

observation unable to identify the shooter, but then you have everyday people able to do things extraordinary things without training. Boatright and Jeffries' testimony must be viewed as being bias in light of their relationship with Witcher. The Michigan Supreme Court long ago recognized that it is a scientific and judicially recognized fact that there are serious limitations on the reliability of eyewitness identification of defendants. *People v Franklin Anderson*, 389 Mich 155 (1973). It further recognized the historical and legal fact that a significant number of innocent people have been convicted of crimes they did not commit based on eyewitness identification. *Anderson*, at 172.

This danger has also been recognized by the United States Supreme Court. See, *United States v Wade*, 388 US 218, 228 (1967). In the instant case, a fair assessment of the reliability of alleged eyewitnesses is that they were longtime friends or had some form of prior contact with DeAnthony Witcher. Their identification testimony must be viewed as being highly questionable. Defendant Searcy submits that had his jury heard this damning confession from Vincent Smothers, it is more likely than not, no reasonable juror would find him guilty beyond a reasonable doubt.

This Court has been presented with both a confession from the killer, and eight alibi witnesses to support Defendant Searcy's claim of actual innocence. Taken together, these separate pieces of evidence support Defendant's claim of actual innocence sufficiently to warrant a new trial.

Defendant is sure that the prosecution position as it pertains to the alibi witnesses evidence and the highly questionable identification evidence, would be that Defendant Searcy's jury has heard this evidence, thus, it is not "new reliable evidence" under *Schlup v Delo*, 513 US 298, 316 (1995). Such a position is of no moment in light of the United States Supreme Court's latest pronouncement in *House v Bell*, 547 US 518 (2006):

""Schlup makes plain that the habeas court must consider all the evidence, old and new, incriminating and exculpatory..."House, at 538. (quoting Schlup, 513 US at 327-28).

Thus, the question reverts back to whether Defendant Searcy's new evidence, coupled with the evidence presented at trial, establishes "that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt." Schlup, at 327. In Defendant's Searcy's view, his new evidence does just that, and this Honorable Court should accordingly grant him a new trial for the reasons set forth below.

Actual Innocence:

To satisfy the Schlup standard, a claim of actual innocence must be both "credible" and "compelling." See House, 547 US at 521, 538. For the claim to be "credible," it must be supported by "new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." Schlup, 513 US at 324. For the claim to be "compelling," the defendant must demonstrate that "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt-or to remove the double negative, that more likely any reasonable juror would have reasonable doubt." 547 US at 538.

Defendant Searcy submits that he can show that "no reasonable juror would have voted to convict him had Smothers confession been submitted at his trial.

One must look to Smothers' confession as stated in his affidavit. Smothers not only states what happen, but how it all came about, the name of the person who aided him, how they laid in wait for the victim. Also in his confession, Smothers admits that Defendant Searcy played no role in the shooting death of Jamal Segars, and the shooting of Brian Minner, more importantly, Smothers states: "I needed to come forward with this murder as I done in previous cases." (See affidavit of Vincent Smothers, attached).

The previous case(s) that Smothers was referring to is the case of People v. Davontae Sanford, (Wayne County Circuit Court, docket No. 07-015018-FC). Sanford was ordered released from prison on June 6, 2016, by Wayne County Circuit Judge Brian Sullivan, after serving eight years in prison for four murders that took place in a house on Runyon street on Detroit's east side. Sanford was ordered released from prison after convicted "hit man" Vincent Smothers confessed, that he, not Sanford had committed the murders. The murders confessed to by Smothers in the People v. Sanford case, is not the only murders he has confessed to. In Todd v. Kwame Kilpatrick & City of Detroit, 2012 Mich. App. Lexis 234 (2012) (a whistle blower protection act case). Detroit Police Officer Ira Todd investigated Smothers and elicited a confession from him that he was hired by another Detroit Police Officer to kill the officer's wife so that the Officer could collect insurance proceeds and continue an extramarital affair. According to Detroit news papers accounts, Mrs. Rose Cobbs, a teacher, and wife of a Detroit Police Officer, was shot and killed outside of a CVS pharmacy on Dickerson and Jefferson in Detroit while her husband (the police officer) was inside the store. After Smothers had confessed to the Cobbs murder and admitted that he was hired by the husband to kill the wife, the husband committed suicide. Defendant ask that this Court take judicial notice pursuant to MCR 201(b) of the adjudicative facts regarding Smothers confessions.

Vincent Smothers confession at the time he made it was so far contrary to his pecuniary or proprietary interest, and subjected him to criminal liability, that it rendered invalid any criminal liability against Defendant Searcy. This is so because "a reasonable person in Smothers position would not have made the confessions unless believing them to be true." The State of Michigan has endorsed Smothers' credibility in People v Sanford, supra, and Todd v Kwame Kilpatrick & City of Detroit, supra. As the United States Supreme Court observed

in *Arizona v Fulminante*, 499 US 279 (1991):

"A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him...[T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its [the jury] ability to put them out of mind even if told to do so." *Fulminante*, at 296.

An ever present peril for the criminal justice system is the conviction of an innocent person. Under our judicial system, two propositions are clear: Justice is the search for the truth and the judicial system is staffed by fallible human beings who inevitably err. As a consequence of these two conflicting propositions some means must exist to exonerate those legally guilty but actually innocent -- balancing the interests in finality and efficiency with the interest in fundamental fairness. "After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent." *Herrera v Collins*, 506 US 390, 399 (1993).

Michigan law has been noticeably quiet as to what constitutes "actual innocence." In 2009, the Michigan Supreme Court issued an order directing the Court of Appeals to consider "whether a defendant's constitutional rights are implicated given that the trial court found a significant possibility that the defendant is innocent based on evidence defendant's attorney failed to present at trial. *People v Swain*, 485 Mich 994 (2209). On remand the Michigan Court of Appeals looked to federal case law governing actual innocence claims and procedural defaults and thereafter concluded that the defendant had failed to show a constitutional deprivation. *People v Swain*, 288 Mich App 609 (2010).

The federal standard as to what constitutes a colorable showing of actual

innocence under Schlup was explained by Justice Kennedy in House as follows: A defendant must show that it is "more likely than not that any reasonable juror would have reasonable doubt" regarding guilt.

The reasonable doubt formulation is understandable because the focus of an innocence inquiry is the weighting of the impact of evidence not given at trial on a reasonable juror in light of the evidence considered by the jury in rendering their verdict. It is not the role of the reviewing court to make independent factual determination of innocence. In making its innocence inquiry, as stated above, the reviewing court, "must consider all the evidence, old and new, incriminating and exculpatory, without regard to its admissibility at trial. It is in this area that a federal innocence claim under Schlup, parts company with the newly discovered standard of Cress. See Souter v Jonas, 395 F.3d 577, n.9 (6th Cir. 2005). Furthermore, the Souter Court stated the following in regards to affidavits:

"[T]he new affidavits do not merely add to the defense, but also deduct from the prosecution. As a result, the affidavits can be considered new 'reliable evidence' upon which an actual innocence claims may be based." Souter, at 593.

Prior to Mr. Smothers executing the affidavit, he contacted Defendant Searcy by letter introducing himself and explaining that he had read his case in the law library while researching issues and discovered that he was in prison for the Jamal Segars murder. In the letter, Smothers states that he is in prison for "multiple homicides" and that the Segars murder was committed by him and that Mr. Searcy is in prison for a crime he did not commit. Smothers goes on in the letter to state that he is willing to provide Defendant with an affidavit and more details concerning the crime. (See letter of Vincent Smothers, dated August 22, 2015, attached).

In Schlup, the Supreme Court held that the standard for actual innocence is

not whether the facts "unquestionably establish" Defendant's innocence, but whether the facts "undermine confidence in the result of the trial."

The Schlup Court ruled that a showing that the evidence was sufficient to convict does not bar the reliance on a colorable claim of innocence:

"petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." Schlup, at 331.

Although the Schlup standard is demanding and permits review only in the extraordinary case, the Court has emphasized that the standard does not require absolute certainty about the defendant's guilt or innocence. House, at 538. In House the defendant presented credible new evidence that undermined the evidence supporting the jury's verdict. 547 US at 553-54.

In House, the defendant challenged his conviction for the murder of a woman who lived near him. The victim's daughter testified that, on the night of the murder, her mother was lured out of the house by a man with a deep voice, like that of defendant. 547 US at 523-24. A witness who helped in the search for Mrs. Muncey's body stated that he saw House emerge from an embankment near where the victim's body was found, wiping his hands on a rag. 547 US at 524-25. When the police questioned House, he told them that he had been with his girlfriend during the evening of the murder, the girlfriend however, later told the police that had in fact left her trailer to go for a walk at about 10:30 or 10:45 in the evening, the medical examiner had determined that Muncey had probably died. According to House girlfriend when he returned to the trailer, he was "hot and panting, did not have his shirt and shoes." At 526-27. When the police interviewed House, they noticed that he had scratches on his arms and legs as well as a bruise on his right ring finger. Finally, testing by the FBI revealed human blood of Muncey's type on the pants House had been wearing the night of the murder and semen on Muncey's nightgown that was consistent with House's

blood type. 547 US at 528-29. Despite this and other evidence suggesting that House was in fact guilty, the United States Supreme Court held that he had succeeded in making a compelling showing of actual innocence because he had produced expert testimony that "called into question" the "central forensic proof connecting him to the crime," (the blood and semen) and had produced evidence in the form of a new witness testimony that Muncey's husband had confessed to killing her. At 548-53.

In viewing this mountain of evidence against House, and the Supreme Court's finding that he had introduced credible new evidence that undermined the evidence supporting the jury's verdict, then surely, Defendant Searcy has when applying the Schlup standard and guided by the Supreme Court's application of that standard in House, coupled with the highly questionable identification testimony, the relationship of some of the witnesses with DeAnthony Witcher, and the "confession of the perpetrator of the crime (Vincent Smothers), along with his confession in People v. Sanford (which caused Sanford's release from prison), and his confession to being hired by a Detroit Police Officer to kill Rose Cobbs, this Court must conclude that it is more likely than not, in light of the credible new evidence Defendant Searcy has presented in support of his motion for a new trial, that any reasonable juror would have harbored a reasonable doubt about his guilt.

In Chambers v Mississippi, 410 US 284 (1973), the United States Supreme Court ruled that it was a denial of due process of law to exclude from jury consideration the confession of another person to the crime for which the defendant was on trial. US Const., Amendment, XIV. The Court hearsay rules cannot constitutionally be applied to bar admission of another person's confession of involvement in the very actions for which the defendant was on trial.

A defendant in a criminal trial has the due process right to seek out the truth in the process of defending himself. *Davis v Alaska*, 415 US 308, 320 (1974). While it is possible for a person to confess and still be innocent, a confession is normally thought of as being powerful evidence of the guilt of the declarant. *Fulminante*, *supra*. However, in the present case this Court has before it not just one confession from the real killer, but confessions by the killer in other cases, that the State of Michigan has found to be credible enough to have a judge to order the immediate release of a man from prison. See, *People v Sanford*, and in another case where a three judge panel of the Michigan Court of Appeals allowed the same killer's confession regarding another murder to be used as evidence in a whistle blower protection act case. See, *Todd v. Kwame Kilpatrick & City of Detroit*. To deny a new trial in this case would amount to excluding from evidence the out of court confession of Vincent Smothers, contrary to *Chambers v Mississippi*.

Defendant Searcy has made a strong showing that he is actually innocent under the standard set forth in *Schlup* and *House*.

1-B DEFENDANT SEARCY IS ENTITLED TO AN EVIDENTIARY
HEARING TO DEVELOP A RECORD FOR HIS NEWLY
DISCOVERED/NEW RELIABLE EVIDENCE CLAIM.

It is unreasonable for a trial court to determine the credibility of witnesses on the basis of prejudice, and unreasonable state court rulings cannot be sustained. *Terry Williams v Taylor*, 529 US 362 (2000). 'If, for example, a state court makes evidentiary findings without conducting a hearing and giving defendant an opportunity to present evidence, such findings clearly result in an unreasonable determination of the facts. *Taylor v Mattox*, 366 F.3d 992 (9th Cir. 2004).

This Honorable Court is obligated to hold a hearing and determine not whether the Court believes Vincent Smothers, but whether any reasonable trier of fact could believe him. *People v Machura*, 205 Mich App 481 (1984). It is well established that a statement by a witness against his own penal interest is often effective at preventing a conviction of the charged defendant, *Chambers*, *supra*, *Fulminante*, *supra*. As the Court stated in *Chambers*, "few rights are more fundamental than that of an accused to present witnesses in his own defense." Here, Defendant Searcy has a witness for his own defense, one with personal knowledge, the killer himself, who swears Defendant had no role in the killing. Yet, his fundamental right to present that witness in his defense may be denied if he is not allowed an evidentiary hearing.

Defendant Searcy is entitled to an evidentiary hearing so that he can develop a record for his actual innocence claim. See also *In re Troy Anthony Davis*, 557 US 482 (2009), which provides for evidentiary hearings in light of an actual innocence claim.