UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: City of Detroit, Michigan, Debtor.	Bankruptcy Case No. 13-53846 Judge Thomas J. Tucker Chapter 9

CITY OF DETROIT'S MOTION FOR THE ENTRY OF AN ORDER ENFORCING THE BAR DATE ORDER AND CONFIRMATION ORDER AGAINST KENNETH NIXON

The City of Detroit, Michigan ("City") by its undersigned counsel, Miller, Canfield, Paddock and Stone, PLC, files this *Motion for the Entry of an Order Enforcing the Bar Date Order and Confirmation Order Against Kenneth Nixon* ("Motion"). In support of this Motion, the City respectfully states as follows:

I. Introduction

1. On June 28, 2023, Kenneth Nixon ("Nixon") filed a lawsuit against the City seeking monetary damages on account of alleged events which occurred in 2005, approximately eight years before the City filed for bankruptcy. As a result, the filing of this lawsuit violates the discharge and injunction provisions in the City's confirmed Plan and the Bar Date Order (each as defined below).

2. The City informed Nixon of these violations and asked him to voluntarily dismiss the City from the lawsuit, but to no avail. As a result, the City is left with no choice but to seek an order barring and permanently enjoining Nixon from asserting and prosecuting the claims described in the federal court action

against the City or property of the City and requiring Nixon to dismiss the City from the lawsuit with prejudice.

II. Factual Background

A. The City's Bankruptcy Case

3. On July 18, 2013 ("Petition Date"), the City filed this chapter 9 case.

4. On October 10, 2013, the City filed its Motion Pursuant to Section 105, 501 and 503 of the Bankruptcy Code and Bankruptcy Rules 2002 and 3003(c), for Entry of an Order Establishing Bar Dates for Filing Proofs of Claim and Approving Form and Manner of Notice Thereof ("Bar Date Motion") [Doc. No. 1146], which was approved by order of this Court on November 21, 2013 ("Bar Date Order"). [Doc. No. 1782].

5. The Bar Date Order established February 21, 2014, as the deadline for filing claims against the City. Paragraph 6 of the Bar Date Order states that the

> following entities must file a proof of claim on or before the Bar Date…any entity: (i) whose prepetition claim against the City is not listed in the List of Claims or is listed as disputed, contingent or unliquidated; and (ii) that desires to share in any distribution in this bankruptcy case and/or otherwise participate in the proceedings in this bankruptcy case associated with the confirmation of any chapter 9 plan of adjustment proposed by the City…

Bar Date Order ¶ 6.

6. Paragraph 22 of the Bar Date Order also provides that:

> Pursuant to sections 105(a) of the Bankruptcy Code and Bankruptcy Rule 3003(c)(2), any entity that is required to file a proof of claim in

this case pursuant to the Bankruptcy Code, the Bankruptcy Rules or this Order with respect to a particular claim against the City, but that fails properly to do so by the applicable Bar Date, shall be forever barred, estopped and enjoined from: (a) asserting any claim against the City or property of the City that (i) is in an amount that exceeds the amount, if any, that is identified in the List of Claims on behalf of such entity as undisputed, noncontingent and liquidated or (ii) is of a different nature or a different classification or priority than any Scheduled Claim identified in the List of Claims on behalf of such entity (any such claim under subparagraph (a) of this paragraph being referred to herein as an "Unscheduled Claim"); (b) voting upon, or receiving distributions under any Chapter 9 Plan in this case in respect of an Unscheduled Claim; or (c) with respect to any 503(b)(9) Claim or administrative priority claim component of any Rejection Damages Claim, asserting any such priority claim against the City or property of the City.

7. Nixon did not file a proof of claim.

8. On October 22, 2014, the City filed its *Eighth Amended Plan of the Adjustment of Debts of the City of Detroit* ("Plan"), which this Court confirmed on November 12, 2014. [Doc. Nos. 8045 & 8272].

9. The discharge provision in the Plan provides:

> Except as provided in the Plan or in the Confirmation Order, the rights afforded under the Plan and the treatment of Claims under the Plan will be in exchange for and in complete satisfaction, discharge and release of all Claims arising on or before the Effective Date. Except as provided in the Plan or in the Confirmation Order, Confirmation will, as of the Effective Date, discharge the City from all Claims or other debts that arose on or before the Effective Date, and all debts of the kind specified in section 502(g), 502(h) or 502(i) of the Bankruptcy Code, whether or not (i) proof of Claim based on such debt is Filed or deemed Filed pursuant to section 501 of the Bankruptcy Code, (ii) a Claim based on such debt is allowed pursuant to section 502 of the Bankruptcy Code or (ii) the Holder of a Claim based on such debt has accepted the Plan.

Plan, Art. III.D.4, at p.50.

10. Further, the Plan injunction set forth in Article III.D.5 provides in pertinent part:

> **Injunction**
>
> **On the Effective Date, except as otherwise provided herein or in the Confirmation Order,**
>
> **a. all Entities that have been, are or may be holders of Claims against the City…shall be permanently enjoined from taking any of the following actions against or affecting the City or its property…**
>
> **1. commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind against or affect the City of its property…**
>
> **5. proceeding in any manner in any place whatsoever that does not conform or comply with the provisions of the Plan or the settlements set forth herein to the extent such settlements have been approved by the Bankruptcy Court in connection with Confirmation of the Plan; and**
>
> **6. taking any actions to interfere with the implementation or consummation of the Plan.**

Plan, Article III.D.5, at pp.50-51 (emphasis added).

11. The Court also retained jurisdiction to enforce the Plan injunction and to resolve any suits that may arise in connection with the consummation, interpretation or enforcement of the Plan. Plan, Art. VII. F, G, I, at p.72.

B. Nixon's Lawsuit Against the City

12. On June 28, 2023, Nixon filed a complaint ("Complaint") against the City and five named police officers and other unidentified employees of the Detroit Police Department ("Defendant Officers") in their individual capacity,[1] in the United States District Court for the Eastern District of Michigan ("District Court"), commencing case number 23-11547 ("Lawsuit"). Complaint ¶¶ 18-19. A copy of the Complaint is attached as **Exhibit 6A** and the docket in the Federal Court Lawsuit is attached as **Exhibit 6B.**

13. In the Complaint, Nixon alleges that very late at night on May 19, 2005, a fire broke out at 19428 Charleston Street, Detroit and that two children of the five children living in the house perished in the fire. Complaint ¶¶ 20-21.

14. Nixon asserts that "he had absolutely nothing to do with this crime. At the time of the fire, Mr. Nixon was at home with Latoya Caulford, his then-girlfriend and the mother of his child, and some of Ms. Caulford's family members." Complaint ¶ 24.

[1] The Complaint does not appear to assert claims against the Defendant Officers in their official capacity. However, the City requests that this Court enter an order requiring the dismissal of any claims against the Defendant Officers in their official capacity as Nixon does not clearly state whether the claims against the Defendant Officers are limited to their individual capacity.

15. Nixon asserts that notwithstanding his "absolute innocence", he was arrested shortly after the fire based on a fabricated story from one of the children, Brandon Vaughn, who resided at 19428 Charleston Street. Complaint ¶¶ 28-36.

16. Nixon further asserts that the Defendants coerced an informant who resided in the same cellblock as Nixon to falsely state that Nixon had confessed to the crime. Complaint ¶¶ 49-57.

17. Nixon asserts that based on Vaughn's "coached testimony" and the "informant's fabricated testimony" he was convicted of arson, murder and attempted murder. At his sentencing, Nixon stated: "I would just like you to know that you're about to sentence an innocent man to prison." Complaint ¶¶ 59-60.

18. Nixon was convicted on September 21, 2005. Complaint ¶ 1.

19. Nixon further asserts that "Never giving up hope on proving his innocence, Plaintiff continued to pursue appeals and other means to secure his freedom." Complaint ¶¶ 6, 62.

20. In the lawsuit, Nixon seeks damages "for the period from May 20, 2005, the date he was falsely arrested and imprisoned, through each and every year to the present and into the future." Complaint ¶ 88.

C. Nixon Unsuccessfully Appeals His Conviction

21. Nixon unsuccessfully appealed his conviction. *People v. Nixon*, No. 266033, 2007 WL 624704 (Mich. Ct. App. Mar. 1, 2007). *See also* **Exhibit 6C**,

Petition for Habeas Corpus ("Petition"), Appendix Item #1, PageID. 69. In his appeal, Nixon asserted that he was entitled to a new trial on the grounds of newly discovered evidence. *People v. Nixon*, No. 266033, 2007 WL 624704 at *1 (Mich. Ct. App. Mar. 1, 2007). Specifically, Nixon claimed that his codefendant and girlfriend, Latoya Caulford, who was acquitted of all charges in a separate jury trial, came forward after his trial and stated that Nixon did not commit the crimes because, when they occurred, he was with her in her room at a different home. *Id.* The court of appeals found that this was not newly discovered evidence and thus Nixon was not entitled to a new trial. *Id.*

22. On appeal, Nixon also argued that the trial court abused its discretion when it allowed the prosecutor to play portions of his telephone calls from jail. *Id.* The court of appeals rejected this argument and found that the telephone calls were relevant. *Id*. at *2.

23. Nixon further argued that the trial court erred when it admitted Brandon Vaughn's statement that identified Nixon as the person who started the fire. *Id.* at *3. The court of appeals found that the statements were not hearsay, but even if they were, they would be admissible as excited utterances. *Id.*

24. Finally, Nixon asserted that he was denied effective assistance of counsel. The court of appeals also rejected this argument and stated that Nixon "clearly was not deprived of a fair trial." *Id.* at *4.

25. The court of appeals affirmed the trial court on March 1, 2007. *Id.*

26. The Michigan Supreme Court denied leave to appeal on September 10, 2007, and denied reconsideration on November 29, 2007. Petition, PageID. 3-4, 75-76, Appendix Items ## 2-3.

27. Nixon also filed a motion for relief from judgment in the trial court on December 8, 2008. *Id.* The trial court considered the merits of all the issues and denied relief by Opinion and Order entered July 17, 2009. Petition, PageID. 3-4, 77, Appendix Item #4.

28. Application for leave to appeal was filed and denied by the Michigan Court of Appeals on November 23, 2009, in docket no. 293476. Petition, PageID. 3-4, 79, Appendix Item #5. Application for leave to appeal was also denied by the Michigan Supreme Court in docket no. 140403, on September 9, 2010. Petition, PageID. 3-4, 80, Appendix Item #6.

D. Nixon's Application for Writ of Habeas Corpus is Denied

29. On November 23, 2010, Nixon filed the Petition. *See* **Exhibit 6C**. The Petition was 102 pages, cited over 85 cases and contained 13 exhibits. *Id.*

30. In the Petition, Nixon asserted that there that was newly discovered evidence of actual innocence, that his counsel was ineffective, that his conviction was based on perjured evidence, that he was denied a fair trial due to prosecutorial misconduct, and that his appellate counsel was constitutionally ineffective.

31. With respect to actual innocence, Nixon asserted that he had newly discovered evidence of actual innocence, which included evidence that the informant "fabricated testimony for the express purpose of obtaining early release so he could be home for his daughter's graduation." Petition, PageID. 5.

32. Nixon also argued ineffective assistance of counsel. Petition, PageID. 5-8. He asserted that his counsel was ineffective because his counsel did not obtain the results from a polygraph test he allegedly passed, failed to properly prepare witnesses, and failed to elicit testimony from witnesses which would have proven his innocence. *Id.*

33. Nixon submitted a six-page affidavit in support of the Petition. Petition, PageID. 81, Appendix Item #7. In the affidavit, Nixon again asserted that he was innocent. PageID. 82, paragraph 7. He also filed the alleged polygraph results as appendix item 8. Petition, PageID. 87-88. The polygrapher concluded that Nixon was being truthful when he denied committing the crime. *Id.* He further submitted affidavits and polygraph results from his girlfriend wherein she claimed that Nixon was with her when the crime was committed. Petition, PageID. 89 - 94, Appendix Items ## 9-10.

34. On September 28, 2012, the Magistrate Judge issued a 37-page report and recommendation, which recommended that the District Court deny the Petition. **Exhibit 6D**, Report and Recommendation.

35. On October 11, 2012, Nixon filed his objections to the Report and Recommendation ("Objection"). **Exhibit 6E**, Objection. In the Objection, Nixon again advanced several objections based on his claim of actual innocence. Objection, PageID. 1804-1807. Nixon advanced several other objections, including that he passed a polygraph test. Objection, PageID. 1807-1815.

36. On November 12, 2012, the United States District Court for the Eastern District of Michigan issued a memorandum and order overruling Nixon's objections to the Report and Recommendation and denying Nixon's application for a writ of habeas corpus. *Nixon v. McQuiggin*, No. 10-14652, 2012 WL 5471128, at *1 (E.D. Mich. Nov. 9, 2012).

III. Argument

37. Nixon violated the Plan's injunction and discharge provisions when he filed the Lawsuit to assert pre-petition claims and otherwise seek relief against the City. And, he continues to violate them by persisting in prosecuting the Lawsuit.

38. Under the "fair contemplation" test, Nixon's claim arose before the City's bankruptcy filing because, prior to the City's filing, Nixon "could have ascertained through the exercise of reasonable due diligence that he had a claim" against the City. *In re City of Detroit, Michigan*, 548 B.R. 748, 763 (Bankr. E.D. Mich. 2016) (internal quotation marks and citation omitted). Indeed, for years before the City filed for bankruptcy, Nixon had been arguing that he was innocent.

39. For bankruptcy purposes, Courts agree that a claim for a wrongful conviction does not accrue when the conviction is vacated. Instead, it arises when the claim first enters into the plaintiff's fair contemplation. In one example, a court noted,

> It must be said here that all Sanford's claims against the City were within his "fair contemplation" before the City declared bankruptcy. He certainly contemplated the factual bases underlying the claims raised in the complaint, since he attempted repeatedly to argue actual innocence before the state courts since at least 2008, insisting that his confession was falsely obtained, concocted, and coerced. Sanford correctly points out that he could not have sued the City until his convictions were set aside, which did not happen until after the bankruptcy. But the courts that have considered the question uniformly have concluded that claims based on prepetition malicious prosecutions were barred, notwithstanding that the plaintiff could not file suit on his claims until his criminal conviction was overturned.

Sanford v. City of Detroit, No. 17-13062, 2018 WL 6331342, at *5 (E.D. Mich. Dec. 4, 2018); *see also Monson v. City of Detroit*, No. 18-10638, 2019 WL 1057306 at *8-9 (E.D. Mich. Mar. 6, 2019); *Burton v. Sanders*, No. 20-11948, 2021 WL 168543, at *4-6 (E.D. Mich. Jan. 1, 2021).

40. The claim comes within the plaintiff's fair contemplation when the underlying events occur, such as the improper arrest, but certainly no later than the date of the trial at which the allegedly improper conviction occurs.

41. This issue has arisen repeatedly in the City's bankruptcy case. Doc. Nos. 11159, 13000 (prior motions to enforce). In each instance, the Court recognized that, because the events that gave rise to the asserted claim occurred

prepetition, the claimant was able to (or should have been able to) contemplate that he had potential claims against the City and, accordingly, file a proof of claim in the City's bankruptcy case if he wished to participate in the case and recover on the claim. *See* Doc. Nos. 11296, 13025 (granting motions referenced above).

42. The instant situation is no different.

43. Nixon's lawsuit is based on claims stemming from actions that culminated in a conviction in 2005. Complaint ¶1.

44. Nixon has proclaimed his innocence since 2005, including at trial, in several lengthy appeals and a petition for habeas corpus, all of which were denied. Each of these proclamations of innocence and events occurred prior to the City's bankruptcy filing.

45. Thus, as in each of the prior cases before this Court, Nixon should have filed a proof of claim in the City's bankruptcy case if he wanted to assert a claim against the City. He did not. He is now barred from asserting any claim against the City or property of the City under the Bar Date Order and Plan.

46. The Plan's discharge provision also states that the "rights afforded under the Plan and the treatment of Claims under the Plan will be in exchange for and in complete satisfaction, discharge and release of all Claims arising on or before the Effective Date." Plan Art. III.D.4, at p.50.

47. Consequently, Nixon does not have a right to a distribution or payment under the Plan on account of the claims asserted in the Lawsuit. Plan, Art. III.D.5, at p.50 ("[A]ll entities that have been, are or may be holders of Claims against the City . . . shall be permanently enjoined from . . . proceeding in any manner in any place whatsoever that does not conform or comply with the provisions of the Plan."). *See also* Plan, Art. I.A.19, at p.3; Art. I.A.134, at p.11; Art. VI.A.1, at p.67 ("Notwithstanding any other provision of the Plan, no payments or Distributions shall be made on account of a Disputed Claim until such Claim becomes an Allowed Claim."). Any claims that Nixon may have had were discharged, and the Plan enjoins Nixon from pursuing them. The Bar Date Order also forever barred, estopped, and enjoined Nixon from pursuing the claims asserted in the Lawsuits.

48. Even if Nixon could somehow seek relief on his claims against the City or its property (which he cannot), the proper and only forum for doing so would be in this Bankruptcy Court. There is no set of circumstances under which Nixon is, or would have been, permitted to commence and prosecute the Lawsuit against the City or its property.

IV. Conclusion

49. The City thus respectfully requests that this Court enter an order, in substantially the same form as the one attached as **Exhibit 1**: (a) directing Nixon to dismiss, or cause to be dismissed, with prejudice the City and the Defendant Officers

in their official capacity from the Lawsuit; (b) permanently barring, estopping and enjoining Nixon from asserting the claims alleged in, or claims related to, the Lawsuit against the City or property of the City; and (c) prohibiting Nixon from sharing in any distribution in this bankruptcy case. The City sought, but did not obtain, concurrence to the relief requested in the Motion.

Dated: August 24, 2023

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Marc N. Swanson
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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	Bankruptcy Case No. 13-53846
City of Detroit, Michigan,	Judge Thomas J. Tucker
Debtor.	Chapter 9

EXHIBIT LIST

Exhibit 1	Proposed Order
Exhibit 2	Notice of Opportunity to Object
Exhibit 3	None
Exhibit 4	Certificate of Service
Exhibit 5	None
Exhibit 6A	Complaint
Exhibit 6B	Federal Court Lawsuit Docket
Exhibit 6C	Petition for Habeas Corpus
Exhibit 6D	Report and Recommendation
Exhibit 6E	Objections to the Report and Recommendation

EXHIBIT 1 – PROPOSED ORDER

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	Bankruptcy Case No. 13-53846
City of Detroit, Michigan,	Judge Thomas J. Tucker
Debtor.	Chapter 9

ORDER GRANTING CITY OF DETROIT'S MOTION FOR THE ENTRY OF AN ORDER ENFORCING THE BAR DATE ORDER AND CONFIRMATION ORDER AGAINST KENNETH NIXON

This matter, having come before the Court on the *City of Detroit's Motion for the Entry of an Order Enforcing the Bar Date Order and Confirmation Order Against Kenneth Nixon* ("Motion"),[1] upon proper notice and a hearing, the Court being fully advised in the premises, and there being good cause to grant the relief requested,

THE COURT ORDERS THAT:

1. The Motion is granted.

2. Within five days of the entry of this Order, Kenneth Nixon shall dismiss, or cause to be dismissed, with prejudice the City of Detroit and the Defendant Officers in their official capacity from the case captioned a*s Kenneth*

[1] Capitalized terms used but not otherwise defined in this Order shall have the meanings given to them in the Motion.

Nixon v. City of Detroit, et al., filed in the United States District Court for the Eastern District of Michigan and assigned case number 23-11547 ("Lawsuit").

3. Kenneth Nixon is permanently barred, estopped and enjoined from asserting claims asserted in the Lawsuit or claims arising from or related to the Lawsuit against the City of Detroit or property of the City of Detroit.

4. Kenneth Nixon is prohibited from sharing in any distribution in this bankruptcy case.

5. The Court shall retain jurisdiction over any and all matters arising from the interpretation or implementation of this Order.

EXHIBIT 2 – NOTICE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	Bankruptcy Case No. 13-53846
City of Detroit, Michigan,	Judge Thomas J. Tucker
Debtor.	Chapter 9

NOTICE OF OPPORTUNITY TO OBJECT TO CITY OF DETROIT'S MOTION FOR THE ENTRY OF AN ORDER ENFORCING THE BAR DATE ORDER AND CONFIRMATION ORDER AGAINST KENNETH NIXON

The City of Detroit has filed papers with the Court requesting the entry of an order enforcing the bar date order and confirmation order against Kenneth Nixon.

Your rights may be affected. You should read these papers carefully and discuss them with your attorney.

If you do not want the Court to enter an Order granting the *City of Detroit's Motion for the Entry of an Order Enforcing the Bar Date Order and Confirmation Order Against Kenneth Nixon,* within 14 days, you or your attorney must:

1. File with the court a written response or an answer, explaining your position at:[1]

United States Bankruptcy Court
211 W. Fort St., Suite 1900
Detroit, Michigan 48226

If you mail your response to the court for filing, you must mail it early enough so that the court will **receive** it on or before the date stated above. You must also mail a copy to:

Miller, Canfield, Paddock & Stone, PLC
Attn: Marc N. Swanson
150 West Jefferson, Suite 2500
Detroit, Michigan 48226

2. If a response or answer is timely filed and served, the clerk will schedule a hearing on the motion and you will be served with a notice of the date, time, and location of that hearing.

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

[1] Response or answer must comply with F. R. Civ. P. 8(b), (c) and (e).

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Marc N. Swanson

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Dated: August 24, 2023

EXHIBIT 3 – NONE

EXHIBIT 4 – CERTIFICATE OF SERVICE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: City of Detroit, Michigan, Debtor.	Bankruptcy Case No. 13-53846 Judge Thomas J. Tucker Chapter 9

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 24, 2023, he served a copy of the foregoing **CITY OF DETROIT'S MOTION FOR THE ENTRY OF AN ORDER ENFORCING THE BAR DATE ORDER AND CONFIRMATION ORDER AGAINST KENNETH NIXON** upon counsel for Kenneth Nixon, in the manner described below:

Via first class mail and email:

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DATED: August 24, 2023

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EXHIBIT 5 – NONE

EXHIBIT 6A
Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

KENNETH NIXON, Plaintiff, v. CITY OF DETROIT, DETECTIVE MOISES JIMENEZ, COMMANDER JAMES TOLBERT, DETECTIVE KURTISS STAPLES, SGT. EDDIE CROXTON, OFFICER ALMA HUGHES-GRUBBS, AND OTHER AS-OF-YET UNKNOWN EMPLOYEES OF THE CITY OF DETROIT, Defendants.	No.

COMPLAINT & DEMAND FOR JURY TRIAL

NOW COMES Plaintiff, KENNETH NIXON, by and through his attorneys, GOODMAN HURWITZ & JAMES, P.C., and LOEVY & LOEVY, complaining of Defendants CITY OF DETROIT, DETECTIVE MOISES JIMENEZ, COMMANDER JAMES TOLBERT, DETECTIVE KURTISS STAPLES, SGT. EDDIE CROXTON, OFFICER ALMA HUGHES-GRUBBS, and OTHER AS-OF-YET UNKNOWN EMPLOYEES OF THE CITY OF DETROIT, and alleges as follows:

INTRODUCTION

1. On September 21, 2005, Plaintiff Kenneth Nixon was convicted of an arson-murder that he did not commit and was sentenced to life in prison without parole.

2. After serving nearly 16 years in prison, on February 18, 2021, he was finally exonerated, and his innocence was established.

3. The story of how Mr. Nixon came to be wrongfully convicted begins and ends with the Defendants. Rather than seriously investigate the arson-homicide, the Defendants knowingly manipulated and then relied on obviously coached false evidence from the 13-year-old brother of two of the victims to arrest Mr. Nixon.

4. Worse yet, Defendants completely ignored the prosecutor's sounding of the alarm bell regarding how thin the evidence was against Plaintiff; they neither renewed their investigation nor followed up on any new or old leads. Instead, in a concerted effort to cover up the truth, Defendants coerced a jailhouse informant to give fabricated testimony and then deliberately concealed from both the prosecution and defense the manner in which that false evidence was created.

5. Based on the 13-year-old boy's coached and false testimony and the informant's fabricated evidence, Plaintiff was wrongfully convicted of arson, murder and attempted murder. He was sentenced to life in prison without the possibility of parole.

6. Plaintiff, however, never gave up on proving his innocence. More than a decade after his conviction, in or around 2016, the Cooley Law School Innocence Project began representing Plaintiff and in or around 2018, the Wayne County Prosecutor's Office Conviction Integrity Unit ("CIU") undertook a re-investigation of Plaintiff's case.

7. After re-opening the investigation and analyzing the evidence, the CIU determined that Plaintiff had been wrongfully convicted.

8. On February 18, 2021, Wayne County Circuit Court Judge Bruce Morrow entered a Stipulated Order vacating Plaintiff's conviction; all charges against him were then dismissed.

9. Finally a free man, Mr. Nixon now seeks redress for his nearly 16 years of wrongful incarceration.

10. In addition to compensating Mr. Nixon for the years that he spent wrongfully convicted of an arson-murder he did not commit and his attendant loss of freedom, and his continued suffering, this action seeks to remedy Defendant City of Detroit's unlawful policies, practices, and/or customs of routinely conducting unlawful interrogations, and of failing to adequately train, supervise, and/or discipline its officers that led Defendant Officers to violate Kenneth Nixon's constitutional and state law rights.

JURISDICTION AND VENUE

11. This action is brought pursuant to 42 U.S.C. §§ 1983 and 1988, the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and the laws and Constitution of the State of Michigan.

12. This Court has jurisdiction over Plaintiff's constitutional claims pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over any and all state constitutional and state law claims pursuant to 28 U.S.C. § 1367(a).

13. Plaintiff's claims for declaratory relief are authorized by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

14. Venue is proper under 28 U.S.C. § 1391(b)(2), in that this is the judicial district in which the events giving rise to this claim occurred.

15. The amount in controversy exceeds Seventy-Five Thousand ($75,000.00) dollars.

THE PARTIES

16. Plaintiff KENNETH NIXON is currently a 37-year-old native of Detroit, Michigan, where, but for his time wrongfully in prison, he has resided his whole life.

17. He is the father of two children and the President of the Organization of Exonerees. The Organization of Exonerees is a non-profit organization that advocates on behalf of innocent persons who are or have been wrongfully convicted

of crimes, and campaigns for criminal justice reform. Mr. Nixon is the Director of Outreach and Community Partnership for the nonprofit organization Safe and Just Michigan. He is also studying political science at Wayne State University.

18. At all times relevant hereto, Defendants Sergeant EDDIE CROXTON, former Commander JAMES TOLBERT, Detective MOISES JIMENEZ, Detective KURTISS STAPLES, ALMA HUGHES-GRUBBS and other unidentified employees of the Detroit Police Department ("Defendant Officers") were police officers or otherwise employed by the Detroit Police Department. All are sued in their individual capacities and at all times relevant hereto acted under color of regulations, usage, custom and state law and within the scope of their authority and employment and pursuant to the policies and practices of Defendant CITY OF DETROIT during the investigation and prosecution of the crime at issue.

19. Defendant CITY OF DETROIT is a Michigan municipal corporation authorized as such by the laws of the State of Michigan, that operates a police department as a part of its responsibilities and services. At all times relevant herein, Defendant CITY OF DETROIT, acting through and by its policymaking officials, acted under color of regulation, usage, custom, and law and pursuant to its policies and practices as did all the individual Defendants herein. The City is or was the employer of each of the Defendant Officers at all relevant times.

STATEMENT OF FACTS

The Charleston Fire

20. Very late at night on May 19, 2005, a fire broke out at 19428 Charleston Street, Detroit, Michigan.

21. Naomi Vaughn lived at 19428 Charleston Street with her then-boyfriend Ronrico Simmons and Ms. Vaughn's five children. Tragically, two of Ms. Vaughn's children perished in the fire at her home.

22. Detroit firefighters responded to the scene. They later determined that someone had thrown a Molotov cocktail into a second-story bedroom window, igniting the fire.

23. During the course of their investigation, Defendants deliberately, knowingly, and/or recklessly ignored any and all other leads, withheld exculpatory evidence, and fabricated evidence to wrongfully charge and cause the conviction of Mr. Nixon of this crime.

Kenneth Nixon's Innocence

24. Plaintiff Kenneth Nixon had absolutely nothing to do with this crime. At the time of the fire, Mr. Nixon was at home with Latoya Caulford, his then-girlfriend and the mother of his child, and some of Ms. Caulford's family members.

25. At the time of the fire, Ms. Caulford was living with her cousin, Mario Mahdi, and Mr. Nixon regularly stayed there to be with his girlfriend and son.

26. Mr. Nixon was working for a towing company. He had been working earlier that day and had towed several cars.

27. By approximately 10:00 pm on the night of the fire, Mr. Nixon was at home with Ms. Caulford and their son, and he remained there until Detroit police officers awoke the household and arrested him around 5:00 am the following morning.

The Police Investigation

28. Notwithstanding his absolute innocence, Mr. Nixon was arrested shortly after the fire based on a statement made by one of Naomi Vaughn's children, 13-year-old Brandon Vaughn ("Brandon").

29. Brandon had met Mr. Nixon through his mother's boyfriend Ronrico Simmons. Mr. Nixon and Mr. Simmons had been good friends but had a falling out several months earlier—in January 2005—after Mr. Nixon found out that Mr. Simmons and Latoya Caulford had had a brief affair.

30. Brandon gave a number of statements to the police identifying Mr. Nixon as having started the fire, all of which were known at the time by Defendants to be inconsistent and unreliable.

31. For example, shortly after the fire, Brandon told police officers and the arson investigator that he was upstairs in his bedroom when he heard a "boom" and then the second floor erupted in flames. Brandon allegedly ran downstairs and

outside where he saw Mr. Nixon getting into a green car; he could not identify the driver of the car.

32. Just a few hours later, and *after* the firefighters determined that a Molotov cocktail was used to start the fire, Brandon gave a different story, telling Defendant Staples that he was outside on his front porch when he allegedly saw Mr. Nixon throw a glass bottle into the second story of the house and then saw Mr. Nixon get into the passenger side of a car, but he could not see who was driving it.

33. The next day Brandon changed his story once again, saying that he now allegedly saw Mr. Nixon's girlfriend Latoya Caulford driving the getaway car, having previously and repeatedly denied being able to identify the driver.

34. Ronrico Simmons also gave inconsistent statements to the police, including about how the fire started and whether he and Plaintiff had had a feud or whether Plaintiff and Ms. Caulford were involved in the fire.

35. So fraught were these inconsistent statements that Defendant Staples admitted in a memo to Defendant Tolbert that it was "obvious[]" that Brandon had been "coached by family members." Defendants Staples and Tolbert withheld this memo from the prosecutor and the defense.

36. Defendant Staples wrongfully relied on Brandon's statements to arrest and charge Plaintiff, despite knowing that they were false.

Defendants Fabricate Evidence to Try to Corroborate Brandon's False Identification

37. Rather than investigate the fire and determine the identity of the true perpetrator, Defendant Officers short-circuited the police investigation and fabricated evidence to corroborate Brandon's coached and false identification of Plaintiff.

38. For example, one of the family members that was home with Mr. Nixon at the time of the Charleston Fire was Mario Mahdi, Latoya Caulford's cousin.

39. When Mr. Nixon was arrested, Mr. Mahdi was also at home. At that time, the police told Mr. Mahdi to get on the ground, handcuffed him and placed a gun to his neck.

40. The police then drove Mr. Mahdi past the crime scene on their way to the police station where he was interrogated. Rather than listen to what Mr. Mahdi had to say, Defendant Sgt. Croxton lied to Mr. Mahdi and told him as a "fact" that Plaintiff started the fire. Defendant Croxton then intentionally and falsely reported that Mr. Mahdi arrived home later than he actually did, thus knowingly undermining Plaintiff's alibi.

41. Additionally, because he had absolutely nothing to do with the fire, Plaintiff agreed to submit to a polygraph. Defendant Staples told Plaintiff that if he passed the polygraph, he could go home.

42. On May 20, 2005, Defendant Alma Hughes-Grubbs administered a

polygraph to Plaintiff, which he passed. However, Defendant Hughes-Grubbs fabricated that Plaintiff had failed the polygraph.

43. In fact, when Mr. Nixon was given a polygraph by an independent examiner a few years later, he passed. That is because Mr. Nixon is innocent of this crime.

44. Nonetheless, based on Brandon's identification and the Defendant Officers' fabricated evidence implicating Mr. Nixon in the fire, Mr. Nixon was arrested and charged with arson and murder.

45. He was falsely imprisoned continuously from May 20, 2005, the date of his arrest, until his exoneration and release on February 18, 2021.

The Withheld Muscat Memo and Fabricated Jailhouse Informant

46. On August 3, 2005, Wayne County prosecutor Patrick Muscat wrote a Memorandum to Defendant Tolbert ("Muscat Memo"). In the Muscat Memo, Mr. Muscat described the arson-murder as "an extremely high profile case" that had "serious problems." Mr. Muscat directed Defendant Tolbert to "find a way to corroborate [Brandon's] testimony" because there was a "desperate need" for more evidence.

47. Mr. Muscat also directed Defendant Tolbert to follow-up on evidence that Ms. Vaughn's prior home had been firebombed by a jealous boyfriend. While the findings of their investigation suggested a perpetrator other than Plaintiff of the

arson for which he was being prosecuted, on information and belief, Defendant Officers failed to disclose this evidence to Mr. Muscat or to Plaintiff during his criminal proceedings.

48. Instead, Defendants myopically focused on shoring up evidence of Plaintiff's purported guilt, which included Defendant Tolbert asking Defendant Jimenez to speak with Plaintiff's cellmates.

49. On information and belief, Defendant Tolbert asked Defendant Jimenez to conduct this follow-up investigation—instead of one of the original detectives on the Charleston Fire investigation—because Defendant Tolbert, as Commander of Major Crimes, knew that Defendant Jimenez would "find a way to corroborate [Brandon's] testimony" regardless of what the evidence actually showed.

50. On information and belief, Defendant Jimenez could not find a single cellmate of Plaintiff's who could implicate Plaintiff in any way.

51. Consequently, Defendant Jimenez turned to an informant he had worked with before, who had been on the same cellblock as Plaintiff Nixon for approximately three (3) days in May 2005.

52. Defendant Jimenez told the informant that he needed the informant to help him with a case.

53. Rather than ask the informant about any conversations he had had with Plaintiff and what the informant knew about the Charleston Fire, Defendant Jimenez

fed the informant the information he wanted the informant to say, including the false statement that Plaintiff confessed to the informant that he had committed the crime.

54. In exchange for adopting Defendant Jimenez's false narrative inculpating Mr. Nixon in the crime, Defendant Jimenez promised the informant that he would get a reduced sentence on his own pending case and that the informant would get out of prison in time to see his daughter graduate from high school.

55. The informant agreed to parrot back the fabricated statements that Defendant Jimenez fed him, including that Mr. Nixon confessed to committing the crime, in exchange for the promise that he would be released early.

56. The informant's statement was entirely false. Mr. Nixon never confessed to him that he was responsible for the Charleston Fire. Mr. Nixon is innocent of the Charleston Fire.

57. No one ever disclosed to the prosecutor or the defense the promises that Defendant Jimenez made to the informant in exchange for his testimony in Plaintiff's criminal case, or the fact that the information in the informant's statement was fed to him and fabricated by Defendant Jimenez.

58. Nor did anyone ever disclose to the defense the Muscat Memo or its contents.

Mr. Nixon's Trial

59. Based on Brandon's "coached" testimony and the informant's

fabricated testimony, Mr. Nixon was convicted of arson, murder, and attempted murder.

60. At his sentencing, Mr. Nixon stated: "I just would like you to know that you're about to sentence an innocent man to prison."

61. He was then sentenced to two life terms in prison without parole on the murders and 10-20 years on each of the arson and attempted murder convictions.

Mr. Nixon's Exoneration

62. Never giving up hope of proving his innocence, Plaintiff continued to pursue appeals and other means to secure his freedom.

63. The Cooley Law Innocence Project took up Plaintiff's cause in or about 2016 and, in or about 2018, convinced the CIU to undertake a re-investigation of Mr. Nixon's case.

64. Following that re-investigation, on February 18, 2021, Wayne County Circuit Court Judge Bruce Morrow entered a Stipulated Order vacating Plaintiff's conviction; all charges against Mr. Nixon were then dismissed.

The City of Detroit's Policy and Practice of Conducting Flawed Investigations

65. The constitutional violations that caused Plaintiff's wrongful conviction were not isolated events. To the contrary, they were the result of Defendant City of Detroit's longstanding policies and practices of pursuing wrongful convictions through reliance on profoundly flawed investigations and fabricated

"informant" testimony.

66. Defendant City of Detroit, acting through the Detroit Police Department ("DPD") has a long history of using testimony of jailhouse snitches without any regard to the accuracy of their statements.

67. In the decade prior to Mr. Nixon's arrest, in particular, DPD officers engaged in a persistent and widespread pattern and practice of offering bribes and favors to inmates in exchange for false incriminating testimony to "solve" homicide cases.

68. In the 1990s through the 2000s, homicide detectives regularly offered perks (e.g., food and drink, drugs, conjugal visits, television privileges, and leniency) to detainees in exchange for testimony against other detainees; officers provided prewritten witness statements for detainees to memorize and/or they provided confidential information from the case files in order to fabricate credibility. For example,

a. Informant Edward Allen spent two years detained on the ninth floor of DPD headquarters and provided testimony against five other detainees in exchange for favors, including a sexual relationship with homicide detective Monica Childs, who prompted him to give false testimony against Larry Smith Jr. in 1994 (who was exonerated in 2021);

b. Informant Joe Twilley claims 40 to 50 different inmates confessed their crimes to him, and police say he provided testimony in at least 20 cases, including falsely testifying to Ramon Ward's "confession" in 1994 (who was then exonerated in 2020), and a similar false "confession" of Bernard Howard the same year (who was also exonerated in 2020);

c. Informant Oliver Cowan helped secure at least six murder convictions, including Roman Ward (mentioned above), and he gave false testimony provided to him in a prewritten statement implicating Lacino Hamilton in 1994 (who was exonerated in 2020); and

d. Informant Ellis Frazier Jr. falsely testified in 2001 that, while occupying a holding cell adjacent to Marvin Cotton, Mr. Cotton implicated himself in a fatal shooting; he later confessed that the false statement was provided to him by a homicide detective, and Mr. Cotton and his co-defendant were exonerated in 2020.

69. This widespread practice within the DPD was well known, approved, and encouraged by command officers and policymakers for Defendant City prior to Plaintiff's arrest. For example, in 1995, a Wayne County prosecutor raised concerns about the DPD's misconduct relating to informants. Those concerns went unanswered and were again raised just two years prior to Plaintiff's arrest during an evidentiary hearing in another matter. Yet the practice persisted for decades and, on information and belief, continues to date.

70. Similarly, at all relevant times herein, DPD had a practice of arresting material witnesses without probable cause, transporting them without reasonable suspicion or consent, using unreasonable and excessive means – including arresting, transporting, using excessive force, pointing guns at, and/or lying to witnesses – to harass and intimidate witnesses into signing false or misleading written statements in order to fabricate inculpatory evidence and/or falsely undermine exculpatory evidence. For example:

a. Janetta Toles was arrested by DPD officers in 1997 and held for four

days and interrogated regarding suspected criminal activity by other people in her apartment building; in Ms. Toles' civil suit, a DPD homicide sergeant admitted that holding innocent witnesses overnight was common practice and part of their training at the time;

b. In statistics reported to the FBI in 1998 and 1999, the DPD was making a disproportionate number of arrests related to homicide cases that far exceeded the number of homicides themselves.

c. In 2000, Maribel Franco-Rosario was held for three-and-a-half days for questioning by DPD homicide detectives, including Defendant Jimenez, based only on their suspicion of her husband;

d. In 2001, DPD officers arrested Barbara Berry along with several family members and a friend and interrogated them (including a seven-year-old) about a murder suspect; the adults were detained for fourteen hours, and none of them were suspected of committing any crime;

e. Also in 2001, high ranking officials for Defendant City acknowledged that they needed to take steps to ensure that unlawful witness detention would no longer occur; and

f. These practices continued for several years, including throughout 2005 and the arrest of Mr. Mahdi.

71. This practice was well known, approved, and encouraged by command officers and official policymakers for Defendant City prior to Plaintiff's arrest. On information and belief, these practices continue to date.

72. DPD also has a longstanding pattern and practice of withholding exculpatory evidence from prosecutors and criminal defendants, which has directly caused dozens, if not hundreds, of wrongful convictions, including the wrongful conviction of Mr. Nixon. This practice was well known, approved, encouraged, and ratified by command officers and official policymakers for Defendant City prior to

Plaintiff's arrest and continues to date.

73. Defendant City's deliberate indifference to these systemic issues, policies, and patterns of practice directly and affirmatively were a moving force in the wrongful conviction of Plaintiff and the violation of his constitutional rights, as described herein.

The City of Detroit's Failure to Train, Supervise and Discipline

74. In addition, the Defendant City of Detroit's failure to train, supervise and discipline its police officers was a moving force in the violation of Plaintiff's constitutional rights, as set forth herein.

75. Defendant City, acting through the DPD, failed to train its police officers on the appropriate use of inmates as informants or witnesses in criminal cases. Specifically, the City failed to provide guidance, training or supervision to ensure the accuracy and veracity of the testimony of jailhouse informants and/or to prevent the fabrication of testimony in exchange for favors, leniency, or other benefits.

76. The need for such guidance, training and supervision is, and was at all relevant times hereto, patently obvious for any law enforcement agency that has utilized informants. In the City of Detroit in 2005, and at all relevant times hereto, the pattern of unconstitutional conduct in the use of jailhouse informants, as described above, was so widespread that high-ranking officers and policymakers

were aware of the need for new or different supervision and training and, yet, declined to provide it.

77. At all relevant times hereto, the City also failed to provide training and/or supervision to its officers regarding the treatment of witnesses; specifically, Defendant City provided no safeguards against harassment and intimidation of material witnesses and to protect against false or misleading witness statements unduly influenced by police.

78. The need for such guidance, training and supervision is, and was at all relevant times hereto, obvious for any law enforcement agency, and particularly in the City of Detroit in 2005, where the pattern of unconstitutional conduct in using jailhouse informants, as described above, was so widespread that high-ranking officers and official policymakers were aware of the need for new or different training and supervision and yet were deliberately indifferent to the need for said guidance, training and supervision, and/or intentionally declined to provide it.

79. Even when there were determinations of misconduct, regarding use of inmates as informants or witnesses and/or the treatment of said witnesses, Defendant City, acting through its high-ranking officers and/or official policymakers in the DPD, failed to discipline said officers or hold them accountable in any meaningful way, thereby ratifying said misconduct.

80. At all relevant times hereto, Defendant City also failed to provide

training and/or supervision to its police officers on ensuring the full disclosure of exculpatory and impeachment evidence to prosecutors, criminal defendants and their counsel.

81. The need for such guidance, training and supervision is, and was at all relevant times hereto, obvious for any law enforcement agency. In the City of Detroit in 2005 and at all relevant times hereto, the pattern of unconstitutional conduct in withholding exculpatory and impeachment evidence, as described above, was so widespread that high-ranking officers and official policymakers were aware of the need for new or different training and supervision and were deliberately indifferent to the need and/or intentionally declined to provide it.

82. Even when there were determinations of misconduct, regarding use of inmates as informants or witnesses and/or the treatment of said witnesses, Defendant City, acting through its high-ranking officers and/or official policymakers in the DPD, failed to discipline said officers or hold them accountable in any meaningful way, thereby ratifying said misconduct.

Defendants' Repeated Misconduct

83. Finally, Defendant City failed to supervise and discipline the Officer Defendants in this matter as well as officers who had pervasive histories of using jailhouse informants to provide false testimony, arresting and intimidating material witnesses to provide false or misleading statements, and/or withholding exculpatory

information from prosecutors and criminal defendants, thereby ratifying said misconduct.

84. Defendant Tolbert, for example, was alleged to have been among a group of DPD commanding officers who interfered with the high-profile investigation of the murder of Tamara Greene to protect then-Mayor Kwame Kilpatrick, and he later manufactured evidence against a 14-year-old child, Davontae Sanford, causing Sanford's wrongful conviction for a quadruple homicide for which Sanford was wrongfully imprisoned for nearly 9 years. Defendant Tolbert has also since been placed on the Wayne County Prosecutor's "Giglio list" for giving false testimony.

85. Defendant Jimenez has a long history of misconduct allegations that were ignored by DPD officials until after his retirement in 2021, including claims that at least twice he arrested homicide witnesses without probable cause in order to extricate information, that he presented false evidence in a request for warrant, and that he withheld evidence in two murder cases, which led to the wrongful conviction of Alexandre Ansari.

86. Supervising officers with policymaking authority were aware of these unconstitutional practices and showed deliberate indifference to, acquiescence in, and/or approval of them.

DAMAGES

87. Defendants' actions deprived Plaintiff Kenneth Nixon of his civil rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and his state law rights.

88. This action seeks damages for the period from May 20, 2005, the date he was falsely arrested and imprisoned, through each and every year to the present and into the future.

89. Kenneth Nixon's liberty was curtailed upon his arrest on May 20, 2005, and continued for the duration of his incarceration until his release on February 18, 2021.

90. Defendants' unlawful, intentional, willful, deliberately indifferent, reckless, and/or bad faith acts and omissions caused Mr. Nixon to be falsely arrested, tried, wrongfully convicted and incarcerated for nearly sixteen (16) years for crimes he did not commit.

91. Defendants' unlawful, intentional, willful, deliberately indifferent, reckless, and/or bad faith acts and omissions caused Kenneth Nixon severe injuries and damages, which continue to date and will continue into the future, for all of which he is entitled monetary relief, including but not limited to:

a. Seizure and loss of liberty;

b. Personal and physical injuries, including assaults, illness and inadequate medical care;

c. Pain and suffering;

d. Severe mental anguish, emotional and psychological distress, humiliation, indignities, embarrassment and degradation;

e. Permanent loss of natural psychological development including the loss of young adulthood, past and future;

f. Loss of family relationships;

g. Damage to business and property;

h. Legal expenses; and

i. Loss of earnings and earning potential.

92. The conduct of Defendants was reckless and outrageous, entitling Plaintiff to an award of punitive damages from any and all the individual Defendants, herein, as well as costs and reasonable attorney fees, pursuant to 42 U.S.C. §1988.

COUNT ONE—42 U.S.C. § 1983
Fourteenth Amendment Due Process

93. Mr. Nixon incorporates each paragraph of this Complaint as if fully restated here word for word.

94. As described more fully above, the Defendant Officers, while acting individually, jointly, severally and in conspiracy with one another, as well as under color of law and within the scope of their employment, deliberately, recklessly and/or intentionally deprived Mr. Nixon of his constitutional clearly established Fourteenth Amendment due process right to fair criminal proceedings by, among other things, fabricating inculpatory evidence and withholding exculpatory and/or impeachment evidence.

95. Absent the Defendant Officers' violations of Mr. Nixon's constitutional right to a fair criminal proceeding, the prosecution of Mr. Nixon could not and would not have been pursued.

96. The misconduct described in this count was undertaken pursuant to the policies and practices of the City of Detroit, in the manner more fully described below, in Count Five.

97. As a direct and proximate result of Defendant Officers' fabrication of false inculpatory evidence, acting pursuant to the customs, policies and/or practices of Defendant City of Detroit, Defendant Officers violated Kenneth Nixon's clearly established Fourteenth Amendment due process rights, including the right to a fair trial, along with his Fourth Amendment right to be free from unreasonable seizures, Mr. Nixon was wrongfully convicted and suffered the injuries and damages described above.

98. Acting with recklessness, deliberate indifference and/or intent, by withholding material exculpatory and impeachment evidence prior to, during, and after trial, Defendant Officers, acting pursuant to the customs, policies and/or practices of Defendant City of Detroit, violated Kenneth Nixon's clearly established Fourteenth Amendment right to due process of law as announced by the United States Supreme Court in *Brady v. Maryland* and its progeny, undermining confidence in the outcome of the trial, and directly and proximately causing Plaintiff

Kenneth Nixon to be wrongfully arrested, prosecuted, convicted and imprisoned, and to suffer the constitutional violations, injuries and damages described above.

99. As a direct and proximate result of the foregoing actions, Plaintiff Nixon has suffered the following injuries, among others:

a. Unreasonable seizure and loss of liberty;

b. Personal and physical injuries, including assaults, illness and inadequate medical care;

c. Pain and suffering;

d. Severe mental anguish, emotional and psychological distress, humiliation, indignities, embarrassment and degradation;

e. Permanent loss of natural psychological development including the loss of the adolescent years of his childhood and his early manhood, past and future;

f. Loss of family relationships;

g. Damage to business and property;

h. Legal expenses;

i. Loss of earnings and earning potential; and

j. Continuing injuries and damages as fully set forth above.

COUNT TWO—42 U.S.C. § 1983
Fourth and Fourteenth Amendment – Unreasonable Seizure and Illegal Detention and Prosecution

100. Mr. Nixon incorporates each paragraph of this Complaint as if fully restated here word for word.

101. As described more fully above, Defendant Officers, individually,

jointly, severally and in conspiracy with one another, as well as under color of law and within the scope of their employment and authority, accused Mr. Nixon of criminal activity and exerted influence to initiate, continue, and perpetuate a criminal prosecution against Plaintiff that was lacking in probable cause, unreasonably instituted, by suppressing exculpatory evidence, fabricating false evidence, and failing to adequately investigate the crime or even follow up on the lead to another more likely suspect, in spite of the fact that they knew Mr. Nixon was innocent, all in violation of his constitutional rights.

102. In so doing, the Defendants caused Mr. Nixon to be deprived of his liberty without probable cause, detained without probable cause, and subjected improperly to judicial proceedings for which there was no probable cause. These judicial proceedings were instituted and continued maliciously, resulting in injury.

103. The prosecution of Plaintiff ultimately terminated in his favor when his conviction was vacated and all charges dismissed in February 2021, post-conviction proceedings.

104. The actions of these Defendants violated Plaintiff's clearly established Fourth and Fourteenth Amendment rights to be free from unreasonable seizure and thereby caused his wrongful conviction and the injuries and damages set forth above.

105. The misconduct described above was undertaken pursuant to the policies and practices of Defendant City of Detroit, in the manner more fully

described below in Count Five.

106. As a direct and proximate result of the foregoing actions, Plaintiff Nixon has suffered the following injuries, among others:

a. Seizure and loss of liberty, resulting in:

b. Personal and physical injuries, including assaults, illness and inadequate medical care;

c. Pain and suffering;

d. Severe mental anguish, emotional and psychological distress, humiliation, indignities, embarrassment and degradation;

e. Permanent loss of natural psychological development including the loss of the adolescent years of his childhood and his early manhood, past and future;

f. Loss of family relationships;

g. Damage to business and property;

h. Legal expenses;

i. Loss of earnings and earning potential; and

j. Continuing injuries and damages as fully set forth above.

COUNT THREE—42 U.S.C. § 1983
Failure to Intervene

107. Mr. Nixon incorporates each paragraph of this Complaint as if fully restated here.

108. In the manner described more fully above, by their conduct and under color of law, during the constitutional violations described herein, one or more of the Defendant Officers stood by without intervening to prevent the violation of Mr.

Nixon's constitutional rights, even though they had the opportunity and duty to do so.

109. The Defendant Officers' actions and omissions in the face of a constitutional duty to intervene were the direct and proximate cause of Mr. Nixon's constitutional violations and injuries, including but not limited to loss of liberty, physical harm and emotional distress.

110. The actions of these Defendants violated Plaintiff's clearly established Fourth and Fourteenth Amendment rights to be free from unreasonable seizure and thereby caused his wrongful conviction and the injuries and damages set forth above.

111. The misconduct described in this count was undertaken pursuant to the policies and practices of the City of Detroit, in the manner more fully described below in Count Five.

112. As a direct and proximate result of the foregoing actions, Plaintiff Nixon has suffered the following injuries, among others:

a. Seizure and loss of liberty, resulting in:

    i. Restrictions on all forms of personal freedom including but not limited to diet, sleep, personal contact, movement, educational opportunities, vocational opportunities, athletic opportunities, personal fulfillment, sexual activity, family relations, reading, television, movies, travel, enjoyment, and expression;

b. Personal and physical injuries, including assaults, illness and inadequate medical care;

c. Pain and suffering;

d. Severe mental anguish, emotional and psychological distress, humiliation, indignities, embarrassment and degradation;

e. Permanent loss of natural psychological development including the loss of the adolescent years of his childhood and his early manhood, past and future;

f. Loss of family relationships;

g. Damage to business and property;

h. Legal expenses;

i. Loss of earnings and earning potential; and

J. Continuing injuries and damages as fully set forth above.

COUNT FOUR—42 U.S.C. § 1983
SUPERVISOR LIABILITY

113. Supervisory Defendant Staples was the officer in charge of the investigation and prosecution of Mr. Nixon. Defendant Tolbert was the supervisor of the Homicide Division and was personally involved in overseeing this "high profile" case.

114. Supervisory Defendants Staples and Tolbert gave direct orders causing the violation of Mr. Nixon's constitutional rights and/or encouraged or knowingly approved of the actions of other officers under their authority in their actions that violated the constitutional rights of Mr. Nixon, to wit:

a. They directed and/or approved of Defendant Croxton's treatment of a material witness to fabricate an inaccurate witness statement and falsely undermine Mr. Nixon's alibi,

b. They directed and/or approved of Defendant Hughes-Grubbs' fabricated polygraph result, and

c. They directed and/or approved of Defendant Jimenez procuring fabricated testimony from a jailhouse informant.

115. The actions of these Defendants violated Plaintiff's clearly established Fourth and Fourteenth Amendment rights to be free from unreasonable seizure and thereby caused his wrongful conviction and the injuries and damages set forth above.

116. As a direct and proximate result of the foregoing actions, Plaintiff Nixon has suffered the following injuries, among others:

a. Unreasonable seizure and loss of liberty;

b. Personal and physical injuries, including assaults, illness and inadequate medical care;

c. Pain and suffering;

d. Severe mental anguish, emotional and psychological distress, humiliation, indignities, embarrassment and degradation;

e. Permanent loss of natural psychological development including the loss of the adolescent years of his childhood and his early manhood, past and future;

f. Loss of family relationships;

g. Damage to business and property;

h. Legal expenses;

i. Loss of earnings and earning potential; and

J. Continuing injuries and damages as fully set forth above.

COUNT FIVE—42 U.S.C. § 1983
Conspiracy to Deprive Constitutional Rights

117. Mr. Nixon incorporates each paragraph of this Complaint as if fully restated here.

118. After the Charleston Fire, the Defendant Officers, acting within the scope of their employment and under color of law, agreed among themselves and with other individuals to act in concert in order to deprive Mr. Nixon of his constitutional rights, including his rights to due process, all as described in the various paragraphs of this Complaint.

119. In this manner, the Defendant Officers, acting in concert with other unknown coconspirators, conspired by concerted action to accomplish an unlawful purpose by unlawful means.

120. In furtherance of the conspiracy, each of the coconspirators engaged in and facilitated overt acts, including but not limited to those set forth above—such as fabricating and withholding evidence—and was an otherwise willful participant in joint activity.

121. As a direct and proximate result of the illicit prior agreement and actions in furtherance of the conspiracy referenced above, Mr. Nixon's rights were violated, and he suffered injuries, including but not limited to loss of liberty, physical harm, and emotional distress.

122. The misconduct described in this Count was objectively unreasonable

and was undertaken intentionally, with malice and willful indifference to Mr. Nixon's clearly established constitutional rights.

123. The misconduct described in this count was undertaken pursuant to the policies and practices of the City of Detroit, in the manner more fully described below in Count Five.

COUNT SIX—42 U.S.C. §1983
City of Detroit Municipal Liability Under *Monell:*
Policy and Practice Claim

124. Mr. Nixon incorporates each paragraph of this Complaint as if fully restated here word for word.

125. Defendant City of Detroit, acting through its top officials, policymakers and the Detroit Police Department (DPD), authorized, sponsored, approved, and ratified actions by Detroit Police Department officers, supervisors and investigators during the course of their law enforcement actions conducted within the scope of their respective authority and under color of law.

126. At all relevant times hereto, Defendant City, acting through its top officials, policymakers and the Detroit Police Department (DPD), did enable, ratify, condone, tolerate approve, and ratify actions that constituted improper, flawed, erroneous and inappropriate police investigative methods, which were a moving force in the violation of the constitutional rights of citizens, including Plaintiff Kenneth Nixon.

127. Those improper, flawed, erroneous and inappropriate police investigative methods constituted customs, policies and practices, which included but were not limited to the following:

a. An unwritten yet widespread practice of arresting and intimidating material witnesses to obtain fabricated inculpatory evidence or falsely undermine exculpatory evidence;

b. An unwritten yet widespread practice of using jailhouse informants to fabricate inculpatory evidence, particularly in homicide cases in order to close and falsely "solve" the cases;

c. An unwritten yet widespread practice of withholding exculpatory materials or information from criminal defendants;

d. Failure to supervise, train and/or discipline law enforcement officers, including but not limited to the individually named Defendant officers herein, regarding the proper use of jailhouse informants, including failure to provide practices for ensuring truthful and accurate testimony; at all times relevant hereto City policymakers knew that this lack of supervision and discipline would likely promote and/or condone the use of fabricated evidence from jailhouse informants and while said officers, and DPD officers knew that regardless of their improper use of jailhouse informants, there would be no reprisal by way of discipline, termination, criticism, or otherwise, thereby guaranteeing the continuation of such unconstitutional actions by Detroit police officers, including Defendants herein; and

e. Failure to supervise, train and/or discipline law enforcement officers, including but not limited to the individually named Defendant officers herein, with regard to withholding exculpatory materials or information from criminal defendants, while at all times knowing that this lack of supervision and/or discipline would likely promote and/or condone the withholding of exculpatory materials or information where said officers, and other DPD officers, knew that regardless of their withholding of exculpatory materials or information, there would be no accountability by way of supervision, discipline, retraining, counselling, termination, criticism, or otherwise, thereby guaranteeing the continuation of such unconstitutional actions with impunity by Detroit police officers, including Defendants herein; and

f. Condoning, approving, ratifying, and acquiescing in known unconstitutional conduct, and known patterns of unconstitutional conduct, undertaken by its officers, including the Defendant Officers herein, and its supervisors, thereby adopting said conduct as policy of Defendant City through the DPD.

128. In particular, Defendant City, acting through its Police Department, supervisors and/or policymakers, was on actual notice that the Defendant Officers had histories of fabricating inculpatory evidence and withholding exculpatory evidence and deliberately and as a matter of policy failed to investigate, discipline, supervise and/or retrain said Defendants, thereby condoning and/or acquiescing in their unconstitutional actions and causing the false arrest, unlawful prosecution, wrongful conviction and wrongful imprisonment of Mr. Nixon.

129. Each of the aforementioned policies and/or practices were known to Defendant City as being highly likely and probable to cause violations of the constitutional rights of criminal defendants, including but not limited to Mr. Nixon.

130. The conduct of the individually named Defendants herein was committed pursuant to the policies and/or practices of Defendant City.

131. Each such policy and/or practice, referenced above, was a moving force in the violations of Mr. Nixon's constitutional rights, as set forth herein.

132. As a direct and proximate result of the foregoing actions, Plaintiff Nixon has suffered the following injuries, among others:

a. Seizure and loss of liberty;

b. Personal and physical injuries, including assaults, illness and inadequate medical care;

c. Pain and suffering;

d. Severe mental anguish, emotional and psychological distress, humiliation, indignities, embarrassment and degradation;

e. Permanent loss of natural psychological development including the loss of the adolescent years of his childhood and his early manhood, past and future;

f. Loss of family relationships;

g. Damage to business and property;

h. Legal expenses;

i. Loss of earnings and earning potential; and

j. Continuing injuries and damages as fully set forth above.

COUNT SEVEN—State Law Claim
Malicious Prosecution

133. Mr. Nixon incorporates each paragraph of this Complaint as if fully restated here.

134. In the manner described more fully above, the Defendant Officers individually, jointly, and in conspiracy with one another, as well as under color of law and within the scope of their employment, caused a criminal proceeding against Mr. Nixon to be commenced or continued.

135. The Defendant Officers accused Mr. Nixon of criminal activity knowing those accusations to be without genuine probable cause, and they made statements to prosecutors with the intent of exerting influence and to institute and

continue the judicial proceedings without any probable cause for doing so.

136. The Defendant Officers caused Mr. Nixon to be improperly subjected to judicial proceedings for which there was no probable cause. These judicial proceedings were instituted and continued maliciously, resulting in injury.

137. Statements of the Defendant Officers regarding Mr. Nixon's alleged culpability were made with knowledge that those statements were false and perjured. The Defendant Officers were aware that, as alleged more fully above, no true or reliable evidence implicated Mr. Nixon in the Charleston Fire, and all inculpatory evidence was coerced or fabricated. Furthermore, the Defendant Officers intentionally withheld from and misrepresented to prosecutors facts that further vitiated probable cause against Mr. Nixon, as set forth above, and failed to investigate evidence that would have led to the actual perpetrator. The Defendant Officers withheld the facts of their manipulation and the resulting fabrications from Mr. Nixon.

138. The misconduct described in this Count was undertaken intentionally, with malice, willfulness, and reckless indifference to the rights of others.

139. The charges against Mr. Nixon were terminated in his favor.

140. As a direct and proximate result of the foregoing actions, Plaintiff Nixon has suffered the following injuries, among others:

a. Seizure and loss of liberty;

b. Personal and physical injuries, including assaults, illness and inadequate medical care;

c. Pain and suffering;

d. Severe mental anguish, emotional and psychological distress, humiliation, indignities, embarrassment and degradation;

e. Permanent loss of natural psychological development including the loss of the adolescent years of his childhood and his early manhood, past and future;

f. Loss of family relationships;

g. Damage to business and property;

h. Legal expenses;

i. Loss of earnings and earning potential; and

j. Continuing injuries and damages as fully set forth above.

COUNT EIGHT—State Law Claim
Civil Conspiracy

141. Mr. Nixon incorporates each paragraph of this Complaint as if fully restated here.

142. As described more fully in the preceding paragraphs, the Defendant Officers, acting in concert with other known and unknown coconspirators, conspired by concerted action to accomplish an unlawful purpose by unlawful means.

143. In furtherance of the conspiracy, the Defendant Officers committed overt acts and were otherwise willful participants in joint activity including but not limited to the malicious prosecution of Mr. Nixon.

144. The misconduct described in this Count was undertaken intentionally,

with malice, willfulness, and reckless indifference to the rights of others.

145. As a direct and proximate result of the foregoing actions, Plaintiff Nixon has suffered the following injuries, among others:

a. Seizure and loss of liberty;

b. Personal and physical injuries, including assaults, illness and inadequate medical care;

c. Pain and suffering;

d. Severe mental anguish, emotional and psychological distress, humiliation, indignities, embarrassment and degradation;

e. Permanent loss of natural psychological development including the loss of the adolescent years of his childhood and his early manhood, past and future;

f. Loss of family relationships;

g. Damage to business and property;

h. Legal expenses;

i. Loss of earnings and earning potential; and

j. Continuing injuries and damages as fully set forth above.

WHEREFORE, Plaintiff KENNETH NIXON, respectfully requests that this Court enter a judgment in his favor and against Defendants CROXTON, STAPLES, TOLBERT, ALMA HUGHES-GRUBBS AND JIMENEZ, as-yet UNKNOWN OFFICERS OF THE DETROIT POLICE DEPARTMENT, and the CITY OF DETROIT awarding: (a) compensatory damages, attorneys' fees and costs against each Defendant, jointly and severally; (b) punitive damages against each of the

Defendant Officers because they acted willfully, wantonly, and/or maliciously; (c) declaratory relief in the form of an order relating to the City of Detroit's liability; and (d) any other relief this Court deems just and appropriate.

JURY DEMAND

Plaintiff, KENNETH NIXON, hereby demands a trial by jury pursuant to Federal Rule of Civil Procedure 38(b) on all issues so triable.

Dated: June 28, 2023

RESPECTFULLY SUBMITTED,

/s/ Jon Loevy
Jon Loevy
Arthur Loevy
Gayle Horn
Isabella Aguilar
Loevy & Loevy
311 N. Aberdeen St.
Chicago, IL 60607
(312) 243-5900

Julie Hurwitz
Kathryn James
Goodman Hurwitz & James
1394 E Jefferson Ave.
Detroit, MI 48207
(313) 567-6170

EXHIBIT 6B

Federal Court Lawsuit Docket

U.S. District Court
Eastern District of Michigan (Ann Arbor)
CIVIL DOCKET FOR CASE #: 5:23-cv-11547-JEL-EAS

Nixon v. Detroit, City of et al
Assigned to: District Judge Judith E. Levy
Referred to: Magistrate Judge Elizabeth A. Stafford
Cause: 42:1983 Civil Rights Act

Date Filed: 06/28/2023
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Kenneth Nixon

represented by **Gayle Horn**
Loevy & Loevy
ATTN Lauren Lobata
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ATTORNEY TO BE NOTICED

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V.

Defendant

Detroit, City of

Defendant

Moises Jimenez
Detective

represented by **Andrea M. Frailey**
Nathan & Kamionski LLP
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ATTORNEY TO BE NOTICED

Defendant

James Tolbert
Commander

represented by **Shneur Zalman Nathan**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Kurtiss Staples
Detective

represented by **Andrea M. Frailey**
(See above for address)
ATTORNEY TO BE NOTICED

Avi Kamionski
(See above for address)
ATTORNEY TO BE NOTICED

Christopher J. Raiti
(See above for address)
ATTORNEY TO BE NOTICED

Kristine Baker
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Eddie Croxton
Sgt.

represented by **Andrea M. Frailey**
(See above for address)
ATTORNEY TO BE NOTICED

Avi Kamionski
(See above for address)

ATTORNEY TO BE NOTICED

Christopher J. Raiti
(See above for address)
ATTORNEY TO BE NOTICED

Kristine Baker
(See above for address)
ATTORNEY TO BE NOTICED

Shneur Zalman Nathan
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Alma Hughes-Grubbs
Officer

represented by **Andrea M. Frailey**
(See above for address)
ATTORNEY TO BE NOTICED

Avi Kamionski
(See above for address)
ATTORNEY TO BE NOTICED

Christopher J. Raiti
(See above for address)
ATTORNEY TO BE NOTICED

Kristine Baker
(See above for address)
ATTORNEY TO BE NOTICED

Shneur Zalman Nathan
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

John Doe
Other As-Of-Yet Unknown Employees of the City of Detroit

Date Filed	#	Docket Text
06/28/2023	1	COMPLAINT filed by Kenneth Nixon against All Defendants with Jury Demand. Plaintiff requests summons issued. Receipt No: AMIEDC-9399746 - Fee: $ 402. County of 1st Plaintiff: Macomb - County Where Action Arose: Wayne - County of 1st Defendant: Wayne. [Previously dismissed case: No] [Possible companion case(s): None] (Loevy, Jon) (Entered: 06/28/2023)
06/28/2023		A United States Magistrate Judge of this Court is available to conduct all proceedings in this civil action in accordance with 28 U.S.C. 636c and FRCP 73. The Notice, Consent, and Reference of a Civil Action to a Magistrate Judge form is available for download at http://www.mied.uscourts.gov (KBro) (Entered: 06/28/2023)
06/28/2023	2	SUMMONS Issued for * All Defendants * (KBro) (Entered: 06/28/2023)
06/28/2023	3	ATTORNEY APPEARANCE: Kathryn Bruner James appearing on behalf of Kenneth Nixon (James, Kathryn) (Entered: 06/28/2023)
06/28/2023	4	ATTORNEY APPEARANCE: Julie H. Hurwitz appearing on behalf of Kenneth Nixon (Hurwitz, Julie) (Entered: 06/28/2023)
07/14/2023	5	CERTIFICATE of Service/Summons Returned Executed. Detroit, City of served on 7/13/2023, answer due 8/3/2023. (Hurwitz, Julie) (Entered: 07/14/2023)
07/14/2023	6	ATTORNEY APPEARANCE: Isabella Aguilar appearing on behalf of Kenneth Nixon (Aguilar, Isabella) (Entered: 07/14/2023)
07/26/2023	7	NOTICE of Appearance by Gayle Horn on behalf of Kenneth Nixon. (Horn, Gayle) (Entered: 07/26/2023)
07/26/2023	8	CERTIFICATE OF SERVICE by Kenneth Nixon *as to James Tolbert* (Hurwitz, Julie) [Summons returned executed] Modified on 7/27/2023 (NAhm). (Entered: 07/26/2023)
07/26/2023	9	CERTIFICATE OF SERVICE by Kenneth Nixon *as to Kurtiss Staples* (Hurwitz, Julie) [Summons returned executed] Modified on 7/27/2023 (NAhm). (Entered: 07/26/2023)

07/26/2023	10	CERTIFICATE OF SERVICE by Kenneth Nixon *as to Moises Jiminez* (Hurwitz, Julie) [Summons returned executed] Modified on 7/27/2023 (NAhm). (Entered: 07/26/2023)
07/26/2023	11	CERTIFICATE OF SERVICE by Kenneth Nixon *as to Alma Hughes Grubbs* (Hurwitz, Julie) [Summons returned executed] Modified on 7/27/2023 (NAhm). (Entered: 07/26/2023)
08/03/2023	12	STIPULATED ORDER to Extend Time for Defendant City of Detroit to Respond to Complaint. **Response due by 9/2/2023** Signed by District Judge Judith E. Levy. (EPar) (Entered: 08/03/2023)
08/03/2023	13	NOTICE of Appearance by Christopher J. Raiti on behalf of Moises Jimenez, Kurtiss Staples. (Raiti, Christopher) (Entered: 08/03/2023)
08/03/2023	14	NOTICE of Appearance by Avi Kamionski on behalf of Moises Jimenez, Kurtiss Staples. (Kamionski, Avi) (Entered: 08/03/2023)
08/03/2023	15	NOTICE of Appearance by Shneur Zalman Nathan on behalf of Moises Jimenez, James Tolbert. (Nathan, Shneur) (Entered: 08/03/2023)
08/03/2023	16	NOTICE of Appearance by Kristine Baker on behalf of Moises Jimenez, Kurtiss Staples. (Baker, Kristine) (Entered: 08/03/2023)
08/03/2023	17	NOTICE of Appearance by Andrea M. Frailey on behalf of Moises Jimenez, Kurtiss Staples. (Frailey, Andrea) (Entered: 08/03/2023)
08/04/2023	18	NOTICE of Appearance by Christopher J. Raiti on behalf of Alma Hughes-Grubbs. (Raiti, Christopher) (Entered: 08/04/2023)
08/04/2023	19	NOTICE of Appearance by Avi Kamionski on behalf of Alma Hughes-Grubbs. (Kamionski, Avi) (Entered: 08/04/2023)
08/04/2023	20	NOTICE of Appearance by Shneur Zalman Nathan on behalf of Alma Hughes-Grubbs. (Nathan, Shneur) (Entered: 08/04/2023)
08/04/2023	21	NOTICE of Appearance by Kristine Baker on behalf of Alma Hughes-Grubbs. (Baker, Kristine) (Entered: 08/04/2023)
08/04/2023	22	NOTICE of Appearance by Andrea M. Frailey on behalf of Alma Hughes-Grubbs. (Frailey, Andrea) (Entered: 08/04/2023)
08/08/2023	23	NOTICE of Appearance by Avi Kamionski on behalf of Eddie Croxton. (Kamionski, Avi) (Entered: 08/08/2023)
08/08/2023	24	NOTICE of Appearance by Shneur Zalman Nathan on behalf of Eddie Croxton. (Nathan, Shneur) (Entered: 08/08/2023)
08/08/2023	25	NOTICE of Appearance by Christopher J. Raiti on behalf of Eddie Croxton. (Raiti, Christopher) (Entered: 08/08/2023)
08/08/2023	26	NOTICE of Appearance by Kristine Baker on behalf of Eddie Croxton. (Baker, Kristine) (Entered: 08/08/2023)
08/08/2023	27	NOTICE of Appearance by Andrea M. Frailey on behalf of Eddie Croxton. (Frailey, Andrea) (Entered: 08/08/2023)
08/09/2023	28	STIPULATED ORDER Extending Time for Defendants Croxton, Hughes-Grubbs, Jimenez, Staples, and Tolbert to Answer 1 Complaint; **Responsive Pleading due by 9/18/2023, Signed by District Judge Judith E. Levy. (WBar) (Entered: 08/09/2023)**

PACER Service Center

Transaction Receipt

08/23/2023 10:15:21

PACER Login:	mcps3037	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	5:23-cv-11547-JEL-EAS
Billable Pages:	5	**Cost:**	0.50

EXHIBIT 6C

Petition for Habeas Corpus

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

KENNETH FITZGERALD NIXON

(b) County of Residence of First Listed Plaintiff CChippewa
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
SHELDON HALPERN 26339 Woodward Avenue
Huntington Woods, MI 48070
(248) 554-0400

DEFENDANTS

GREGG McQUIGGIN

County of Residence of First Listed Defendant ChippewaG
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)
Michigan Attorney General, Habeas Corpus Division

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☒ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgement

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S. C. 2254

Brief description of cause:
Continued unconstitional confinement of a state prisoner, contary to the 4th, 6th and 14th Amendments

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Bruce Morrow, Wayne Circuit Court DOCKET NUMBER 05-005711-01

DATE
November 22, 2010

SIGNATURE OF ATTORNEY OF RECORD
Sheldon Halpern

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

PURSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed?

☐ Yes
☒ No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)

☒ Yes
☐ No

If yes, give the following information:

Court: Michigan court of Appeals, Michigan Supreme Court

Case No.: 266033 133678 293476 140403

Judge: C. Stevens, M Talbot, C. Murray; O'Connell, Talbot, Saad, Supreme Court Bench

Notes :

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

KENNETH FITZGERALD NIXON,

Petitioner,

-v- Case No.
Hon.

GREG MCQUIGGIN, Warden,

Respondent.
_____/

PETITION FOR HABEAS CORPUS

Petitioner Kenneth Fitzgerald Nixon, by and through his attorney, Sheldon Halpern, moves this Honorable Court pursuant to 28 U.S.C. § 2254 to grant Habeas Corpus relief, and says:

1. Petitioner, Kenneth Fitzgerald Nixon, was convicted after jury trial in Wayne County Circuit Court Case No. 05-005711-01, and sentenced by the Hon. Bruce U. Morrow on October 12, 2005 to terms of life in prison for felony murder first degree murder and 20 to 40 years for attempted murder and 10-20 years for arson of a dwelling.

2. Petitioner, through counsel, sought direct appeal with the Michigan Court of Appeals, with counsel filing a brief and a supplemental brief, and Petitioner filing a pro per Standard 11 brief, and the Michigan Court of Appeals considered all the issues, affirming the convictions at issue on March 1, 2007, in docket no. 266033. The

Michigan Supreme Court denied leave to appeal on September 10, 2007, and denied reconsideration on November 29, 2007 in docket no. 133678.

3. Petitioner filed a Motion for Relief from Judgment in the trial court on December 8, 2008. The trial court considered the merits of all the issues and denied relief by Opinion and Order entered July 17, 2009.

4. Application for leave to appeal was filed with and denied by the Michigan Court of Appeals on November 23, 2009 in docket no. 293476. Application for leave to appeal was denied by the Michigan Supreme Court in docket no. 140403, on September 9, 2010.

5. The Wayne County Circuit Court is a state court of Michigan, located within the Eastern District of Michigan. Respondent Greg McQuiggin is the Warden of the Chippewa Correctional Facility, a state prison located within the Western District of Michigan, where Petitioner Kenneth Fitzgerald Nixon is being held as prisoner 499063.

6. **Issue I. Newly discovered evidence of actual innocence permits consideration of Petitioner's constitutional violations.** Petitioner, Kevin Fitzgerald Nixon, submits that because of his colorable claim of innocence, any claims of procedural default that may be advanced by respondent in this case should be disregarded and his issues heard on the merits. *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005); *Schlup v. Delo*, 513 U.S. 298; 115 S. Ct. 851; 130 L.Ed.2d 808 (1995).

The evidence presented at trial was ambiguous as best. The physical and forensic evidence was inconclusive. The only witness to implicate Petitioner provided circumstances and details that defy physics, logic and internal consistency. Perhaps

sensing these shortcomings, the prosecutor introduced the testimony of a jail house informant in an effort to suggest the Petitioner had confessed to another jail inmate. The prosecutor went as far as to tell the jury:

> "The point is no matter how you shake it, no matter how you look at Mr. January, he's telling you what was told to him, and that is evidence that you can use by itself to convict beyond a reasonable doubt." (T IV, 170-171).

7. Petitioner has obtained evidence that Stanley January had fabricated his testimony for the express purpose of obtaining early release so he could be home for his daughter's graduation. Petitioner presents new evidence that his conviction was based on perjured testimony by the same witness the prosecutor told the jury they solely rely upon to find Petitioner guilty. Petitioner has made a prima facie case that any confidence in the outcome of his trial has been substantially undermined.

8. **Issue II. Petitioner was denied a fair trial by ineffective assistance of counsel in violation of the Sixth Amendment.** Petitioner submits that his trial counsel was ineffective in several areas, each providing an independent ground for relief, including:

a) failure to investigate and prepare for trial. Before trial, while the police were investigating the case, Petitioner, claiming his innocence agreed to take a polygraph examination. After the exam, the polygrapher who administered the test indicated he had passed the test. (See affidavit of Kenneth Nixon, in Appendix). The investigating officer told defense counsel Petitioner had failed the exam. Rather than pursue this information and contact the test administrator, defense counsel did nothing

despite being asked to pursue this important lead. As it is, Petitioner did pass a polygraph exam. The results of that examination are found in the Appendix. This approach became a recurring theme for the defense, being provided with information but not following up or conducting interviews.

During trial, defense counsel when talking about possible defense witnesses commented: "Those witnesses – I haven't had a chance to get out to see, but I called them all. They're supposed to be here today." (T IV, 13).

An important witness, a prosecution witness, was a cousin to codefendant. Despite such obvious access to talk to this witness, Mario Mahdi, defense counsel's preparation was limited to a brief interview in hallway of court just before court was to resume.

Another example of the failure to prepare is seen where trial counsel called an alibi witness to testify but failed to ask about how she had seen Petitioner at home even while the fire trucks were just responding. The importance is noted when the prosecutor claimed that while people could have seen Petitioner at home, he could of snuck out of the house, firebombed the house and made it back to the house. The testimony not heard by the jury because of counsel's failure to prepare for trial was that Petitioner was still at the house while the fire trucks were coming and therefore there was no time for Petitioner to have snuck out of the house and returned.

Similarly, defense witnesses included a neighbor on his front porch during the all relevant times who said he never saw Petitioner leave out the front of the house. The prosecutor claimed that Petitioner could have snuck out the back of the house.

Defense counsel had failed to ask the witnesses about the condition of the back door of the house on Havana Street. The back door was secured shut, having been broken and for security purposes could not be opened at all and the only way Petitioner could have left the house was through front door and testimony at trial demonstrated he never went out the front door during the relevant times. Petitioner was denied effective assistance of counsel. *Sims v Livesay,* 970 F2d 1575 (CA 6, 1992).

b) providing erroneous advice. Petitioner was a young man facing murder charges and was trusting and relying upon the advice of counsel. Before trial began, trial counsel was under the impression that by conducting a trial jointly with codefendant LaToya Caulfield, Petitioner would benefit from hearing some of the same evidence despite the fact that LaToya Caulfield was Petitioner's primary alibi witness. By failing to seek separate trials, Petitioner's best alibi witness was not available to testify on Petitioner's behalf. Trial counsel also failed to advise Petitioner on the right to testify. *Lyons v Jackson*, 299 F.3d 588 (6th Cir. 2002).

c) failure to present evidence; The prosecutor's theory was that Petitioner and Ronrico Simmons were fighting with each other over LaToya Caulfield at the time of the fire and that was the motivation for Petitioner to firebomb Simmons' house. Before trial even began, Petitioner's mother told defense counsel that Simmons and Nixon had grown up together and were like brothers and like brothers fought from time to time, but had reconciled their differences and were on friendly terms at the time of the fire. (See Affidavit of Tracy Nixon in Appendix). Defense counsel refused to even consider using her as a witness and never bothered to develop this important

information. The failure to interview and to prepare and obtain these statements constitutes ineffective assistance of counsel. *Stewart v Wolfenbarger*, 468 F3d 338, 356-357 (6th Cir, 2005):

d) failure to object Trial counsel permitted without objection for the prosecutor to transmute Stanley January's testimony into a confession made by Petitioner. As discussed in the separate issue concerning prosecutorial misconduct, Stanley January did not testify to such a confession. His testimony fell considerably short of even providing an inferable basis of a confession. The prosecutor was allowed to tell the jury that they could rely upon January's testimony exclusively to find Petitioner guilty. Trial counsel also failed to object to the prosecutor's questioning of a witness wherein the prosecutor gave the impression she was aware of witness tampering by Petitioner while improperly questioning Trevor Hill.

It is objectively unreasonable to conclude strategy is involved where trial counsel does not even bother to investigate or interview witnesses and is unable to even determine if evidence is favorable to the Petitioner. *Washington v Hofbauer*, 228 F3d 689 (CA 6, 2000).

9. We cannot have confidence in the verdict where unreasonable actions taken by counsel deprived the jury of relevant and critical evidence that supported the defense denying Petitioner of his constitutional rights. *McQueen v Scroggy*, 99 F3d 1302, 1311 (CA 6, 1996); *Kyles v Whitley*, 514 US 419, (1995). The state courts unreasonably refused to grant an evidentiary hearing on ineffective assistance of counsel, therefore, the federal court should conduct one.

10. ***Issue III. Petitioner's conviction based upon perjured testimony.*** The prosecutor decided to add to the case against Petitioner by calling Stanley January, an inmate, who was at the same jail that Petitioner housed at prior to trial. The jailhouse informant relayed to the jury how Petitioner had confided in him and claimed Petitioner had confessed to the crime.

The prosecutor even bolstered jailhouse informant January's testimony with selective clips of recorded telephone conversations of inmates made from the jail. Defense counsel was not provided with any access to other telephone conversations involving inmate January, and was not permitted to review the calls and to listen for the first time, when played for the jury, and could not cross-examine or impeach with other telephone conversations.

Petitioner has obtained newly discovered evidence that jailhouse information fabricated his testimony, and had planned on fabricating his testimony to avoid consequences for his criminal actions and obtain early enough release to attend his daughter's graduation.

Had a jury been provided with this evidence, that Stanley January lied about hearing any kind of a confession made by Petitioner, there is a reasonable probability of different result. In this case the prosecutor told the jury they could rely exclusively upon Stanley January's testimony to find Petitioner guilty. (T IV, 170-171). Where that testimony is exposed a perjury, no reasonable juror could find Petitioner guilty.

Petitioner submits these documents provide prima facie proof that the testimony to the jury from jailhouse witness January was perjured.

Petitioner further submits that the prosecutor was aware that jailhouse informant January's testimony was materially false and not only did not correct the misleading impression left with the jury, but bolstered the informant's testimony with selected recorded telephone conversations involving Mr. January. The prosecutor, in general, is aware of the strong possibility of false testimony as provided by a jail house informant. A prosecutor misleads a jury and suborns perjury when vouching for and telling a jury they should exclusively rely upon jailhouse informant testimony to convict under these circumstances.

11. Significant ethical and legal implications arise for prosecutors when the government offers leniency to individuals who take part, or claim to take part, in crimes. An offer of leniency "gives the witness a powerful incentive to fabricate his testimony in order to curry favor with the government," and also to find "a fast and easy way out of trouble with the law." *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001).

Petitioner contends that there were specific facts present from which it is reasonably inferred that either the investigating officers and/or the prosecutor knew Stanley January was lying to the jury.

Under these circumstances, Petitioner submits the prosecuting authorities were aware of Stanley January's perjury and failed to correct the same entitling Petitioner to relief in the form of a new trial. *Rosencrantz v Lafler*, 568 F.3d 577 (6th Cir. 2009), ("A conviction obtained by the knowing use of perjured testimony must be set aside if 'the false testimony could . . . in any reasonable likelihood have affected the

judgment of the jury. . . .' *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (internal quotation marks omitted); see also *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)."

12. ***Issue IV. Petitioner denied a fair trial by prosecutorial misconduct.*** The prosecutor at trial during cross-examination of a defense witness, decided to introduce facts of witness intimidation of prosecution witnesses, including that prosecution witnesses were assaulted in the parking lot after court. Of course there was no evidence of any such conduct, nor was any evidence ever introduced from the witness stand regarding any intimidiation of prosecution witensses. The problem was that there was no good faith basis to even support these questions; not even "[a] well reasoned suspicion that a circumstance is true." *United States v. Sampol*, 636 F.2d 621, 658 (D.C. Cir. 1980).

Further misconduct occurred where during closing argument the prosecutor misstated the testimony of Stanley January and transmuted that testimony into a confession that the jury was told was sufficient in and of itself to convict Petitioner. The witness could not say he actually heard a confession, but the prosecutor told the jury he had.

13. Where a prosecutor's comments violate an explicitly granted right under the Constitution, the comments constitute a constitutional violation. *Hodge v Hurley*, 426 F.3d 368, (6th Cir, 2005); *Donnelly v DeChristoforo*, 416 US 637; 94 S Ct 1868; 40 L Ed 2d 431 (1974). Where a prosecutor argues facts not in evidence, the prosecutor becomes a witness, not subject to cross-examination. In so doing, he violates due

process and the constitutional right of confrontation. *Berger v United States,* 295 US 78; 55 S Ct 629; 79 L Ed 1314 (1935).

It was highly prejudicial to place before the jury untrue facts of a confession by Petitioner, which could cause the jury to abandon the presumption of innocence, *Taylor v. Kentucky*, 436 U.S. 478; 98 S.Ct. 1930; 56 L.Ed.2d 468 (1978).

14. ***Issue V. Appellate counsel was constitutionally ineffective.***

We submit there was ineffective assistance of appellate counsel regarding the failure of the appeal attorney to raise the issues raised herein, as well as to review the record and present meritorious issues on appeal. This constitutes "cause" for any procedural default arising from the failure to raise claims of ineffective assistance of counsel in the first appeal. *Alston v Garrison*, 720 F2d 812 (CA 4, 1983); *Osborn v Shillinger*, 861 F2d 612 (CA 10, 1988); *Dawan v Lockhart*, 980 F2d 470 (CA 8, 1992); *Combs v Coyle*, 205 F3d 269 (CA 6, 2000); *Satterlee v. Wolfenbarger*, 374 F. Supp. 2d 562 (E.D. Mich. 2005), aff'd 453 F.3d 362 (6th Cir. 2006).

It is reasonably probable that Petitioner Nixon would have gotten a reversal on his appeal of right, but for the inaction of appellate counsel. See *Mapes v Coyle*, 171 F3d 408 (CA 6, 1999), finding ineffective assistance of appellate counsel where counsel omitted issues that were "significant and obvious." Under *Mapes v Coyle* and many other cases, a court may find ineffective assistance of appellate counsel from the failure to raise particular issues on appeal if the issues were obvious or should have been discovered, and if the failure to raise them was prejudicial. It is impossible to imagine how failure to raise these issues could have helped Mr. Nixon's appeal in any

way. If the issues had been raised, the result of the appeal would unquestionably have been different. In this case, the issues not raised in the earlier appeal are highly meritorious and will change the result, if they can get consideration on their merits.

15. **Other matters.** The convictions and sentences under which Petitioner is imprisoned are unlawful, unconstitutional and void because of violation of Petitioner's constitutional rights. The violations are not mere irregularities, but are major constitutional violations which deprived him of fundamental fairness, and reflect unreasonable state court rulings which fail to follow correct standards established by the United States Supreme Court and are unreasonable in light of the facts on the record.

16. This Court has jurisdiction over this Petition and the issues raised pursuant to 28 U.S.C. §2241 and 28 U.S.C. §2254, because Petitioner is being held in violation of the Constitution and laws of the United States pursuant to a decision that was contrary to, and involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

17. Petitioner incorporates by reference the Brief in Support of Petition for Habeas Corpus and the exhibits in the Appendix.

WHEREFORE, Petitioner Kenneth Fitzgerald Nixon moves this Honorable Court to take the following action:

a) Accept jurisdiction over this case;

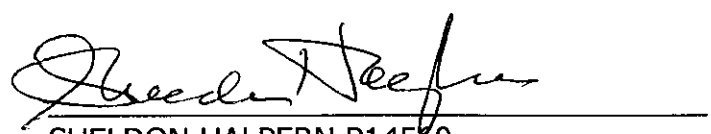
b) Require the Respondent to answer the allegations in this Petition and the Brief in Support;

c) Hold such evidentiary hearings as this Court may deem necessary or appropriate;

d) Issue an Order that this Court will grant a Writ of Habeas Corpus unless the State vacates the conviction and holds a new trial within a specified time;

e) Issue a Writ of Habeas Corpus freeing Petitioner from his unconstitutional confinement.

Respectfully submitted,



SHELDON HALPERN P14560
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Dated: November 22, 2010

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

KENNETH FITZGERALD NIXON,

Petitioner,

-v- Case No.
Hon.

GREG MCQUIGGIN, Warden,

Respondent.
_____/

BRIEF IN SUPPORT OF PETITION FOR HABEAS CORPUS

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER PETITIONER SHOULD BE EXCUSED FROM PROCEDURAL DEFAULTS, IF ANY, BECAUSE OF A SUBSTANTIAL SHOWING OF INNOCENCE?

Petitioner says "yes."

II. WHETHER PETITIONER WAS DENIED A FAIR TRIAL BY INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT?

Petitioner says "yes."

III. WHETHER PROSECUTOR'S USE OF PERJURED TESTIMONY DENIED PETITIONER DUE PROCESS?

Petitioner says "yes."

IV. WHETHER THE PROSECUTOR PREJUDICED PETITIONER WITH IMPROPER AND MISLEADING ARGUMENT?

Petitioner says "yes."

V. WHETHER PETITIONER WAS PREJUDICED BY FAILURE TO PROVIDE CONSTITUTIONALLY EFFECTIVE REPRESENTATION ON APPEAL?

Petitioner says "yes."

STATEMENT OF THE CASE

Statement of Proceedings:

Petitioner, Kenneth Fitzgerald Nixon, was convicted after jury trial in Wayne County Circuit Court Case No. 05-005711-01, and sentenced by the Hon. Bruce U. Morrow on October 12, 2005 to terms of life in prison for felony murder first degree murder and 20 to 40 years for attempted murder and 10-20 years for arson of a dwelling.

Petitioner, through counsel, sought direct appeal with the Michigan Court of Appeals, with counsel filing a brief and a supplemental brief, and Petitioner filing a pro per Standard 11 brief, and the Michigan Court of Appeals considered all the issues, affirming the convictions at issue on March 1, 2007, in docket no. 266033. The Michigan Supreme Court denied leave to appeal on September 10, 2007, and denied reconsideration on November 29, 2007 in docket no. 133678.

Petitioner filed a Motion for Relief from Judgment in the trial court on December 8, 2008. The trial court considered the merits of all the issues and denied relief by Opinion and Order entered July 17, 2009. Application for leave to appeal was filed with and denied by the Michigan Court of Appeals on November 23, 2009 in docket no. 293476. Application for leave to appeal was denied by the Michigan Supreme Court in docket no. 140403, on September 9, 2010.

Petitioner seeks habeas corpus review of his unconstitutional confinement.

Statement of Facts:

On May 19, 2005 just before midnight, Naomi Vaughn was home at 19428 Charleston, Detroit, MI, asleep in her upstairs bedroom when she was awakened by her 13 year old son Brandon who was screaming. (T II, 64-65). When she awoke, there was no smoke in her room, no indication at all that anything was wrong. (T II, 66). When she stepped in the hallway, she noticed in that her son Raylon's bedroom next to hers was on fire. (T II, 66-67).

Brandon Vaughn was in his bedroom, also upstairs, when before midnight he heard a boom when something hit the house and then he saw his brother Raylon's bedroom on fire. (T III, 184). The fire investigator noted that a bottle had been thrown with gasoline in it that struck just outside and below Raylon's bedroom window, and that the bedroom would have been "superheated" and in flames within 15-20 seconds after the bottle hit the house. (T III, 142, 145, 151).

Naomi Vaughn and Brandon Vaughn went downstairs and she watched Brandon unlock the two locks of the front door and the two locks of the porch door to their residence and after an attempt to retrieve her other children, they went outside the house and she lost sight of Brandon for a moment. (T II, 90-92, 111-112).

Naomi Vaughn and her children were living in a house of her boyfriend, Ronrico Simmons who was not at home when the fire started, but was walking towards the house on Annin Street when he heard Naomi Vaughn screaming and the upstairs of his house on fire and ran to help. (T II, 96; T III, 74-75). Annin Street runs east-west and ends at Charleston Street. (T II, 73-74). There was a streetlight at the intersection of Annin and Charleston that was operating that night. (T II, 73-74; T III, 77). Ms.

Vaughn's house was the first house south of Annin on the east side of Charleston and explained how Mr. Simmons could see the house was on fire as he was walking on Annin from Havana Street, 3 blocks to the west of Charleston and had seen the fire when he was less than 1 block away from Charleston and then just ran to Ms. Vaughn's assistance. (T II, 73-74, 96).

Police and fire responded to the scene, two children had died in the fire and by 3:00 a.m. that morning, Naomi Vaughn and Ronrico Simmons were being interviewed for their statements. (T III, 97; T III, 113). Both Simmons and Vaughn said they did not know who had burnt their house but both told the police about an encounter earlier that day where Raylon and the other children got into a fight, just down the block from the house, with Dajah and her friends. (T II, 78-79, 114, 122-123; T III, 95, 98).

A few hours after this fight, a man, saying he was Dajah's father, appeared at the house and spoke with Naomi Vaughn. (T II, 79, 114; T III, 105-106). While he was there, another car drove up and a woman got out and charged up to the house and had to be restrained by Dajah's dad from going after Naomi Vaughn. (T II, 116-117). During this encounter, Dajah's dad repeatedly noted his disappointment in the attack on his daughter and repeatedly stressed to Naomi: "this is how people's houses get shot up" (T II, 119-120; T III, 105-106).

The next day, both Vaughn and Simmons changed their stories to the police and both now said that Brandon Vaughn had told them that night that he saw who did the firebombing and it was "Beans" (Petitioner Nixon) and "Toya", (jointly tried

codefendant LaToya Caulfield who was acquitted). (T II, 130;T III, 126-127). Despite claiming Brandon told him this information the night of the fire while the police and fire officials were present Simmons could not explain why he never told Brandon to tell any of these officials, nor why Simmons did not tell any of these officers about this important information. (T III, 114). Similarly, when Naomi Vaughn was asked that if Brandon told her that night that "Beans and Toya did this" why did she not tell anyone, she could only say: "At that time, I didn't – I don't know why I didn't." (T II, 130).

Later that morning, the police raided a house 3 blocks over 19380 Havana Street where LaToya Caulfield lived with Petitioner. (T III, 14, 18). The police seized Petitioner's work pants and work shoes and examined the tow truck and took rags and other items. (T III, 153-154). Petitioner works for a towing service and had worked all that prior day and had closed up the auto shop around 10:00 p.m. on May 19, 2005 and drove the tow truck home and parked it on Havana Street. (T IV, 110, 112). The canine handler noted the dog detected gasoline and petroleum products associated with Petitioner's clothes and work boots. (T III, 182). The canine handler had to admit that the dog does not differentiate between petroleum products and the canine will indicate a hit when finding motor oil. (T III, 185, 188, 195).

One prosecution witness testified that Petitioner and LaToya Caulfield were home on Havana Street at the time the house on Charleston was firebombed. (T III, 21-22, 26). Defense witnesses included the neighbor who was on porch during the night including when the firebombing took place and Petitioner and Caulfield never left

the Havana house; (T IV, 131-132), and a relative of Ms. Caulfield who said LaToya and Petitioner were at home during that night and did not leave. (T IV, 148-149).

The last prosecution witness called was an acknowledged "jailhouse informant", Stanley January. (T IV, 168). January was facing armed robbery charges when he cut a deal to testify against a different inmate at jail. (T IV, 7-8). January told the jury he was testifying out of the kindness of his heart and was not expecting any consideration for his testimony. (T IV, 43-44). January was scheduled to be sentenced within days after offering his testimony against Petitioner. (T IV, 7-8). January was also facing parole violations for the armed robbery, having been parole on the time of the robbery, and still had to contend with that proceeding. (T IV, 51).

Back in May, 2005, January was in jail in the same area as Petitioner and had asked Petitioner to let him make a three-way call, so he could talk to his daughter. (T IV 20). January then related how Petitioner told him he was in jail being accused of the firebombing and was in a conversation with others, including another inmate who knew the fathers of the two children that perished in the firebombing and asked Petitioner if he did it. (T IV, 20, 25).

When asked about the circumstances during which Petitioner confessed January testified:

> "But any way, you know, he just was – he looked real nervous, you know. I told him that 'You know, you have that right to be nervous,' you know, dealing with the nature of the crime that he's supposed to be in here for, you know." (T IV, 22).

January claimed to have written down the notes of his encounter in May, 2005 but did not tell anyone until 3 months later, or just before his upcoming sentencing. (T IV, 35,, 38). Those notes also had scribbles of details he was trying to string together concerning two other inmates that were in the jail and for which he had intentions of offering his cooperation to authorities. (T IV, 65-66). Although there was never any evidence offered that even suggested there Petitioner had ever been inside the house on Charleston, let alone had been involved in a fight, inmate January told the jury how Petitioner had gotten into a fight at the house at Charleston Street before the firebombing. (T IV, 69).

LaToya Caulfield was acquitted and Petitioner was convicted.

ARGUMENT

I. PETITIONER SHOULD BE EXCUSED FROM PROCEDURAL DEFAULTS, IF ANY, BECAUSE OF A SUBSTANTIAL SHOWING OF INNOCENCE.

Petitioner, Kevin Fitzgerald Nixon, submits that because of his colorable claim of innocence, any claims of procedural default that may be advanced by respondent in this case should be disregarded and his issues heard on the merits. *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005); *Schlup v. Delo*, 513 U.S. 298; 115 S. Ct. 851; 130 L.Ed.2d 808 (1995).

A. Standard for Schlup Gateway Claims.

In *Schlup v. Delo*, 513 U.S. 298; 115 S. Ct. 851; 130 L.Ed.2d 808 (1995), the United States Supreme Court held that the colorable claim of innocence by Schlup permitted him to avoid any procedural bars, despite his inability to show "cause and prejudice" for not raising the issue previously.

> "Schlup's claim of innocence, on the other hand, is procedural, rather than substantive. His constitutional claims are based not on his innocence, but rather on his contention that the ineffectiveness of his counsel, see *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and the withholding of evidence by the prosecution, see *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), denied him the full panoply of protections afforded to criminal defendants by the Constitution.
> ...
> Schlup's claim of innocence is thus "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."
> ...

> However, if a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims."

The Supreme Court in *Schlup v. Delo* also explained that when innocence is not the constitutional issue, but merely used as a gateway for other constitutional claims, the standard of proof of the innocence is substantially reduced:

> "If there were no question about the fairness of the criminal trial, a Herrera-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish Schlup's innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about Schlup's guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, Schlup's threshold showing of innocence would justify a review of the merits of the constitutional claims."

The standard, then, is not whether the facts "unquestionably establish" Petitioner's innocence. The standard is whether the facts "undermine confidence in the result of the trial."

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

> "[P]etitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict."

Even if the evidence is sufficient to convict, Petitioner has plainly shown evidence of innocence sufficient to "undermine confidence in the result of the trial," and therefore sufficient to permit his federal constitutional claims to be heard. See also *Richter v. Bartee*, 973 F. Supp. 1118 (D. Neb. 1997); *McCoy v. Norris*, 958 F.Supp. 420 (E.D. Ark. 1996); *Reasonover v. Washington*, 60 F.Supp.2d 937 (E.D. Mo. 1999); *Paradis v. Arave*, 130 F.3d 557, 564 (9th Cir. 2000).

B. Evidence presented at trial

The physical evidence presented at trial was less than persuasive and could not permit any juror to reasonably infer guilt or innocence from the test results. There were remnants of a glass bottle that contained gasoline that hit below Raylon's upstairs bedroom window and that bedroom was in flames within 15-20 seconds. (T III, 142, 145, 151). A Molotov cocktail had been thrown at the house, a canine unit had been deployed and gasoline detected at the Charleston house. (T III, 145). Later when Petitioner was arrested in his home on Havana Street, his work clothes and boots were taken into custody and subjected to a canine unit test and was found to have traces of petroleum products. (T II, 180, 182).

The canine handler explained that a hit meant that the dog detected petroleum products; however the dog can not differentiate between any of the petroleum products and if there were traces of motor oil on the pants or boots, the dog would indicate a hit for petroleum products. (T II, 185, 188, 193).

While this may have been incriminating evidence in another case, Petitioner had worked that day and closed up the shop around 10:00 pm and drove his tow truck

home to Havana Street. (T IV, 111-112). Petitioner works with motor vehicles all day and is a tow truck driver. (T IV, 110). That his work pants and shoes have petroleum products is both expected and not any indication of a connection to the firebombing.

The prosecutor's theory was that Ronrico Simmons and Petitioner were enemies because Simmons had dated LaToya Caulfield, and Petitioner, therefore, must have firebombed Simmons' house in revenge, assisted by LaToya Caulfield who drove Petitioner in her car over to Charleston. To support this theory, the prosecutor introduced evidence of a past dispute between Simmons and Petitioner months prior to the firebombing and statements from two witnesses, Brandon Vaughn and Stanley January.

The only statements provided by Brandon Vaughn, 13 years old at the time, that were not contradicted by his earlier testimony and the testimony of the other prosecution witnesses were that: Brandon was in his upstairs in his bedroom before the fire, (T III, 184); and, Brandon disappeared for a moment and then came back acting very agitated after the fire, when the victims were gathering themselves outside but before the police and fire personnel responded. (T II, 92, 96;T III, 79).

As to what happened in between was unclear as Brandon Vaughn gave one version at trial that differed from his version provided at the preliminary examination, and for which to be true, then his mother, Naomi Vaughn, lied and her boyfriend, Ronrico Simmons must be blind.

At trial, Brandon was in his bedroom, upstairs, on the north side of the house, he was not asleep, when he heard a boom like noise just before midnight on May 19, 2005. (T III, 184). Brandon claimed he was not aware there was any fire when he ran downstairs. (T III, 186). Brandon went downstairs, unlocked the doors and went out the porch and saw Nixon getting into the passenger side of a car. (T III, 185).

Brandon claimed to have seen LaToya driving the car and to having chased the car to see who it was and then went back upstairs, woke up his mother and brought her outside and at that time he saw Rico running. (T III, 187).

Brandon said that LaToya was in her car heading south on Charleston when Petitioner Nixon got into the car, and the car backed up and turned around on Annin Street and then headed North on Charleston for a couple blocks and turned on Lantz. (T III, 190-192).

Brandon's testimony at trial had some significant differences from his preliminary examination testimony including that while at trial he said he did not know there was a fire before running outside, at the preliminary examination he said he said he saw flames in his brother's room before running downstairs. (PE I, 22). Another example is that at the preliminary examination, Brandon Vaughnn not only saw Petitioner get in the car, he stated he had watched Petitioner throw the bottle at his brother's window while standing on the porch in the first place. (PE I, 34).

Brandon Vaughn's testimony was also contradicted by the other prosecution witnesses. For example, Brandon says he heard something hit the house so he ran downstairs, he unlocks the front door and the porch door, he claims to have seen

Petitioner at this time and running after the car to identify LaToya, watches the car back up Charleston, turn around on Annin and then head north on Charleston and then Brandon runs back to the house, and wakes up his mother, Naomi Vaughn. (T III, 185-192).

The arson investigator stated that once the bottle hits the house, the bedroom would be in flames being "superheated" within 15-20 seconds. (T III, 151). It is highly doubtful that Brandon Vaughn did not know the bedroom upstairs was not on fire. Indeed, in previous statements, Brandon did admit he saw the flames before going downstairs the first time. (PE I, 22).

Naomi Vaughn said Brandon woke her up and at that time, there was nothing apparently wrong in her room until she got to the hallway and could see the fire, and she watched Brandon Vaughn unlock the two locks of the front door and unlock the two locks of the porch door and go outside. (T II, 90-92, 111-112).

If Naomi is telling the truth then the fire expert is wrong about how long this fire with an accelerant took to engulf the bedroom with flames, and Brandon for some reason, after running outside the house and seeing Petitioner, then runs back inside the house, and locks the 2 porch door locks and the 2 front door locks, runs upstairs and then wakes up his mother, and they go back downstairs and she watches Brandon then unlock the 2 front door locks and 2 porch door locks.

Additionally, if Brandon's testimony is accurate and Petitioner and LaToya, in their car backed up onto Annin and then turned north on Charleston while the house was burning, then Ronrico Simmons either lied about his testimony or else is blind

because Mr. Simmons was walking on Annin towards Charleston at the very same time Petitioner and LaToya were turning around in front him, underneath the lit streetlight. (T III, 76, 108-109).

Although several witnesses told the jury versions of what Brandon Vaughn allegedly said to them while the fire was being fought, none of these witnesses never bothered to tell any investigating official when giving their initial statements, (T III, 97; T III, 113); instead, the mention of what Brandon had said was not made until a day and half later. (T II, 130;T III, 126-127). Such testimony by Brandon Vaughn is highly improbable and could not reasonably be relied upon as being accurate.

Perhaps sensing the inherent weakness in Brandon Vaughn's testimony, the prosecutor's last witness was jail house informant, Stanley January.

Mr. January was facing armed robbery charges when he cut a deal to testify against a different inmate at jail. (T IV, 7-8). January told the jury he was testifying out of the kindness of his heart and was not expecting any consideration for his testimony. (T IV, 43-44). January was scheduled to be sentenced within days after offering his testimony against Petitioner. (T IV, 7-8). January was also facing parole violations for the armed robbery, having been parole on the time of the robbery, and still had to contend with that proceeding. (T IV, 51).

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C) Newly discovered evidence

After the trial in this matter, Christopher Crump, an inmate at a correctional facility, sent a letter to Petitioner's mother, Tracy Nixon explaining that he had been in the Wayne County Jail at the time with Nixon and Stanley January. Mr. Crump informed Tracy Nixon that Stanley January fabricated his testimony against Petitioner so that he could make a deal with the prosecutor's office and arrange to be out of jail in time for his daughter's high school graduation.

The undersigned counsel was presented this information by Tracy Nixon and made arrangements for a professional visit with Mr. Crump at Chippewa Correctional Facility and discussed the matters stated in the letter sent to Tracy Nixon and was

provided a typed statement prepared by Mr. Crump setting forth what he would testify to at hearing.

That statement provided:

- Crump was in the same holding cell with Stanley January are several occasions;
- Crump had seen January before at the Motor City Casino and they formed a friendship.
- January told Crump he was in jail for robbery, but was trying to get out of jail so that he could still attend his daughter's graduation;
- January explained to Crump that he believed he found a way to get out of jail early when he met another inmate in jail and had a chance to go through his discovery packet and found out some details by his murder case and with that information he was going to fabricate a story and make some deals with the government;
- Crump had no intention of being labeled a snitch while in Wayne County Jail, but did happen to see Stanley January while at Quarantine at Jackson State Prison, where all newly sentenced are housed;
- January told Crump he received 1 year for the robbery in exchange for his testimony against Nixon. This was the first time January identified the inmate he had fabricated testimony against;
- A couple of weeks later, January was very nervous and explained to Crump that the other inmate, Kenneth Nixon, would be coming soon and January needed to get out of Quarantine;
- Just prior to January being transferred Crump asked for his inmate number and was provided the phone number and address for his daughter instead.

Had a jury been provided with this evidence, that Stanley January lied about hearing any kind of a confession made by Petitioner, there is a reasonable probability of different result. In this case the prosecutor told the jury they could rely exclusively

upon Stanley January's testimony to find Petitioner guilty. (T IV, 170-171). Where that testimony is exposed a perjury, no reasonable juror could find Petitioner guilty.

D) Additional evidence of innocence

In further support of Petitioner's claim of innocence are the results of a polygraph examination wherein the examiner found Petitioner's answers that he did not firebomb the house on Charleston and was home with LaToya Caulfield in her house on Havana Street to be truthful and reliable. Similarly are the polygraph results of LaToya Caulfield and another alibi witness, Tracy Nixon. Both witnesses were found to be truthful and reliable. Those results are found in the Appendix. Polygraph results may be admitted and relied upon in post conviction proceedings and are part of the state court record. See, *People v Barbara,* 400 Mich 352, 411–414; 255 NW2d 171 (1977); accord, *People v Phillips*, 469 Mich 390 (2003).

The affidavits of Petitioner Nixon and Tracy Nixon are found in the Appendix. Finally, Petitioner offers the testimony of LaToya Caulfield, who was a codefendant jointly tried with Petitioner, the jury deciding Petitioner's fate never considered this evidence. Her affidavit is found in the Appendix.

E) Conclusion

When considering the impact of this new evidence, it is instructive to recall that the prosecutor told the jury that they could convict Petitioner based solely upon the testimony of jailhouse informant Stanley:

> "The point is no matter how you shake it, no matter how you look at Mr. January, he's telling you what was told to him, and that is evidence that you can use by itself to convict beyond a reasonable doubt." (T IV, 170-171).

Petitioner presents new evidence that his conviction was based on perjured testimony by the same witness the prosecutor told the jury they solely rely upon to find Petitioner guilty. Petitioner has made a prima facie case that any confidence in the outcome of his trial has been substantially undermined.

While the Supreme Court does not recognize a free standing claim of actual innocence as a cognizable habeas claim, *Herrera v Collins*, 506 US 390, 417 (1993) does provide that newly discovered evidence that supports actual innocence and a constitutional violation will merit habeas relief. Here, Petitioner has presented newly discovered evidence this is conviction was based upon perjured testimony. A habeas claim is made out where a state prisoner demonstrates his conviction is based upon perjured testimony, regardless of whether the government knew it was perjury at the time the evidence was presented. The Second Circuit recently granted permission to file a successive habeas in *Quezada v Smith*, 10-2738-op (2nd Cir. 10-21-2010), holding:

> Once newly discovered evidence has been presented, the gate-keeping issues are whether Quezada has identified a constitutional error and, if so, whether he has shown by clear and convincing evidence that but for that error no reasonable jury would have found him guilty. As noted, at this stage Quezada is required only to make a prima facie showing that these two requirements have been met. To show constitutional error he relies on *Sanders v. Sullivan*, 863 F.2d 218 (2d Cir. 1988). We ruled in *Sanders* that due process is violated if a state leaves in place a criminal conviction after a credible recantation of material testimony and the recantation would "most likely" have changed the outcome. 863 F.2d at 222.

See also *Smith v Roberts*, 115 F.3d 818 (10th Cir. 1997); *Lewis v Erickson,* 946 F.2d 1361 (8th Cir. 1991).

At a minimum, this Court should conduct a hearing on the claim of innocence and other claims advanced in the Petition. *In Re Byrd,* 269 F.3d 585 (6th Cir. 2001) [en banc].

In *Byrd,* the petitioner submitted an affidavit by John Brewer that contradicted his trial testimony, admitted Brewer's own role in the incident, and exonerated Byrd. The panel followed the unreasonable rule of presuming that evidence supporting innocence is a lie, finding without any hearing that the Brewer affidavit "lacks any credibility whatsoever" and that it contradicted his sworn testimony at trial. *In Re Byrd,* 269 F.3d 544 (2001). The en banc court found that there was reason to hold a hearing, *In Re Byrd*, 269 F.3d at 591, concurring opinion of Judge Jones, with 3 other judges:

> "The en banc court agrees with the view in *Burris v. Parke,* 116 F.3d 256 (7th Cir.1997) that in these circumstances, a federal court does well when it refuses to rubber-stamp such inadequate proceedings in the state court on a habeas claim. Otherwise, 'a state could insulate its decisions from collateral attack in federal court by refusing to grant evidentiary hearings in its own courts.'"

In *In Re Lott,* 366 F.3d 431 (6th Cir. 2004), the Court found that to get a hearing the Petitioner need merely make a "prima facie showing" that his claim is meritorious, which means "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court."

Petitioner has consistently requested an evidentiary hearing from the state courts to present witnesses and provide support for his claims and the state courts have refused to hold such hearings. (Hrng 7/17/2009, 7, 11).

In *Souter v. Jones,* the Court noted that the only evidence of that petitioner's guilt was the bottle, and the evidence discovered after trial, consisting of recantations by prosecution witnesses, cast considerable doubt on whether the bottle caused the injuries. Here the new evidence shows Stanley January's testimony to have been perjured and also shows that Petitioner was not involved in the firebombing. As the Court held in *Souter*:

> "[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 claim may be based."

The same is true here, in that the new evidence adds to the defense and deducts from the prosecution. This Court should order that there has been a substantial showing of innocence permitting Petitioner Nixon's issues to be heard on their merits. In the alternative, the Court should conduct an evidentiary hearing on the showing of innocence before issuing a final ruling. *In Re Byrd,* supra.

II. PETITIONER WAS DENIED A FAIR TRIAL BY INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.

This was a "fast track" case in that this homicide trial was held within 3 months from the date of the preliminary examination and the trial court noted its displeasure with the unpreparedness:

> "[W]hat continues to surprise me is how discovery is conducted during trial....everybody isn't on board, and it seems like the investigation on – isn't working as diligently to try to provide the Prosecution with what they need in order to go forward; and, certainly, if you don't have it, it handicaps the Defense." (T III, 7-8).

Further problems with the discovery and failure to have the case ready for trial caused the trial court to observe:

> "I don't know why we're dealing with pretrial matters in the middle of trial on the fourth day....But you're asking me to rule on something and again I'm thinking that it's pretrial and we're on the fourth day." (T III, 118).

Petitioner submits he was denied a fair trial by ineffective assistance of trial counsel. A criminal defendant is entitled to the effective assistance of counsel. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Beasley v United States*, 491 F2d 687 (CA 6, 1974); *People v Pickens*, 446 Mich 298 (1994); US Const, Amend VI; Const 1963, Art 1, §20.

The standard employed under *Strickland* asks two questions. First, were the attorney's advice and actions "within the range of competence demanded of attorneys in criminal cases," or, stated differently, were the actions and advice "reasonable under prevailing professional norms." *Strickland*, at 687, 688. The second question is

whether the representation failing to meet these standards prejudiced the defendant.

In *Beasley v United States*, 491 F2d 687 (CA 6, 1974), the Court stated that, to be constitutionally adequate:

> "Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a timely manner."

Defense counsel in a criminal case has a "Duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v Washington*, supra.

Effective assistance of counsel requires that counsel make reasonable investigations into the prosecutor's case and adequately prepare for trial. *Kimmelman v Morrison*, 477 US 365; 106 S Ct 2574; 91 L Ed 2d 305 (1986). As the Court held in *Washington v Hofbauer*, 228 F3d 689 (CA 6, 2000), "the label 'strategy' is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel."

Failure of defense counsel to adequately investigate or present a defense constitutes ineffective assistance of counsel. *Sims v Livesay*, 970 F2d 1575 (CA 6, 1992); *Landers v Rees*, 782 F2d 1042 (CA 6, 1985); *Wilson v Cowan*, 578 F2d 166 (CA 6, 1978); *Beasley v United States*, supra; *United States v Porterfield*, 624 F2d 122 (CA 10, 1980); *Gaines v Hopper*, 575 F2d 1147 (CA 5, 1978); *Sullivan v Fairman*, 819 F2d 1382, 1391-1392 (CA 7, 1987).

Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence if the failure deprives the defendant of a substantial defense. In *Landers v Rees*, 782 F2d 1042 (CA 6, 1985), the Court stated

"Counsel's failure to pursue a substantial defense, however, violates the defendant's constitutional right when the failure is a result of ineffectiveness or incompetence." An attorney fails to act reasonably where he fails to investigate defenses. *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993):

> "Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories. An attorney must make a reasonable investigation in preparing a case or make a reasonable decision not to conduct a particular investigation. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir.), cert. denied, 112 S. Ct. 431 (1991).

As the Court held in *Hart v. Gomez*, 174 F.3d 1067 (9th Cir. 1999):

> "A lawyer who fails adequately to investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance."

In *Strickland v Washington*, supra, the Supreme Court held that prejudice is shown from ineffective assistance of counsel when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 US at 664. Under *Strickland*, the defendant need not make the higher showing that "counsel's deficient performance more likely than not altered the outcome of the case." 466 US at 693. However, in this case both the lower standard of *Strickland* and the higher standard rejected by *Strickland* are met as to each individual and separate claim presented.

A) Failure to investigate.

Before trial, while the police were investigating the case, Petitioner, claiming his innocence agreed to take a polygraph examination. After the exam, the polygrapher who administered the test indicated he had passed the test. (See affidavit of Kenneth Nixon, in Appendix). The investigating officer told defense counsel Petitioner had failed the exam. Rather than pursue this information and contact the test administrator, defense counsel did nothing despite being asked to pursue this important lead. As it is, Petitioner did pass a polygraph exam. The results of that examination are found in the Appendix. This approach became a recurring theme for the defense, being provided with information but not following up or conducting interviews.

During trial, defense counsel when talking about possible defense witnesses commented: "Those witnesses – I haven't had a chance to get out to see, but I called them all. They're supposed to be here today." (T IV, 13).

An important witness, a prosecution witness, was a cousin to codefendant. Despite such obvious access to talk to this witness, Mario Mahdi, defense counsel's preparation was limited to a brief interview in hallway of court just before court was to resume.

Another example of the failure to prepare is seen where trial counsel called an alibi witness to testify but failed to ask about how she had seen Petitioner at home even while the fire trucks were just responding. The importance is noted when the prosecutor claimed that while people could have seen Petitioner at home, he could of snuck out of the house, firebombed the house and made it back to the house. The testimony not heard by the jury because of counsel's failure to prepare for trial was that

Petitioner was still at the house while the fire trucks were coming and therefore there was no time for Petitioner to have snuck out of the house and returned.

Similarly, defense witnesses included a neighbor on his front porch during the all relevant times who said he never saw Petitioner leave out the front of the house. The prosecutor claimed that Petitioner could have snuck out the back of the house. Defense counsel had failed to ask the witnesses about the condition of the back door of the house on Havana Street. The back door was secured shut, having been broken and for security purposes could not be opened at all and the only way Petitioner could have left the house was through front door and testimony at trial demonstrated he never went out the front door during the relevant times.

Petitioner was denied effective assistance of counsel. *Sims v Livesay*, 970 F2d 1575 (CA 6, 1992).

B. Failure to provide constitutionally effective advice

Petitioner was a young man facing murder charges and was trusting and relying upon the advice of counsel. Before trial began, trial counsel was under the impression that by conducting a trial jointly with codefendant LaToya Caulfield, Petitioner would benefit from hearing some of the same evidence despite the fact that LaToya Caulfield was Petitioner's primary alibi witness. By failing to seek separate trials, Petitioner's best alibi witness was not available to testify on Petitioner's behalf.

Trial counsel also failed to advise Petitioner on the right to testify. In *Lyons v Jackson*, 299 F.3d 588 (6th Cir. 2002), the constitutional nature of the role and purpose of advice was discussed:

> The duty of defense counsel to consult is paramount when a client has to decide whether or not to waive a constitutional right, such as the right to trial. Because the decision whether or not to plead guilty ultimately rests with the client, see *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) ("the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Burger, C.J., concurring) ("[o]nly such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make"), counsel must ensure that the client's decision is as informed as possible. Failing even to consider, let alone notify the client of, a factor that could negate the entire benefit of the guilty plea is not within the range of professional norms."

Petitioner submits the failure to be properly informed of his rights by trial counsel constituted ineffective assistance of counsel.

C) Failure to present evidence

The prosecutor's theory was that Petitioner and Ronrico Simmons were fighting with each other over LaToya Caulfield at the time of the fire and that was the motivation for Petitioner to firebomb Simmons' house. Before trial even began, Petitioner's mother told defense counsel that Simmons and Nixon had grown up together and were like brothers and like brothers fought from time to time, but had reconciled their differences and were on friendly terms at the time of the fire. (See Affidavit of Tracy Nixon in Appendix). Defense counsel refused to even consider using her as a witness and never bothered to develop this important information.

There was other information available to show no animosity existed between Simmons and Petitioner at the time of the fire, but defense counsel did not develop that

evidence either. Ronrico Simmons when first interviewed by the police after the fire never mentioned Petitioner as being an enemy or being someone likely to have started the fire. Indeed, the police asked if he knew Petitioner, and Simmons said he did not have a problem with Petitioner and if the police wanted to get in touch with Nixon, Simmons could call him on his two-way radio. (T III, 98).

The failure to interview and to prepare and obtain these statements constitutes ineffective assistance of counsel. See *Stewart v Wolfenbarger*, 468 F3d 338, 356-357 (6th Cir, 2005):

> "Where counsel fails to investigate and interview promising witnesses, and therefore 'ha[s] no reason to believe they would not be valuable in securing [defendant's] release,' counsel's inaction constitutes negligence, not trial strategy." *Workman v. Tate,* 957 F.2d 1339, 1345 (6th Cir.1992) (quoting *United States ex rel. Cosey v. Wolff,* 727 F.2d 656, 658 n. 3 (7th Cir.1984)). *See also Blackburn v. Foltz,* 828 F.2d 1177, 1183 (6th Cir.1987) ("Counsel did not make any attempt to investigate this known lead, nor did he even make a reasoned professional judgment that for some reason investigation was not necessary.").

This is the type of evidence that would provide a reasonable juror with a basis to find Petitioner not guilty and therefore would make a different result probable. This failure of defense counsel to present evidence in support of the defense constitutes ineffective assistance of counsel. *Sims v Livesay*, 970 F2d 1575 (CA 6, 1992); *Landers v Rees*, 782 F2d 1042 (CA 6, 1985); *Wilson v Cowan*, 578 F2d 166 (CA 6, 1978); *Beasley v United States*, supra; *United States v Porterfield*, 624 F2d 122 (CA 10, 1980); *Gaines v Hopper*, 575 F2d 1147 (CA 5, 1978); *Sullivan v Fairman*, 819 F2d 1382, 1391-1392 (CA 7, 1987).

D) Failure to Object

Trial counsel permitted without objection for the prosecutor to transmute Stanley January's testimony into a confession made by Petitioner. As discussed in the separate issue concerning prosecutorial misconduct, Stanley January did not testify to such a confession. His testimony fell considerably short of even providing an inferable basis of a confession. The prosecutor was allowed to tell the jury that they could rely upon January's testimony exclusively to find Petitioner guilty.

Trial counsel also failed to object to the prosecutor's questioning of a witness wherein the prosecutor gave the impression she was aware of witness tampering by Petitioner while improperly questioning Trevor Hill.

Further, trial counsel failed to object to the repeated hearsay statements made by Brandon Vaughn as retold to the jury through other witnesses.

The critical failure of an attorney to object can be ineffective assistance of counsel if it deprives the defendant of an opportunity for dismissal of the case or for success on appeal. *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996); *Kowalak v. United States*, 645 F.2d 534, 537-538 (6th Cir. 1981); *Corsa v. Anderson*, 443 F. Supp. 176 (ED Mich. 1977). Trial counsel's performance can be deemed deficient based upon the failure to object to highly prejudicial remarks made by the prosecutor during trial. *United States v. Rusmisel*, 716 F.2d 301 (5th Cir. 1983); *Seehan v. State of Iowa*, 37 F.3d 389 (8th Cir. 1994); *Weygandt v. Ducharme*, 774 F.2d 1491 (9th Cir. 1985).

As discussed in each issue, it prejudiced Petitioner when the prosecutor made improper and unfair arguments during trial and closing. It is hard to consider any matters more prejudicial then allowing the jury to hear such damaging and untrue

information before deciding his client's fate. It is more than probable that these omissions affected the outcome of the proceedings entitling Petitioner to a new trial that honors a defendant's constitutional rights.

E) Conclusion:

There are cases finding ineffective assistance of counsel from the approach to the defense taken by defense counsel. See, for example, *Groseclose v Bell*, 130 F3d 1161 (CA 6, 1997); *Tucker v Prelesnik*, 181 F3d 747 (CA 6, 1999); *Jemison v Foltz*, 672 F Supp 1002 (E.D. Mich 1987); *Harris v Reed (On Remand)*, 894 F2d 871 (CA 7, 1990); *Hart v Gomez*, 174 F3d 1067 (CA 9, 1999).

It is objectively unreasonable to conclude strategy is involved where trial counsel does not even bother to investigate whether information could provide evidence favorable to the Petitioner. *Washington v Hofbauer*, 228 F3d 689 (CA 6, 2000).

Nor can trial counsel's efforts be considered strategic. A decision can be deemed strategic, only if based on conclusions reached after reasonable investigation. Consider *Towns v. Smith,* 395 F.3d 251 (6th Cir, 2005):

> "'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *accord Clinkscale,* 375 F.3d at 443. A purportedly strategic decision is not objectively reasonable "when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant,* 941 F.2d 1449, 1462 (11th Cir.1991) (cited in *Combs,* 205 F.3d at 288)."

Here, as in *Lord v Wood*, 184 F3d 1097 (CA 9, 1999), "trial counsel had at their fingertips information that could have undermined the prosecution's case, yet

chose not to develop this evidence...Their performance therefore fell outside the wide range of professionally competent assistance that *Strickland* requires." See also *Jemison v Foltz*, supra [failure to cross-examine witnesses as to points that might prove helpful to the defense was ineffective assistance of counsel.]

Prejudice is determined by whether the errors involved undermined the integrity of the proceedings. It is not necessary to show that the evidence not pursued by counsel would have changed the result. A reviewing court should focus on whether counsel's alleged errors "have undermined the reliability of and confidence in the result." *McQueen v Scroggy*, 99 F3d 1302, 1311 (CA 6, 1996):

> "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." Id. at 1311-12 (quoting *Strickland*, 466 US at 686, 104 S Ct 2052).
>
> As the Court held in *Kyles v Whitley*, 514 US 419, (1995):
>
> "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial understood as a trial resulting in a verdict worthy of confidence."

We cannot have confidence in the verdict where unreasonable actions taken by counsel deprived the jury of relevant and critical evidence that supported the defense and would have provided a basis for a reasonable juror to find him not guilty and denied Petitioner of his constitutional rights.

This Court should grant habeas relief in the form of an evidentiary hearing, and upon making findings and rulings, order a new trial for Petitioner.

III. PROSECUTOR'S USE OF PERJURED TESTIMONY DENIED PETITIONER DUE PROCESS.

The firebombing of a house resulting in the death of young children in a predominantly Chaldean and African American neighborhood presented evidentiary problems for the prosecutor on many levels.

While the police did detect the presence of gasoline related particles on Petitioner's work clothing, the connection to a firebomb was unpersuasive where Petitioner had spend over hours that day at working on and services vehicles, as he did every working day at his job.

Petitioner maintained his innocence and had an alibi, being at home at the time the house on Charleston was firebombed.

The prosecutor decided to add to the case against Petitioner by calling Stanley January, an inmate, who was at the same jail that Petitioner housed at prior to trial. The jailhouse informant relayed to the jury how Petitioner had confided in him and confessed to the crime.

The prosecutor even bolstered jailhouse informant January's testimony with selective clips of recorded telephone conversations of inmates made from the jail.

Defense counsel was not provided with any access to other telephone conversations involving inmate January, and was not permitted to review the calls and to listen for the first time, when played for the jury, and could not cross-examine or impeach with other telephone conversations.

Petitioner has obtained newly discovered evidence that jailhouse information fabricated his testimony, and had planned on fabricating his testimony to avoid consequences for his criminal actions and obtain early enough release to attend his daughter's graduation.

Petitioner submitted the following evidence in support this claim to the state courts in the form of statements prepared and made by Christopher Crump that included:

- Crump was in the same holding cell with Stanley January are several occasions;
- Crump had seen January before at the Motor City Casino and they formed a friendship.
- January told Crump he was in jail for robbery, but was trying to get out of jail so that he could still attend his daughter's graduation;
- January explained to Crump that he believed he found a way to get out of jail early when he met another inmate in jail and had a chance to go through his discovery packet and found out some details by his murder case and with that information he was going to fabricate a story and make some deals with the government;
- Crump had no intention of being labeled a snitch while in Wayne County Jail, but did happen to see Stanley January while at Quarantine at Jackson State Prison, where all newly sentenced are housed;
- January told Crump he received 1 year for the robbery in exchange for his testimony against Nixon. This was the first time January identified the inmate he had fabricated testimony against;
- A couple of weeks later, January was very nervous and explained to Crump that the other inmate, Kenneth Nixon, would be coming soon and January needed to get out of Quarantine;
- Just prior to January being transferred Crump asked for his inmate number and was provided the phone number and address for his daughter instead.

Had a jury been provided with this evidence, that Stanley January lied about hearing any kind of a confession made by Petitioner, there is a reasonable probability of different result. In this case the prosecutor told the jury they could rely exclusively upon Stanley January's testimony to find Petitioner guilty. (T IV, 170-171). Where that testimony is exposed a perjury, no reasonable juror could find Petitioner guilty.

Petitioner submits these documents provide prima facie proof that the testimony to the jury from jailhouse witness January was perjured.

Petitioner further submits that the prosecutor was aware that jailhouse informant January's testimony was materially false and not only did not correct the misleading impression left with the jury, but bolstered the informant's testimony with selected recorded telephone conversations involving Mr. January.

Petitioner submits there are alternate theories to support a constitutional violation. Initially, Petitioner submits that it violates due process to sustain a conviction that was obtained by perjured testimony, regardless if the prosecutor was aware of the perjury at the time of the trial.

A habeas claim is made out where a state prisoner demonstrates his conviction is based upon perjured testimony, regardless of whether the government knew it was perjury at the time the evidence was presented. The Second Circuit recently granted permission to file a successive habeas in *Quezada v Smith*, 10-2738-op (2nd Cir. 10-21-2010), holding:

> Once newly discovered evidence has been presented, the gate-keeping issues are whether Quezada has identified a constitutional error and, if so, whether he has shown by clear and convincing evidence that but for that error no reasonable jury would have found him guilty. As noted, at this stage Quezada is required only to make a prima facie showing that these two requirements have been met. To show constitutional error he relies on Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988). We ruled in Sanders that due process is violated if a state leaves in place a criminal conviction after a credible recantation of material testimony and the recantation would "most likely" have changed the outcome. 863 F.2d at 222.

See also *Smith v Roberts*, 115 F.3d 818 (10th Cir. 1997); *Lewis v Erickson*, 946 F.2d 1361 (8th Cir. 1991).

Secondly, the prosecutor is charged with knowledge that Stanley January's testimony was false and constituted perjury. Not only did the prosecutor present a jailhouse informant, the prosecutor actually vouched for Stanley January during closing arguments:

> "But what you can tell about Stanley January is that he took detailed notes of what he did and who he talked to, and his conversations corroborate." (T IV, 161).

> "The point is no matter how you shake it, no matter how you look at Mr. January, he's telling you what was told to him, and that is evidence that you can use by itself to convict beyond a reasonable doubt." (T IV, 170-171).

The prosecutor, in general, is aware of the strong possibility of false testimony as provided by a jail house informant. A prosecutor misleads a jury and suborns perjury when vouching for and telling a jury they should exclusively rely upon jailhouse informant testimony to convict under these circumstances. Significant ethical

and legal implications arise for prosecutors when the government offers leniency to individuals who take part, or claim to take part, in crimes. An offer of leniency "gives the witness a powerful incentive to fabricate his testimony in order to curry favor with the government," and also to find "a fast and easy way out of trouble with the law." *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001).

Judge Stephen S. Trott, a judge on the U.S. Court of Appeals for the Ninth Circuit cautioned in *Bowie*, supra:

> [B]ecause of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates alike. Frequently, and because they are aware of the low value of their credibility, criminals will even go so far as to create corroboration for their lies by recruiting others into the plot".
>
> ***
>
> What emerges from this record is an intent to secure a conviction of murder even at the cost of condoning perjury. This record emits clear overtones of the Machiavellian maxim: 'the end justifies the means,' an idea that is plainly incompatible with our constitutional concept of ordered liberty.'" (citation omitted)).

The known and admitted inherent unreliability of jailhouse informant's testimony has been long known with the United States Supreme Court having recognized the "serious questions of credibility" informers pose. *On Lee v. United States*, 343 U. S. 747, 757 (1952).

Recently, the United States Supreme Court was asked to establish rules for even considering whether to admit jailhouse informant testimony at trial. See. *Kansas v Ventris*, 07-1356 (U.S. 4-29-2009) ("Respondent's amicus insists that jailhouse snitches are so inherently unreliable that this Court should craft a broader exclusionary rule for uncorroborated statements obtained by that means." The dissent in *Ventris* commented that "The likelihood that evidence gathered by self-interested jailhouse informants may be false cannot be ignored."

Specifically, Petitioner contends that there were specific facts present from which it is reasonably inferred that either the investigating officers and/or the prosecutor knew Stanley January was lying to the jury.

Consider how the prosecutor was aware that Stanley January was taking notes down on different inmates, trying to piece together the facts about their cases, with an admitted intent of offering damaging testimony against those inmates in exchange for obtaining favorable treatment. (T IV, 63, 65-66).

The prosecutor also knew that January had already testified against another inmate using information he could piece together. The prosecutor was also aware that January was still facing a parole violation hearing and sentencing for a robbery charge, both to take place after testifying against Petitioner. (T IV, 7-8, 51).

The prosecutor was aware that January waited 3 months before telling anyone about his information. (T IV, 35). The prosecutor witnessed January having troubles remembering what his testimony was supposed to be and having to look at his notes. (T IV, 35, 38). Under these circumstances, Petitioner submits the prosecuting

authorities were aware of Stanley January's perjury and failed to correct the same entitling Petitioner to relief in the form of a new trial. *Rosencrantz v Lafler,* 568 F.3d 577 (6th Cir. 2009), ("A conviction obtained by the knowing use of perjured testimony must be set aside if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . .' *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (internal quotation marks omitted); see also *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)."

This Court should find that Petitioner's conviction was obtained by the use of perjured testimony and should grant relief in the form of a new trial.

IV. THE PROSECUTOR PREJUDICED PETITIONER WITH IMPROPER AND MISLEADING ARGUMENT.

Petitioner was convicted for firebombing a house that resulted in the death of two children. In an effort to make Petitioner appear like a bad person to the jury, the prosecutor cross examined Petitioner's employer, Mr. Hill with questions suggesting the prosecutor was aware of witness intimidation without any evidence to support the fabricated prior bad act:

> "Q. Okay. Sir, have you threatened any of the People's witnesses in this case?
>
> A. No. I don't even know who the witnesses are.
>
> Q. You don't even know who the witnesses are?
>
> A. No, sir.
>
> Q. Sir, were you present in the parking lot outside of the courthouses last week?
>
> A. No, sir.
>
> Q. After court?
>
> A. No, sir.
>
> Q. You didn't have anything to do with the assaulting, punching one of the witnesses in this case?" (TIV, 116).

The problem was that there was no good faith basis to even support these questions; not even "[a] well reasoned suspicion that a circumstance is true." *United States v. Sampol*, 636 F.2d 621, 658 (D.C. Cir. 1980).

The prosecutor also introduced the testimony of Stanley January a jail house informant. When Mr. January was asked directly if Petitioner confessed to him, January explained he did not actually hear Nixon confess. (T IV, 21). When pressed to describe the circumstances of the confession, January told the jury:

> "But any way, you know, he just was – he looked real nervous, you know. I told him that 'You know, you have that right to be nervous,' you know, dealing with the nature of the crime that he's supposed to be in here for, you know." (T IV, 22).

January even explained that Nixon was nervous when another inmate that knew the fathers of the deceased children had asked Nixon if he killed those children. (T IV, 25). Nevertheless, during closing argument, the prosecutor stated:

> "The point is no matter how you shake it, no matter how you look at Mr. January, he's telling you what was told to him, and that is evidence that you can use by itself to convict beyond a reasonable doubt." (T IV, 170-171).

Here the prosecutor tells the jury that Stanley January heard the Petitioner confessed to him yet when asked to explain the manner of this confession, the witness never could describe how Petitioner confessed.

The record at best demonstrated that when a friend of the father of the deceased children asked Petitioner if he did it, Petitioner appeared nervous, but never admitted to firebombing the house.

Statements by the prosecutor of this kind prejudice defendants. See *People v Erb*, 48 Mich App 622, 632, (1973):

> "Also to be considered is the prominence of the office which the prosecutor holds and the subsequent weight of statements made by the prosecuting attorney. Statements made by a

> prosecutor which attest to or vouch for the credibility of certain witnesses are very cautiously reviewed. To hold otherwise would be to ignore the impact of such statements upon a jury, which is heavily influenced by prosecutorial comments; when such comments relate to the credibility of a witness, which is the exclusive province of the jury, prejudice to the defendant readily follows."

Where a prosecutor's comments violate an explicitly granted right under the Constitution, the comments constitute a constitutional violation. *Hodge v Hurley,* 426 F.3d 368, (6th Cir, 2005); *Donnelly v DeChristoforo*, 416 US 637; 94 S Ct 1868; 40 L Ed 2d 431 (1974). Where a prosecutor argues facts not in evidence, the prosecutor becomes a witness, not subject to cross-examination. In so doing, he violates due process and the constitutional right of confrontation. *Berger v United States*, 295 US 78; 55 S Ct 629; 79 L Ed 1314 (1935).

The conduct of the prosecutor was in clear violation of established constitutional rights, reaffirmed by the Sixth Circuit in *Hodge v Hurley,* 426 F.3d 368, (6th Cir., 2005):

> It is patently improper for a prosecutor either to comment on the credibility of a witness or to express a personal belief that a particular witness is lying. *United States v. Young*, 470 U.S. 1, 17-19 (1985); *Berger*, 295 U.S. at 86-88 (citing prosecutor's statements suggesting that he had personal knowledge that a witness was not being truthful as one example of egregious prosecutorial misconduct); *see also Bates v. Bell*, 402 F.3d 635, 646 (6th Cir. 2005) ("To be certain, prosecutors can argue the record, highlight the inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence. But, they can not put forth their opinions as to credibility of a witness, guilt of a defendant, or appropriateness of capital punishment.")

A conviction should be reversed where prejudicial and improper argument by the prosecutor has the effect of denying the defendant a fair trial. *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987); *Bruno v. Rushen*, 721 F.2d 1193 (9th Cir. 1983). If the argument is sufficiently improper, it may be cause for reversal even without an objection. *United States v. Harris*, 523 F.2d 172 (6th Cir. 1973); *Malley v. Manson*, 547 F.2d 25 (2nd Cir. 1976); *People v. Rosales*, 160 Mich. App. 304 (1987).

It was highly prejudicial to place before the jury untrue facts of a confession by Petitioner, which could cause the jury to abandon the presumption of innocence, *Taylor v. Kentucky*, 436 U.S. 478; 98 S.Ct. 1930; 56 L.Ed.2d 468 (1978).

This Court should find that the Michigan courts acted contrary to and have involved an unreasonable application of clearly established federal law embodied in decisions of the Supreme Court, and find further that this state adjudication involved an unreasonable determination of the facts and grant Petitioner a writ of Habeas Corpus to be issued unless the State grants a new trial at which the jury should judge Petitioner's guilt or innocence based on the actual testimony and not improper prosecutor argument.

V. FAILURE TO PROVIDE CONSTITUTIONALLY EFFECTIVE REPRESENTATION ON APPEAL.

We submit there was ineffective assistance of appellate counsel regarding the failure of the appeal attorney to raise the issues raised in the Motion for Relief for Judgment filed in the state courts, as well as to review the record and present meritorious issues on appeal. The 6th Circuit in *Mapes v Tate*, (*Mapes II*), 388 F.3d 187 (6th Cir. 2004) ruled with respect to ineffective assistance of appellate counsel:

> In order to establish a Sixth Amendment violation, it must be shown both that counsel's representation fell below an objective standard of reasonableness, and that his deficiencies prejudiced the defendant. See *Strickland*, 466 U.S. at 687-88, 104 S.Ct. 2052. With respect to prejudice in the context of ineffective assistance of appellate counsel, a defendant must show a reasonable probability that, but for his counsel's defective performance, he would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). Although this analysis necessarily involves an evaluation of the underlying claims, it does not require a decision on or a determination of these issues. All that is required is a determination that, based on the nature of the underlying claims, there is "a reasonable probability that, but for his counsel's [failings] . . ., [the defendant] would have prevailed on his appeal." Id.; see also *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir.2004).

The issues in this case were so highly meritorious that, if raised and considered on the merits, they could not fail to win.

Appellate counsel raised issues which were inferior to those raised in a Motion for Relief from Judgment. Those issues included a claim based upon non-testifying codefendant's statements and was rejected being neither newly discovered nor likely to have any effect on the outcome; a claim of hearsay statements of identification made

by a witness who was present and subject to cross-examination rejected under state law; a claim based on the playing of taped jailhouse phone calls, and claims of ineffective assistance of counsel for not objecting to the hearsay and prosecutorial misconduct.

It is reasonably probable that Petitioner Nixon would have gotten a reversal on his appeal of right, but for the inaction of appellate counsel. See *Mapes v Coyle*, 171 F3d 408 (CA 6, 1999), finding ineffective assistance of appellate counsel where counsel omitted issues that were "significant and obvious." Under *Mapes v Coyle* and many other cases, a court may find ineffective assistance of appellate counsel from the failure to raise particular issues on appeal if the issues were obvious or should have been discovered, and if the failure to raise them was prejudicial. It is impossible to imagine how failure to raise these issues could have helped Mr. Nixon's appeal in any way.

The issue of ineffective assistance of appellate counsel was discussed at length in *Mason v Hanks*, 97 F3d 887 (CA 7, 1996). The Court held:

> "Effective advocacy does not require the appellate attorney to raise every non-frivolous issue under the sun, of course. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). After all, "[o]ne of the principal functions of appellate counsel is winnowing the potential claims so that the court may focus on those with the best prospects." *Page v. United States*, 884 F.2d 300, 302 (7th Cir.1989). This is not to say that counsel's selection of the issues to pursue on appeal is beyond scrutiny. **"Were it legitimate to dismiss a claim of ineffective assistance of counsel on appeal solely because we found it improper to review appellate counsel's choice of issues, the right to effective assistance of counsel on appeal**

> **would be worthless."** *Gray*, 800 F.2d at 646.[1] Instead, we engage in a pragmatic assessment of appellate counsel's work. Genuinely strategic decisions that were "arguably appropriate at the time, but, with the benefit of 'hindsight', appear[ ] less than brilliant" will not be second-guessed. *Gray*, 800 F.2d at 646 (citing *United States v. Harris*, 558 F.2d 366, 371 (7th Cir.1977)).
>
> But when appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient (*Gray*, 800 F.2d at 646; *Hollenback*, 987 F.2d at 1275)[2], and **when that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial," we will deem the lack of effective assistance prejudicial** (*Gray*, 800 F.2d at 646). ...
>
> The ultimate question we ask is "whether, but for counsel's errors, there is a reasonable probability that the outcome of the proceeding [here, Mason's direct appeal] would have been different."

Ineffective assistance of appellate counsel is "good cause" for failing to raise an issue in the appeal of right. *Edwards v Carpenter*, 529 US 446; 120 S Ct 1587; 146 L Ed 2d 518 (2000) *Murray v Carrier*, 477 US 478, 488; 106 S Ct 2639; 91 L Ed 2d 397 (1986); MCR 6.508(D).

If the issues had been raised, the result of the appeal would unquestionably have been different. In this case, the issues not raised in the earlier appeal are highly meritorious and will change the result, if they can get consideration on their merits.

As the Court held in *Mayo v Henderson*, 13 F3d 528 (CA 2, 1994):

> "a petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker."

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[1] *Gray v Greer*, 800 F2d 644 (CA 7, 1986)
[2] *Hollenback v United States*, 987 F2d 1272 (CA 7, 1993)

"See, also, *Fagan v Washington*, 942 F2d 1155, 1157 (CA 7,1991) ("His lawyer failed to raise either claim, instead raising weaker claims... No tactical reason--no reason other than oversight or incompetence--has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had."); *Matire v Wainwright*, 811 F2d 1430, 1438 (CA 11,1987) (ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue" raising instead a "weak issue")." *Mayo v Henderson*, supra.

In *Strickland v Washington*, supra, the Supreme Court held that prejudice is shown from ineffective assistance of counsel when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 US at 664.

While it is true that an attorney need not raise all arguable claims, it does not thereby follow that the attorney never need to raise any arguable claim. Instead, "The question is whether a reasonable appellate attorney could conclude that [the claimed issue was] not worthy of mention on appeal."

This Court should order an evidentiary hearing regarding ineffective assistance of appellate counsel and upon full consideration of the issues find that ineffective assistance of appellate counsel excuses any procedural default, and grant relief in the form of a new trial, or at minimum, a new appeal of right.

CONCLUSION

WHEREFORE, Petitioner Kenneth Fitzgerald Nixon moves this Honorable Court to take the following action:

a) Accept jurisdiction over this case;

b) Require the Respondent to answer the allegations in this Petition and the Brief in Support;

c) Hold such evidentiary hearings as this Court may deem necessary or appropriate;

d) Issue an Order that this Court will grant a Writ of Habeas Corpus unless the State vacates the conviction and holds a new trial within a specified time;

e) Issue a Writ of Habeas Corpus freeing Petitioner from his unconstitutional confinement.

Respectfully submitted,

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Dated: November 22, 2010

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

KENNETH FITZGERALD NIXON,

Petitioner,

-v- Case No.
Hon.

GREG MCQUIGGIN, Warden,

Respondent.
_____/

APPENDIX INDEX FOR PETITION FOR HABEAS CORPUS

Item	Content
1.	Michigan Court of Appeals Opinion affirming conviction.
2.	Michigan Supreme Court Order denying leave.
3.	Michigan Supreme Court Order denying reconsideration.
4.	Trial Court Order denying Motion for Relief from Judgment.
5.	Michigan Court of Appeals Order denying leave.
6.	Michigan Supreme Court Order denying leave.
7.	Affidavit of Kenneth Nixon.
8.	Polygraph results.
9.	Affidavit of LaToya Caulfield.
10.	Polygraph results.
11.	Affidavit of Tracy Nixon.
12.	Polygraph results.
13	Statement prepared by Cris Crump.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH FITZGERALD NIXON,

Defendant-Appellant.

UNPUBLISHED
March 1, 2007

No. 266033
Wayne Circuit Court
LC No. 05-005711-01

Before: O'Connell, P.J., and Saad and Talbot, JJ.

PER CURIAM.

Defendant firebombed a home in which Naomi Vaughn lived with her five children and her boyfriend, Ronrico Simmons, and two of the children died. A jury convicted defendant of two counts of felony murder, MCL 750.316(1)(b), four counts of attempted murder, MCL 750.91, and arson of a house, MCL 750.72. Defendant appeals his convictions, and we affirm.

I. Newly Discovered Evidence

Defendant contends that he is entitled to a new trial on the grounds of newly discovered evidence. Specifically, defendant claims that his codefendant and girlfriend, Latoya Caulford, who was acquitted of all charges in a separate jury trial, came forward after defendant's trial and stated that defendant did not commit the crimes because, when they occurred, he was with her in her room at a different home.[1]

[1] Defendant failed to preserve this issue by moving for a new trial or by moving for relief from judgment. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Defendant filed a motion with this Court to remand for an evidentiary hearing and a motion for a new trial on this basis, but this Court denied the motion. *People v Nixon*, unpublished order of the Court of Appeals, entered June 16, 2006 (Docket No. 266033). Therefore, review is limited to the existing record. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

We review unpreserved claims for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture: (1) an error must have occurred, (2) the error must be clear or obvious, (3) and the error must have affected substantial rights, meaning it affected the outcome of the trial. *Carines, supra* at 763, citing *United States v Olano*, 507 US

(continued...)

To obtain a new trial on the basis of newly discovered evidence, a defendant must prove 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." *Cox*, *supra* at 450 (citation omitted). Evidence is newly discovered if defendant or his counsel did not know about it at the time of trial. *People v Burton*, 74 Mich App 215, 222-223; 253 NW2d 710 (1977).

There is no new information in this case. First and foremost, both defendants obviously were aware of this evidence at the time of defendant's trial. Also, in his closing argument, defense counsel asserted that defendant was in Caulford's room with her at the time of the crime, and several witnesses corroborated that assertion.[2] Accordingly, Caulford's "new evidence" testimony would add very little to the testimony that defendant already presented. The jury heard three witnesses testify that defendant was in Caulford's room with her and did not find them credible. It is highly unlikely that the jury would have believed the same assertion if it was also given by Caulford, who was defendant's girlfriend and was tried for the same offenses. Such evidence would be merely cumulative, and there is no likelihood that it would result in a different outcome. Defendant has failed to establish plain error affecting his substantial rights, and he is not entitled to a new trial.

II. Audio Tapes

Defendant says that the trial court abused its discretion when it allowed the prosecutor to play portions of defendant's telephone calls from jail. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This Court defers to the trial court's judgment when the trial court chooses an outcome that falls within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).[3]

(...continued)

725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Carines, supra* at 763-764, citing *Olano, supra* at 736-737.

[2] Mario Mahdi, Caulford's cousin who also lived in the house, testified that he saw defendant playing a video game, probably around midnight. Later in his testimony, Mahdi stated that he believed defendant and Caulford were in Caulford's bedroom at the time of the fire, around midnight, but he did not see defendant. Basim Alyais, Caulford's neighbor, testified that he was on his porch drinking beer from 7:00 p.m. to 12:30 a.m. on the night of the incident, and defendant did not leave the house after 10:00 p.m. Lisa Anne Caulford-Zaatari, Caulford's aunt, also testified that she was at Caulford's home from 4:00 p.m. to 12:10 a.m., and defendant and Caulford went in the bedroom at 9:30 p.m. According to Caulford-Zaatari, defendant did not leave while she was there.

[3] In general, evidence is admissible if it is relevant. *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998); MRE 402. Michigan Rule of Evidence 401 provides, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to

(continued...)

Stanley J. January, Jr. was in the Wayne County jail at the same time as defendant. January testified that, on May 23, 2005, defendant told him he was the one who perpetrated the firebombing but he thought only Naomi was home and he felt sorry that the children were killed. The same day, defendant made a phone call from the jail to January's daughter so that January could talk to her. The prosecution played this phone call for the jury to corroborate January's testimony, and January identified defendant's voice as he handed the phone to January, his own voice, and his daughter's voice. According to January, he also heard defendant tell someone over the phone that he hoped to get out of jail on bond so that he could disappear. Moreover, January claimed that he did not talk to defendant after May 23, 2005, because defendant was moved to a different cell that evening, and this was corroborated by the second phone call that was played for the jury, made by defendant on May 24, 2005. These two calls were relevant because they were used to show that January's testimony was credible. *Mills*, *supra* at 72.

In another call played for the jury, defendant told someone that a police dog searched his clothes and his house. This evidence was relevant to establish that the clothes the police collected from a bedroom in Caulford's house were those defendant wore on the date of the crime. The call also established that the police dog correctly alerted officers to the clothing, which tested positive for the presence of gasoline.

In a fourth recording, defendant discussed "Mario [Mahdi]" "his girlfriend," "Lisa," and "Mario's daddy." Defendant told the person on the other end of the line not to offer "Mario's daddy" anything because he would tell. This phone call was relevant to demonstrate a possible reason for the inconsistencies between Mario Mahdi's statement to the police and his testimony at trial. On the day of the crime, Mahdi told police that, in either March or April 2005, Mahdi and defendant were driving past Simmons's home and defendant said, "He's going to get his." However, at trial, Mahdi claimed that defendant did not make that statement and Mahdi explained that he told the police otherwise because he was scared. Mahdi also testified at trial to facts that he did not tell police, but that supported defendant's alibi defense. In general, a defendant's threat against a witness is admissible to show consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). It is reasonable to conclude from Mahdi's inconsistencies and defendant's statements on the audiotape that defendant may have had friends

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(...continued)

the determination of the action more probable or less probable than it would be without the evidence." *People v Hall*, 433 Mich 573, 580; 447 NW2d 580 (1989). The evidence must be "material," or significant to the determination of the action, and it must be "probative," meaning it "makes a fact of consequence more or less probable than it would be without the evidence." *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995).

Even if relevant, the court may exclude evidence "'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.'" *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000); MRE 403. Unfair prejudice exists where a jury is likely to give marginally probative evidence undue or preemptive weight, and it would be inequitable to allow its admission. *Mills*, *supra* at 75-76.

or family members try to influence witness testimony. This evidence is both relevant and material.[4]

III. Hearsay

Further, defendant claims that the trial court erred when it admitted Brandon Vaughn's statements that identified defendant as the person who started the fire. Defendant did not object to the testimony and, thus, this issue is unpreserved and we review it for plain error. *Knox*, *supra* at 508; *Carines, supra* at 763-764.

Pursuant to MRE 801(d)(1)(C), if a prior statement is one of identification and the witness is available for cross-examination, it is considered substantively admissible as nonhearsay. *People v Malone*, 445 Mich 369, 376-378; 518 NW2d 418 (1994). The rule "does not require laying a foundation other than that the witness is present and found to be available for cross-examination." *Id.*, p 377.

Brandon Vaughn is one of the children who survived the fire and he consistently identified defendant as the person who started the fire to his mother, Simmons, Lieutenant Frank Maiorana, the arson investigator, and at trial. Brandon also knew defendant for two years before the crime. Brandon testified that he was awake in his room when he heard something hit the house. Brandon ran downstairs to see what happened, he unlocked the door, saw defendant get into the passenger seat of Caulford's green Neon, saw Caulford driving, and chased the car. Brandon then ran back into the house, woke his mother, told her who he saw commit the crimes, and got his younger sister out of the house. Brandon told Simmons what happened after Brandon was outside. Simmons testified that Brandon was frantic and crying, and he kept walking off and coming back. Brandon told Simmons he saw Caulford and defendant drive up in a green Neon, defendant threw something at the house, jumped back in the car, and Caulford drove off.

At the scene, Brandon told Lieutenant Maiorana that he heard a loud boom in his brother, Raylond's, bedroom and saw defendant run from the front of the house, get into a green Neon that Caulford was driving, and take off down the street. Maiorana made small talk with Brandon before talking about the fire to make sure Brandon was calm and answered accurately. Maiorana found the cocktail in Raylond's bedroom after talking to Brandon. The police drove Brandon by

[4] Defendant also maintains that probative value of the phone calls is substantially outweighed by the danger of unfair prejudice resulting from informing the jury that the calls were made from jail. However, before the tapes were even played, January testified that he met defendant and spoke with him in the county jail on May 23, 2005. Therefore, the jury already knew defendant was in jail, and based on the date given, defendant's incarceration was for the present case. Defendant relies on cases that find prejudice where there is a reference to a defendant's prior incarcerations or prior convictions, which is not the case here. See *People v Greenway*, 365 Mich 547, 549-550; 114 NW2d 188 (1962); *People v Fleish*, 321 Mich 443, 461; 32 NW2d 700 (1948); *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). Defendant was not unfairly prejudiced by the introduction of the phone calls to the jury.

Caulford's home around 1:30 a.m., and Brandon identified the home and the green Neon as Caulford's and indicated that defendant was involved in the incident.

Defense counsel had the opportunity to cross-examine Brandon regarding his identification of defendant and, during cross-examination, Brandon specifically said he told Simmons that defendant started the fire. Defense counsel did not address Brandon's conversation with Maiorana. Therefore, Simmons' and Maiorana's testimony regarding Brandon's identification of defendant was admissible as nonhearsay under MRE 801(d)(1)(C).

Moreover, were we to consider the testimony hearsay, the statements would be admissible as excited utterances.[5] MRE 803(2). Surviving a devastating fire that killed two of his siblings clearly is a startling event. Brandon made his statements to Simmons during the fire, and Brandon was in a frantic state. Maiorana arrived at the scene while the house was still on fire and talked to Brandon only 15 to 30 minutes after that. Although Maiorana may have calmed Brandon down to get his statement, it is unlikely that a 13-year-old who had just escaped a house fire and had actually seen his brother on fire, would have the capacity to fabricate a story about who committed such a crime against his family. Brandon's statements qualify as excited utterances under the hearsay exception, and the court did not err in admitting this testimony.

IV. Ineffective Assistance of Counsel

Defendant says that he was denied the effective assistance of counsel. Defendant did not move for a new trial or an evidentiary hearing before the trial court on this issue, and therefore, we review this issue on the basis of the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).[6]

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[5] An excited utterance is " '[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.' " *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998); MRE 803(2). Such a statement is considered more reliable because the declarant does not have the opportunity for reflection necessary for fabrication. *People v Straight*, 430 Mich 418, 423-424; 424 NW2d 257 (1988). There is no express time limit for an excited utterance. *Smith*, *supra* at 551. Rather, the focus of the exception is the "lack of capacity to fabricate, not the lack of time to fabricate." *Straight*, *supra* at 425.

[6] The determination whether defendant received ineffective assistance of counsel is a question of both fact and constitutional law. The trial court's findings of fact are reviewed for clear error, while questions of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The right to effective assistance of counsel is guaranteed by the United States and Michigan Constitutions, in order to protect a criminal defendant's right to a fair trial. US Const, Am VI; Const 1963, art I, § 20; *Strickland v Washington*, 466 US 668, 684; 104 S Ct 2052; 80 L Ed 2d 674 (1984). There is a strong presumption that defendant received effective assistance of counsel, and the burden is on defendant to prove counsel's actions were not sound trial strategy. *LeBlanc*, *supra* at 578. To prevail on a claim of ineffectiveness of counsel, defendant must show: (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "that counsel's errors were so

(continued...)

Defendant maintains that defense counsel should have objected when the prosecutor asked Trevor Hill, defendant's business partner, if he had threatened or assaulted any of the witnesses in this case, or if defendant paid Hill for his testimony. According to defendant, the prosecutor presented no evidence linking him to any alleged threats, assaults or pay-offs of any witnesses. However, as discussed, the prosecutor presented evidence in the fourth phone call played for the jury, in which defendant discussed "Mario," "his girlfriend," "Lisa," and "Mario's daddy" and told the recipient of the phone call not to offer Mario's daddy anything because he would tell. This phone call was relevant and admissible to demonstrate a possible reason for the inconsistencies between Mahdi's statement to the police and his testimony at trial, and that defendant may have had friends or family members try to influence witness testimony. Trial counsel's decision not to object to every statement that surfaced throughout the course of the trial was a matter of strategy that is presumed reasonable. *Strickland, supra* at 689.

Defendant also asserts that trial counsel was ineffective for not objecting to the admission of Brandon's identification statements during other witnesses' testimony. We have concluded that such statements were admissible. "Trial counsel is not required to advocate a meritless position." *People v Snider,* 239 Mich App 393, 425; 608 NW2d 502 (2000). In addition, trial counsel used the inconsistencies in the details of all Brandon's statements to argue that his testimony was not believable and may have come from Simmons, creating reasonable doubt that defendant was the perpetrator. This demonstrates that counsel's decision was the result of calculated reasoning, and this Court will not substitute its judgment for that of counsel in matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant clearly was not deprived of a fair trial.

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Michael J. Talbot

(...continued)

serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland, supra* at 687; *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994). A defendant must show that, but for trial counsel's errors, there would have been a different outcome. *Pickens, supra* at 314.

Order

Michigan Supreme Court
Lansing, Michigan

September 10, 2007

133678

Clifford W. Taylor, Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman, Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

KENNETH FITZGERALD NIXON,
Defendant-Appellant.

SC: 133678
COA: 266033
Wayne CC: 05-005711-01

On order of the Court, the application for leave to appeal the March 1, 2007 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

p0830

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

[redacted]

Corbin R. Davis
Clerk

APPENDIX ITEM #2

Order

Michigan Supreme Court
Lansing, Michigan

November 29, 2007

Clifford W. Taylor,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

133678(72)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 133678
COA: 266033
Wayne CC: 05-005711-01

KENNETH FITZGERALD NIXON,
Defendant-Appellant.

_____/

On order of the Court, the motion for reconsideration of this Court's September 10, 2007 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 29, 2007

Clerk

d1119

STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT COURT	ORDER DENYING/GRANTING MOTION	CASE NO. 05-5711-01

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

KENNETH FITZGERALD NIXON
Defendant

At a Session of Said Court held in The Frank Murphy Hall of Justice

at Detroit in Wayne County on JUL 17 2009

PRESENT: Honorable HON. BRUCE U. MORROW
Judge

A Motion for RELIEF FROM JUDGEMENT

having been filed; and

the People having filed an answer in opposition; and the Court having reviewed the briefs and records in the case and being fully advised in the premises;

IT IS ORDERED THAT the Motion for RELIEF FROM JUDGEMENT be and

is hereby ☒ denied ☐ granted.

Bruce U Morrow
Judge

ORDER DENYING/GRANTING MOTION

FORM #7

APPENDIX ITEM #4

STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT COURT	ORDER DENYING/GRANTING MOTION	CASE NO. 05-5711-01

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

KENNETH NIXON
Defendant

At a Session of Said Court held in The Frank Murphy Hall of Justice

at Detroit in Wayne County on JUL 17 2009

PRESENT: Honorable HON. BRUCE U. MORROW
Judge

A Motion for AN EVIDENTIARY HEARING

having been filed; and

the People having filed an answer in opposition; and the Court having reviewed the briefs and records in the case and being fully advised in the premises;

IT IS ORDERED THAT the Motion for AN EVIDENTIARY HEARING be and

is hereby ☒ denied ☐ granted.

Bruce U Morrow
Judge

ORDER DENYING/GRANTING MOTION

FORM #7

Court of Appeals, State of Michigan

ORDER

People of MI v Kenneth Fitzgerald Nixon

Docket No. 293476

LC No. 05-005711

Cynthia Diane Stephens
Presiding Judge

Michael J. Talbot

Christopher M. Murray
Judges

The Court orders that the application for leave to appeal is DENIED because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

NOV 23 2009
Date

Sandra Schultz Mengel
Chief Clerk

Order

Michigan Supreme Court
Lansing, Michigan

SEP 13 2010

Marilyn Kelly,
Chief Justice

Michael F. Cavanagh
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway
Alton Thomas Davis,
Justices

September 9, 2010

140403

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 140403
COA: 293476
Wayne CC: 05-005711

KENNETH FITZGERALD NIXON,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the November 23, 2009 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 9, 2010

Clerk

d0830

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 05-005711-01
HON. BRUCE U. MORROW

v

KENNETH FITZGERALD NIXON,
Defendant.

/

KYM L. WORTHY (P38875)
Wayne County Prosecutor
1441 Saint Antoine Street
Detroit, MI 48226
(313) 224-5777

SHELDON HALPERN (P14560)
Attorney for Defendant
26339 Woodward Avenue
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(248) 554-0400

/

KENNETH NIXON'S AFFIDAVIT IN SUPPORT OF NEW TRIAL PURSUANT TO HIS DECEMBER 8, 2008, MOTION FOR RELIEF FROM JUDGMENT

Kenneth Nixon a legally competent adult makes this affidavit pursuant to MCR 2.119(B)(1)(a)-(c). Affiant will testify to all the facts stated below which are based on his personal knowledge, unless otherwise stated to be on information and belief.

A. INTRODUCTION

1. I am the defendant in this case. I am serving life without parole for 2 convictions of first-degree murder. I was also convicted and sentenced on 4 counts of attempted murder and 1 count arson.

2. I was tried before Wayne County Circuit Judge Bruce Morrow along with my co-defendant LaToya Caulford. We had a joint trial with separate juries. Neither I nor Ms. Caulford testified.

APPENDIX ITEM #7

3. Ms. Caulford was acquitted on all charges.

4. The Michigan Court of Appeals affirmed my conviction. The Michigan Supreme Court denied my application for appeal. My case is now before this Honorable Court on my Motion For Relief From Judgment postappeal proceeding.

B. MY ACTUAL INNOCENCE AND MY ALIBI DEFENSE WERE NOT PRESENTED TO THE JURY.

5. I have known LaToya Caulford since we were in elementary school. At the time of my arrest on May 20, 2005, we had been together in an intimate relationship for 3-4 years. We have a son, Keyone who was 13 months-old at the time of my arrest.

6. On the night of the fire at Naomi Vaughn's home May 19, 2005, I was with LaToya and our infant son at LaToya's residence on Havana Street, Detroit, Michigan. I arrived there after work about 10:00 PM. I remained there and did not leave until Detroit Police Homicide Detectives arrested me the next morning about 5:00 – 6:00 AM May 20, 2005.

7. Several hours after my arrest the police gave me a polygraph test because I repeatedly told them I did not set the fire, I was not present at the fire and I did not know who set the fire.

8. The detectives who were questioning me drove me to a police station located in a school building near downtown. I was placed in a room with a female polygraph examiner. She asked me a number of questions about the fire. I truthfully answered her questions. She did not tell me if I had passed or failed the test. She did say (paraphrased): "I'm beginning to see the truth." She then left the room.

9. I do not know for a fact and do not have personal knowledge, but I believe she then met with and talked to the detectives.

10. When the examiner re-entered the testing room, she told me I failed the test because I had not truthfully answered each and every question. I understood her to be telling me I had passed some of the questions and had not passed some of them.

11. I was then escorted out of the room by the examiner who returned me to the detectives in an open hallway.

12. I was behind the two detectives as we walked down the hallway toward the stairs. The examiner walked along with me, to my side. When I looked directly at her, she mouthed the words: "You passed."

13. I told my trial lawyer the facts stated in paragraphs 7-12 above. On several occasions before my trial I asked my lawyer if the prosecutor had given him a report, or any written materials regarding the polygraph test. My lawyer told me the prosecutor told him there were no reports and seemed to indicate to my lawyer that the test itself had never taken place.

14. I never saw any written reports or discovery materials regarding the police polygraph procedure. On the morning my trial began, my lawyer told me he had received a report from the prosecutor that morning. He neither gave me a copy of the report, nor showed me a copy of it.

15. I asked my lawyer what were the test results. He told me I had failed. I asked him if he could (or if he planned to) call the police polygraph examiner as a

witness. He said he did not plan to/would not call her because (paraphrased): "Every examiner he knew would say I failed in order to keep their job."

16. My lawyer never discussed or advised me about taking a private test so that the police polygraph procedure/results could be challenged.

17. At no time before or during my trial did my lawyer ever discuss with me whether or not I would testify in my own defense. He never explained anything about that topic: i.e., my rights to testify or to remain silent; what it would mean to me, my case and the jury if I testified, or if I did not testify. He did not tell how I would be questioned in court by him, and then cross examined by the prosecutor; etc., etc., etc.

18. My appeal lawyer never discussed with me the topic of not testifying at trial.

19. My present lawyer was the first to discuss and explain everything about my rights to either testify or to not testify. He made sure I understood his explanation.

C. MY PENDING MOTIONS FOR RELIEF FROM JUDGMENT, FOR FAVORABLE INITIAL JUDICIAL CONSIDERATION; FAVORABLE CONSIDERATION OF POLYGRAPH EVIDENCE; AND FOR AN EVIDENTIARY HEARING ON MY INEFFECTIVE ASSISTANCE OF COUNSEL AND NEWLY DISCOVERED EVIDENCE CLAIMS.

20. My present lawyer personally consulted with me at Saginaw Correctional Facility before I was transferred to Macomb Correctional Facility. He discussed and explained every aspect of my case followed by his advisements regarding strategies and tactics of this MCR 6.500 proceeding.

21. In addition to personal consultation, I have had several discussions, consultations and advisements by telephone with my lawyer and a member of his office staff.

22. While my lawyer was investigating my actual innocence defense including witness interviews, he made a professional visit to Chippewa Correctional Facility where he interviewed a prisoner named Christopher Crump. Mr. Crump gave my lawyer critical information based on Crump's personal knowledge that prosecution witness Stanley January had lied at my trial. After completing his investigation, my lawyer then asked me if I was willing to take polygraph tests. I indicated my full support of and agreement with that plan.

23. I was polygraphed at Macomb Correctional Facility, New Haven, Michigan on November 6, 2008. I was given three separate tests: two involved the firebombing incident; the other test involved my trial lawyer's failure to consult or advise me regarding my right to testify, and whether I would or would not testify during my trial.

24. I was told by the polygraph examiner Mr. Ellerbrake, and my lawyer that I passed all three tests because I was truthful in all the facts of my case as I told those facts to my lawyer and Mr. Ellerbrake. Mr. Ellerbrake's questions were based on the factual recitations I had previously given to my lawyer and to Mr. Ellerbrake the day he gave me the tests. I was also given copies of the test results and reports.

25. I also discussed with my lawyer and he advised me regarding polygraph testing for LaToya Caulford and my mother Tracy Nixon regarding certain specific facts of my case.

26. I do not have personal knowledge of the questions asked. I do have personal knowledge of the facts, conversations and events provided by LaToya and my mother that made up the factual bases of their tests.

27. I have since learned from my lawyer and my mother that she and LaToya passed their polygraph tests. I know that they passed because they have truthfully told my lawyer everything they know about my case.

28. I want to testify before Judge Morrow regarding my innocence, my alibi defense and all the facts I have stated in this affidavit. I want Judge Morrow to hear each and every detail of my case, most importantly that I did not commit this horrible crime.

Kenneth Fitzgerald Nixon

Dated: January 9, 2009

Subscribed and sworn to before me
this 9 day of January, 2009.

Notary Public

Macomb County, Michigan

My Commission Expires: 2/25/13

Document drafted by: Sheldon Halpern P.C.

[redacted]

GHENT ELLERBRAKE & ASSOCIATES, LLC
POLYGRAPH & INVESTIGATIVE SERVICES

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Sheldon Halpern
Attorney at Law
26339 Woodward Ave.
Huntington Woods, Mi 48070

November 6, 2008

CONFIDENTIAL

SUBJECT: Kenneth Fitzgerald Nixon, Examinee, b/m, dob 3/29/86

At your request, Kenneth Nixon was examined at the Macomb Correctional Facility. This examination was directed at evaluating his truthfulness regarding a fire bombing in the City Of Detroit on May 19, 2005.

RELEVANT QUESTIONS:

The examinee was asked the following relevant questions, which he answered as indicated:

1. Do you know, for sure, who caused that fire at 19428 Charleston on May 19, 2005? NO
2. Did you cause that fire at 19428 Charleston on May 19, 2005? NO
3. Were you on Charleston St. at the time of the fire? NO
4. Are you the one Brandon saw on Charleston St. immediately before the fire? NO

APPENDIX ITEM #8

DIAGNOSTIC EVALUATION:

After careful analysis of the Examince's polygrams based on the case facts available, it is the opinion of the undersigned that Kenneth Nixon is being truthful..

William F. Ellerbrake

William F. Ellerbrake
Polygraph Examiner
License #6001000207

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH FITZGERALD NIXON,

Defendant-Appellant.
_____/

246033

Court of Appeals No. ~~256496~~
Lower Court No. 04-1911

State of Michigan)
)ss
County of Wayne)

LaTOYA CAULFORD

I, LaTOYA CAULFORD, being first duly sworn, say that the following is true to the best of my knowledge and belief:

1. I was originally charged as a co-defendant in the above-captioned case.

2. I was not present during the firebombing which occurred on May 19, 2005 at 19428 Charleston, and I have personal knowledge that Defendant Kenneth Nixon was also not present at the location Charleston during the hours of 10:00 p.m. through 5:00 a.m. of the following morning, as he was with me in my bedroom at my house during that entire time.

3. At 10:00 p.m., Mr. Nixon arrived at my house in my green Neon, and at approximately 10:15 p.m., we watched T.V. in my bedroom until approximately 11:45 p.m. when I fell asleep.

APPENDIX ITEM #9

4. At approximately 12:00 a.m., I was awakened by my aunt who was knocking at the front door in the screen-in porch, who wanted to get her cigarettes from inside the house.

5. When I awoke at that time, Mr. Nixon was still sleeping in my bed, along with our 1-year old child.

6. After giving my aunt her cigarettes from inside the house, I returned to bed at approximately 12:15 a.m., and stayed there with Mr. Nixon until 5:00 a.m., when the police came and arrested Mr. Nixon.

7. I did not give this information to Mr. Nixon's lawyer before trial because I was tried separately in this case and was represented by another attorney.

Deponent further sayeth not.

LaToya Caulford

LaTOYA CAULFORD

Subscribed and sworn to before me
this 17th day of ~~May,~~ July 2006.

Delphis J. Turner
Notary Public

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 05-005711-01
HON. BRUCE U. MORROW

v

KENNETH FITZGERALD NIXON,
Defendant.
_____/

KYM L. WORTHY (P38875)
Wayne County Prosecutor
1441 Saint Antoine Street
Detroit, MI 48226
(313) 224-5777

SHELDON HALPERN (P14560)
Attorney for Defendant
26339 Woodward Avenue
Huntington Woods, MI 48070
(248) 554-0400

_____/

AFFIDAVIT OF LATOYA CAULFORD IN SUPPORT OF KENNETH NIXON'S DECEMBER 8, 2008, MOTION FOR RELIEF FROM JUDGMENT

LaToya Caulford a legally competent adult makes this affidavit pursuant to MCR 2.119(B)(1)(a)-(c). Affiant will testify to all the facts stated below which are based on her personal knowledge.

1. I have read and reviewed my July 6, 2006 Affidavit that was prepared by Attorney David R. Cripps for use in the appeal case of my Co-Defendant, Kenneth Nixon.

2. All of my statements regarding the facts, circumstances, dates and times of Kenneth Nixon's whereabouts during the late night hours of May 19, 2005 (10:00 PM to 12:00 PM) and early morning hours (12:01 AM to approximately 6:00 AM) of May 20,

2005 were accurately and truthfully stated in my Affidavit dated and notarized July 6, 2006.

3. All of my statements regarding the facts, circumstances, dates and times of my whereabouts during the late night hours of May 19, 2005 (10:00 PM to 12:00 PM) and early morning hours (12:01 AM to approximately 6:00 AM) of May 20, 2005 were accurately and truthfully stated in my Affidavit dated and notarized July 6, 2006.

4. Accordingly, I hereby adopt and re-affirm the truthfulness of my July 6, 2006 Affidavit statements.

5. If called as a witness in any court proceeding, at any time, at any place, I will testify to the statement made in my July 6, 2006 Affidavit; as well as the above statements of re-affirmance.

LaToya Caulford

Dated: December 17, 2008

Subscribed and sworn to before me
This 17th day of December, 2008.

MELVENNA NICOLE FANT, Notary Public
Wayne County, Michigan
Acting in Oakland County, Michigan
My Commission Expires: 09/15/2013

MELVENNA NICOLE FANT
Notary Public, State of Michigan
County of Wayne
My Commission Expires Sep. 15, 2013
Acting in the County of Oakland

Document drafted by: Sheldon Halpern P.C. (P14560)

[redacted]

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Sheldon Halpern
Attorney at Law
26339 Woodward Ave
Huntington Woods, Mi 48070

December 18, 2008

CONFIDENTIAL

SUBJECT: LaToya Caulford, Examinee, b/f, dob 7/15/86

At your request, LaToya Caulford was examined in my office on December 18, 2008. This examination was directed at evaluating her truthfulness regarding an affidavit dated July 6, 2006

RELEVANT QUESTIONS:

The examinee was asked the following relevant questions, which she answered as indicated:

1. Were you present at the fire bombing that occurred at 19428 Charleston, May 19/20, 2005? NO
2. Are you lying about Kenneth Nixon not leaving your house on Havana between 10pm May 19, 2005 and 5am May 20, 2005? NO
3. Did you tell any deliberate lies in your affidavit dated July 6, 2005? NO

APPENDIX ITEM #10

DIAGNOSTIC EVALUATION:

After careful analysis of the Examinee's polygrams based on the case facts available, it is the opinion of the undersigned that LaToya Caulford is being truthful..

William F. Ellerbrake
Polygraph Examiner
License #600100026

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 05-005711-01
HON. BRUCE U. MORROW

v

KENNETH FITZGERALD NIXON,
Defendant.

/

KYM L. WORTHY (P38875)
Wayne County Prosecutor
1441 Saint Antoine Street
Detroit, MI 48226
(313) 224-5777

SHELDON HALPERN (P14560)
Attorney for Defendant
26339 Woodward Avenue
Huntington Woods, MI 48070
(248) 554-0400

/

TRACY NIXON'S AFFIDAVIT IN SUPPORT OF KENNETH NIXON'S DECEMBER 8, 2008, MOTION FOR RELIEF FROM JUDGMENT

A. INTRODUCTION

1. I am Kenneth Nixon's mother.

2. The subject matter of this Affidavit is the May 19, 2005, fire at the home of Naomi Vaughn, 19428 Charleston, Detroit, Michigan, that happened very late in the evening of the 19th. Two of Ms. Vaughn's young children died in the fire. This Affidavit also details Ronrico Simmons' long-standing friendship with Kenneth and my entire family as that friendship relates to the fire.

3. Kenneth was arrested by Detroit Police Homicide Section Detectives in the early morning hours (approximately 6:00 AM) of the very next day, May 20, 2005.

4. My son was charged with murder, arson and attempted murder. His girlfriend and mother of their infant son, LaToya Caulford, was also charged as Kenneth's co-defendant.

5. Kenneth and LaToya were tried together before separate juries. LaToya was acquitted of all charges. Kenneth was convicted and sentenced to life in prison.

6. The Detroit Police and Wayne County Prosecutor's theory of the case was that Kenneth firebombed the Vaughn home, where Ronrico Simmons lived, as retaliation against Ronrico over a personal matter involving Kenneth, Ronrico and LaToya.

7. In January 2005 Kenneth told me he suspected Ronrico and LaToya were carrying on a secret affair. I told Kenneth if that was in fact the situation, he should sever his relationships with both LaToya and Ronrico, and take care of and focus only on his relationship with his son.

8. Shortly thereafter, Kenneth learned that Ronrico and LaToya were in fact having an affair. Kenneth was devastated because of LaToya's infidelity and Rico's breach of friendship and trust. As a result, Kenneth and Ronrico became bitter enemies. Each threatened physical harm to the other.

9. On a very regular basis (every 2 or 3 days) I would hear from family, friends and neighborhood acquaintances about the latest episode in Kenneth and Ronrico's "beef".

B. KENNETH NIXON AND RONRICO SIMMONS BIOGRAPHICAL HISTORY

10. Ronrico Simmons came into our family's life many years ago when he was 13 years old. He is 6 years older than Kenneth who was 7 at that time. His relationship with

Kenneth developed over the years into a close friendship with Ronrico much like a big brother to Kenneth.

11. Ronrico became fully involved with my family on a day-to-day basis to such a degree of closeness that Ronrico would call me "Mom". We called him Rico.

12. As a mother to Kenneth and surrogate mother to Rico, I was deeply saddened, hurt and concerned over Kenneth and Rico's estrangement. I made it my business to do all I could to make (force) the boys to reconcile.

13. In either March or April of 2005, six to eight weeks before the fire, I put my foot down with Kenneth. I insisted he "reach out" to Rico and end their feud before something bad happened.

14. One day during that time period Kenneth was at my home. In my presence he called Rico on the telephone. I only heard Kenneth's side of the conversation. I heard him say to Rico (paraphrased): "We are going to stop this beefing right now. You stay away from me, I'll stay away from you. I've got my girl and my son. You stay away from me, I'll stay away from you."

15. After that day, I did not hear any more reports of the prior day-to-day melodrama between Kenneth and Rico.

C. MY INTERACTIONS AND CONVERSATIONS WITH KENNETH'S TRIAL LAWYER

16. After Kenneth's arrest I had many conversations and contacts with his lawyer, Attorney Robert F. Kinney. I passed on a great deal of information I was receiving and gathering about the fire and the surrounding circumstances. I routinely passed this information to Mr. Kinney.

17. When I learned that the police and prosecutor were using Kenneth and Rico's "beef" regarding LaToya as the "motive" for Kenneth to have set the fire, I told Mr. Kinney all of the above facts regarding the history of Kenneth and Rico's friendship; especially the facts of their estrangement because of Rico's affair with LaToya; and their (Kenneth and Rico) reconciliation several weeks before the fire. I indicated I want to testify to inform the jury of the true status of their friendship. I wanted the jury to be told that the prosecutor's theory of Kenneth's motive was all wrong.

18. Mr. Kinney told me my information was hearsay; and even if I did testify, I would not be believed because I was Kenneth's mother.

19. I will testify anytime, any place to the above stated facts.

Tracy D. Nixon

Tracy Nixon

Dated: December 17, 2008

Subscribed and sworn to before me
This 17th day of December, 2008.

Melvenna Nicole Fant

MELVENNA NICOLE FANT, Notary Public
Wayne County, Michigan
Acting in Oakland County, Michigan
My Commission Expires: 09/15/2013

MELVENNA NICOLE FANT
Notary Public, State of Michigan
County of Wayne
My Commission Expires Sep. 15, 2013
Acting in the County of Oakland

Document drafted by: Sheldon Halpern P.C.

[redacted]

GHENT ELLERBRAKE & ASSOCIATES, LLC
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Sheldon Halpern
Attorney at Law
26339 Woodward Ave
Huntington Woods, M 48070

December 18, 2008

CONFIDENTIAL

SUBJECT: Tracy Nixon, Examinee, b/f, dob 4/22/66

At your request, Tracy Nixon was examined in my office on December 18, 2008. This examination was directed at evaluating her truthfulness regarding an affidavit dated December 17, 2008.

RELEVANT QUESTIONS:

The examinee was asked the following relevant questions, which she answered as indicated:

1. Did you tell any deliberate lies in your affidavit dated December 17, 2008? NO

2. Are all the facts in your affidavit dated December 17, 2008 true? YES

DIAGNOSTIC EVALUATION:

After careful analysis of the Examinec's polygrams based on the case facts available, it is the opinion of the unders gned that Tracy Nixon is being truthful..

William F. Ellerbrake

William F. Ellerbrake
Polygraph Examiner
License #600100026

AFFIDAVIT OF CHRIS CRUMP

This affidavit is affirmed by Affiant Chris Crump, and Affiant is conveying a true statement to the Best of my Knowledge, Information and Belief and this affidavit is made of my own free will and accord, further in the interest of justice and on behalf of an innocent man.

1). Affiant Chris Crump was incarcerated on May 9th, 2005, affiant's case docket numbers #'s are 36th District Court No: 04-56615-C.C. 05-5305, 05-59782-C.C. 05-5221; Circuit Court Case Number: 05-055858.01. Some of affiant's court dates include 5-17-05; 5-24-05; 6-1-05 and 9-14-05.

2). Affiant further states that on several occasions affiant happened to be in the same holding cell awaiting to be transferred to Court with a man that affiant came to know as Stanley Janaury.

3). On Affiant's first encounter with Stanley January approached me and stated that Affiant looked familiar and Stanley January then asked Affiant where affiant lived? Affiant replied that he was from the westside of Detroit and asked where Stanley January where he lived. He replied he lived on the eastside of Detroit. From that point affiant and January continued to talk about places that we frequented and through these conversations we both came to the conclusion that we frequented the "Motor City Casino" and Janaury stated that is where he had saw affiant before.

4). Affiant and January continued to talk about why each other is locked up and he told affiant that he was locked up for Bank Robbery or Armed Robbery and that he had to get out of jail. He stated that his daughter was graduating from High School and going to college and that his ex-wife and daughter would be disappointed and furious at him if he missed this hallmark occasion. That is what January confided to affiant at that first time meeting.

5). The next time that affiant saw Stanley January down in the holding cells, he greeted affiant affectionately as "nephew", gave affiant a handshake and pulled affiant to the side and stated: "Let me hollar at you." Again Affiant and January began to talk and catch up when January all of sudden stated that he thought he found a way to get out from under his case. January told affiant that a guy that was housed in the same unit with him had went to recreation, and while he was out of his cell he went through his discovery package and read his police incident report and found out the details of why the guy was accused of a murder. He said that he (Stanley January) was going to make up a lie that involved the circumstances of what he was charged with to try and make a deal with the prosecutor to get his case dropped or try and get the minimum amount of time for his in exchange for testifying against this guy. January then asked what affiant thought of his plan, is it good and did affiant think it would work? Janaury then asked affiant not to ever say anything about what he had told affiant.

6). Affiant thought to himself, this is wrong, but affiant kept his thoughts to himself because he was not looking for any conflict, and keep his confidence!

7). Affiant knows and expresses in the African-American Community it is socially unacceptable to testify or become an informant against someone for the State's Prosecution of another person's freedom.

8). Affiant may or may not have seen Stanley January once or twice more after the

APPENDIX ITEM # 13

previous two encounters.

9). Affiant's next time he seen Stanley January was in Jackson Prison Quarantine. As as matter of fact, affiant and January both were housed in 7 Block in Jackson Prison on the Westside of the building on the first gallery, affiant locked in 7-1-083, just a few cells or more from January, so when we were released for breakfast, lunch and dinner chow, we often walked to the chow hall together and when they broke our cell doors for the hour yard session, we often went to yard together.

10). When affiant got the first opportunity to ask Stanley January about the amount of time he was sentenced to do, he started smiling and again pulled affiant to the side in confidence and told affiant that his pla had worked and how the prosecutor was stupid enough to let him hood wink them.

11). Stanley January told affiant he received 1 year for his crime in exchange for his fabricated testimony against Nixon. That was the first time that January said the name of the person that he testified against.

12). A couple weeks after January confessed about the fabricated testimony and the deal he made, affiant noticed that January was anxious and really nervous about something and so affiant asked Stanley January on the yard, why he was so stressed out and January stated: "I got to leave quarantine before the guy Kenneth Nixon got here."

13). One day before Stanley January was about to transfer out, Affiant asked January for his inmate number so that he could keep in touch. January replied: "You don't need my inmate number because I am going to be free within 6 months to 7 months and here is contact information." He gave affiant a home address that he said was his daughter's house at 4642 St. Antoine in Detroit and a telephone number: #313-833-7334 and told affiant to contact him there at these contact numbers and address. Stanley said this in a gloating manner!

14). Affiant further states that some months later affiant was transferred to Macomb Correctional Facility and was contacted by my brother's girldfriend, who asked did affiant know a Kenneth Nixon since affiant's incarceration? Affiant told her no, but asked why did she want to know? She then told affiant that he was her hairstylist son and affiant told her that he was sending her some information concerning her son case. Affaiant never heard from Nixon's Mother.

15). This Monday, August 24th, 2008, an attorney by the name of Stanley Halperin contacted me to find out what exactly did I know.

Affiant declares that the foregoing is true to the best of my knowledge, information and belief and affiant is willing to testify to the same in a Court of Law and of his own free will and accord. Further Affiant sayeth not!

Respectfully,

/S/_____ Date: August ___, 2008
Mr. Chris Crump

cc:file
hjb/CC
Attorney Halperin
Ms. Nixon

EXHIBIT 6D

Report and Recommendation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENNETH FITZGERALD NIXON,

Petitioner,

v.

CASE NO. 2:10-CV-14652
JUDGE AVERN COHN
MAGISTRATE JUDGE PAUL J. KOMIVES

GREG McQUIGGIN,

Respondent.
_____/

REPORT AND RECOMMENDATION

Table of Contents

I. RECOMMENDATION: The Court should deny petitioner's application for the writ of habeas corpus.

II. REPORT:

A. *Procedural History*

1. Petitioner Kenneth Fitzgerald Nixon is a state prisoner, currently confined at the Chippewa Correctional Facility in Kincheloe, Michigan.

2. On September 21, 2005, petitioner was convicted of two counts of first degree felony murder, MICH. COMP. LAWS § 750.316(1)(b); four counts of attempted murder, MICH. COMP. LAWS § 750.91; and arson of a dwelling, MICH. COMP. LAWS § 750.72, following a jury trial in the Wayne County Circuit Court. On October 12, 2005, he was sentenced to mandatory terms of life imprisonment without parole on the murder convictions, concurrent terms of 20-40 years' imprisonment on the attempted murder convictions, and a concurrent term of 10-20 years' imprisonment on the arson conviction.

3. Petitioner appealed as of right to the Michigan Court of Appeals raising, through counsel, the following claims:

> I. DEFENDANT IS ENTITLED TO A NEW TRIAL BASED ON A SWORN AFFIDAVIT SIGNED BY HIS CO-DEFENDANT LATOYA CAULFORD, WHO STATES THAT MR. NIXON DID NOT COMMIT THE CRIMES FOR WHICH HE WAS CONVICTED DUE TO THE FACT THAT HE WAS WITH HER DURING THE ENTIRE TIME PERIOD WHEN THE CRIME WAS ALLEGED TO HAVE TAKEN PLACE.
>
> II. THE COURT ABUSED ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF DEFENDANT'S JAIL INCARCERATION THROUGH AUDIO CLIPS OF HIS JAIL CALLS WHEN THAT EVIDENCE WAS MARGINALLY PROBATIVE, HIGHLY PREJUDICIAL, AND THERE WAS A DANGER THE JURY WOULD GIVE IT UNDUE WEIGHT.
>
> III. DEFENDANT WAS DENIED DUE PROCESS WHEN THE COURT

ERRONEOUSLY ALLOWED BRANDON VAUGHN'S STATEMENT OF IDENTIFICATION INTO EVIDENCE UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE.

IV. DEFENSE TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN: (1) FAILING TO OBJECT TO THE TESTIMONY OF BRANDON VAUGHN'S STATEMENT OF IDENTIFICATION INTO EVIDENCE UNDER THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE; AND (2) FAILING TO OBJECT AT TRIAL TO IRRELEVANT EVIDENCE THAT DEFENDANT, DEFENDANT'S FAMILY OR OTHERS ALLEGEDLY THREATENED OR ATTEMPTED TO BUY-OFF A WITNESS, WHERE THERE WAS NO PROOF THAT APPELLANT HAD ANYTHING TO DO WITH THOSE THREATS OR ALLEGED PAY-OFF OFFER.

The court of appeals found no merit to petitioner's claims, and affirmed his conviction and sentence. *See People v. Nixon*, No. 266033, 2007 WL 624704 (Mich. Ct. App. Mar. 1, 2007) (per curiam).

4. Petitioner sought leave to appeal these issues to the Michigan Supreme Court. The Supreme Court denied petitioner's application for leave to appeal in a standard order. *See People v. Nixon*, 480 Mich. 854, 737 N.W.2d 743 (2007).

5. Petitioner thereafter filed a motion for relief from judgment in the trial court pursuant to MICH. CT. R. 6.500-.508, raising claims of newly discovered evidence, ineffective assistance of counsel, and prosecutorial misconduct. The trial court denied the motion on July 17, 2009. The Michigan Court of Appeals and Michigan Supreme Court denied petitioner's applications for leave to appeal in standard orders, based on petitioner's "failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Nixon*, 488 Mich. 852, 787 N.W.2d 482 (2010); *People v. Nixon*, No. 293476 (Mich. Ct. App. Nov. 23, 2009).

6. Petitioner, through counsel, filed the instant application for a writ of habeas corpus on November 23, 2010. As grounds for the writ of habeas corpus, he raises the following claims:

I. PETITIONER SHOULD BE EXCUSED FROM PROCEDURAL

DEFAULTS, IF ANY, BECAUSE OF A SUBSTANTIAL SHOWING OF INNOCENCE.

II. PETITIONER WAS DENIED A FAIR TRIAL BY INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.

III. PROSECUTOR'S USE OF PERJURED TESTIMONY DENIED PETITIONER DUE PROCESS.

IV. THE PROSECUTOR PREJUDICED PETITIONER WITH IMPROPER AND MISLEADING ARGUMENT.

V. FAILURE TO PROVIDE CONSTITUTIONALLY EFFECTIVE REPRESENTATION ON APPEAL.

7. Respondent filed his answer on June 3, 2011. He contends that petitioner's claims are without merit.

8. Petitioner filed a reply to respondent's answer on July 18, 2011.

B. *Factual Background Underlying Petitioner's Conviction*

Petitioner's conviction arises from the firebombing of a home in which Naomi Vaughn lived with her boyfriend and five children. As a result of the firebombing, two of the children in the home were killed. The evidence adduced at trial was summarized in the prosecutor's brief on appeal:

> This case arises out of the firebombing of Naomi Vaughn's home on May 19, 2005. Her ten-year-old son Raylond and one-year-old daughter Tamyah died in the fire. 9/19/05, 76-77. Also living at the home were Vaughn's three other children and her boyfriend, Ronrico Simmons. 9/14/05, 62-65; 9/15/05, 68-69.
>
> Simmons had dated and had a sexual relationship with codefendant LaToya Caulford during the first two months of 2005. Caulford lived approximately three blocks away from Vaughn. Defendant Kenneth "Beans" Nixon and Caulford had a child together. Although Simmons believed that defendant and codefendant were no longer together, he learned otherwise in February. Defendant told Simmons that "he didn't want to be walking around and everybody think he a hoe." He said "it wasn't over until somebody was dead." 9/15/05, 68-71, 102-103.
>
> In March, Simmons and defendant had a confrontation, and Simmons broke out the windows of defendant's car. Two days later, they had a phone conversation. 9/15/05, 71-73. Simmons had no conversations or dealings with defendant after the

month of March. 9/15/05, 87-88. He saw defendant twice in front of Caulford's house, but did not stop. 9/15/05,73-74.

On the night of the fire, Naomi Vaughn's thirteen-year-old son Brandon was in his bedroom when he heard a "boom." He ran downstairs, unlocked the door, and saw defendant getting into the passenger seat of codefendant's green Neon. Brandon chased after the car as it backed up and saw that codefendant was driving. He then ran back to the house. He quickly realized that the house was on fire, and woke up his mother. He led her outside, and then returned to retrieve one of his sisters. He was unable to go upstairs because the fire was too strong. 9/15/05, 181-193, 224.

Naomi Vaughn awoke to Brandon's screams of "Ma, ma." On stepping out of her room, she felt the heat of the fire. She saw Raylond's bed on fire, and tried to grab him, but the fire exploded. She ran down the stairs but intended on trying to save Raylond again. Brandon then unlocked the door, and she, Brandon and one of her daughters ran outside. While outside, she asked Brandon about Tamyah. They then ran back into the house, but could not find her in her room. At that point, Brandon was screaming "Beans and Toya did this to us." Brandon retrieved his sister Alicia and they exited the house. He and his mother attempted to enter the house once more, but the fire was too strong. 9/14/05, 65-69.

Brandon talked to Simmons after he exited the house for the second time. 9/15/05, 227-229. Simmons had gone to a coffee shop on the night of the fire. On returning, he saw that the house was on fire. 9/15/05 73-76. He unsuccessfully attempted to get the children out of the house before calling 911. 9/15/05, 76, 110-111. He later spoke with Brandon. Brandon was "frantic" and crying. [Brandon told Simmons] that he saw Beans pull up in a green Neon, throw a cocktail at the house, jump back in the car, and back up down the street. He said Toya was driving the car. 9/15/05, 79-80.

Firefighters responded to the scene and discovered the second story of the home engulfed in flames. 9/14/05, 164-165, 169-172. The arson investigator, Lt. Frank Maiorana, spoke to Brandon at the crime scene. Brandon told him that he heard a loud boom, that the room erupted in flames, and that smoked filled the second floor of the house. He said that he ran out of the house and saw a person run from the front of the house and get in the passenger side of a car. The car backed up down the street, turned around, and drove away. Lt. Maiorana's notes reflected that Brandon named the person as "Bing," but Lt. Maiorana conceded that he may have misunderstood him. Brandon also told him that the car belonged to Bing's baby's momma. 9/l5/05, 153-154.

Officer Kurtiss Staples likewise interviewed Brandon at the scene. Brandon told him that he was standing on the front porch when he saw a car pull up in front of the house. He saw Bean get out of the passenger side of the car. He was holding a glass bottle with a cloth sticking out of the top. He threw the bottle at the house through the top window. Brandon indicated that he had seen Bean's baby momma driving the car earlier in the day. The car went in reverse after the fire and then turned around. 9/19/05, 90-96.

The handler of Swifty, a dog trained to detect flammable liquids, arrived on

the scene after the tire had been put out. The dog alerted him to the second floor south bedroom, just below the window that faced the street. The handler smelled gasoline. 9/l4/05, 175-179. Lt. Maiorana likewise smelled the odor of gasoline when he examined the house. He opined that the fire started at the second-floor window and extended to the bed. He found the remains of a green bottle on the floor under the window, and opined that the Molotov cocktail landed on the person who was in the bed. 9/l5/05, 142-146, 151, 164. Subsequent testing of the glass revealed the presence of a "gasoline/heavy mix," such as kerosene or a charcoal starter. 9/l9/05, 73.

The police executed a search warrant at 19380 Havana at approximately 3:00 a.m. on the night of the fire. They arrested defendant in the home. 9/l5/05, 56-58. Size 12 gym shoes, pants, and a green belt were found in the home. Swifty later alerted its handler to those items. 9/14/05, 137-139, 179-182. During a telephone call made from the jail on June 15, 2005 defendant stated that the dog searched his clothes. [People's Exhibit 33]. 9/19/05, 71-72, 166. Those clothes tested positive for the presence of gasoline. 9/19/05, 73.

A green Neon was parked in the street in front of the Havana St. house. A tow truck was also parked on the street. 9/14/05,139-141; 9/19/05, 80-81. After the police impounded the car, Swifty alerted its handler to right corner of the front passenger seat, the floorboard area below that seat, and some clothing in the rear seat. 9/14/05, 182-185. An evidence technician took samples of cloth and carpet from the front passenger seat, clothing from the rear passenger seat, and gloves and a pair of size 12 boots from the trunk, but subsequent testing did not reveal any petroleum products. 9/14/05, 147-151, 163-164; 9/19/05, 74. Codefendant's fingerprint was found on the rearview mirror. 9/14/05, 151-152, 163. From the tow truck, the technician retrieved a white T-shirt and a red plastic gas can. 9/14/05,152-154.

Defendant was arraigned on the warrant on May 22, 2005 [See Circuit Court Docket Entries]. Both he and Stanley January were housed together in quarantine at the jail the following day. [Mr. January did not receive any consideration for his testimony in the instant case. As part of his plea agreement, he agreed to testify in another case. 9/19, 15-18, 29, 48-52; People's Exhibit 29, attached as Appendix B]. 9/19/05, 60-62. They and other inmates spoke about their respective cases. 9/19/05, 18-20. That day, defendant also arranged for a three-way call so that January could speak to his daughter. 9/19/05, 20-21, 52-55. A recording of that call corroborated January's testimony. [People's Exhibit 30] 9/19/05, 27-28.

January testified that defendant spoke about the firebombing and said something about a cocktail. Defendant said he was sorry about the kids because he just had a kid himself. He thought Naomi was home when he committed the firebombing, not the kids. 9/19/05, 21, 24, 26.

January only had contact with defendant on May 23, 2005, because defendant was moved to a different cell later in the day. 9/19/05, 29. A recording of a call defendant made from the jail at 11:00 a.m. on May 24, 2005, corroborated January's testimony in that regard. In that call, defendant acknowledged that he had been moved in the jail. [People's Exhibit 32]. 9/19/05, 71.

On June 10, 2005, the date defendant was arraigned on the Information in Circuit Court, defendant made a telephone call from the jail. During that call, defendant (1) discussed Mario, Lisa, and Mario's "daddy," (2) stated that they "don't want Mario," and (3) referring to Mario's daddy, said "don't offer him nothing" because he would "tell." [People's Exhibit 34]. 9/19/05, 72, 167-168.

In September of 2005, the Court presided over defendant's trial during which defendant was represented by attorney Robert F. Kinney III. Mario Mahdi was one of the People's witnesses. Mahdi testified that defendant was "hurt" by Simmons dating codefendant. In April, defendant stated to him "How would you feel if your friend was messing with your girl?" 9/15/05, 20. Mahdi, however, testified that he had lied to the police when he told them that defendant said "he's going to get his" as they passed by Simmons home in March or April 9/15/05,16-19.

Mahdi testified that defendant was at the house on Havana when he arrived home with his girlfriend at 10:50 p.m. on the night of the fire. He said his mother, codefendant, and codefendant's child were on the couch and defendant was in the shower. He said defendant must have gotten out of the shower and gone into the bedroom at 11:15 or 11:20. 9/15/05, 29-31, 37-40. He said he saw defendant playing video games downstairs at some point. He went upstairs to bed at about 1:00. When he came back downstairs at about 1:30 to get a condom, he saw defendant in bed next to codefendant. 9/15/05, 40-42. He said he had told the police that he saw defendant's face twice that night, but the police did not record what he told them regarding where he saw defendant. 9/15/05, 50-51.

In addition to Officer Staples, defense counsel called three witnesses. Trevor Hill testified that he worked with defendant driving tow trucks. He said that they worked together on May 19, 2005, and he last saw him that night at 7:00 or 7:30 p.m. Hill testified that defendant called him a couple of times that evening, and they last spoke at between 9:00 and 10:00. Defendant called him to tell him that he had locked the shop and then called him again after he arrived home. 9/19/05, 109-116.

Codefendant's next-door neighbor, Basim Alyais, testified that he saw defendant outside codefendant's house at approximately 4:00 p.m. on May 19, 2005. Defendant was holding his baby and waiting for codefendant. Codefendant arrived at between 4:30 and 5:00. Defendant went inside with codefendant, but eventually left in codefendant's car. He returned at between 9:30 and 10:00 p.m. 9/19/05, 128-131, 137. Alyais testified that he sat on his porch, drinking beer, until 12:00 or 12:30 a.m. He did not see defendant leave again. Both codefendant's car and the tow truck were still there when he went inside his house. 9/19/05, 131-132.

Codefendant's aunt, Lisa Anne Caulford-Zaatari, testified that she arrived at codefendant's home on May 19, 2005, at 4:00 or 5:00 p.m. Codefendant came home about fifteen minutes later. At 5:15 or 5:30 p.m., she and codefendant left. When they returned at 6:00 or 6:30 p.m., defendant was waiting in the tow truck with the baby. Defendant left thirty or forty-five minutes later in the Neon. 9/19/05, 140-142, 145-148. He was wearing dirty work clothes when he returned at between 8:30 and 9:30. According to Caulford-Zaatari, defendant talked on his cell phone and played with the baby. At about 9:30 or 9:45, he took a shower. He, codefendant, and the

> baby then went into the bedroom. 9/19/05, 142-143. She testified that defendant never left the house again that night. The car did not leave either. When Caulford-Zaatari left at 12:10 a.m. to go to Majid's house, defendant, codefendant, the baby, and Mario were at the house. 9/19/05, 143-144, 149-151.
>
> Caulford-Zaatari testified that defendant, codefendant, and the Neon did not leave after defendant arrived home that night. She explained: "Because I would have seen, if he was going to take the green Neon or if Toya was going to take the green Neon, they would have left, they would have had to get out of the bedroom through me." She testified that defendant and codefendant were in the bedroom the entire time. 9/19/05, 150-151.

Pl.-Appellee's Br. on App., in *People v. Nixon*, No. 293476 (Mich. Ct. App.), at 3-10; *see also*, Def.-Appellant's Br. on App., at 1-4; Pet'r's Br. in Supp. of Pet., at 2-6.

C. *Standard of Review*

Because petitioner's application was filed after April 24, 1996, his petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Amongst other amendments, the AEDPA amended the substantive standards for granting habeas relief by providing:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

"[T]he 'contrary to' and 'unreasonable application' clauses [have] independent meaning." *Williams v. Taylor*, 529 U.S. 362, 405 (2000); *see also, Bell v. Cone*, 535 U.S. 685, 694 (2002). "A state court's decision is 'contrary to' . . . clearly established law if it 'applies a rule that contradicts

the governing law set forth in [Supreme Court cases]' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [this] precedent.'" *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) (per curiam) (quoting *Williams*, 529 U.S. at 405-06); *see also, Early v. Packer*, 537 U.S. 3, 8 (2002); *Bell*, 535 U.S. at 694. "[T]he 'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (quoting *Williams*, 529 U.S. at 413); *see also, Bell*, 535 U.S. at 694. However, "[i]n order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. The state court's application must have been 'objectively unreasonable.'" *Wiggins*, 539 U.S. at 520-21 (citations omitted); *see also, Williams*, 529 U.S. at 409.

By its terms, § 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with "clearly established federal law as determined by the Supreme Court." Thus, "§ 2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." *Williams*, 529 U.S. at 412. Further, the "phrase 'refers to the holdings, as opposed to the dicta, of [the] Court's decisions as of the time of the relevant state-court decision.' In other words, 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (citations omitted) (quoting *Williams*, 529 U.S. at 412).

Although "clearly established Federal law as determined by the Supreme Court" is the

benchmark for habeas review of a state court decision, the standard set forth in § 2254(d) "does not require citation of [Supreme Court] cases–indeed, it does not even require *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early*, 537 U.S. at 8; *see also, Mitchell*, 540 U.S. at 16. Further, although the requirements of "clearly established law" are to be determined solely by the holdings of the Supreme Court, the decisions of lower federal courts are useful in assessing the reasonableness of the state court's resolution of an issue. *See Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003); *Phoenix v. Matesanz*, 233 F.3d 77, 83 n.3 (1st Cir. 2000); *Dickens v. Jones*, 203 F. Supp.2d 354, 359 (E.D. Mich. 2002) (Tarnow, J.).

D. *Newly Discovered Evidence (Claim I)*

Petitioner contends that newly discovered evidence establishes that he is actually innocent of the crimes for which he was convicted. For the most part, petitioner asserts this claim as a basis for overcoming any procedural bars, rather than as an independent basis for relief. Respondent asserts a procedural bar with respect to petitioner's prosecutorial misconduct claims, but argues alternatively that these claims are without merit. Further, as explained below these claims are meritless and thus the Court need not rely on a procedural bar in resolving the petition.[1]

To the extent petitioner is attempting to assert an freestanding innocence claim, he is not

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[1]While the procedural default doctrine precludes habeas relief on a defaulted claim, the procedural default doctrine is not jurisdictional. *See Trest v. Cain*, 522 U.S. 87, 89 (1997). Thus, while the procedural default issue should ordinarily be resolved first, "judicial economy sometimes dictates reaching the merits of [a claim or claims] if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated." *Barrett v. Acevedo*, 169 F.3d 1155, 1162 (8th Cir. 1999) (internal citations omitted); *see also*, *Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997) (noting that procedural default issue should ordinarily be resolved first, but denying habeas relief on a different basis because resolution of the default issue would require remand and further judicial proceedings); *Walter v. Maass*, 45 F.3d 1355, 1360 n.6 (9th Cir. 1995). Accordingly, the Court may proceed directly to the merits of the purportedly defaulted claims.

entitled to habeas relief. First, such a claim is not cognizable on habeas review. A writ of habeas corpus may be granted "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Thus, the existence of new evidence, standing alone, is not a basis for granting the writ. As the Supreme Court has explained: "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993); *see also*, *id*. at 404 (claim of actual innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise [procedurally] barred *constitutional* claim considered on the merits.") (emphasis added); *Schlup v. Delo*, 513 U.S. 298, 314-16 (distinguishing, in part, *Herrera* because in this case the petitioner "accompanie[d] his claim of innocence with an assertion of constitutional error at trial."); *Townsend v. Sain*, 372 U.S. 293, 317 (1963) ("Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus."), *overruled in part on other grounds*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). Thus, the newly discovered evidence, standing alone, provides no basis for habeas relief. *See Cress v. Palmer*, 484 F.3d 844, 854 (6th Cir. 2007); *Wright v. Stegall*, 247 Fed. Appx. 709, 711 (6th Cir. 2007).[2]

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[2]In *Herrera* and again in *House v. Bell*, 547 U.S. 518 (2006), the Supreme Court noted that it might be the case that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief," but explicitly declined to determine whether this is, in fact, the constitutional rule. *Herrera*, 506 U.S. at 417; *see also*, *House*, 547 U.S. at 555. This rule affords no basis for relief to petitioner, however. First, as *Herrera* makes clear this rule is limited to the context of executing an innocent person, and has no applicability in a non-capital case. *See Hodgson v. Warren*, 622 F.3d 591, 601 (6th Cir. 2010); *Wright*, 247 Fed. Appx. at 711. Second, because the Supreme Court has recognized that the question whether there

Further, even if such a claim were cognizable, petitioner's evidence falls far short of that necessary to establish that he is innocent. In *Herrera*, without elaborating further, the Court noted that even if a free-standing claim of innocence were cognizable on habeas review, "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Herrera*, 506 U.S. at 417. In *Schlup*, the Court elaborated on the showing required to establish "actual innocence" for purposes of overcoming a procedural bar to consideration of a constitutional claim. The Court explained that, to establish actual innocence, the petitioner must "show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327 (internal citation and quotation omitted). The Supreme Court has also explained that a petitioner cannot establish his actual innocence merely be rehashing his innocence claims raised in the state courts and relying on the evidence adduced at trial. If he could, federal habeas review would become nothing more than a second trial on the merits, something the Supreme Court has repeatedly admonished the federal courts to avoid. *See Milton v. Wainwright*, 407 U.S. 371, 377 (1972) ("The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases *de novo*[.]"). Thus, "to be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional

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exists a "federal constitutional right to be released upon proof of 'actual innocence' . . . is an open question," *District Attorney's Office for the 3d Jud. Dist. v. Osborne*, 129 S. Ct. 2308, 2321 (2009), a state court's failure to grant relief on the basis of actual innocence cannot be contrary to or an unreasonable application of any clearly established federal law under § 2254(d)(1). *See Reyes v. Marshall*, No. CV 10-3931, 2010 WL 6529336, at *3 (Aug. 23, 2010), *magistrate judge's report adopted*, 2011 WL 1496376 (C.D. Cal. Apr. 14, 2011). *See generally*, *Murdoch v. Castro*, 609 F.3d 983, 994 (9th Cir. 2010) (state court's failure to grant relief on basis which Supreme Court has recognized is an open question cannot be unreasonable application of clearly established law); *Smith v. Hofbauer*, 312 F.3d 809, 817 (6th Cir. 2002) (same).

error with new reliable evidence that was not presented at trial." *Schlup*, 513 U.S. at 324. "Examples of evidence which may establish factual innocence include credible declarations of guilt by another, trustworthy eyewitness accounts, and exculpatory scientific evidence." *Pitts v. Norris*, 85 F.3d 348, 350-51 (8th Cir. 1996) (citations omitted); *accord Schlup*, 513 U.S. at 324 (referring to "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence").

Here, petitioner's innocence claim is not based on the type of new, reliable evidence identified in *Schlup*. Petitioner relies primarily on the unsigned, unnotarized affidavit of Chris Crump. *See* Br. in Supp. of Pet., App. 13. In this affidavit, Crump avers that while incarcerated with January, January told Crump that he had found a way to "get out from under his case." January told Crump that

> a guy that was housed in the same unit with him had went to recreation, and while he was out of his cell he went through his discovery package and read his police incident report and found out the details of why the guy was accused of a murder. He said that he (Stanley January) was going to make up a lie that involved the circumstances of what he was charged with to try and make a deal with the prosecutor to get his case dropped or try and get the minimum amount of time for his in exchange for testifying against this guy.

Id., ¶ 5. Crump's affidavit is not the type of new, reliable evidence identified in *Schlup* for a number of reasons. First, Crump has never signed the affidavit. "[A]n unsigned, undated, and unnotarized affidavit by a fellow-prisoner stating that one of the Government witnesses lied at the trial" is insufficient to warrant habeas relief or an evidentiary hearing. *Purkhiser v. Wainwright*, 455 F.2d 506, 507 (5th Cir. 1972) (per curiam); *see also*, *Teahan v. Almager*, 383 Fed. Appx. 615, 615 (9th Cir. 2010) (unsworn statements of purported alibi witnesses given to counsel were insufficient to show actual innocence); *Milton v. Secretary, Dep't of Corrections*, 347 Fed. Appx. 528, 531 (11th Cir. 2009) ("The alleged 'Oath Statement' of the victim's mother is not new, reliable evidence

because it is not sworn to or signed by the purported author."). Second, new statements from witnesses years after the crime are inherently suspect, *see Schlup*, 513 U.S. at 331, and such statements are to be viewed with "a degree of skepticism." *Herrera*, 506 U.S. at 423 (O'Connor, J., concurring); *see also*, *McCray v. Vasbinder*, 499 F.3d 568, 574 (6th Cir. 2007) (citing *United States v. Willis*, 257 F.3d 636, 645 (6th Cir. 2001). Third, even if Crump would have testified to the facts stated in his purported affidavit, the testimony regarding January's statements to him would have been hearsay, and thus inadmissible as substantive evidence. At most, they would have been admissible solely to impeach January's testimony. Such newly discovered impeachment evidence does not provide sufficient evidence of actual innocence to overcome a procedural bar, much less does it provide sufficient evidence to support a free-standing innocence claim. *See Calderon v. Thompson*, 523 U.S. 538, 563 (1998) (newly discovered impeachment evidence, which is "a step removed from evidence pertaining to the crime itself," "provides no basis for finding" actual innocence); *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992) (newly discovered impeachment evidence "will seldom, if ever," establish actual innocence).

Petitioner also relies on the results of independent polygraph examinations taken by him and his codefendant. These results do not constitute reliable evidence of innocence to satisfy a *Schlup* gateway claim, much less the significantly higher bar applicable to any freestanding claim of innocence. Because polygraph results are "generally inadmissible as unreliable," they are "not persuasive evidence of actual innocence." *Knickerbocker v. Wolfenbarger*, 212 Fed. Appx. 426, 433 (6th Cir. 2007); *see also*, *Pearson v. Booker*, No. 08-14422, 2011 WL 3511484, at *8 (E.D. Mich. Aug. 11, 2011) (Lawson, J.); *Bower v. Walsh*, 703 F. Supp. 2d 204, 208 (E.D.N.Y. 2010). Accordingly, the Court should conclude that to the extent petitioner is attempting to raise a

freestanding claim of innocence as a substantive ground for relief, it is not cognizable and without merit.[3]

E. *Prosecutorial Misconduct (Claims III & IV)*

Petitioner raises two separate prosecutorial misconduct claims. First, in Claim III, petitioner contends that the prosecutor presented perjured testimony. Second, in Claim IV, petitioner contends that he was denied a fair trial by the prosecutor's questions to a witness and comments. The Court should conclude that petitioner is not entitled to habeas relief on these claims.

1. *Perjured Testimony (Claim III)*

Petitioner first argues that the prosecutor presented the perjured testimony of January, the jailhouse informant. The Court should reject this claim.

a. Clearly Established Law

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[3]In his reply, petitioner contends that the trial court, in rejecting petitioner's new evidence claim, concluded that Crump's affidavit was unreliable because only scientific evidence can support a finding of innocence sufficient to grant a new trial. Petitioner contends that this statement by the trial judge is contrary to, or an unreasonable application of, clearly established federal law, namely *Schlup* and *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005). There are a number of problems with this argument. First, *Souter*, being a court of appeals case, cannot constitute "clearly established Federal law, as determined by the Supreme Court," under § 2254(d)(1). Second, neither *Schlup* nor *Souter* establish a federal constitutional standard for evaluating newly discovered evidence applicable to the states. They merely discuss the federal standard for evaluating newly discovered evidence to overcome a procedural bar. On the contrary, it is well established that nothing in the Constitution requires a state to establish a system of postconviction review, and thus "an infirmity in a state post-conviction proceeding does not raise a constitutional issue[.]" *Gee v. Groose*, 110 F.3d 1346, 1351-52 (8th Cir. 1997) (internal quotation omitted); *accord Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring); *Dawson v. Snyder*, 988 F. Supp. 783, 826 (D. Del. 1997) (citing *Steele v. Young*, 11 F.3d 1518, 1524 (10th Cir. 1993) and *Duff-Smith v. Collins*, 973 F.2d 1175, 1182 (5th Cir. 1992)). Finally, as characterized by petitioner (the transcript has not been submitted to the Court), the judge stated at the hearing that the evidence "was 'unscientific' and not likely to lead to a different result." Reply, at 2 (quoting Hr'g Tr., dated 7/17/09, at 32-33). This statement is a far cry from a legal conclusion that only scientific evidence can justify a new trial, and in any event does not appear far off from the *Schlup* Court's recognition that "reliable evidence" consists of "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324.

It is well established that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (footnote omitted); *accord Napue v. Illinois*, 360 U.S. 264, 271 (1959). This is true whether the false testimony goes to the defendant's guilt or to a witness's credibility, *see Napue*, 360 U.S. at 270, and it matters not whether the prosecution directly elicits the false testimony or merely allows false testimony to go uncorrected, *see id.* at 269. To succeed on this claim petitioner must show that: (1) the prosecutor presented evidence which was false; (2) the prosecutor knew of the falsity; and (3) the evidence was material. *See Coe v. Bell*, 161 F.3d 320, 343

With respect to the first element, it is well established that petitioner bears the burden of proving that the testimony amounted to perjury. As the Fourth Circuit has explained, "[a] defendant seeking to vacate a conviction based on perjured testimony must show that the testimony was, indeed, perjured. Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony." *United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987); *accord United States v. Verser*, 916 F.2d 1268, 1271 (7th Cir. 1990) ("[N]ot every testimonial inconsistency that goes uncorrected by the government establishes a constitutional violation."); *Horton v. United States*, 983 F. Supp. 650, 657 (E.D. Va. 1997); *United States v. Hearst*, 424 F. Supp. 307, 318 (N.D. Cal. 1976). (6th Cir. 1999). As the *Verser* court further explained, to establish a constitutional violation petitioner must show that the "inconsistent testimony amounted to perjury, 'the willful assertion under oath of a false, material fact.'" *Verser*, 916 F.2d at 1271 (quoting *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984)); *see also*, *Horton*, 983 F. Supp. at 657 (quoting *United States v. Smith*, 62 F.3d 641, 646 (4th Cir. 1995)) (in order to

establish *Napue* violation defendant must show that the government knowingly used perjured testimony, perjury being "false testimony concerning a material matter, 'given with the willful intent to deceive (rather than as a result of, say, confusion, mistake, or faulty memory.'"). In other words, petitioner must show that the testimony was "indisputably false." *Byrd v. Collins*, 209 F.3d 486, 817-18 (6th Cir. 2000).

With respect to the second element, as the Sixth Circuit has explained in order for a witness's perjury at trial to constitute a basis for habeas relief, the petitioner must show "prosecutorial involvement in the perjury." *Burks v. Egeler*, 512 F.2d 221, 229 (6th Cir. 1975). The Sixth Circuit has repeatedly reaffirmed the requirement that a petitioner show prosecutorial involvement in or knowledge of the perjury. *See, e.g.*, *Rosencrantz v. Lafler*, 568 F.3d 583-84 (6th Cir. 2009); *Byrd v. Collins*, 209 F.3d 486, 517-18 (6th Cir. 2000); *King v. Trippett*, 192 F.3d 517, 522 (6th Cir. 1999); *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998); *Ford v. United States*, No. 94-3469, 1994 WL 521119, at *2 (6th Cir. Sept. 23, 1994); *Akbar v. Jago*, No. 84-3540, 1985 WL 13195, at *1 (6th Cir. Apr. 10, 1985); *Roddy v. Black*, 516 F.2d 1380, 1383 (6th Cir. 1975). And the Supreme Court has repeatedly characterized the Due Process Clause only as barring conviction on the basis of perjury known by the prosecution to be such. *See, e.g.*, *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (emphasis added) ("[I]t is established that a conviction obtained through use of false evidence, *known to be such by representatives of the State*, must fall under the Fourteenth Amendment."); *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added) (due process is violated by the "*knowing* use of perjured testimony."); *see id*. at 103-04 & nn. 8-9 (discussing cases). At a minimum, "[t]he Supreme Court has never held that due process is offended by a conviction resting on perjured testimony where the prosecution did not know of the testimony's falsity at trial."

LaMothe v. Cademartori, No. C 04-3395, 2005 WL 3095884, at *5 (N.D. Cal. Nov. 11, 2005) (citing *Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, J., dissenting from denial of certiorari) (noting that the Supreme Court has yet to consider the question of whether due process is violated by a conviction based on perjured testimony regardless of the prosecutor's knowledge)); *cf. Briscoe v. LaHue*, 460 U.S. 325, 326 n. 1 (1983) ("The Court has held that the prosecutor's knowing use of perjured testimony violates due process, but has not held that the false testimony of a police officer in itself violates constitutional rights.").

b. Analysis

Here, petitioner can show neither that January's testimony amounted to perjury nor that the prosecutor knew of any such perjury. As to the first element, petitioner's claim is based on Crump's affidavit. As explained above, however, this unsigned affidavit has no evidentiary weight. In the absence of any proper evidence that January committed perjury, petitioner's claim fails. More fundamentally, even assuming that petitioner could show that January's testimony was false, he has presented no evidence that the prosecutor had any knowledge of or involvement in the perjury. Petitioner does not assert that the prosecutor had any specific knowledge of January's alleged perjury. Rather, petitioner merely argues that "[t]he prosecutor, in general, is aware of the strong possibility of false testimony as provided by a jail house informant" and that a prosecutor therefore "misleads and suborns perjury when vouching for and telling a jury they should exclusively rely upon jailhouse informant testimony to convict." Br. in Supp. of Pet., at 33. Petitioner cites no caselaw holding that such general knowledge about the unreliability of jailhouse informer testimony constitutes knowledge that a specific witness committed perjury. On the contrary, petitioner's general claim regarding the reliability of such testimony "does not . . . demonstrate that prosecutors

in [petitioner's] particular case knew that [January was] lying." *Dykes v. Borg*, No. 94-55111, 1995 WL 139360, at *1 (9th Cir. Mar. 30, 1995). Petitioner further argues that "it is reasonably inferred that either the investigating officers and/or the prosecutor knew Stanley January was lying to the jury" because the prosecutor knew that: (1) January was taking notes on various inmates trying to piece together facts about their cases for the purpose of offering testimony against them; (2) January had already testified against another inmate; and (3) January waited 3 months to tell anyone about petitioner's statement to him. These facts were all brought out during the questioning of January, and certainly provide bases upon which to discount January's testimony. They do not, however, show that the prosecutor knew that January was committing perjury. Speculative allegations of prosecutorial knowledge are insufficient to establish a *Napue/Giglio* claim. *See Skains v. California*, 386 Fed. Appx. 620, 621-22 (9th Cir. 2010). Because petitioner has failed to establish either that January's testimony was false or that, if false, the prosecutor knew of the falsity, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

2. *Questioning of Witnesses and Comments (Claim IV)*

In his fourth claim, petitioner contends that he was denied a fair trial by the prosecutor's questioning of witnesses and comments during closing argument. The Court should conclude that petitioner is not entitled to habeas relief on this claim.

a. Clearly Established Law

For habeas relief to be warranted on the basis of prosecutorial misconduct, it is not enough that the prosecutor's conduct was "undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Rather, the misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id*. (internal quotation

omitted). *Darden* constitutes "[t]he 'clearly established Federal law' relevant" to a prosecutorial misconduct claim. *Parker v. Matthews*, 132 S. Ct. 2148, 2153 (2012) (per curiam). "[T]he touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). "[T]he *Darden* standard is a very general one, leaving courts 'more leeway . . . in reaching outcomes in case-by-case-determinations.'" *Parker*, 132 S. Ct. at 2155 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In reviewing whether prosecutorial comments deprived a defendant of a fair trial, a court may not consider the remarks in isolation, but must consider the remarks in the context of the entire trial, including the prosecutor's appropriate comments, the court's instructions to the jury, and the evidence presented in the case. *See Brown v. Payton*, 544 U.S. 133, 144 (2005); *United States v. Young*, 470 U.S. 1, 11 (1985); *Donnelly v. DeChristoforo*, 416 U.S. 636, 645 (1974). Even on direct review, where AEDPA deference does not apply, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." *Young*, 470 U.S. at 11.

b. Analysis

Petitioner contends that the prosecutor deprived him of a fair trial by asking Trevor Hill, petitioner's employer, whether he had threatened any witness outside the courthouse. The prosecutor asked Hill:

> Q. Okay. Sir, have you threatened any of the People's witnesses in this case?
> A. No. I don't even know who the witnesses are.
> Q. You don't even know who the witnesses are?
> A. No, sir.
> Q. Sir, were you present in the parking lot outside of the courthouse last week?
> A. No, sir.
> Q. After court?
> A. No, sir.
> Q. You didn't have anything to do with the assaulting, punching one of the witnesses in this case?

Trial Tr., dated 9/19/05, at 116. In rejecting petitioner's claim that counsel was ineffective for failing to object to this questioning, the Michigan Court of Appeals concluded that the questioning was not improper. The court noted that there was evidence that Mahdi had been threatened and that petitioner attempted to have friends or family members influence witness testimony. *See Nixon*, 2007 WL 624704, at *3. Petitioner cannot show that this questioning deprived him of a fair trial. As the court of appeals noted, there was some evidence that petitioner attempted, through friends and family, to influence witnesses, and that one witness had changed his story. Thus, there was some basis for the prosecutor's question. In any event, the questioning played no significant role in the trial. The questioning was brief in the context of the trial, Hill denied that he had threatened or assaulted any witness, and the prosecutor never again returned to the theme, either in questioning of Hill or other witnesses, or in closing arguments. In these circumstances, petitioner cannot show that he was denied a fair trial by the prosecutor's questioning of Hill.

Petitioner also contends that he was denied a fair trial when the prosecutor "misstated the testimony of Stanley January and transmuted that testimony into a confession" because January "could not say he actually heard a confession, but the prosecutor told the jury he had." Pet., at 9. This claim is without merit. January testified that he recalled the conversation with petitioner, but could not remember it word-for-word. *See* Trial Tr., dated 9/19/05, at 19. When asked by the prosecutor if petitioner "confessed" to January that he committed the crime, January responded that petitioner "spoke about it." *Id*. at 21. When another inmate asked petitioner if he committed the crime, petitioner "looked real nervous." *Id*. at 22. Petitioner told January that he thought "Naomi" was at home, but did not think any children were in the house. *See id*. at 24. Petitioner did not mention the father of Naomi's children (Rico), but when another inmate indicated that he knew the

father petitioner again became nervous. *See id*. at 25. When January asked him how he had done it, petitioner "said something about a cocktail," and said the house belonged to Naomi. *See id*. at 26.

During closing argument, the prosecutor began his discussion of January's testimony by addressing some of the credibility issues regarding January. The prosecutor then played for the jury the phone call that petitioner placed on January's behalf which, the prosecutor argued, corroborated some of January's testimony and showed that petitioner trusted January to some extent. Regarding the substance of January's testimony, the prosecutor continued:

> Mr. January's testimony is corroborated by indisputable physical evidence, and it makes sense, when you listen to it, compared to what Brandon Vaughn says.
>
> Also, ladies and gentlemen, Mr. January, if he wanted, if he wanted to make this up, and somehow he knew all of this information about what this – how this crime occurred, do you think he probably could have gone into more detail than he did in his testimony and his statement. He only said a few things he remembered Mr. Nixon saying. "Naomi's house, somebody named Rico was one of the fathers, a cocktail, didn't think the kids were home, sorry about killing kids because he just had a kid himself." Those five facts, ladies and gentlemen, every one of those facts is proven to you by another witness in this case, and some of those witnesses are the Defense's witnesses.
>
> The point is no matter how you shake it, no matter how you look at Mr. January, he's telling you what was told to him, and that is evidence that you can use by itself to convict beyond a reasonable doubt.

Id. at 170-71. After playing for the jury another phone call that corroborated January's testimony that petitioner was moved after he got scared that somebody recognized him, the prosecutor argued that this further supported January's testimony:

> The point is that Mr. January comes in the court and tells you Mr. Nixon got moved, and then we can prove that Mr. Nixon got moved. More corroborative evidence of what Mr. January tells you today. When you take his testimony along with Brandon Vaughn's and an absolutely weak and pathetic defense that's offered to you, the elements have been shown, and the verdict is appropriate for guilty as charged.

Id. at 171-72.

Contrary to petitioner's argument, nothing in the prosecutor's closing statement mischaracterized January's testimony. January did not come out and explicitly state that petitioner "confessed" to him, but neither did the prosecutor characterize January's testimony in that manner. Notably absent from the prosecutor's discussion of January's testimony is even a single instance of the words "confessed" or "confession." Rather, the prosecutor argued that petitioner made statements to January which showed petitioner's knowledge of the details of, and hence involvement in, the crime. This is precisely the import of January's testimony, and the prosecutor did no more than argue that (a) the facts of January's testimony were corroborated by other witnesses, and (b) those facts supported a finding that petitioner was guilty of the crimes charged. At no point did the prosecutor state that petitioner had confessed the crime to January, but only that it was a fair inference from the facts petitioner admitted to January that petitioner was involved in the crime. The prosecutor's comments were therefore proper. *See Nichols v. Scott*, 69 F.3d 1255, 1283 (5th Cir. 1995) (comment "is permissible to the extent that it draws a conclusion based solely on the evidence presented.") (internal quotation omitted); *United States v. Grey Bear*, 883 F.2d 1382, 1392 (8th Cir. 1989); *Martin v. Foltz*, 773 F.2d 711, 717 (6th Cir. 1985) (prosecutor may argue permissible inferences from the evidence). Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

F. *Ineffective Assistance of Counsel (Claims II & V)*

Petitioner next raises several claims that counsel was ineffective in various respects. The Court should conclude that petitioner is not entitled to habeas relief on these claims.

1. *Clearly Established Law*

The Sixth Amendment right to counsel and the right to effective assistance of counsel protect the fundamental right to a fair trial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish the ineffective assistance of counsel, petitioner must show that: (1) counsel's errors were so serious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) counsel's deficient performance prejudiced the defense. *Id*. at 687. These two components are mixed questions of law and fact. *Id*. at 698. Further, "[t]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. If "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.* With respect to the performance prong of the *Strickland* test, a strong presumption exists that counsel's behavior lies within the wide range of reasonable professional assistance. *See id*. at 689; *see also O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994). "[D]efendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690. With respect to the prejudice prong, the reviewing court must determine, based on the totality of the evidence before the factfinder, "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id*. at 695. It is petitioner's burden to establish the elements of his ineffective assistance of counsel claim. *See United States v. Pierce*, 63 F.3d 818, 833 (6th Cir. 1995) (petitioner bears the burden of establishing counsel's ineffectiveness); *Lewis v. Alexander*, 11 F.3d 1349, 1352 (6th Cir. 1993) (same).

As the Supreme Court has recently explained, *Strickland* establishes a high burden that is difficult to meet, made more so when the deference required by § 2254(d)(1) is applied to review a state court's application of *Strickland*:

> "Surmounting Strickland's high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id*., at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.
>
> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id*., at 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles*, 556 U.S., at ----, 129 S.Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at ----, 129 S.Ct. at 1420 . Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Harrington v. Richter, 131 S. Ct. 770, 788 (2011).

2. *Trial Counsel (Claim II)*

a. Failure to Investigate

Petitioner first contends that counsel was ineffective for failing to investigate in a number of respects. For example, petitioner contends that counsel was ineffective for failing to investigate

the results of the polygraph examination conducted by the police. Petitioner contends that although the investigator officer told defense counsel that petitioner had failed the exam, the examiner told petitioner that he had passed. Petitioner contends that counsel failed to pursue this information and contact the examiner. However, petitioner cannot show how he was prejudiced by counsel's failure. Michigan categorically excludes from evidence the results of polygraph examinations. *See People v. Jones*, 468 Mich. 345, 355, 662 N.W.2d 376, 382 (2003); *People v. Kahley*, 277 Mich. App. 182, 183, 744 N.W.2d 194, 196 (2007). This *per se* rule excluding polygraph results does not infringe petitioner's right to present a defense. *See United States v. Scheffer*, 523 U.S. 303, 309-17 (1998). Recognizing this rule, petitioner argues that he was prejudiced because counsel's "error prevented him from gaining the support he needed from witnesses and presenting character witnesses[.]" Reply, at 5. Even assuming that petitioner could establish prejudice in this manner,[4] he has failed to offer anything other than speculation in support of his claim here. First, it is speculative that petitioner even passed the polygraph examination. Petitioner contends that he was *told* that he

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[4]In support of his argument, petitioner relies on the Michigan Supreme Court's explanation in *People v. Phillips*, 469 Mich. 390, 666 N.W.2d 657 (2003) (per curiam), in which the court explained:

> If the results of a polygraph examination indicate that a defendant might not have committed the crime, a victim could reconsider her identification testimony. For the same reason, a prosecutor could reconsider the decision to prosecute or offer a plea bargain. On the other hand, a defendant might use the results to convince character witnesses to testify on his behalf. Even if convicted, favorable polygraph results may help a defendant reconcile with his family or friends.

Id. at 395 n.3, 666 N.W.2d at 660 n.3. *Phillips* is inapposite. In that case, the court was considering an issue of statutory construction regarding MICH. COMP. LAWS § 776.21(5), which grants a defendant in a criminal sexual conduct case a statutory right to a polygraph. The portion of the court's opinion quoted above was merely the Supreme Court's speculation about the legislature's "reasons for drafting this provision in the manner in which it did." *Phillips*, 469 Mich. at 395 n.3, 666 N.W.2d at 660 n.3. Nothing in the Michigan Supreme Court's decision or reasoning suggests that an attorney's failure to investigate polygraph results can cause prejudice by making it more difficult for a defendant to secure character witnesses. Petitioner has cited, and I have found, no case from any court holding that a counsel's failure to investigate the results of a polygraph can cause prejudice in the manner suggested by petitioner.

passed by the examiner, but he has not presented an affidavit from the examiner, a copy of the polygraph report, or any other evidence showing that he in fact passed the police-conducted polygraph examination. The only evidence he relies on is the report that he passed a different polygraph examination during the post-conviction proceedings. These results, however, provide at most only minimal support for the contention that he passed an examination conducted by a different examiner years earlier. Further, petitioner's argument that favorable results on the polygraph may have made it possible for him to secure character or other witnesses is wholly speculative. Petitioner does not identify a single such witness who would have testified on his behalf if only he had known that petitioner passed a polygraph, much less does he provide any evidence regarding the substance of these speculative witnesses' testimony. Thus, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

Petitioner also contends that counsel was ineffective for failing to interview prosecution witness Mario Mahdi, petitioner's cousin, who despite being called by the prosecution actually testified favorably to petitioner. Petitioner contends that counsel's preparation with respect to Mahdi "was limited to a brief interview in [the] hallway of court just before court was to resume." Br. in Supp. of Pet., at 23. Again, however, petitioner has failed to identify any prejudice arising from counsel's allegedly inadequate preparation. Mahdi recanted his earlier statements to the police and testified favorably to petitioner at trial, supporting petitioner's alibi. Petitioner does not identify any additional, favorable evidence that counsel should have elicited from Mahdi.

Petitioner further contends that counsel failed to sufficiently interview his alibi witnesses. At trial, in addition to his alibi witnesses petitioner presented the testimony of a neighbor, who claimed that he was sitting on his porch until 12:00 or 12:30 on the night in question and did not see

petitioner leave the house. During closing argument, the prosecutor argued that despite this testimony, petitioner could have left his home through the back door, which the neighbor would not have seen. Petitioner contends that had counsel properly interviewed his alibi witnesses, he could have elicited testimony that the back door was broken and had been secured shut. Again, however, petitioner has presented no evidence to support this assertion. He presents no affidavit from an alibi witness attesting to this fact, and indeed does not even include such an averment in his own affidavit. A statement about the condition of the door in counsel's brief does not constitute evidence that any witness could or would have testified as petitioner contends. Because it is petitioner's burden to establish the elements of his ineffective assistance claim, *see Pierce*, 63 F.3d at 833, petitioner is not entitled to habeas relief on his failure to investigate claims.

b. Improper Advice

Petitioner next contends that counsel was ineffective for providing improper advice in a number of respects. First, petitioner contends that counsel improperly failed to seek a separate trial from codefendant LaToya Caulfield, advising petitioner that he would benefit from hearing some of the evidence introduced against Caulfield. Petitioner contends that Caulfield would have been his primary alibi witness, and that "[b]y failing to seek separate trials, Petitioner's best alibi witness was not available to testify on Petitioner's behalf." Br. in Supp. of Pet., at 24. Petitioner cannot establish that he was prejudiced or that counsel was deficient, for several reasons. First, petitioner cannot show a reasonable probability that a motion to sever would have been granted. Under Michigan law, "the decision to sever or join defendants lies within the discretion of the trial court." *People v. Hana*, 447 Mich. 325, 346, 524 N.W.2d 682, 690 (1994). There is no right to a separate trial, and "a strong policy favors joint trials in the interests of justice, judicial economy, and

administration." *People v. Harris*, 201 Mich. App. 147, 152, 505 N.W.2d 889, 892 (1993). A trial court is required to grant separate trials only where a defendant, through affidavit or offer of proof, demonstrates "clearly, affirmatively, and fully . . . that his substantial rights will be prejudiced" in the absence of severance. *Hana*, 447 Mich. at 346, 524 N.W.2d at 690. Petitioner has not made such a showing. Second, petitioner did, in effect, have a separate trial. Although he and Caulfield were tried jointly, they were tried before separate juries, precisely so that evidence admissible against only one of them would not be heard by the other's jury. Petitioner fails to explain why he could not call Caulfield under this arrangement, any less than if the trials had been completely separate. Third, petitioner cannot show that Caulfield would have testified in separate trials. Even in cases on direct review, a defendant seeking relief on the type of claim raised by petitioner must show that his codefendant in fact would have waived any Fifth Amendment privilege and actually testified at trial. *See Ross v. United States*, 339 F.3d 483, 493-94 (6th Cir. 2003). Here, although Caulfield's affidavit describes what she would testify to now, she does not aver that she was willing to waive her privilege against self-incrimination at the time of trial. *See* Br. in Supp. of Pet., Exs. 8 & 9. Finally, petitioner cannot show that, had Caulfield been willing to testify and been called by counsel, there is a reasonable probability that the result of his proceeding would have been different. Petitioner presented several alibi witnesses, each of whose testimony the jury rejected. Caulfield's additional alibi testimony would have been self-serving, as it served to exonerate both her and petitioner. This is not a case in which petitioner's co-defendant would have implicated herself while exonerating petitioner. There is no reasonable probability that the jury would have accepted Caulfield's testimony while rejecting petitioner's other alibi testimony. Thus, petitioner is not entitled to habeas relief on this claim.

Petitioner also contends that counsel failed to advise him about his right to testify. Specifically, petitioner avers:

> At no time before or during my trial did my lawyer ever discuss with me whether or not I would testify in my own defense. He never explained anything about that topic, i.e., my rights to testify or to remain silent; what it would mean to me, my case and the jury if I testified, or if I did not testify. He did not tell how I would be questioned in court by him, and then cross examined by the prosecutor; etc., etc., etc.

Br. in Supp. of Pet., Ex. 7, ¶ 17. This claim fails, for several reasons. First, at no point during the trial, particularly when counsel indicated that the defense rested, did petitioner indicate that he wished to testify or otherwise object to counsel's decision not to call him. In light of the presumption that trial counsel followed the professional rules of conduct, petitioner's silence weighs heavily against his claim. *See United States v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000); *United States v. Nohara*, 3 F.3d 1239, 1243 (9th Cir. 1993). Further, petitioner has presented no evidence, apart from his own self-serving affidavit, to support his claim that counsel did not inform him of his right to testify. *See Ashley v. United States*, 17 Fed. Appx. 306, 309, 2001 WL 966493, at *3 (6th Cir. Aug. 16, 2001). Likewise, petitioner has offered nothing to establish that he was prejudiced by counsel's alleged failure to advise him of his right to testify. Petitioner avers only that counsel failed to inform him of his rights. He does not aver that, had he been properly advised he would in fact have testified, much less does he aver what the purported testimony would have been or offer any reason to believe that there is a reasonable probability that the result of the proceeding would have been different had he testified. Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

c. Failure to Present Evidence

Petitioner next contends that counsel was ineffective for failing to present evidence to rebut

the prosecutor's theory that he and Simmons were fighting over the affections of Caulfield. Petitioner contends that his mother could have testified that he and Simmons had resolved their disagreement, and thus that the prosecutor's theory of petitioner's motive was wrong. The Court should conclude that petitioner is not entitled to habeas relief on this claim. Counsel's strategic decisions regarding what witnesses to call at trial are "virtually unchallengeable." *Awkal v. Mitchell*, 613 F.3d 629, 641 (6th Cir. 2010). The Court's "concern is not to decide, using hindsight, what [it] think[s] would have been the *best* approach at trial. Instead, [the Court] consider[s] only if the approach ultimately taken was within 'the wide range of reasonable professional assistance' given the circumstances." *English v. Romanowski*, 602 F.3d 714, 728 (6th Cir. 2010) (quoting *Strickland*, 466 U.S. at 689). Here, petitioner cannot show that counsel's decision to refuse to call petitioner's mother was unreasonable, or that he was prejudiced by the absence of this testimony. On the contrary, it is likely that the testimony of petitioner's mother would have hurt rather than helped petitioner's case.

As petitioner's mother, Tracy Nixon, indicates in her affidavit, petitioner told her in January 2005 that he suspected Simmons and Caulfield were having an affair. When he later learned that they were in fact having an affair, petitioner was "devastated," he and Simmons "became bitter enemies," and "[e]ach threatened physical harm to the other." Br. in Supp. of Pet, Ex. 11, ¶ 8. On a regular basis she would hear from family or friends "about the latest episode in Kenneth and Ronrico's 'beef.'" *Id.*, ¶ 9. This testimony would have bolstered the prosecutor's theory that petitioner had a motive for the crime against Simmons. Contrary to petitioner's argument, the affidavit of his mother does not establish that petitioner and Simmons "had reconciled their differences and were on friendly terms at the time of the fire." Reply, at 7. Rather, petitioner's

mother avers that she overheard petitioner's side of a telephone conversation in which petitioner said: "We are going to stop this beefing right now. You stay away from me, I'll stay away from you." Br. in Supp. of Pet., Ex. 11, ¶ 14. Even assuming that Tracy Nixon's hearsay account of this conversation would have been admissible, petitioner's statements do not indicate a reconciliation or that he and Simmons were on friendly terms. At best petitioner's statements indicate a cease-fire, one to which Simmons' response is unknown. Nothing in Tracy Nixon's affidavit establishes that petitioner and Simmons had reconciled or calls into question the prosecutor's motive theory, and indeed much of the affidavit supports the prosecutor's motive theory. Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

d. Failure to Object

Petitioner next contends that counsel was ineffective for failing to object to: (1) the prosecutor "transmuting" January's testimony into a confession made by petitioner; (2) the prosecutor's questioning of Hill suggesting that Hill had tampered with a witness; and (3) hearsay statements of Brandon Vaughn admitted through the testimony of other witnesses. The Court should conclude that petitioner is not entitled to habeas relief on this claim.

It is well established that counsel cannot be deemed ineffective for failing to raise a meritless objection. *See Bradley v. Birkett*, 192 Fed. Appx. 468, 475 (6th Cir. 2006); *Anderson v. Goeke*, 44 F.3d 675, 680 (8th Cir. 1995); *Burnett v. Collins*, 982 F.2d 922, 929 (5th Cir. 1993). Here, any objection by counsel on the bases suggested by petitioner would have been meritless. As explained above, the prosecutor did not "transmute" January's testimony; rather, the prosecutor properly argued on the basis of January's testimony, and did not misrepresent that testimony in any way. As also explained above, the prosecutor's questioning of Hill was not improper. With respect to the

hearsay statements of Brandon Vaughn, the Michigan Court of Appeals concluded that the testimony was admissible as a matter of state law. Specifically, the court concluded that Vaughn's statements to other witnesses were not hearsay under Rule 801(d)(1)(C) because they were statements of identification, and in any event were admissible as excited utterances under Rule 803(2). *See Nixon*, 2007 WL 624704, at *2-*3. It is well-established that "[a] determination of state law by a state appellate court is . . . binding in a federal habeas action." *Sarausad v. Porter*, 503 F.3d 822, 824 (9th Cir. 2007); *see also*, *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *Gall v. Parker*, 231 F.3d 265, 303 (6th Cir. 2000) ("Principles of comity and finality equally command that a habeas court can not revisit a state court's interpretation of state law."). Thus, in analyzing petitioner's ineffective assistance claim, the Michigan Court of Appeals's conclusion that the evidence was properly admitted is binding on this Court. *See Narlock v. Hofbauer*, 118 Fed. Appx. 34, 34 (6th Cir. 2004) (per curiam); *Basile v. Bowersox*, 125 F. Supp. 2d 930, 960 (E.D. Mo. 1999). Because the evidence was properly admitted under state law, petitioner cannot be deemed ineffective for failing to object. Accordingly, petitioner is not entitled to habeas relief on this claim.

3. *Appellate Counsel (Claim V)*

Petitioner also contends that his appellate counsel was ineffective for failing to raise on direct appeal the claims that petitioner raised in his state court motion for relief from judgment. In the appellate counsel context, to demonstrate prejudice petitioner must show a reasonable probability that his claims would have succeeded on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *Benning v. Warden*, 345 Fed. Appx. 149, 155-56 (6th Cir. 2009); *McCleese v. United States*,

75 F.3d 1174, 1180 (7th Cir. 1996). As explained above, each of petitioner's underlying claims is without merit, and thus petitioner cannot show that he was prejudiced by counsel's failure to raise them on direct appeal. Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

G. *Recommendation Regarding Certificate of Appealability*

1. *Legal Standard*

As amended by the Antiterrorism and Effective Death Penalty Act, section 2253 provides that a petitioner may not appeal a denial of an application for a writ of habeas corpus unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). The statute further provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). As the Sixth Circuit has noted, this language represents a codification of the Supreme Court's decision in *Barefoot v. Estelle*, 463 U.S. 880 (1983), and "[t]he AEDPA thus makes no change to the general showing required to obtain a certificate[.]" *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1073 (6th Cir. 1997); *accord Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Although the statute does not define what constitutes a "substantial showing" of a denial of a constitutional right, the burden on the petitioner is obviously less than the burden for establishing entitlement to the writ; otherwise, a certificate could never issue. Rather, the courts that have considered the issue have concluded that "'[a] substantial showing requires the applicant to "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues (in a different manner); or that the questions are adequate to deserve encouragement to proceed further."'" *Hicks v. Johnson*, 186 F.3d 634, 636 (5th Cir. 1999) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 755 (5th Cir. 1996) (quoting *Barefoot*, 463 U.S. at 893

n.4)); *accord Slack*, 529 U.S. at 483-84. Although the substantive standard is the same, "[t]he new Act does, however, require that certificates of appealability, unlike the former certificates of probable cause, specify which issues are appealable." *Lyons*, 105 F.3d at 1073. (citing 28 U.S.C. § 2253(c)(3)).

Effective December 1, 2009, the newly created Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a), 28 U.S.C. foll. § 2254. The rule tracks § 2253(c)(3)'s requirement that any grant of a certificate of appealability "state the specific issue or issues that satisfy the showing required by § 2253(c)(2)," Rule 11(a), but omits the requirement contained in the pre-amendment version of Federal Rule of Appellate Procedure 22(b)(1) that the court explain "why a certificate should not issue." FED. R. APP. P. 22(b)(1) (version effective prior to 2009 amendment); *see id.*, advisory committee note, 2009 amendments. In light of the new Rule 11 requirement that the Court either grant or deny the certificate of appealability at the time of its final adverse order, I include a recommendation regarding the certificate of appealability issue here.

2. *Analysis*

If the Court accepts my recommendation regarding the merits of petitioner's claims, the Court should also conclude that petitioner is not entitled to a certificate of appealability, for the reasons explained above. To the extent petitioner raises his newly discovered evidence and actual innocence claims as independent grounds for relief, it is not reasonably debatable that such claims are not cognizable on habeas review. With respect to petitioner's perjury claim, as explained above petitioner has failed to present any competent evidence that January committed perjury, and he has

failed to present any evidence whatsoever that the prosecutor knew of this alleged perjury. Thus, the resolution of this claim is not reasonably debatable. Further, because there was a good faith basis for the prosecutor's question to Hill regarding witness tampering, and because the question did not deprive petitioner of a fair trial in any event, the resolution of petitioner's prosecutorial misconduct claim is not reasonably debatable. Finally, for the reasons explained in detail above, the resolution of petitioner's various ineffective assistance of counsel claims is not reasonably debatable. Accordingly, the Court should conclude that petitioner is not entitled to a certificate of appealability.

H. *Conclusion*

In view of the foregoing, the Court should conclude that the state courts' resolution of petitioner's claims did not result in a decision which was contrary to, or which involved an unreasonable application of, clearly established federal law. Accordingly, the Court should deny petitioner's application for the writ of habeas corpus. If the Court accepts this recommendation, the Court should deny petitioner a certificate of appealability.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within fourteen (14) days of service of a copy hereof as provided for in FED. R. CIV. P. 72(b)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *See Willis v. Secretary of Health*

& Human Servs., 931 F.2d 390, 401 (6th Cir. 1991). *Smith v. Detroit Federation of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within fourteen (14) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

s/Paul J. Komives
PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated: 9/28/12

The undersigned certifies that a copy of the foregoing order was served on the attorneys of record and by electronic means or U.S. Mail on September 28, 2012.

s/Eddrey Butts
Case Manager

EXHIBIT 6E

Objections to the Report and Recommendation

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

KENNETH FITZGERALD NIXON,

Petitioner,

-v-

GREG MCQUIGGIN, Warden,

Respondent.
_____/

Case No. 10-cv-14652
Hon. AVERN COHN
Mag. Judge PAUL J. KOMIVES

PETITIONER'S OBJECTIONS TO
MAGISTRATE'S REPORT AND RECOMMENDATION

Petitioner Kenneth Fitzgerald Nixon, by and through his attorney, Sheldon Halpern, filed a Petition for Habeas Corpus. On September 28, 2012, Magistrate Paul J. Komives issued a Report and Recommendation recommending that Habeas Corpus be denied, and that no Certificate of Appealability should be granted. Petitioner presents the following Objections to Magistrate's Report and Recommendation:

1. **Objection 1. Factual background.** The Magistrate uses for his factual background the statement of facts filed by the prosecutor in a brief to the Michigan Court of Appeals. (R&R, 5-9). We submit that the duty of the federal court to independently determine the facts is not met by reading the prosecutor's brief instead of reading the actual transcripts. In this case, the prosecutor's rendition of "facts" is a highly edited, one-sided version of the testimony. We find it objectionable that this argumentative presentation, which has never been adopted as fair and correct by a state court, should be elevated to the same status as if it were state court findings.

Even if it had been a state court finding, the District Court has the duty to examine both sides of the case, not just one side.

3. One example is the treatment of evidence presented as to who had motives for burning the house. The magistrate judge by adopting the Respondent's statement of facts ignored evidence presented at trial that:

a) the dispute between Ronrico Simmons and Defendant had been exaggerated and was no longer an issue between the two men and even Simmons had to admit that the beef with Nixon was over and Nixon no longer posed a threat to him or his house on the day of the fire. (T III, 130); and,

b) on the day of the fire attack, Naomi Vaughn's daughter had gotten into a confrontation with an Bajah, an Arab child who lived in the neighborhood and which became intense with Bajah's dad coming over to Naomi and threatening her saying "this is how people's houses get shot up" and repeating the threat over and over again. (T II, 78-81, 119-122; T III, 106). When statements were first made to the police about who may have been responsible, both Naomi Vaughn and Ronrico Simmons could only think of Bajah's father as being motivated to harm her and her family. (T II, 81, 122-123). Not surprisingly, the prosecutor's version of facts somehow leaves out those facts.

4. **Objection 2. Actual Innocence-Due Process**. Petitioner advanced this issue to excuse any procedural default, the magistrate judge spent considerable time analyzing and rejecting a free standing claim of innocence but did not address the claim that Due Process is violated where a conviction is allowed to stand based upon

perjured testimony. See *Ortega v. Duncan,* 333 F.3d 102, 108 (2d Cir. 2003): ("[W]hen false testimony is provided by a government witness without the prosecution's knowledge, due process is violated only if the testimony was material and the court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." (internal quotation marks omitted)).

5. **Objection 3. Actual Innocence state court findings.** The magistrate opined that the statement of Mr. Crump did not have evidentiary value, being unsigned, but ignores that the state court had ruled it was newly discovered evidence, but concluded it would not make a different result probable. (Hrng, 07/17/2009, 32-33). Respondent did not appeal that state court finding, and is precluded from raising it now. *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696 (1999); *Turcheck v Amerifund FIN.*, 272 Mich. App. 341, 351 (2006). Established law provides that the state courts' findings are presumed correct and may be rebutted only by clear and convincing evidence. 28 U.S.C. §(s) 2254(d). The United States Supreme Court has noted that a disagreement with a state court factual finding is not grounds for a district court to overturn a state court finding unless it "was based on an unreasonable determination of the facts" in light of the state court record. *Harrington v. Richter*, 562 U. S. ___, 131 S.Ct. 770, (2011). Even then that is when it is a finding that was challenged on appeal. Here the state court finding was never challenged on appeal by either Petitioner or Respondent.

5. **Objection 4. Actual Innocence – evidentiary standards.** The magistrate made findings concerning and restricting the type of evidence the court may

consider when evaluating an actual innocence claim that is contrary to established United States Supreme Court case law. In evaluating the claim the magistrate failed to take heed of *House v. Bell*, 547 U.S. 518 (2006). This Court must consider "all the evidence, old and new, incriminating and exculpatory," without regard to whether it would necessarily be admitted under rules of evidence. *Id.* at 538 (quoting *Schlup*, 513 U.S. at 331-32) (internal quotation marks omitted). Based on this total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* (quoting *Schlup*, 513 U.S. at 329). "The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *Id.*

6. In this case, the prosecutor need the testimony of January as there was huge evidentiary gap in the prosecutor's case when trying to use Brandon Vaughn's testimony as it is impossible to reconcile "[o]n the night of the fire, Naomi Vaughn's thirteen year old son Brandon was in his bedroom when he heard a 'boom'" with "Brandon told him that he was standing on the front porch when he saw a car pull up in front of the house. He saw Bean get out of the passenger side of the car. He was holding a glass bottle with a cloth sticking out of the top. He threw the bottle at the house through the top window." (RRR, 5, quoting from Respondent's statement of facts in brief on appeal). The magistrate failed to consider all the evidence with respect to likely effect on a juror and the holding is objectively unreasonable.

7. **Objection 5. Actual Innocence – evidentiary hearing.** The magistrate made findings of credibility and reliability of evidence, as did the state

courts, without holding an evidentiary hearing. At every stage of the state court proceedings Petitioner requested an evidentiary hearing, and did not get it. He should get one now. *Michael Williams v. Taylor*, 529 U.S. 420; 120 S.Ct. 1479; 146 L.Ed.2d 435 (2000). It is unreasonable for the 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 U.S. 362; 120 S.Ct. 1495; 146 L.Ed.2d 389 (2000). "If, for example, a state court makes evidentiary findings without holding a hearing and giving petitioner 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).

8. **Objection 6. Prosecutorial Misconduct – perjured testimony** (Issue III). The Magistrate Judge's finding that the prosecutor was not aware of the perjury ignores the second half of the claim as noted in the Reply, that the prosecutor was aware that January had received a deal for testifying against Petitioner as January still had two legal proceedings pending at which he was providing his testimony to obtain favorable treatment, yet the jury was told he did not receive any consideration for his testimony. Petitioner submits that the prosecutor is charged with knowledge of what offers for testimony are provided to a witness. *Rosencrantz v Lafler*, 568 F.3d 577 (6th Cir. 2009). Here the prosecutor already knew that January was also gathering notes on two other inmates with the hope of offering testimony in those cases to improve his current conditions. (T IV, 65-66).

9. The Magistrate Judge also glossed over the citations provided in the brief and reply demonstrating that prosecutor's in general are fully aware of the inherent unreliability of jail house confessions and in specific that January makes notes to study cases and then try to come up with testimony to help himself. Combined, the prosecutor is shown to have known, or should have known, January's testimony was perjured and failed to correct the same: Here where the prosecutor tells the jury they may convict Petitioner on January's testimony alone, (T IV, 170-171), due process is implicated and the unfairness of the trial requires remedy. *Smith v Phillips*, 455 U.S. 209, 219 (1982).

10. Further objection is made as to the offer of evidence provided in the form of the Crump statement which was excluded as not being part of the record yet, as objected to above, the state court did included that statement as part of the record, did find it was newly discovered, just not reliable without holding an evidentiary hearing. Petitioner incorporates his objections stated above with respect to value of the Crump statement and the failure to conduct an evidentiary hearing.

11. **Objection 7. Prosecutorial Misconduct – comments and conduct** (Issue IV). A) Petitioner objects to formalistic approach in ruling that the prosecutor did not use the words "confessed" or "confession" and therefore no misconduct was present and the prosecutor is only making fair inference when telling the jury:

> "The point is no matter how you shake it, no matter how you look at Mr. January, he's telling you what was told to him, and that is evidence that you can use by itself to convict beyond a reasonable doubt." (T IV, 170-171),

12. The statement that the jury may use what January "what was told to him [by Petitioner], and that is evidence that you can use by itself to convict" is mischaracterization as January has no personal knowledge of the crime and testified that Petitioner did not confess, (T IV, 21) only that:

> "But any way, you know, he just was – he looked real nervous, you know. I told him that 'You know, you have that right to be nervous,' you know, dealing with the nature of the crime that he's supposed to be in here for, you know." (T IV, 22)

13. Looking nervous is not evidence of a crime upon which a jury may convict, a confession. Petitioner submits it is objectively unreasonable to permit prosecutors to commit misconduct by merely avoiding specific terms. More importantly, it is not the use of a specific term that is at issue, but whether the conduct had the effect of denying a fair trial. *Smith v Phillips,* supra.

14. Petitioner submits it was objectively unreasonable to implicate Petitioner to his prejudice in causing witness Mahdi's recantation. Neither the tape nor testimony from Mahdi made any logical or reasonably inferable connection to witness Hill. Asking witness Mahdi about being intimidated might be supported by the record, but that is not the issue, it is the prejudicial inference as to who was involved in witness intimidation. No one suggested, let alone connected Hill with a threat to Mahdi or others. The evidence submitted did not implicate nor involve witness Hill and there was no good faith basis to even support these questions to Hill; not even "[a] well reasoned suspicion that a circumstance is true." *United States v. Sampol*, 636 F.2d 621, 658 (D.C.

Cir. 1980). Objection is made to the conclusion there was a basis for the questions in the first place.

15. Objection is also made to the finding of no prejudice. It is hard to consider any matter more prejudicial then the invention of incidents of witness intimidation by the Petitioner. Federal courts have allowed jurors to reasonably rely upon such as substantive evidence of guilt. See *United States v. Hayden,* 85 F.3d 153 (4th Cir.1996); *United States v. Bein,* 728 F.2d 107, 114-15 (2d Cir.1984), (An overt act of witness intimidation by a defendant can be regarded as a tacit admission of guilt). It is more than probable that such substantive "evidence" critical to the determination of guilt or innocence reasonably affected the outcome of the proceedings entitling Petitioner to a new trial.

16. **Objection 8. Ineffective assistance of counsel. *failure to investigate and prepare for trial. a) Polygraph results.***

Objection is made to the exclusion of Michigan case law that discusses the prejudicial effect from not pursuing a polygraph or using polygraph results. The magistrate claims since this discussion came out of analysis of a statute the holding is inapposite. This holding is objectionable as the reasoning and holdings of *People v Phillips,* 469 Mich 390 (2003), connecting prejudice to polygraph examinations are not assailable. Rather then contest the holdings as being unreasonable or unpersuasive, the magistrate instead proclaims the holdings inapposite. *Phillips* discusses and demonstrates the connectivity between polygraph results and prejudice by interfering with the right to present a defense in the form of access and support from witnesses.

17. **b) *Interviewing witnesses prior to trial.*** The unfamiliarity of evidence and testimony prevented trial counsel from establishing that there was only one method of ingress and egress from Petitioner's alibi location and that entrance was watched the entire time and Petitioner never left. This permitted the prosecutor to say Petitioner exited out the back door. Such unfamiliarity also prevented trial counsel from establishing a timeline for the alibi that went through the time when the fire trucks had already arrived. This failure permitted the prosecutor to undermine the alibi witness by suggesting the witness had left before the fire had started and therefore left a gap of time unaccounted. Petitioner was denied effective assistance of counsel. *Sims v Livesay,* 970 F2d 1575 (CA 6, 1992). Petitioner requested hearings to establish these violations and was unreasonably denied and the magistrate judge, while acknowledging if the allegations if proven would justify relief, refused to conduct an evidentiary hearing on the issue of ineffective assistance of counsel. Where the state courts refused to hold a hearing even though properly requested, and there were cognizable claims of ineffective assistance of counsel raised, the federal court should hold a hearing. *Michael Williams v. Taylor*, 529 U.S. 420; 120 S.Ct. 1479; 146 L.Ed.2d 435 (2000); see also *In Re Troy Anthony Davis*, 557 U.S. ____ (2009) (No. 08-1443, August 17, 2009).

18. **Objection 9. Ineffective assistance of counsel, *providing erroneous advice.*** The magistrate judge denied this claim finding that there was no impediment to counsel calling LaToya Caulfield at trial. (RRR, 29). This finding

supports ineffective assistance of counsel as there can be little dispute her testimony supported the alibi, and would have also rebutted the evidentiary weakness exposed in the other alibi witness, and trial counsel did not present this evidence at trial based upon erroneous understanding of law in Michigan. This important evidence was available but not presented because of ineffective assistance of counsel.

19. Further objection is made concerning advice concerning the right to testify, especially in a case where an alibi defense is raised where the magistrate somehow infers that Petitioner would not testify in support of his defense, in effect requiring a transcript of proposed testimony. Such a position would be reasonable if a hearing had been held and the petitioner refused to testify, but that is not the present case. *Gonzales v Elo,* 233 F.3d 348, 350 (CA 6, 2000).

20. Petitioner further objects to credibility determinations being made by the magistrate judge without conducting an evidentiary hearing and then for substituting the magistrate's ruling on the evidence in the place of what a reasonable juror would have likely done with the evidence not heard at trial. *Kyles v. Whitley*, 514 U.S. 419, (1995).

21. **Objection 10. Ineffective assistance of counsel. *failure to present evidence;*** Petitioner objects to findings of credibility without holding a hearing with respect to the testimony of Tracy Nixon. The offer of proof was made to support an evidentiary hearing and provided context of the relationship between Petitioner and Ronrico Simmons that the jury did not hear, including that these were long lifetime friends who have had disagreements before and reconcile and as time

passed, their last dispute has also been reconciled. At a minimum this evidence would have rebutted the prosecutor's interpretation of Simmons' testimony and would have made a different result probable.

22. **Objection 11. Ineffective assistance of counsel. *failure to object***

Objection is made to the conclusion by the Magistrate that the objections not made were meritless and therefore there can be no ineffective assistance of counsel. The opposite must also be true, where the comments and evidence submitted by the prosecutor denied a fair trial, the failure of counsel to object and have those comments and evidence removed from trial is ineffective assistance of counsel. *United States v. Rusmisel*, 716 F.2d 301 (5th Cir. 1983); *Seehan v. State of Iowa*, 37 F.3d 389 (8th Cir. 1994); *Weygandt v. Ducharme*, 774 F.2d 1491 (9th Cir. 1985).

23. Petitioner also objects to the ruling that objections to Brandon Vaughn's testimony would not succeeded because the state court made proper evidence rulings. Petitioner submits that the evidence was excludable as the state courts were objectively unreasonable in finding that "15 to 30 minutes" is not enough time for a person to contrive, be improperly influenced and fabricate a statement. In Michigan, it is not the time that is the determining factor, rather it is the capacity to fabricate; where there is an opportunity for wrongful influencing by Simmons and others as the record provides before the statement is given, then that statement does not qualify as an excited utterance. *People v Smith*, 456 Mich 543, 550 (1998).

24. We cannot have confidence in the verdict where unreasonable actions taken by counsel deprived the jury of relevant and critical evidence that supported the

defense denying Petitioner of his constitutional rights. *McQueen v Scroggy*, 99 F3d 1302, 1311 (CA 6, 1996); *Kyles v Whitley*, 514 US 419, (1995).

25. **Objection 12. Ineffective assistance of appellate counsel** (Issue V). Objection is made to the finding that ineffective assistance of appellate counsel can not be demonstrated in this case because the underlying issues lack merit. The objections provided to the prior issues demonstrate the merit of each issue and prejudice suffered as a result thereof, the failure of appellate counsel to raise meritorious issues that would have been a different result probable constitutes ineffective assistance of appellate counsel.

26. **Objection 13. Evidentiary hearing.** Where the state courts refused to hold a hearing even though properly requested, and there were cognizable claims of ineffective assistance of counsel raised, a reasonable jurist could find that the federal court should hold a hearing. *Michael Williams v Taylor*, 529 U.S. 420; 120 S.Ct. 1479; 146 L.Ed.2d 435 (2000); see also *In Re Troy Anthony Davis*, 557 U.S. ____ (2009) (No. 08-1443, August 17, 2009).

27. **Objection 14. Certificate of appealability.** Not one of these issues is frivolous. A strong case can be made that Petitioner deserves relief on every single one of these issues. In *Miller-El v Cockrell*, 537 U.S. 322; 23 S.Ct. 102; 154 L.Ed.2d 931 (2003), the Court held that the 5th Circuit wrongly denied Petitioner Miller–El of a Certificate of Appealability. The United States Supreme Court held that a Certificate of Appealability should not be denied by the Court "merely because it believes the applicant will not demonstrate an entitlement to relief." While the Magistrate did reach

a conclusion that Petitioner should lose, that alone does not provide cause to deny the Certificate; if it did, no Habeas Corpus petitioner could ever appeal. The Magistrate's decision was not based on the simple application of clear precedent. The Magistrate had to engage in considerable analysis to reach its conclusion, in a 37 page ruling. To find there is nothing in those 37 pages that a reasonable jurist could disagree with, as the Magistrate did, is itself manifestly unreasonable.

RELIEF REQUESTED

WHEREFORE, Petitioner Kenneth Fitzgerald Nixon seeks this Court rule upon the Objections made and upon full consideration of the matters presented, this Honorable Court should hold such evidentiary hearings as this Court may deem necessary or appropriate; issue an Order that this Court will grant a Writ of Habeas Corpus unless the State vacates the conviction and holds a new trial within a specified time; and, Issue a Writ of Habeas Corpus freeing Petitioner from his unconstitutional confinement.

Respectfully submitted,

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Dated: October 11, 2011

CERTIFICATE OF ELECTRONIC FILING

Sheldon Halpern certifies that on 10-11-2012 he filed the Petitioner's Objections to Magistrate's Report and Recommendation with the ECF filing system of the United States District Court, with copies to be electronically sent to opposing counsel, Judge Cohn, and Magistrate Komives.

Respectfully submitted,

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