable to address the ballistics match during *his* opening statement, but the court prohibited both parties from even mentioning the discovery of the gun during their opening statements, in an attempt to enhance fairness.

Finally, defendant argues that he had no opportunity to make an effective choice of trial strategy by concentrating on separating defendant from the gun rather than merely by presenting an alibi and attacking the credibility of the eyewitnesses. There is no question that the ballistics evidence greatly enhanced the significance of the gun. Nonetheless, defendant offers little argument for how his trial strategy would have differed if he had known about the match before trial. The *Burwick* Court explicitly concluded that the lack of an argument regarding how the trial could have proceeded differently is relevant to the question of whether a defendant was prejudiced by the introduction of late-discovered evidence. *Burwick, supra* at 295. The fact that the gun matched the caliber of the casings in question was known before trial and already required defendant, albeit to a lesser extent, to separate himself from the gun. Moreover, the defense was offered time to secure an expert and to present additional witnesses. Regardless, counsel declined and, instead, appeared to reasonably use cross-examination techniques and

existing witnesses to address the ballistics match and the origin of the gun. Defendant's mother and grandmother testified that defendant was not actually living in the apartment where he was arrested. The grandmother also testified that the gun did not belong to defendant but was left in the apartment by another man. Defendant does not suggest what testimony or other evidence would have further distanced him from the gun or why he would not have investigated such evidence from the outset.

The ballistics evidence was clearly important to a jury's full understanding of the facts of the case. Defendant failed to request a continuance and presents a near total lack of argument for how the trial would have differed if the ballistics evidence had been received earlier or if the trial had been postponed. Thus, a reversal is unwarranted.

Defendant lastly argues that he is entitled to a new trial, or at least a remand for an evidentiary hearing, based on newly discovered evidence. He contends that a prosecution witness, Latasha Boatright, provided perjured testimony when she testified that she was "a friend" of DeAnthony Witcher, the intended victim in this case.[1] Defendant indicates that Boatright and Witcher were not "friends" but rather were half-siblings. Defendant argues that "[t]here is a real likelihood that the jury would have discounted Boatright's testimony, knowing that Boatright was Witcher's half-sister with a possible motive to falsely accuse [defendant] out of spite." We disagree that a reversal or a remand is warranted.

As stated in *People v Miller*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995), "[b]efore a new trial is warranted" on the basis of newly discovered evidence, "a defendant must demonstrate that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence." Here, evidence that Boatright was Witcher's half-sister would *not* have been likely to cause a different result, given that Boatright already demonstrated a possible bias by testifying that Witcher was her friend. Moreover, the alleged fact that Boatright was Witcher's half-sister does not necessarily render untrue the statement that Boatright was also his friend. Accordingly, a reversal or remand is unwarranted.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio

[1] Different individuals ended up being shot, apparently in a case of mistaken identity.

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT,
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Circuit Court No. 04-012890-01-FC
Honorable Timothy M. Kenny

THELONIOUS SEARCY,

Defendant.

The People's Appendix C

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STATE OF MICHIGAN
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The People's Appendix C-1

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

-vs-

VINCENT SMOTHERS
Defendent.

_____/

AFFIDAVIT

STATE OF MICHIGAN)
COUNTY OF WAYNE)

I, VINCENT SMOTHERS, being first sworn, state under the penalty of perjury that the following is true:

I'm coming forward with this information about the murder of JAMAL SEGARS, because I heard it's a innocent man sentenced, for this crime, I want to tell the truth about every vile murder, I committed in the CITY OF DETROIT. I want to give all of my victims family closure for their love one's death.

On SEPTEMBER 6, 2004, approximately around 9:00 P.M., me & my man JEFFEREY DANIELS approached a silver (2) door 2004 Corvette. The driver was this guy name JAMAL SEGARS, on the street, we called him "Q". He was a certified "Dope Boy", from the Buffalo Projects off of Nevada. Him & his brother "Walla" was getting money for real. I had been on these boy's trail for 6 mths. strait, tracking they every move. The only thing about these two boy's was their crew they stayed 20 deep. It was me & JEFFEREY goal to catch these boy's solo. If I catch these boys solo I could easily get 20 or 30 thousand from either brother's pocket.

After tracking these boy's moves for month;s, we caught "Q" by his self, at the "CITY AIRPORT" on CONNER'S. We spotted "Q" sitting in traffic headed towards GRATIOT with his top let down on his corvette, talking on his cell-phone. Shortly after we spotted "Q", JEFFEREY parked his 4 door blk Lumina on FINDLEY & CONNER'S, then we proceeded toward's "Q" corvette. As me & JEFFEREY approached "Q's" corvette a tall 6 foot 3 African American male, wearing dark jeans with a white button up shirt, approached "Q's" passenger door with a phone in his right hand. When the guy got into the car, I told JEFFEREY fuck-it, let's go.

JEFFEREY pulled out his chrome & black HK 45, and continued walking towards the rear of the corvette, through traffic. Soon as we got to the trunk of the corvette. "Q" looked back at me. Without any hesitation I fire three shot's, from my chrome & black HK 40 into "Q's" back. Soon as I fired, JEFFEREY fired into the air, When he fired into the air, the passenger ducked down as if he was grabbing something from the floor. I proceeded to fire (3) more times into the left side of "Q" from the driver side, then I fired a fatal shot towards his head, As I stood over him, I snatched $300 dollars from his left hand, then I fled back to JEFFEREY'S car.

As I got into the car, an unmarked BLACK DETROIT POLICE SQUAD CAR, "CROWN VICTORIA", crashed into a 4 door Burgundy Maranda in front of a SHELL GAS STATION on CONNER'S. Seconds after the two car's collided head on, the passenger cop, which was a Caucasian male, got out, wearing a gray hood and black pants firing shot's at JEFFEREY. The driver of the police car, appeared to be hurt, his airbag's were deployed. I never saw the driver get out the squad car.

After the passenger from the squad car fired at JEFFEREY, JEFFEREY took off running with the crowd of people, then he returned to the car, I sped down FINDLEY TO GUNSTON, then I took GUNSTON TO GRATIOT. I drove down GRATIOT towards 8 MILE. I pulled into a store parking lot on NOVARRA & GRATIOT. While I was there, I told JEFFEREY to get rid of the (45). He tried to convince me to let him keep the pistol. I wasn't having it.

I pulled out my "40" from my hip, letting him know that I wasn't playing. Fearing the consequences, he told me he would sell it. After we agreed on him selling the pistol, I told him to lay low & don't speak on this shit, then I got out of the car.

Two weeks after the incident at "THE ALL BLACK PARTY". JEFFEREY was killed on SEPTEMBER 21, 2004 trying to sell a fake kilo of drywall, on BALFOUR & WHITTIER. A few months after JEFFEREY was killed they arrested a guy that looked like

JEFFEREY for "Q" murder, that shit fucked me up. I needed to come forward with this murder as I done in previous case.

Sincerely,

VINCENT SMOTHERS

Subscribed and Swore to before me on this 10th, day of December 2015.
County of Macomb Notary

MICHELLE WILLIAMS-WAPO
NOTARY PUBLIC, STATE OF MI
COUNTY OF MACOMB
MY COMMISSION EXPIRES Aug 22, 2019
ACTING IN COUNTY OF

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT,
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Circuit Court No. 04-012890-01-FC
Honorable Timothy M. Kenny

THELONIOUS SEARCY,

Defendant.

The People's Appendix C-2

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

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AFFIDAVIT

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After tracking these boy's moves for month;s, we caught "Q" by his self, at the "CITY AIRPORT" on CONNER'S. We spotted "Q" sitting in traffic headed towards GRATIOT with his top down on his corvette, talking on his cell-phone. Shortly after we spotted "Q", JEFFEREY parked his 4 door blk Lumina on FINDLEY & CONNER'S, then we proceeded toward's "Q" corvette. As me & JEFFEREY approached "Q's" corvette a tall 6 foot 3 African American male, wearing dark jeans with a

white button up shirt, approached "Q's" passenger door with a phone in his right hand. When the guy got into the car, I told **JEFFEREY** fuck-it, let's go.

JEFFEREY pulled out his chrome & black HK 45, and continued walking towards the rear of the corvette, through traffic. Soon as we got to the trunk of the corvette. "Q" looked back at me. Without any hesitation I fire three shot's, from my chrome & black HK 40 into "Q's" back. Soon as I fired, **JEFFEREY** fired into the air, When he fired into the air, the passenger ducked down as if he was grabbing something from the floor. I proceeded to fire (3) more times into the left side of "Q" from the driver side, then I fired a fatal shot towards his head, As I stood over him, I snatched $300 dollars from his left hand, then I fled back to **JEFFEREY'S** car.

As I got into the car, an unmarked **BLACK DETROIT POLICE SQUAD CAR, "CROWN VICTORIA"**, crashed into a **4 door Burgundy Maranda** in front of a **SHELL GAS STATION** on **CONNER'S**. Seconds after the two car's collided head on, the passenger cop, which was a Caucasian male, got out, wearing a gray hood and black pants firing shot's at **JEFFEREY**. The driver of the police car, appeared to be hurt, his airbag's were deployed. I never saw the driver get out the squad car.

After the passenger from the squad car fired at **JEFFEREY, JEFFEREY** took off running with the crowd of people, then he returned to the car, I sped down **FINDLEY TO GUNSTON**, then I took **GUNSTON TO GRATIOT**. I drove down **GRATIOT** towards **8 MILE**. I pulled into a store parking lot on **NOVARRA & GRATIOT**. While I was there, I told **JEFFEREY** to get rid of the (45). He tried to convince me to let him keep the pistol. I wasn't having it.

I pulled out my "40" from my hip, letting him know that I wasn't playing. Fearing the consequences, he told me he would sell it. After we agreed on him selling the pistol, I told him to lay low & don't speak on this shit, then I got out of the car.

Two weeks after the incident at **"THE ALL BLACK PARTY"**. **JEFFEREY** was killed on **SEPTEMBER 21, 2004** trying to sell a fake kilo of drywall, on **BALFOUR & WHITTIER**. A few months after **JEFFEREY** was killed they arrested a guy that looked like **JEFFEREY FOR "Q" murder**, that shit fucked me up. I needed to come forward with this murder as I done in previous case.

Sincerely,

VINCENT SMOTHERS

Subscribed and swore to before me
on this 27TH day of December 2015.
County of WAYNE Notary

Gayle Spearman Lasch, Notary Public
State of Michigan, County of Wayne
My Commission Expires 1/30/2020
Acting in the County of MACOMB.

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT,
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Circuit Court No. 04-012890-01-FC
Honorable Timothy M. Kenny

THELONIOUS SEARCY,

Defendant.

The People's Appendix D

Kym L. Worthy
Prosecuting Attorney
County of Wayne

Jason W. Williams
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Training and Appeals

Thomas M. Chambers P 32662
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Affidavit of Vincent Smothers

BEFORE ME, the undersigned Notary, on December 21st 2016, personally appeared Vincent Smothers, who being by me first duly sworn, on his oath, deposes and says:

1. My name is Vincent Smothers, and I make this affidavit from personal knowledge of the matters addressed herein.

2. On September 6, 2004, I committed the murder of Jamal Segers, a man known to me by his street name of "Q". I did not know Mr. Segers personally, I knew him by sight and through his reputation as one of the major drug dealers in the City of Detroit.

3. The murder happened in the area of Conner Street and Whithorn Street in Detroit, near the entrance to Detroit City Airport.

4. I was driving northbound on Conner with an associate, Jeffrey Daniels, when I spotted Jamal Segers behind the wheel of his Corvette. He was facing southbound and was stuck in traffic because of a large party that was going on at the airport.

5. I knew that Segers was likely to have cash on him because he was a drug dealer and I decided to rob him. I drove one block to the north and parked my car at Conner and Findlay. Jeffrey Daniels and I got out of the car and started walking towards Seger's Corvette to rob him. We both had handguns, a 40 caliber and a 45 caliber.

6. As I approached the rear of Segers' Corvette it appeared to me that he might have spotted me through his rear view mirror. I fired about three shots at Segers from the rear of the Corvette. I continued walking toward the driver's side door and fired about 3 more shots. When I arrived at the driver's side door I fired a single shot at Segers' head. Segers had money in his hand. I reached into the car and grabbed the money out of his hand. There was a passenger in Segers' car. Jeffrey Daniels was on the passenger side of the car and fired at least one shot into the air, but did not shoot at the passenger.

7. At this point, an unmarked police car, trying to get to us, got into a crash. The passenger got out of the police car and opened fire on us but neither of us was hit. The driver of the police car appeared to either be hurt or trapped inside because he never got out.

8. Jeffrey Daniels ran up Conner to Findlay to my car. I ran up Whithorn behind a gas station and then to Findlay where my car was parked and drove off with Daniels in the car.

9. I gave my gun to Jeffrey Daniels and told him to get rid of both of them. About two weeks later Jeffrey Daniels was murdered.

10. When I was in prison, after the murder, I heard through other inmates that a person I knew as "Skinny Man" was locked up for the murder of Jamal Segers. I later learned that this person's real name is Thelonious Searcy. I did not know Searcy personally, only by reputation through the streets. I wrote Searcy a letter admitting to him that I had committed the murder that he was locked up for.

11. I decided to come forward because prison is extremely difficult even when you're guilty and it has to be more so when you're not. I know first hand how bad prison is and I don't think someone should suffer through prison for life if they didn't commit the crime.

12. I have not been pressured, bribed, threatened, or in any way forced into signing this statement. I have no reason to lie in this statement. I am willing to testify under oath in a court of law to the contents of this affidavit and to the truth of my involvement in this murder.

FURTHER, YOUR AFFIANT SAYETH NOT.

Vincent Smothers

[Signature of affiant] 12-21-2016 [date]

Subscribed and sworn to before me on December 21, 2016 in Macomb County, Michigan.
My commission expires: March 20, 2022

Signature: _____
Notary Public, State of Michigan, County of Macomb