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

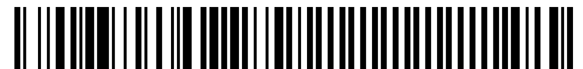
CITY OF DETROIT'S MOTION FOR THE ENTRY OF AN ORDER ENFORCING THE BAR DATE ORDER AND CONFIRMATION ORDER AGAINST MARK CRAIGHEAD

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 Mark Craighead* ("Motion"). In support of this Motion, the City respectfully states as follows:

I. Introduction

1. On August 31, 2023, Mark Craighead ("Craighead") filed a lawsuit against the City seeking monetary damages on account of alleged events which occurred in 2002, more than ten 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 Craighead 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 Craighead from asserting and prosecuting the claims described in the federal court action



against the City, or property of the City, and requiring Craighead 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 Sections 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. Craighead 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 supplied).

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. Craighead's Lawsuit Against the City

12. On August 31, 2023, Craighead filed a complaint ("Complaint") against the City and four named police officers and other unidentified employees of the Detroit Police Department ("Defendant Officers") in their individual capacity, in the United States District Court for the Eastern District of Michigan ("District Court"), commencing case number 23-12243 ("Lawsuit"). Complaint ¶¶ 12-13, PageID.4. 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, Craighead alleges that on June 27, 1997, Chole Pruett ("Pruett") had been shot four times in the torso and his body discovered in an apartment. Complaint ¶ 14, PageID.5. Craighead further alleges that on the same day, at 2:35 a.m., a witness reported that a truck was on fire in Redford Township and that the truck belonged to Pruett. Complaint ¶¶ 14-15, PageID.5.

14. Craighead asserts that he was working an overnight shift at Sam's Club Warehouse at the time of the murder and that he was interviewed in his home by Detroit police investigator Ronald Tate ("Investigator Tate") on August 29, 1997,

and cleared of having any responsibility for the crime. Complaint ¶¶18-19, PageID.5.

15. Craighead states that the case went unsolved and on March 18, 1999, Investigator Tate again questioned Craighead in his home and cleared him from being a suspect a second time. Complaint ¶ 21, PageID.6.

16. The Complaint states that in June 2000, a new team of investigators took on the case and, at that time, Lieutenant Jackson and Investigator Fisher came to Craighead's home and told him that he needed to come to the police station to answer questions about Pruett's death. Complaint ¶¶ 22-26, PageID.6.

17. Craighead states that even though he was tired and hungry and asked if he could come in the next day, the officers gave him no choice but to accompany them immediately. Complaint ¶¶ 27-31, PageID.6 – PageID.7.

18. Further, the Complaint alleges that Craighead was questioned without having been informed of his Miranda rights. Complaint ¶¶ 48-49, PageID.9.

19. Craighead asserts that even though he was not under arrest, he was not allowed to leave or make any phone calls. Complaint ¶¶ 56-59, PageID.10.

20. Craighead states that Defendant Officer Simon told him that he would not be allowed to leave until he took a polygraph test and that he would be released if took the test. Complaint ¶¶ 70-72, PageID.12.

21. Craighead states that he agreed to take the polygraph test so he could go home and when the examination ended, he was falsely told that he had failed the test by polygraph technician, Defendant Sims. Complaint ¶¶ 75, 82, PageID.12-PageID.13.

22. Craighead alleges that the actions of Defendants Fisher, Jackson, Simon, and Sims to falsely arrest him, deny him his right to counsel, wrongly incarcerate him, threaten him with life imprisonment, and withhold medical treatment, among other tactics, were designed to overbear his will. Complaint ¶ 95, PageID.15.

23. Craighead further alleges that Defendant Simon suggested to Craighead that he had accidentally killed Pruett during an argument that turned into a struggle for a gun and the gun went off. Complaint ¶ 101, PageID.16. Defendant Simon allegedly told Craighead that if he told her that happened, that it could be considered self-defense, and she could help him by getting the charges reduced to avoid facing a life sentence. *Id*. She also allegedly told him that if he did so, he could bond out and the fight the charges outside of jail. *Id*.

24. Further, Craighead states that after having no sleep for two days, being hungry, and having had his pleas for a lawyer and to leave ignored, he succumbed to the Defendants' efforts to coerce him to give a false confession, hoping he would

be released to resolve the situation out of custody. Complaint ¶ 103, PageID.16. Instead, he was charged with murder. Complaint ¶¶ 103-104, PageID.16.

25. Craighead alleges that Defendants caused him to be charged with murder despite knowing there was no evidence to support the charge. Complaint ¶ 105, PageID.17. Craighead asserts that his confession was demonstrably false. Complaint ¶ 106, PageID.17. He further asserts that the forensic evidence from the crime scene showed that Pruett was shot multiple times in an execution style shooting, rather than a single gunshot and that the victim was lying prone on the ground when some of the shots were fired. Complaint ¶ 106, PageID.17.

26. Craighead states that prior to trial he moved to "suppress the police statement that Mr. Craighead adopted after being arrested at his home three years after the crime had occurred and being held incommunicado, despite his brother's presence at the police station." **Exhibit 6E**, Craighead 2002 Appeal Brief (as defined below), p.2. The trial court, however, denied Craighead's request. **Exhibit 6E**, Craighead 2002 Appeal Brief, p.7.

27. Craighead's trial began in June 2002. **Exhibit 6C**, Docket of criminal trial, case number 00-007900, p.3.

28. Craighead asserts that at his trial in 2002 his defense "was that the statement extracted by Barbara Simon was false and that he was at work at the Sam's

Club in Farmington Hills the night Mr. Pruett was killed in Detroit." **Exhibit 6G**, Craighead 2010 Appeal Application, p.3.

29. Craighead asserts that he was convicted based on fabricated evidence and that his false confession was used against him. Complaint ¶¶ 126-127, PageID.21.

30. Craighead was found guilty in June 2002, and sentenced in August 2002. **Exhibit 6G**, Craighead 2010 Appeal Application, p.1.

31. Craighead asserts that he spent over seven years incarcerated for manslaughter, but he never gave up hope that he would someday be exonerated. Complaint ¶¶ 129-130, PageID.21.

C. Craighead's First Appeal

32. After he was convicted, Craighead filed a motion for "new trial raising the issues of new evidence and misleading evidence with regard to the initial ruling on the Motion to Suppress Mr. Craighead's statement." **Exhibit 6E**, Craighead 2002 Appeal Brief (as defined below), p.13; *see also* **Exhibit 6C**, docket of criminal trial, case number 00-007900, p. 4. The motion was denied on May 17, 2005. *Id.* Following this ruling, Craighead filed a motion for reconsideration on June 13, 2005, which was also denied on June 27, 2005. *Id.*

33. On September 15, 2002, Craighead filed his first appeal, *People of the State of Michigan v. Mark T. Craighead*, No. 243856. *See* **Exhibit 6D**, 2002 Appeal

Docket. Craighead's brief on appeal is attached as **Exhibit 6E** ("Craighead 2002 Appeal Brief").

34. Craighead requested that the Court of Appeals vacate his convictions or, in the alternative, reverse the convictions and remand for a "fair trial." Craighead 2002 Appeal Brief, p. 13.

35. In the Craighead 2002 Appeal Brief, Craighead asserted that:

> Mr. Craighead did not kill Pruitt [sic] and did not know who had. In 1997, he was working the night shift at Sam's Club on June 26th and June 27th and the building was locked during the shift, as it always was, so he could not have left undetected. He did not tell the police that he shot Pruitt [sic] and only signed the statement because his interrogator, Barbara Simon, told him he would be in prison for the rest of his life if he did not sign it. After being arrested, held overnight and not being allowed contact with anyone, he felt he had no choice but to comply with the police.

Craighead 2002 Appeal Brief, p.2; *see also* p.12 ("Mr. Craighead did not kill Pruitt [sic] and did not know who had killed him.").

36. Craighead further emphasized that "[n]othing in the statement that Simon read was true. He signed the statement because he was broken down and Simon told him he would otherwise be there for the rest of his life." Craighead 2002 Appeal Brief, p.12.

37. On appeal, Craighead also argued that his federal and state constitutional rights against unreasonable searches and seizures were violated when

he was arrested without a warrant or a showing of probable cause, and that his June 21, 2000, statement to the police was obtained as a result of the illegal arrest should have been suppressed. *People v. Craighead*, No. 243856, 2005 WL 3500831, at *2 (Mich. Ct. App. Dec. 22, 2005); Craighead 2002 Appeal Brief, pp. 14-22.

38. Craighead asserted claims against the City and its police officers in the Craighead 2002 Appeal Brief:

> Unfortunately, the police conduct in this case was all too familiar and has been found to be blatantly illegal. This is borne out by two particular documents. The first is the June 5, 2002 letter to Corporation Counsel Ruth Carter from Steven H. Rosenbaum, Chief Special Litigation Section of the United States Attorney's Office. In the June 5th letter, Attorney Rosenbaum indicated that the Detroit Police Department:
>
> > **"defines an arrest as 'a taking of an individual into custody for further investigation,** booking or prosecution', **this policy implicitly permits the arrest of an individual with less than probable cause as a means to facilitate an investigation.** Indeed, some former DPD employees informed us that it was acceptable practice to arrest suspects without probable cause and then continue to investigate the case to develop probable cause prior to arraignment. **Gathering additional evidence after an arrest in order to establish probable cause for that arrest is unconstitutional. County of Riverside v McLaughlin,** 500 U.S. 44, 56 (1991)" (emphasis added) (Letter attached as Appendix D)

> The second location for an explanation is the Consent Judgment that Judge Julian Abele Cook entered, which required, among many other relevant requirements, that officers must be instructed "that the **`possibility' that an individual committed a crime does not rise to the level of probable cause."** (emphasis added) The Consent Judgment further instructed that the officers be given:
>
> > "examples of scenarios faced by DPD officers and interactive exercises that illustrate proper police-community interactions, including scenarios which distinguish an investigatory stop from an arrest by the scope and duration of the police interaction; **between probable cause, reasonable suspicion and mere speculation; and voluntary consent from mere acquiescence to police authority."** (emphasis added) (Consent Decree attached as Appendix E)
>
> The facts of this case bear out all too well the problems that were infecting the Detroit Police Department at the time of this investigation and which ultimately led to entry of the Consent Judgment. Officers Fisher and Jackson engaged in a textbook list of illegal tactics in order to extract an incriminating statement from Mr. Craighead because they believed, i.e., speculated that he was responsible for the shooting.

Craighead 2002 Appeal Brief, pp.15-16 (emphasis supplied).

39. Craighead asserted additional claims against the City later in his brief:

> The trial court further failed to take into account the circumstances surrounding the arrest. Officer Jackson admitted that the Detroit Police do not always obtain a warrant even when they have probable cause for an arrest. Jackson's statement underlies the problems besieging the Detroit police department and the citizens of the City whose rights are being trampled every day by a cavalier

attitude toward the Constitution.

Craighead 2002 Appeal Brief, p. 20.

40. The appeals court disagreed with Craighead's arguments. *People v. Craighead*, No. 243856, 2005 WL 3500831, at *2 (Mich. Ct. App. Dec. 22, 2005). Further, the appeals court found that given the circumstances, the trial court did not clearly err when it found that defendant knowingly and voluntarily waived his Miranda rights and affirmed the lower court in its opinion dated December 22, 2005. *Id.*

41. Craighead sought leave to appeal to the Michigan Supreme Court, but leave was denied on May 2, 2007, in docket no. 130450. *People v. Craighead*, 477 Mich. 1124, 730 N.W.2d 245, 246 (2007)

D. Craighead Retains the Michigan Innocence Clinic

42. In December 2009, Craighead, represented by the Michigan Innocence Clinic, filed his initial motion for relief from judgment, asserting that he was entitled to relief from judgment based upon newly discovered evidence, which consisted of telephone records from Sam's Club in Farmington Hills in June 1997 that purportedly established that he made four telephone calls from inside of the locked store on the night of Pruett's death such that he could not have killed Pruett. *People v. Craighead*, No. 356393, 2021 WL 5027978, at *1 (Mich. Ct. App. Oct. 28, 2021), *appeal denied*, 509 Mich. 974, 972 N.W.2d 845 (2022); **Exhibit 6G**, Craighead 2010

Appeal Application, p.11. After an evidentiary hearing, the trial court denied Craighead's motion, reasoning that defendant failed to present credible evidence that he was the one who made telephone calls from inside the locked store on the night of Pruett's death such that there was no reasonable probability that the evidence would have affected the outcome of defendant's jury trial. *Id.* The trial court's ruling is set forth on pp.6-8 of the Plaintiff-Appellee's Brief in Opposition to Defendant's Delayed Application for Leave to Appeal, **Exhibit 6H**.

E. Craighead's Second Appeal

43. On December 6, 2010, Craighead filed another appeal. *People of the State of Michigan v. Mark T. Craighead*, No. 301465. *See* **Exhibit 6F,** 2010 Appeal Docket. Craighead's Delayed Application for Leave to Appeal is attached as **Exhibit 6G** ("Craighead 2010 Appeal Application.").

44. In the 2010 appeal, Craighead was represented by the University of Michigan Innocence Claim and attorney Bridget McCormack, who later became the Chief Justice of the Michigan Supreme Court. *See* Craighead 2010 Appeal Application, cover page.

45. In the 2010 appeal, Craighead asserted that "[i]n light of the compelling newly discovered evidence of Mr. Craighead's innocence, and the near certainty that this evidence would have led to a different outcome at trial, Mr. Craighead asks this

Court grant this application for leave to appeal . . . and order a new trial in this case." Craighead 2010 Appeal Application, p.vii.

46. Craighead plainly alleges that he "served more than seven years in prison for a crime that he did not commit." Craighead 2010 Appeal Application, p.1.

47. The alleged newly discovered evidence was "phone records newly discovered by the Michigan Innocence Clinic" which allegedly "establish that Mr. Craighead made a telephone call from Sam's Club to his friend . . . just eight minutes before Mr. Pruett's truck was discovered by police, engulfed in flames, in a vacant lot behind an elementary school in Redford Township." Craighead 2010 Appeal Application, pp.1-2; *see also* Craighead 2010 Appeal Application, pp.4, 7-11.

48. Based on the new evidence, Craighead asked the court to reverse the trial court's denial of a motion for relief from judgment and order a new trial where the phone records could be presented to a jury. **Exhibit 6I**, Reply Brief in Support of 2010 Application for Leave to Appeal, pp.8-9. Leave to appeal was denied by the appeals court on November 22, 2011, based on Craighead's failure to meet the burden for establishing an entitlement to relief under court rules. *See* **Exhibit 6J**, November 22, 2011 Court of Appeals Order.

49. Craighead sought appeal to the Michigan Supreme Court, but on October 15, 2012, the Supreme Court agreed with the court of appeals and denied his application for leave to appeal for the same reason. Craighead then further sought

reconsideration by the Supreme Court and reconsideration was denied on January 25, 2013, in docket no. 144415. **Exhibit 6K,** October 5, 2012 and January 25, 2013 Supreme Court Orders.

F. Craighead's Third Appeal

50. On February 24, 2020, Craighead filed another motion for relief from judgment in the trial court which was ultimately granted on February 4, 2021. *See People v. Craighead*, No. 356393, 2021 WL 5027978, at *1 (Mich. Ct. App. Oct. 28, 2021), *appeal denied*, 509 Mich. 974, 972 N.W.2d 845 (2022).

51. This was the third appeal arising out of the shooting death of Chole Pruett on or about June 27, 1997.

52. With the continuing assistance of the Michigan Innocence Clinic, on June 1, 2023, Craighead asserts he was awarded a Certificate of Innocence. Complaint ¶¶ 131-132, PageID.21.

G. Craighead's Claims Against the City

53. The Complaint contains 10 counts.

54. Count I asserts a claim under 42 U.S.C. § 1983 for coerced confession in violation of the Fifth Amendment. In this count, Craighead asserts, among other things, that "Defendant City of Detroit had notice of a widespread practice by officers and agents of the Detroit Police Department under which individuals like Plaintiff who were suspected of criminal activity were routinely coerced against their

will to implicate themselves in crimes of which they were innocent." Complaint, ¶¶ 138-151, PageID.23 – PageID.26.

55. Count II asserts a similar claim under 42 U.S.C. § 1983 for coerced confession in violation of Fourteenth Amendment. Complaint, ¶¶ 152- 157, PageID.27 – PageID.28.

56. Count III asserts a claim under 42 U.S.C. § 1983 for Fourteenth Amendment Due Process. In this count, Craighead asserts that as a direct and proximate result of Defendant Officers of false inculpatory evidence, acting pursuant to the customs, policies and/or practices of the City, the Defendant Officers violated Craighead's due process rights. Complaint, ¶¶ 158-164, PageID.28 – PageID.30.

57. Count IV asserts a claim under 42 U.S.C. § 1983 for Fourth and Fourteenth Amendment – Unreasonable Search and Seizure. Here, Craighead asserts that the Defendant Officers exerted influence to perpetuate a criminal prosecution against Craighead that was lacking in probable cause in spite of the fact that they knew Craighead was innocent. Complaint, ¶¶ 165-171, PageID.30 – PageID.32.

58. Count V asserts a claim under 42 U.S.C. § 1983 for failure to intervene because the Defendant Officers allegedly stood by without intervening to prevent the violation of Plaintiff's constitutional rights. Complaint, ¶¶ 172 - 177, PageID.32 – PageID.33.

59. Count VI asserts a claim under 42 U.S.C. § 1983 for supervisor liability because Supervisor Defendant Jackson allegedly gave direct orders that violated Craighead's constitutional rights. Complaint, ¶¶178 - 180, PageID.31– PageID.35.

60. Count VII asserts a claim under 42 U.S.C. § 1983 for conspiracy to deprive constitutional rights. Complaint, ¶¶ 182- 188, PageID.35 – PageID.36.

61. Count VIII asserts a claim under 42 U.S.C § 1983 for Municipal Liability Under *Monell*. In this Count, Craighead asserts that the City enabled and approved flawed and erroneous police investigative methods that allegedly led to Craighead's wrongful conviction. Complaint, ¶¶ 189 – 197, PageID.36 – PageID.39.

62. Count IX asserts a State Law Claim for Malicious Prosecution because the Defendant Officers falsely accused Craighead of criminal activity. Complaint, ¶¶198 – 205, PageID.40 – PageID.41.

63. Count X asserts a State Law Claim for Civil Conspiracy because the Defendant Officers allegedly participated in a joint malicious prosecution of Craighead. Complaint, ¶¶ 206-210, PageID.42 – PageID.43.

III. Argument

64. Craighead 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.

65. Under the "fair contemplation" test, Craighead's claim arose before the City's bankruptcy filing because, prior to the City's filing, Craighead "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, during his trial and through two appeals, Craighead had been arguing that he was innocent and that his confession was illegally obtained.

66. 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);[1] *Burton v. Sanders*, No. 20-11948, 2021 WL 168543, at *4-6 (E.D. Mich. Jan. 1, 2021).

67. This issue has also arisen repeatedly in the City's bankruptcy case in similar motions to enforce the plan and bar date order. *See* Doc. Nos. 11159 (Siner), 13000 (Ricks), 13691 (Chancellor). 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 (Siner), 13025 (Ricks), 13751 (Chancellor) (orders granting motions referenced above) and **Exhibit 6L,** Doc. No. 13792 (Hearing Transcript on Ricks); **Exhibit 6M,** Doc. No. 13793 (Hearing Transcript on Chancellor).

68. Here, there are numerous instances of Craighead asserting the same types of claims that are raised in the Complaint in public court filings prior to the

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[1] The instant facts are similar to the facts in *Monson*. Indeed, Craighead alleged that "Defendant Simon was also responsible for Lamarr Monson's wrongful conviction. Defendant Simon interrogated Monson for hours, and eventually wrote out a false statement in which Monon admitted inculpatory information about the murder of Christina Brown, and which omitted Monson's alibi." Complaint ¶ 124. This Court should follow the *Monson* court and hold that Craighead's claims were discharged.

City's bankruptcy filing. In both the Complaint and in his public court filings, appeals and arguments prior to the City's bankruptcy case, Craighead claims that he is innocent, that his confession was illegally obtained and that the Detroit police engaged in illegal tactics. *Compare* Complaint, ¶¶ 138-51, PageID.23-PageID.26; Complaint, ¶¶ 158-64, PageID.28-PageID.30; Complaint, ¶¶ 189-97, PageID.36-PageID.39 and Craighead 2002 Appeal Brief, pp. 2, 15-16, 20; Craighead 2010 Appeal Application, pp.1-2.

69. In short, not only could Craighead fairly contemplate the claims in the complaint prior to the City's bankruptcy case, he wrote and argued them repeatedly in public court filings and arguments.

70. Thus, as in each of the prior cases before this Court, Craighead 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.

71. 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.

72. Consequently, Craighead 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 Craighead may have had were discharged, and the Plan enjoins Craighead from pursuing them. The Bar Date Order also forever barred, estopped, and enjoined Craighead from pursuing the claims asserted in the Lawsuits.

73. Even if Craighead 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 Craighead is, or would have been, permitted to commence and prosecute the Lawsuit against the City or its property.

IV. Conclusion

74. 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 Craighead 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 Craighead from asserting the claims alleged in, or

claims related to, the Lawsuit against the City or property of the City; and (c) prohibiting Craighead 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: October 27, 2023

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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

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	Docket in the Federal Court Lawsuit
Exhibit 6C	Docket of criminal trial, case number 00-007900
Exhibit 6D	2002 Appeal Docket
Exhibit 6E	Craighead 2002 Appeal Brief
Exhibit 6F	2010 Appeal Docket
Exhibit 6G	Craighead 2010 Appeal Application
Exhibit 6H	Plaintiff-Appellee's Brief in Opposition to Defendant's Delayed Application for Leave to Appeal

Exhibit 6I	Reply Brief in Support of 2010 Application for Leave to Appeal.
Exhibit 6J	November 22, 2011 Court of Appeals Order
Exhibit 6K	October 5, 2012 and January 25, 2013 Supreme Court Orders
Exhibit 6L	Hearing Transcript on Ricks
Exhibit 6M	Hearing Transcript on Chancellor

EXHIBIT 1 – PROPOSED ORDER

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

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

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 Mark Craighead* ("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, Mark Craighead shall dismiss, or cause to be dismissed, with prejudice the City of Detroit and the Defendant Officers (as such term is defined in the Complaint) in their official

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

capacity from the case captioned as *Mark Craighead v. City of Detroit, et al.,* filed in the United States District Court for the Eastern District of Michigan and assigned case number 23-12243 ("Lawsuit").

3. Mark Craighead 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. Mark Craighead 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: City of Detroit, Michigan, Debtor.	Bankruptcy Case No. 13-53846 Judge Thomas J. Tucker 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 MARK CRAIGHEAD

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 Mark Craighead.

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 Mark Craighead,* 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
Marc N. Swanson (P71149)
150 West Jefferson, Suite 2500
Detroit, Michigan 48226
Telephone: (313) 496-7591
Facsimile: (313) 496-8451
swansonm@millercanfield.com

Dated: October 27, 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 October 27, 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 MARK CRAIGHEAD** upon counsel for Mark Craighead, via the Court's CM/ECF service and in the manner described below:

Via first class mail and email:

Arthur Loevy
Jon Loevy
Rachel Brady
Russell Ainsworth
Megan Colleen Pierce
Loevy & Loevy
311 North Aberdeen
3rd Floor
Chicago, IL 60607
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Email: russell@loevy.com
Email: megan@loevy.com

DATED: October 27, 2023

By: /s/ Marc N. Swanson

Marc N. Swanson (P71149)
150 West Jefferson, Suite 2500
Detroit, Michigan 48226
Telephone: (313) 496-7591
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EXHIBIT 5 – NONE

Exhibit 6A - Complaint

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

MARK CRAIGHEAD, Plaintiff, v. CITY OF DETROIT, FORMER INVESTIGATOR BARBARA SIMON, FORMER INVESTIGATOR JAMES FISHER, FORMER LIEUTENANT BOB JACKSON, POLYGRAPH OPERATOR ANDREW SIMS, AND OTHER AS-OF-YET-UNKNOWN EMPLOYEES OF THE CITY OF DETROIT, Defendants.	No.

COMPLAINT & DEMAND FOR JURY TRIAL

NOW COMES Plaintiff, MARK CRAIGHEAD, by and through his attorneys, LOEVY & LOEVY, complaining of Defendants CITY OF DETROIT, FORMER INVESTIGATOR BARBARA SIMON, FORMER INVESTIGATOR JAMES FISHER, FORMER LIEUTENANT BOB JACKSON, FORMER POLYGRAPH OPERATOR ANDREW SIMS, and OTHER AS-OF-YET UNKNOWN EMPLOYEES OF THE CITY OF DETROIT, and alleges as follows:

INTRODUCTION

1. Plaintiff Mark Craighead was convicted of a murder that he did not commit. As a result, Mr. Craighead was forced to spend over seven years wrongfully incarcerated.

2. Mr. Craighead was 41 years old, gainfully employed, married, and the father to four children when he was falsely arrested for murder. He had no prior criminal history and had never been arrested in his life.

3. The only evidence used to convict Mr. Craighead came from a false confession coerced by Defendants, including the now notoriously corrupt detective Barbara Simon.

4. Defendant Simon has now had four murder convictions overturned based on findings that she coerced suspects into making false confessions.

5. Eventually, Mr. Craighead persevered and was able to obtain a Certificate of Innocence based on employment and telephone records establishing his alibi that he was at work at the time of the murder.

6. Finally a free man, Mr. Craighead now seeks redress for his years of wrongful incarceration and the shame and damage to his reputation wrought by being falsely branded a murder.

7. In addition to compensating Mr. Craighead for the years that he spent wrongfully convicted of a 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 Mark Craighead's constitutional and state-law rights.

JURISDICTION AND VENUE

8. 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.

9. 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).

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

THE PARTIES

11. Plaintiff Mark Craighead is 64 years old. At the time of his false arrest in June 2000, Mr. Craighead was employed by Daimler Chrysler and coached youth football. He was 41 years old, married, and had a 19 year-old daughter, 11 year-old daughter, 5 year-old daughter, and a 2 year-old son. Before his arrest on

murder charges, Mr. Craighead had never been arrested and had no criminal history of any kind whatsoever.

12. At all times relevant hereto, Defendants Simon, Fisher, Jackson, Sims, 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, 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.

13. 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, 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 Crime and Initial Investigation

14. On June 27, 1997, victim Chole Pruett's body was discovered in an apartment. He had been shot four times in the torso.

15. On that same day, at 2:35 a.m., a witness reported that a truck was on fire in Redford Township. The truck belonged to Pruett.

16. As part of the initial investigation in 1997, police questioned over 25 people, including Mr. Craighead.

17. Mr. Craighead was a friend of Pruett's, and willingly answered questions about Pruett's death.

18. Mr. Craighead had nothing to hide. At the time of the murder, he was working an overnight shift at a Sam's Club Warehouse. The warehouse was locked during the entirety of his shift; any attempt to open one of the doors would have set off an alarm.

19. Detroit police investigator Ronald Tate interviewed Mr. Craighead at his home on August 29, 1997, and cleared him from having any responsibility for the crime.

20. During that interview, Investigator Tate had Mr. Craighead sign a statement.

21. The case went unsolved. On March 18, 1999, Investigator Tate reinterviewed Mr. Craighead and again questioned him at his home. As he did in 1997, Investigator Tate cleared Plaintiff from being a suspect a second time.

22. In June 2000, however, a new team of investigators took on the case.

23. On June 20, 2000, Mr. Craighead was home after work, doing some tasks around the house. Then he and his brother Randle went to his wife's beauty salon and then to a football field where Plaintiff would coach youth football.

24. Upon arriving home around 6 p.m. on June 20, 2000, Mr. Craighead saw two men, later identified as Defendant Lieutenant Jackson and Defendant Investigator Fisher, on his porch.

25. The men identified themselves as police investigators and said they were looking for Mark Craighead.

26. When Mr. Craighead identified himself, the investigators said they needed him to come to the police station to answer questions about Pruitt's death.

27. In response, Mr. Craighead told the investigators that he could not come down to the station that day because he was tired and hungry after working a 10-hour shift.

28. Mr. Craighead was indeed tired. The night before his encounter with Defendants Jackson and Fisher, Plaintiff slept approximately 3 hours before rising at 3 a.m. to prepare for the day, and then working his 5 a.m. to 3 p.m. shift.

29. After finishing his shift, Mr. Craighead had gone house hunting with his wife until about 9:30 or 10 p.m.

30. Mr. Craighead asked Defendants Fisher and Jackson if he could come down to the police station the next day after he got off work at 3 p.m.

31. Defendants Jackson and Fisher told Plaintiff no, that he had no choice but to go to the station with them.

32. At the time, Defendants had no probable cause whatsoever to suspect Mr. Craighead of involvement in Pruett's murder or any other crime.

33. Mr. Craighead repeated to Defendants that he was tired after working all day, and that he had not slept much the night before because he and his wife had been house hunting until late.

34. Mr. Craighead also told the Defendants that he was hungry because he had not eaten since that morning, and that he was dirty from working all day.

35. Mr. Craighead again offered to the Defendants that he would come down to the station the following day.

36. Defendant Fisher then told Mr. Craighead that he had no choice but to come to the station for questioning.

37. Mr. Craighead asked the Defendants if he could go inside to change clothes and make a phone call.

38. The Defendants told Mr. Craighead no, that he could not go inside his house, and positioned themselves to block him from accessing his home from the porch.

39. Mr. Craighead continued to request that his interview be delayed until the following day because he was tired, hungry, and dirty.

40. Again, Defendant Fisher instructed Mr. Craighead that he had to come to the station.

41. Mr. Craighead stated that he wanted to go inside to call his lawyer. The Defendants refused that request.

42. Mr. Craighead then asked if the questioning could be conducted at his house rather than the police station downtown. He told the Defendants that Investigator Tate had questioned him at his house on both prior occasions.

43. Defendant Fisher told Mr. Craighead that's the way the old homicide did it, but they are the new homicide and they do things differently, or words to that effect.

44. Defendant Jackson then told Mr. Craighead he could either ride down with them, or ride down in a patrol car, and radioed for a patrol car to come to Mr. Craighead's house.

45. Feeling that he had no choice but to accompany the Defendants, Mr. Craighead asked if his brother could come with him.

46. Defendant Fisher stated that Mr. Craighead's brother could ride separately to the station in his own car.

47. Mr. Craighead then got into the Defendants' car. He was directed to sit in the backseat with Defendant Fisher, while Defendant Jackson drove them to the police station at 1300 Beaubien.

48. During the ride to the police station, Defendants Fisher and Jackson questioned Mr. Craighead about the Pruett homicide.

49. These Defendants did not read Mr. Craighead his *Miranda* warnings before questioning him in the car ride about the murder.

50. When they arrived at the station, Defendants Jackson and Fisher walked Mr. Craighead into the first floor of the police station and allowed Mr. Craighead's brother to follow them inside.

51. Defendants Jackson and Fisher took Mr. Craighead onto an elevator. When Mr. Craighead's brother tried to accompany them, the Defendants told him that he could not proceed past the first floor, but that Mr. Craighead would not be upstairs for long.

52. The Defendants took Mr. Craighead to Squad Seven upstairs.

53. Defendant Fisher directed Plaintiff to sit in a chair next to a desk and began filling out paperwork. During the course of filling out that paperwork,

Defendant Fisher asked Mr. Craighead questions about his personal information and his background.

54. Then Defendant Jackson began questioning Mr. Craighead about the Pruett murder.

55. Defendant Jackson told Plaintiff that this was a three year-old homicide that they needed to close.

56. Mr. Craighead asked if he could go home if he wasn't under arrest, or words to that effect.

57. The Defendants did not allow Mr. Craighead to leave.

58. Mr. Craighead asked again, asking both to go home as well as to call his attorney and his wife.

59. The Defendants again did not allow Mr. Craighead to call his attorney or his wife or to leave.

60. Mr. Craighead then sat at the desk for approximately 30 minutes. While sitting there, Mr. Craighead asked Defendant Jackson if he could leave now.

61. Defendant Jackson responded that it was Defendant Fisher's case, Defendant Fisher was on the phone, and he would finish with Mr. Craighead when he was off the phone.

62. Mr. Craighead was moved to an empty desk where he waited until Defendant Simon came to talk to him.

63. Defendant Simon sat down at the unoccupied desk next to Mr. Craighead and started questioning him.

64. Up to this point in time, no one (including Defendant Simon) had provided Plaintiff with his *Miranda* rights.

65. Mr. Craighead did not respond to Defendant Simon's questions. Instead, he asked to call his attorney, and to go home, telling her that he had been told he was not under arrest.

66. Defendant Simon ignored Mr. Craighead's request for an attorney and to leave, and continued asking him questions.

67. When Mr. Craighead invoked his right to silence and did not answer her questions, Defendant Simon locked Plaintiff in a room in Squad Seven, leaving him there for approximately two to three hours.

68. When Mr. Craighead pounded on the door to be released, Defendant Simon told him that he would not be able to go home or go to work, and that he would not be allowed a phone call until he started cooperating. Defendant Simon told him to sit down and shut up.

69. When Defendant Simon finally released Mr. Craighead from that room, he informed her that he had a migraine headache, he was tired and hungry, and his back was hurting. Mr. Craighead asked again to go home.

70. Defendant Simon responded by telling him that would not go anywhere until he took a polygraph test. Defendant Simon told Mr. Craighead that she could hold him for three or four days and he would lose his job at Chrysler as a result.

71. At the time, Mr. Craighead had not completed his 90-day probationary period at Chrysler (a program Chrysler implemented for all new employees in Mr. Craighead's role), and feared that she was correct and he would lose his job if he did not appear for work.

72. Defendant Simon told Mr. Craighead that, on the other hand, if he agreed to take the polygraph test, she would release him immediately upon completion of the test.

73. Mr. Craighead said he was not in condition to take a polygraph test, but if he was allowed to sleep he would return the following day and take it.

74. Defendant Simon reiterated that the only way he would be allowed to go home and go to work is if he took the polygraph test that night.

75. As a result of the coercion he had experienced thus far, Mr. Craighead agreed to take the polygraph test so that he could go home.

76. Defendant Simon proceeded to return Mr. Craighead to the same locked room, leaving him there for approximately an hour and a half.

77. At approximately 1 a.m. on June 21, Defendant Simon removed Plaintiff from the locked room, handcuffed him, and transported him to a different police facility on Brush Street to take a polygraph test.

78. Once at the polygraph testing facility, Plaintiff was once again left alone in a room while Defendants Simon and Defendant Andrew Sims met alone.

79. Defendant Sims then entered the room where Plaintiff was waiting and questioned Mr. Craighead for about an hour.

80. Defendant Sims then administered the polygraph exam to Mr. Craighead.

81. When the exam ended, Defendant Sims left the room, and then returned to tell Mr. Craighead that polygraph exams are extremely accurate, that juries will believe Defendant Sims's testimony about the polygraph results because he is a licensed polygraph technician, and that polygraph results are admissible in court.

82. Defendant Sims then falsely reported to Mr. Craighead that he had failed the polygraph exam.

83. Defendant Sims then informed Mr. Craighead that the polygraph results would be admissible as evidence against him in the Pruett murder case, and that he needed to talk in order to avoid going to jail for the rest of his life without parole, or words to that effect.

84. Mr. Craighead still refused to falsely implicate himself in the crime.

85. Defendant Sims then left, and Defendant Simon returned.

86. Defendant Simon told Mr. Craighead that his wife would find herself a new husband, and that his children would be calling someone else daddy unless he confessed what he had done, or words to that effect.

87. Defendant Simon threatened Mr. Craighead that if he did not confess, he would go to jail for the rest of his life without parole, or words to that effect.

88. In response, Mr. Craighead asked Defendant Simon if she would release him, as she'd promised to do if he took the polygraph test.

89. Defendant Simon laughed, told Mr. Craighead no, and instead handcuffed him and brought him back to 1300 Beaubien.

90. Back downtown, Defendant Simon brought Mr. Craighead to the ninth floor, where he was fingerprinted and placed in a cell.

91. Mr. Craighead remained in that cell, unable to sleep, until approximately 11 a.m. the next day, when Defendant Fisher removed him from his cell.

92. When Defendant Fisher arrived, Plaintiff informed him that he had a bad headache and required medication for it. Mr. Craighead also asked him for his attorney.

93. Rather than respond, Defendant Fisher told Mr. Craighead that he heard Plaintiff had failed his polygraph test, and that he should help himself confessing what he had done, or words to that effect.

94. Defendant Fisher brought Mr. Craighead down to Squad Seven and turned him over to Defendant Simon.

95. The actions by Defendants Fisher, Jackson, Simon and Sims to falsely arrest Mr. Craighead, deny him his right to counsel, wrongly incarcerate him, threaten him with life imprisonment, withhold medical treatment, among other tactics, were designed to overbear Plaintiff's will.

96. When Mr. Craighead encountered Defendant Simon a little after 11 a.m. on June 21, he had not received any food during his approximately 17 hours in custody, and he had not slept since the few hours of sleep he had the night of June 19.

97. Defendant Simon brought Mr. Craighead to the same room in Squad Seven that he had been locked inside the day before.

98. When they arrived in that room, Mr. Craighead asked for medicine for his headache, and asked to be able to call his attorney.

99. Defendant Simon refused his requests.

100. Defendant Simon told Mr. Craighead that they could prove he killed Pruett, that he would be convicted, and that he would be sent to jail for the rest of his life.

101. Defendant Simon suggested to Mr. Craighead that he had accidentally killed Pruett during an argument that turned into a struggle for a gun and the gun went off. Defendant Simon told Mr. Craighead that if he told her that happened, that it could be considered self-defense, and she could help him by getting the charges reduced to avoid facing a life sentence. She also told him that if he did so, he could bond out and fight the charges outside of jail.

102. Defendant Simon also told him that if Mr. Craighead did not cooperate, she would convict him of murder and he would spend the rest of his life incarcerated.

103. Having had almost no sleep for two days, hungry, and having had his pleas for a lawyer and to leave ignored, Mr. Craighead succumbed to the Defendants' efforts to coerce him to give a false confession. He repeated the scenario suggested to him by Defendant Simon and signed it, hoping that he would be released and he could resolve the situation out of custody.

104. Instead, Plaintiff was charged with murder. He would remain incarcerated for the next seven years.

105. Defendants caused Plaintiff to be charged with murder despite knowing there was no evidence to support the charge.

106. Plaintiff's coerced confession was demonstrably false; the forensic evidence from the scene of Pruett's homicide showed that Pruett was shot multiple times in an execution-style shooting, rather than a single accidental gunshot. Two of the bullets were lodged in the floor beneath the victim, demonstrating that the victim was laying prone on the ground when some of the shots were fired.

107. Moreover, Plaintiff's false confession stated that he struggled with the victim over a gun when the gun accidentally discharged one time, striking the victim. In reality, the victim was shot four times, and none of the shots were fired within two feet of the victim, as would be expected during an accidental firing during a struggle.

108. Plaintiff's confession was devoid of detail and provided no corroboration for the notion that he killed Pruett; nevertheless, it was used to wrongfully convict him.

Plaintiff's Alibi

109. Plaintiff could not have committed the murder because he was at work at the time Pruett was killed.

110. On the night of June 26, 1997, Plaintiff was working his regular overnight shift at a Sam's Club warehouse.

111. Plaintiff worked from either 9 or 10 o'clock at night until 5 or 6 o'clock in the morning.

112. Per Sam's Club's policy, all overnight employees were locked inside the warehouse for the entire shift.

113. Had Mr. Craighead left the warehouse during his shift, an alarm would have sounded at both Wal-Mart headquarters and the Farmington Hills police department.

114. No alarm went off during the night of June 26, 1997 to the morning of June 27, 1997 while Mr. Craighead was there.

115. Phone records also help establish Plaintiff's alibi. During his time at work, he made phone calls from a landline inside the Sam's Club warehouse at 11:01 p.m. and 11:02 p.m. on June 26, 1997, and 12:19 a.m. and 2:27 a.m. on June 27, 1997.

116. The last call from inside the warehouse – at 2:27 a.m. – was placed 8 minutes before Pruett's truck was reported ablaze 30 miles away.

Defendant Simon's Repeated Misconduct

117. Finally, Defendant City failed to supervise and discipline the Officer Defendants in this matter, including Defendant Simon. Some examples of Defendant Simon's misconduct include:

118. Defendant Simon caused Justly Johnson and Kendrick Scott to be wrongfully convicted of the shooting of Lisa Kindred.

119. In 1999, Defendant Simon knew that Johnson and Scott were innocent, but nonetheless threatened two witnesses into implicating them in the murder, ultimately securing their wrongful convictions. First, Simon coerced 16 year-old Antonio Burnette into falsely stating that Johnson and Scott had confessed to the murder. She screamed at Burnette and told him that if he did not provide them with false information about the shooter, they would put the murder on him. Along with another officer, Defendant Simon choked Burnette and threw him around. Burnette, who could not read, eventually agreed to sign a written statement falsely implicating Johnson and Scott. Burnette later recanted, saying he was threatened into providing false inculpatory testimony.

120. Also in 1999, Defendant Simon similarly coerced another witness, Raymond Jackson, a teenager who experienced mental health struggles, into providing false testimony against Johnson and Scott.

121. All told, Defendant Simon caused Johnson and Scott to spend more than 19 years in custody before they were exonerated.

122. Damon Nathaniel spent eight months in jail after Defendant Simon interrogated him for eight hours and then falsely claimed he had confessed to a murder. DNA evidence later proved Nathaniel was innocent of the murder.

123. In 1999, Defendant Simon coerced Steven Brown into implicating himself in a shooting, even though he was innocent. Specifically, Brown accused Simon of leaving him in an interrogation room for hours and then writing a false statement on Brown's behalf.

124. In 1996, Defendant Simon was also responsible for Lamarr Monson's wrongful conviction. Defendant Simon interrogated Monson for hours, and eventually wrote out a false statement in which Monson admitted inculpatory information about the murder of Christina Brown, and which omitted Monson's alibi. Monson requested to call his parents to arrange for a lawyer, and Defendant Simon told him he could call them after he signed the statement. Defendant Simon then falsely testified about the circumstances under which Monson provided this statement. Monson spent 20 years wrongfully in prison before being exonerated by forensic evidence.

125. Supervising officers were aware of these unconstitutional practices and showed deliberate indifference to, acquiescence in, and/or approval of them. Specifically, despite committing gross misconduct, Defendant Simon was not disciplined in any way, and thus was encouraged to commit the misconduct that led to Mr. Craighead being coerced into falsely confessing.

Plaintiff's Conviction and Exoneration

126. Despite his innocence, Mr. Craighead was nonetheless convicted based on fabricated evidence.

127. His false confession was introduced against him.

128. Plaintiff testified in his own defense at trial, but was convicted based on the false evidence.

129. Mr. Craighead spent over seven years incarcerated for manslaughter.

130. He never gave up hope that he would someday be exonerated.

131. Through the work of the Michigan Innocence Clinic, Mr. Craighead was able to present evidence of Defendant Simon's torrid history of misconduct and convinced the criminal court to overturn his conviction.

132. On June 1, 2023, Mr. Craighead was awarded a Certificate of Innocence.

DAMAGES

133. Defendants' actions deprived Mr. Craighead of his civil rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and his state law rights.

134. Mr. Craighead's liberty was curtailed upon his arrest on June 20, 2000, and continued for the duration of his incarceration until his release from prison.

135. Defendants' unlawful, intentional, willful, deliberately indifferent, reckless, and/or bad faith acts and omissions caused Mr. Craighead to be falsely arrested, tried, wrongfully convicted and incarcerated for over seven years for a crime he did not commit.

136. Defendants' unlawful, intentional, willful, deliberately indifferent, reckless, and/or bad faith acts and omissions caused Mr. Craighead 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, 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.

137. 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 I
42 U.S.C. § 1983 – Coerced Confession in Violation of the Fifth Amendment

138. Plaintiff incorporates each paragraph of this pleading as if fully restated here.

139. In the manner described more fully above, the Defendant Officers, individually, jointly, and in conspiracy with each other, as well as under color of law and within the scope of their employment, forced Plaintiff to incriminate himself falsely and against his will, in violation of his rights secured by the Fifth Amendment.

140. As described more fully above, the Defendant Officers participated in, encouraged, advised, and ordered an unconstitutional and unlawful interrogation of Plaintiff that caused him to make involuntary and false statements implicating himself in the murder of Chole Pruett.

141. The coerced, involuntary, false statement the Defendant Officers fabricated and attributed to Plaintiff was used against him to his detriment in his criminal case.

142. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally, with malice and reckless indifference to the

rights of others, and with total disregard for the truth and Plaintiff's clear innocence.

143. As a result of Defendants' misconduct described in this Count, Plaintiff suffered loss of liberty, great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages as set forth above.

144. Plaintiff's injuries were caused by the policies, practices, and customs of Defendant City of Detroit.

145. In addition, at all times relevant to the events described in this pleading and for a period of time before those events, Defendant City of Detroit had notice of a widespread practice by officers and agents of the Detroit Police Department under which individuals like Plaintiff who were suspected of criminal activity were routinely coerced against their will to implicate themselves in crimes of which they were innocent. It was common for suspects interrogated by the Detroit Police Department to be subjected to extreme duress and abuse, to falsely confess to committing crimes to which they had no connection and for which there was no probable cause to suggest they were involved.

146. Specifically, at all relevant times and for a period of time before the events giving rise to this case, there existed a widespread practice among officers, employees, and agents of the Detroit Police Department under which criminal

suspects were coerced to involuntarily implicate themselves by various means, including but not limited to the following: (a) individuals were subjected to unreasonably long and uninterrupted interrogations, often lasting for many hours and even days; (b) individuals were subjected to actual and threatened physical and psychological violence; (c) individuals were interrogated at length without proper protection of their constitutional right to have an attorney present or to remain silent; (d) individuals were forced to sign false statements fabricated by the police; (e) officers and employees were permitted to lead or participate in interrogations without proper training and without knowledge of the safeguards necessary to ensure that individuals were not subjected to abusive conditions and did not confess involuntarily or falsely; and (f) supervisors like Defendant Jackson, with knowledge of permissible and impermissible interrogation techniques did not properly supervise or discipline police officers and employees such that the coercive interrogations continued unchecked.

147. These widespread practices were allowed to flourish because the leaders, supervisors, and policymakers of the Detroit Police Department directly encouraged and were thereby the moving force behind the very type of misconduct at issue by failing to adequately train, supervise, and control their officers, agents, and employees as to proper interrogation techniques and by failing to adequately

punish and discipline prior instances of similar misconduct, thus directly encouraging future abuses like those that affected Plaintiff.

148. The above widespread practices were so well-settled as to constitute *de facto* policy of the Detroit Police Department, and were able to exist and thrive because policymakers with authority exhibited deliberate indifference to the problem, thereby effectively ratifying it.

149. In addition, the misconduct described in this Count was undertaken pursuant to the policy and practice of the City of Detroit in that the constitutional violations committed against Plaintiff were committed either directly by, or with the knowledge or approval of, people with final policymaking authority for the Detroit Police Department.

150. The policies, practices, and customs set forth above have resulted in numerous well-publicized false confessions, including the false confession at issue here, where individuals were convicted of crimes they did not commit after being subjected to abusive interrogation techniques.

151. Plaintiff's injuries were caused by officers, agents, and employees of the City of Detroit, including but not limited to the individually named Defendants who acted pursuant to the policies, practices, and customs set forth above in engaging in the misconduct described in this Count.

COUNT II
42 U.S.C. § 1983 – Coerced Confession in Violation of the Fourteenth Amendment

152. Plaintiff incorporates each paragraph of this pleading as if fully restated here.

153. In the manner described more fully above, the Defendant Officers, individually, jointly, and in conspiracy with each other, as well as under color of law and within the scope of their employment, forced Plaintiff to incriminate himself falsely and against his will, in violation of his right to due process secured by the Fourteenth Amendment.

154. As described in detail above, the misconduct described in this Count was carried out using extreme techniques of psychological coercion. This misconduct was so severe as to shock the conscience, it was designed to injure Plaintiff, and it was not supported by any conceivable governmental interest.

155. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally, with reckless indifference to the rights of others, and with total disregard for the truth and Plaintiff's clear innocence.

156. As a result of Defendants' misconduct described in this Count, Plaintiff suffered loss of liberty, great mental anguish, humiliation, degradation, physical and emotional pain and suffering, and other grievous and continuing injuries and damages as set forth above.

157. Plaintiff's injuries were caused by the policies, practices, and customs of Defendant City of Detroit in the manner more fully described in Count VIII.

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

158. Plaintiff incorporates each paragraph of this Complaint as if fully restated here word for word.

159. 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 Plaintiff 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.

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

161. 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 VIII.

162. 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 Plaintiff's clearly established Fourteenth Amendment due process rights, including the right to a fair trial, Plaintiff was wrongfully convicted and suffered the injuries and damages described above.

163. 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 Plaintiff'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 to be wrongfully arrested, prosecuted, convicted and imprisoned, and to suffer the constitutional violations, injuries and damages described above.

164. As a direct and proximate result of the foregoing actions, Plaintiff 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 IV—42 U.S.C. § 1983
Fourth and Fourteenth Amendment – Unreasonable Seizure and Illegal Detention and Prosecution

165. Plaintiff incorporates each paragraph of this Complaint as if fully restated here word for word.

166. 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 Plaintiff 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, in spite of the fact that they knew Plaintiff was innocent, all in violation of his constitutional rights.

167. In so doing, the Defendants caused Plaintiff 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.

168. The prosecution of Plaintiff ultimately terminated in his favor when his conviction was vacated, all charges dismissed, and he was granted a certificate of innocence.

169. 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.

170. 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 VIII.

171. As a direct and proximate result of the foregoing actions, Plaintiff 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 V—42 U.S.C. § 1983
Failure to Intervene

172. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

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

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

175. 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.

176. 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 VIII.

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

a. Seizure and loss of liberty, resulting in:

b. 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;

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

d. Pain and suffering;

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

f. Permanent loss of natural psychological development, past and future;

g. Loss of family relationships;

h. Damage to business and property;

i. Legal expenses;

j. Loss of earnings and earning potential; and

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

COUNT VI—42 U.S.C. § 1983
Supervisor Liability

178. Supervisory Defendant Jackson was the officer in charge of the investigation and prosecution of Plaintiff. Defendant Jackson was the supervisor of the homicide unit overseeing this case.

179. Supervisory Defendant Jackson gave direct orders causing the violation of Plaintiff's constitutional rights and/or encouraged or knowingly approved of the actions of other officers under his authority in his actions that violated the constitutional rights of Plaintiff, to wit:

a. He directed and/or approved of Plaintiff's arrest without probable cause;

b. He directed and/or approved of Plaintiff's continued detention without probable cause in order to coerce Plaintiff to falsely confess;

c. He directed and/or approved of Defendant Sim's fabricated polygraph result; and

d. He directed and/or approved of the false promises and threats used by Defendants to coerce Plaintiff to falsely confess to murder.

180. The actions of Defendant Jackson violated Plaintiff's clearly established Fourth, Fifth, and Fourteenth Amendment rights to be free from unreasonable seizure, to have a fair trial, and to not be compelled to testify against himself, and thereby caused his wrongful conviction and the injuries and damages set forth above.

181. As a direct and proximate result of the foregoing actions, Plaintiff 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, 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 VII—42 U.S.C. § 1983
Conspiracy to Deprive Constitutional Rights

182. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

183. After Pruett's murder, 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 Plaintiff of his constitutional rights, including his rights to due process, all as described in the various paragraphs of this Complaint.

184. 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.

185. 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.

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

187. The misconduct described in this Count was objectively unreasonable and was undertaken intentionally, with malice and willful indifference to Plaintiff's clearly established constitutional rights.

188. 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 VIII.

COUNT VIII—42 U.S.C. §1983
Municipal Liability Under *Monell*

189. Plaintiff incorporates each paragraph of this Complaint as if fully restated here word for word.

190. 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.

191. 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.

192. 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 coercing suspects through undisclosed threats and false promises to coerce false confessions;

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

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.

193. 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 Plaintiff.

194. 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 Plaintiff.

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

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

197. As a direct and proximate result of the foregoing actions, Plaintiff 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, 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 IX—State Law Claim
Malicious Prosecution

198. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

199. 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 Plaintiff to be commenced or continued.

200. The Defendant Officers accused Plaintiff 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.

201. The Defendant Officers caused Plaintiff 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.

202. Statements of the Defendant Officers regarding Plaintiff'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 Plaintiff in the Pruett murder, 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 Plaintiff, 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 Plaintiff.

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

204. The charges against Plaintiff were terminated in his favor.

205. As a direct and proximate result of the foregoing actions, Plaintiff 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, 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 X—State Law Claim
Civil Conspiracy

206. Plaintiff incorporates each paragraph of this Complaint as if fully restated here.

207. 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.

208. 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 Plaintiff.

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

210. As a direct and proximate result of the foregoing actions, Plaintiff 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, 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 MARK CRAIGHEAD, respectfully requests that this Court enter a judgment in his favor and against Defendants FORMER INVESTIGATOR BARBARA SIMON, FORMER INVESTIGATOR JAMES FISHER, FORMER LIEUTENANT BOB JACKSON, FORMER POLYGRAPH OPERATOR ANDREW SIMS, 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; and (d) any other relief this Court deems just and appropriate.

JURY DEMAND

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

Dated: August 31, 2023

Respectfully submitted,

MARK CRAIGHEAD

By: /s/Megan Pierce
One of Plaintiff's Attorneys

Jon Loevy
Arthur Loevy
Megan Pierce
LOEVY & LOEVY
311 N. Aberdeen, 3rd Floor
Chicago, Illinois 60607
(312) 243-5900
megan@loevy.com

Exhibit 6B - Docket in the Federal Court Lawsuit

U.S. District Court
Eastern District of Michigan (Ann Arbor)
CIVIL DOCKET FOR CASE #: 5:23-cv-12243-JEL-CI

Craighead v. Detroit, City of et al
Assigned to: District Judge Judith E. Levy
Referred to: Magistrate Judge Curtis Ivy, Jr
Cause: 42:1983 Civil Rights Act

Date Filed: 08/31/2023
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Mark Craighead

represented by **Arthur Loevy**
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ATTORNEY TO BE NOTICED

V.

Defendant

Detroit, City of

represented by **Marc N Swanson**
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313-496-7541
Email: swansonm@millercanfield.com
ATTORNEY TO BE NOTICED

Defendant

Barbara Simon
Former Investigator

represented by **T. Joseph Seward**
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210 E. 3rd St.
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Royal Oak, MI 48067
248-733-3580
Email: jseward@sewardhenderson.com
ATTORNEY TO BE NOTICED

Defendant

James Fisher
Former Investigator

represented by **T. Joseph Seward**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Bob Jackson
Former Lieutenant

Defendant

Andrew Sims
Polygraph Operator

Defendant

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

Date Filed	#	Docket Text
08/31/2023	1	COMPLAINT filed by Mark Craighead against All Defendants with Jury Demand. Plaintiff requests summons issued. Receipt No: AMIEDC-9476812 - Fee: $ 402. County of 1st Plaintiff: Oakland - County Where Action Arose: Wayne - County of 1st Defendant: Wayne. [Previously dismissed case: No] [Possible companion case(s): None] (Pierce, Megan) (Entered: 08/31/2023)
09/01/2023	2	SUMMONS Issued for * All Defendants * (NAhm) (Entered: 09/01/2023)
09/01/2023		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 (NAhm) (Entered: 09/01/2023)
09/01/2023	3	NOTICE of Appearance by Megan Colleen Pierce on behalf of Mark Craighead. (Pierce, Megan) (Entered: 09/01/2023)
09/01/2023	4	NOTICE of Appearance by Jon Loevy on behalf of Mark Craighead. (Loevy, Jon) (Entered: 09/01/2023)
09/06/2023	5	NOTICE of Appearance by Arthur Loevy on behalf of Mark Craighead. (Loevy, Arthur) (Entered: 09/06/2023)
09/07/2023	6	NOTICE of Appearance by Russell Ainsworth on behalf of Mark Craighead. (Ainsworth, Russell) (Entered: 09/07/2023)
09/11/2023	7	NOTICE of Appearance by Rachel Brady on behalf of Mark Craighead. (Brady, Rachel) (Entered: 09/11/2023)
09/19/2023	8	CERTIFICATE of Service/Summons Returned Executed. Detroit, City of served on 9/15/2023, answer due 10/6/2023. (Ainsworth, Russell) (Entered: 09/19/2023)
10/03/2023	9	STIPULATED ORDER Extending Time for Defendant City of Detroit to Answer 1 Complaint; Responsive Pleading due by 10/27/2023, Signed by District Judge Judith E. Levy. (WBar) (Entered: 10/03/2023)
10/04/2023	10	ATTORNEY APPEARANCE: Marc N Swanson appearing on behalf of Detroit, City of (Swanson, Marc) (Entered: 10/04/2023)
10/06/2023	11	NOTICE of Appearance by T. Joseph Seward on behalf of James Fisher. (Seward, T.) (Entered: 10/06/2023)
10/06/2023	12	WAIVER OF SERVICE Returned Executed. James Fisher waiver sent on 10/6/2023, answer due 12/5/2023. (Seward, T.) (Entered: 10/06/2023)
10/10/2023	13	NOTICE of Appearance by T. Joseph Seward on behalf of Barbara Simon. (Seward, T.) (Entered: 10/10/2023)
10/10/2023	14	[STRICKEN - Document not Flattened] WAIVER OF SERVICE Returned Executed. Barbara Simon waiver sent on 10/10/2023, answer due 12/11/2023. (Seward, T.) Modified on 10/12/2023 (DJen). (Entered: 10/10/2023)
10/12/2023		NOTICE of Error directed to: T. Joseph Seward re 14 Waiver of Service Executed (60 Day). Document is not flattened and contains fillable fields. Document was stricken and must be refiled correctly. [No Image Associated with this docket entry] (DJen) (Entered: 10/12/2023)
10/12/2023	15	WAIVER OF SERVICE Returned Executed. (Seward, T.) (Entered: 10/12/2023)

PACER Service Center

Transaction Receipt

10/20/2023 16:22:10			
PACER Login:	mcps3037	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	5:23-cv-12243-JEL-CI
Billable Pages:	3	**Cost:**	0.30

Exhibit 6C - Docket of Criminal Trial, Case Number 00-007900

Register of Actions

Case No. 00-007900-01-FC

Party Information

		Attorneys
Appellate Attorney	**Office, Appellate Defenders**	
Defendant	**Craighead, Mark T**	**David A. Moran** *Retained* (734) 763-9353(W) Valerie R. Newman *Retained* (313) 967-2684(W)
Plaintiff	**State of Michigan**	**Molly A. Kettler** (313) 972-3380(W) Janet A. Napp (313) 224-5777(W)

Charge Information

Charges: Craighead, Mark T	Statute	Level	Date
1. Homicide - Murder First Degree - Premeditated	750316-A	.	06/22/2000
2. Homicide - Felony Murder	750316-B	.	06/22/2000
3. Weapons Felony Firearm	750227B-A	.	06/22/2000
4. Homicide - Manslaughter - Statutory Short Form	750321-A	.	06/22/2000

Events & Orders of the Court

DISPOSITIONS

06/23/2000 **Plea** (Judicial Officer: Costello, Robert K.)
3. Weapons Felony Firearm
Defendant Stand Mute: Plea of Not Guilty Entered by Court
2. Homicide - Felony Murder
Defendant Stand Mute: Plea of Not Guilty Entered by Court

07/06/2000 **Disposition** (Judicial Officer: Wallace, Theodore C)
2. Homicide - Felony Murder
Dismissed

06/25/2002 **Disposition** (Judicial Officer: Jones, Vera Massey)
3. Weapons Felony Firearm
Found Guilty by Jury
1. Homicide - Murder First Degree - Premeditated
Not Guilty by Jury
4. Homicide - Manslaughter - Statutory Short Form
Found Guilty by Jury

08/05/2002 **Sentence** (Judicial Officer: Jones, Vera Massey)
3. Weapons Felony Firearm
Condition - Adult:
1. Adult Criminal Sentence, CONS TO MANS. CRD 244 08/05/2002, Active 08/05/2002
State Confinement:
Agency: Michigan Department of Corrections
Effective 8/5/2002
Term: 2 Yr 0 Mo 0 Days to 0 Yr 0 Mo 0 Days
4. Homicide - Manslaughter - Statutory Short Form
Condition - Adult:
1. Adult Criminal Sentence, CONS TO FIREARM 08/05/2002, Active 08/05/2002
State Confinement:
Agency: Michigan Department of Corrections
Effective 8/5/2002
Term: 0 Yr 40 Mo 0 Days to 15 Yr 0 Mo 0 Days

OTHER EVENTS AND HEARINGS

06/22/2000 **Recommendation for Warrant**
06/22/2000 **Warrant Signed**

06/23/2000 **Arraignment On Warrant** (9:00 AM) (Judicial Officer Costello, Robert K.)
Parties Present
Result: Held
06/23/2000 **Interim Condition for Craighead, Mark T**
- Remand
07/06/2000 **Motion To Reduce Bond Filed/Granted**
07/06/2000 **Denied - Order Signed and Filed**
07/06/2000 **Bound Over**
07/06/2000 **Motion To Dismiss A Charge**
07/06/2000 **Filed**
07/06/2000 **Signed And Filed**
07/06/2000 **Trial Docket**
07/06/2000 **Filed**
07/06/2000 **Preliminary Exam** (9:00 AM) (Judicial Officer Wallace, Theodore C)
Parties Present
Result: Held: Bound Over
07/11/2000 **Case Assignment to AOI Docket**
07/21/2000 **Appearance By A Retained Attorney Filed**
07/21/2000 **Arraignment On Information** (9:00 AM) (Judicial Officer Hathaway, Richard P)
Parties Present
Result: Held
07/21/2000 **Disposition Conference** (9:05 AM) (Judicial Officer Hathaway, Richard P)
Parties Present
Result: Held
07/21/2000 **Interim Condition for Craighead, Mark T**
- Remand
08/17/2000 **Motion To Reduce Bond Filed/Granted**
08/17/2000 **Filed**
08/23/2000 **Motion To Set Bond Filed/Signed**
08/23/2000 **Held In Abeyance**
08/23/2000 **Motion Hearing** (9:00 AM) (Judicial Officer Hathaway, Richard P)
Parties Present
Result: Held
10/18/2000 **Motion For Discovery Filed**
10/18/2000 **Filed**
10/18/2000 **Motion For A Walker Hearing (Confession)**
10/18/2000 **Filed**
10/19/2000 **Motion For A Walker Hearing (Confession)**
10/19/2000 **Filed**
12/13/2000 **Motion Hearing** (9:00 AM) (Judicial Officer Hathaway, Richard P)
Parties Present
Result: In Progress
01/25/2001 **Motion Hearing** (9:00 AM) (Judicial Officer Hathaway, Richard P)
Parties Present
Result: In Progress
01/29/2001 **Motion Hearing** (9:00 AM) (Judicial Officer Hathaway, Richard P)
Parties Present
Result: Adjourned:At The Request Of The Prosecution
02/08/2001 **Motion Hearing** (9:00 AM) (Judicial Officer Hathaway, Richard P)
Parties Present
Result: In Progress
02/21/2001 **Motion To Reduce Bond Filed/Granted**
02/21/2001 **Granted - Order Signed and Filed**
02/21/2001 **Motion To Suppress Statements**
02/21/2001 **Denied - Order Signed and Filed**
02/21/2001 **Motion Hearing** (9:00 AM) (Judicial Officer Hathaway, Richard P)
Parties Present
Result: Held
02/21/2001 **Interim Condition for Craighead, Mark T**
- 10%
$50,000.00
03/30/2001 **Pre-Trial** (9:00 AM) (Judicial Officer Morrow, Bruce U.)
Parties Present
Result: Held
06/28/2001 **Motion Hearing** (9:00 AM) (Judicial Officer Hathaway, Richard P)
Parties Present
Result: Adjourned:At The Request Of The Court
08/23/2001 **Motion To Reconsider**
08/23/2001 **Heard And Denied**
08/23/2001 **Case Reassigned**
08/23/2001 **Signed And Filed**
08/23/2001 **Motion Hearing** (9:00 AM) (Judicial Officer Hathaway, Richard P)
Parties Present
Result: Held
08/31/2001 **Motion To Reinstate Bail Filed/Signed**
08/31/2001 **Granted - Order Signed and Filed**
08/31/2001 **Capias Arraignment** (9:00 AM) (Judicial Officer Hathaway, Michael M.)

	Parties Present Result: Defendant Arraigned On Failure to Appear
08/31/2001	**Pre-Trial** (9:05 AM) (Judicial Officer Hathaway, Michael M.) Parties Present Result: Failure to Appear
08/31/2001	**Arraignment on Failure to Appear - Pre Disposition**
08/31/2001	**Failure to Appear - Pre Disposition - Order Signed and Filed**
09/04/2001	**Final Conference** (9:00 AM) (Judicial Officer Hathaway, Michael M.) Parties Present Result: Held
01/04/2002	**Transcript**
01/04/2002	**Filed**
02/14/2002	**Original Blind Draw Judge**
02/14/2002	**Random Reassignment**
02/26/2002	**Appearance By A Retained Attorney Filed**
02/26/2002	**Final Conference** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: Held
05/03/2002	**Notice Of Alibi**
05/03/2002	**Filed**
06/17/2002	**Jury Trial** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: Adjourned:Court Working On Other Trial
06/19/2002	**Jury Trial** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: In Progress
06/20/2002	**Jury Trial** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: In Progress
06/24/2002	**Transcript**
06/24/2002	**Filed**
06/24/2002	**Jury Trial** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: In Progress
06/25/2002	**Found Guilty By Jury**
06/25/2002	**Refer To Probation For A Report**
06/25/2002	**Jury Trial** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: Held
08/05/2002	**Sentencing** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: Held
10/11/2002	**Claim Of Appeal (Circuit)**
10/11/2002	**Filed**
02/28/2003	**Transcript Of Sentence**
02/28/2003	**Filed**
02/28/2003	**Transcript Of Trial**
02/28/2003	**Filed**
02/04/2004	**Motion To Require Production Of Certain Records**
02/04/2004	**Filed**
02/04/2004	**Brief Or Memorandum of Law**
02/04/2004	**Filed**
02/13/2004	**Motion Hearing** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: Adjourned:At The Request Of The Court
03/05/2004	**Motion Hearing** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: Adjourned:At The Request Of The Defense
03/30/2004	**Motion To Remove Appellate Counsel**
03/30/2004	**Granted - Order Signed and Filed**
04/05/2004	**Motion To Withdraw As Attorney**
04/05/2004	**Filed**
04/16/2004	*CANCELED* **Motion Hearing** (9:00 AM) (Judicial Officer Jones, Vera Massey) *Case Disposed/Order Previously Entered* Parties Present Result: Not Held And/Or Disposed
05/05/2004	**Appellate Counsel Appointed Signed and Filed**
05/05/2004	**Filed**
05/13/2004	**Transcript Of Sentence**
05/13/2004	**Filed**
05/13/2004	**Transcript Of Trial**
05/13/2004	**Filed**
06/11/2004	**Motion To Withdraw As Attorney**
06/11/2004	**Filed**
06/15/2004	**Appellate Counsel Appointed Signed and Filed**
06/15/2004	**Filed**
06/28/2004	**Appellate Counsel Appointed Signed and Filed**

06/28/2004	**Filed**
08/09/2004	**Appellate Counsel Appointed Signed and Filed**
08/09/2004	**Filed**
09/01/2004	**Motion Transcript(S)**
09/01/2004	**Filed**
09/01/2004	**Transcript**
09/01/2004	**Filed**
09/21/2004	**Motion Transcript(S)**
09/21/2004	**Filed**
09/28/2004	**Motion Transcript(S)**
09/28/2004	**Filed**
09/28/2004	**Transcript**
09/28/2004	**Filed**
11/18/2004	**Motion To Set Appeal Bond**
11/18/2004	**Filed**
11/18/2004	**Brief Or Memorandum of Law**
11/18/2004	**Filed**
11/18/2004	**Motion For A New Trial**
11/18/2004	**Filed**
11/20/2004	**Transcript Of Pretrial**
11/20/2004	**Filed**
12/09/2004	**Prosecutors Reply**
12/09/2004	**Filed**
12/17/2004	**Motion Hearing** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: In Progress
01/10/2005	**Supplemental Brief Filed**
01/10/2005	**Filed**
05/17/2005	**Motion For A New Trial**
05/17/2005	**Heard And Denied**
05/17/2005	**Motion Hearing** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: Held
06/02/2005	**Motion Transcript(S)**
06/02/2005	**Filed**
06/13/2005	**Motion To Reconsider**
06/13/2005	**Filed**
06/13/2005	**Brief Or Memorandum of Law**
06/13/2005	**Filed**
06/13/2005	**Motion Transcript(S)**
06/13/2005	**Filed**
06/27/2005	**Motion To Reconsider**
06/27/2005	**Denied - Order Signed and Filed**
06/27/2005	**Motion For A New Trial**
06/27/2005	**Denied - Order Signed and Filed**
12/22/2005	**Appellate Court Decision; Affirms Lower Court**
12/22/2005	**Signed And Filed**
02/02/2006	**Application For Leave To Appeal (Circuit)**
02/02/2006	**Filed**
07/03/2006	**Application For Leave To Appeal (Circuit)**
07/03/2006	**Motion Withdrawn**
05/02/2007	**Application For Leave To Appeal (Circuit)**
05/02/2007	**Denied By The Supreme Court**
12/28/2009	**Motion For Relief From Judgment**
12/28/2009	**Filed**
01/19/2010	**Order Signed and Filed** (Judicial Officer: Jones, Vera Massey)
03/26/2010	**Motion**
04/09/2010	**Motion Hearing** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present *03/30/2010 Reset by Court to 04/09/2010* Result: Held
04/09/2010	**Motion For An Evidentiary Hearing** (Judicial Officer: Jones, Vera Massey)
06/30/2010	**Evidentiary Hearing** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: In Progress
07/12/2010	**Notice of Transcript Filed**
07/14/2010	**Evidentiary Hearing** (9:00 AM) (Judicial Officer Jones, Vera Massey) Parties Present Result: Held
07/14/2010	**Order Denying Motion for Relief from Judgment - S/F** (Judicial Officer: Jones, Vera Massey)
11/22/2011	**Application For Leave To File A Delayed Appeal (Circuit)**
01/31/2012	**Transcript Filed**
02/24/2020	**Motion For Relief From Judgment**
02/24/2020	**Miscellaneous, Filed**
02/24/2020	**Miscellaneous, Filed**
02/24/2020	**Miscellaneous, Filed**
02/24/2020	**Miscellaneous, Filed**
02/24/2020	**Miscellaneous, Filed**
02/24/2020	**Miscellaneous, Filed**
02/24/2020	**Miscellaneous, Filed**
02/24/2020	**Miscellaneous, Filed**

02/24/2020	Miscellaneous, Filed
02/24/2020	Miscellaneous, Filed
02/24/2020	Miscellaneous, Filed
02/24/2020	Miscellaneous, Filed
02/24/2020	Miscellaneous, Filed
02/24/2020	Miscellaneous, Filed
02/24/2020	Proof of Service, Filed
02/24/2020	Brief Or Memorandum of Law
06/22/2020	**Order Signed and Filed** (Judicial Officer: Walker, Shannon N.)
07/30/2020	Heard And Granted - Order Signed and Filed (Judicial Officer: Walker, Shannon N.)
09/15/2020	Proof of Service, Filed
09/15/2020	People's Response (Answer) to Motion
09/28/2020	**Post Conviction** (9:00 AM) (Judicial Officer Walker, Shannon N.)
09/29/2020	Brief Or Memorandum of Law
09/29/2020	Defense Exhibit(s)
09/29/2020	Defense Exhibit(s)
09/29/2020	Defense Exhibit(s)
09/29/2020	Defense Exhibit(s)
09/29/2020	Defense Exhibit(s)
09/29/2020	Defense Exhibit(s)
09/29/2020	Proof of Service, Filed
09/29/2020	Defense Exhibit(s)
02/04/2021	Order Granting Motion for Relief from Judgment - S/F (Judicial Officer: Walker, Shannon N.)
07/31/2021	Documents Prior to eFiling
07/27/2022	Motion to Dismiss
07/27/2022	Proof of Service, Filed
08/05/2022	**Motion Hearing** (9:00 AM) (Judicial Officer Walker, Shannon N.) Parties Present Result: Case Was Dismissed
08/05/2022	Heard And Granted - Order Signed and Filed (Judicial Officer: Walker, Shannon N.)
11/18/2022	Motion
11/18/2022	Proof of Service, Filed
12/09/2022	Order Signed and Filed (Judicial Officer: Walker, Shannon N.)

Financial Information

	Defendant Craighead, Mark T			
	Total Financial Assessment			60.00
	Total Payments and Credits			60.00
	Balance Due as of 09/25/2023			**0.00**
11/09/2009	Transaction Assessment			60.00
11/09/2009	Counter Payment	Receipt # 2009-28881	Craighead, Mark T	(60.00)

Exhibit 6D - 2002 Appeal Docket

COA 243856
MSC 130450

PEOPLE OF MI V MARK T CRAIGHEAD
Lower Court/Tribunal
WAYNE CIRCUIT COURT
Judge(s)
JONES VERA MASSEY

Docket Case Documents

Case Information

Case Header

Case Number

COA #243856 MSC #130450

Case Status

MSC Closed
COA Case Concluded; File Archived

Parties & Attorneys to the Case – Court of Appeals

1
PEOPLE OF MI
Plaintiff - Appellee

Attorney(s)
NAPP JANET A
#40633, Prosecutor

2
CRAIGHEAD MARK T
Defendant - Appellant

Attorney(s)
NEWMAN VALERIE R
#47291, State Appellate Defender

Parties & Attorneys to the Case – Supreme Court

1
PEOPLE OF MI
Plaintiff

Attorney(s)
Janet A Napp Attorney
#40633

2
CRAIGHEAD MARK T
Defendant

Attorney(s)

Valerie R Newman

#47291

COLLAPSE ALL EXPAND ALL

Date	No.	Event	
09/16/2002	1	Claim of Appeal - Criminal	+
08/05/2002	2	Order Appealed From	+
09/16/2002	5	Other	+
10/24/2002	6	Invol Dismissal Warning - No Steno Cert	+
11/08/2002	7	Telephone Contact	+
11/20/2002	8	Steno Certificate - Tr Request Received	+
02/18/2003	9	Motion: Extend Time - File Transcript	+
02/24/2003	10	Defective Filing Letter	+
03/05/2003	11	Notice Of Filing Transcript	+
03/13/2003	12	Correspondence Received	+
03/13/2003	13	Defect Cured	+
03/20/2003	14	Order: Withdraw Motion - Request of Party	+
06/13/2003	16	Invol Dismissal Warning - No Appellant Brief	+
06/23/2003	18	Stipulation: Extend Time - AT Brief	+
07/02/2003	17	Telephone Contact	+
07/03/2003	19	Correspondence Sent	+
07/07/2003	20	Correspondence Received	+
07/11/2003	21	Motion: Extend Time - Order Transcript	+
07/11/2003	28	Transcript Requested By Atty Or Party	+
07/15/2003	23	Submitted on Administrative Motion Docket	+
07/17/2003	24	Order: Extend Time - Order Transcript - Grant	+
09/10/2003	25	Telephone Contact	+
10/06/2003	26	Telephone Contact	+
10/16/2003	27	Invol Dismissal Warning - No Steno Cert	+
10/22/2003	29	Transcript Overdue - Notice to Reporter	+
10/30/2003	30	Steno Affidavit - No Notes	+
10/30/2003	31	Steno Certificate - Tr Request Received	+
11/14/2003	32	Steno Affidavit - No Notes	+
12/23/2003	33	Miscellaneous Receipt	+
12/30/2003	34	Submitted on Administrative Motion Docket	+
12/30/2003	36	Order - Generic	+

Date	No.	Entry	
12/30/2003	39	Notice Of Filing Transcript	+
01/06/2004	41	Motion: Reconsideration of Order	+
01/07/2004	42	Notice Of Filing Transcript	+
01/08/2004	40	Miscellaneous Receipt	+
01/20/2004	44	Submitted on Reconsideration Docket	+
01/20/2004	46	Correspondence Received	+
01/21/2004	45	Order: Reconsideration - Deny - Appeal Remains Open	+
01/30/2004	47	Correspondence Received	+
02/02/2004	49	LCt Pleading	+
02/02/2004	50	Brief: Stricken by Order	+
02/02/2004	51	Motion: Remand	+
02/05/2004	48	Correspondence Sent	+
02/19/2004	52	LCt Pleading	+
02/23/2004	54	Answer - Motion	+
03/16/2004	55	Submitted on Motion Docket	+
03/19/2004	57	Order: Remand - Motion - Deny	+
03/19/2004	58	Noticed	+
03/22/2004	59	Correspondence Received	+
04/13/2004	61	Material Received by Record Room	+
04/15/2004	60	Record Request	+
04/21/2004	62	Telephone Contact	+
04/22/2004	63	Record Filed	+
05/28/2004	68	Correspondence Sent	+
06/09/2004	69	LCt Order - Appoint AT Atty	+
06/17/2004	70	Correspondence Sent	+
06/18/2004	71	LCt Order	+
06/18/2004	72	LCt Order - Appoint AT Atty	+
06/18/2004	73	LCt Document	+
06/18/2004	74	Correspondence Sent	+
07/07/2004	75	Correspondence Received	+
07/13/2004	76	Correspondence Sent	+
07/15/2004	77	Prosecutor Advisory - No Brief	+
07/16/2004	78	Telephone Contact	+
08/03/2004	79	LCt Order - Appoint AT Atty	+
08/04/2004	80	Correspondence Sent	+

08/12/2004	81	Correspondence Received	+
08/23/2004	83	Motion: Motion	+
08/23/2004	85	LCt Order - Appoint AT Atty	+
08/26/2004	89	Correspondence Received	+
08/26/2004	90	Correspondence Received	+
08/27/2004	84	Telephone Contact	+
08/27/2004	91	Steno Certificate - Tr Request Received	+
08/30/2004	86	Correspondence Sent	+
08/31/2004	88	Submitted on Administrative Motion Docket	+
09/01/2004	92	Order: Grant - Generic	+
09/03/2004	98	Notice Of Filing Transcript	+
09/03/2004	99	Steno Certificate - Tr Request Received	+
09/07/2004	101	Notice Of Filing Transcript	+
09/08/2004	100	Steno Certificate - Tr Request Received	+
09/24/2004	102	Notice Of Filing Transcript	+
09/27/2004	104	Other	+
09/30/2004	105	Steno Affidavit - No Notes	+
09/30/2004	106	Notice Of Filing Transcript	+
11/18/2004	107	LCt Pleading - Post-Judgment	+
11/23/2004	108	Notice Of Filing Transcript	+
12/08/2004	109	Record Returned	+
12/21/2004	110	Notice Of Filing Transcript	+
01/06/2005	111	Post-judgment Proceedings Overdue - Notice	+
01/10/2005	112	LCt Pleading	+
01/18/2005	113	Material Received by Record Room	+
01/18/2005	114	Telephone Contact	+
01/21/2005	115	Record Filed	+
02/01/2005	116	Steno Affidavit - No Notes	+
02/14/2005	117	Correspondence Received	+
02/14/2005	118	Correspondence Received	+
02/18/2005	119	Steno Affidavit - No Notes	+
02/24/2005	120	Motion: Show Cause - Reporter	+
02/24/2005	125	Transcript Ordered By Trial Court	+
02/24/2005	126	Transcript Ordered By Trial Court	+
02/24/2005	127	Transcript Ordered By Trial Court	+

02/24/2005	128	Transcript Ordered By Trial Court
02/24/2005	129	Transcript Ordered By Trial Court
03/04/2005	122	Telephone Contact
03/08/2005	121	Defective Filing Letter
03/10/2005	123	Defect Cured
03/18/2005	124	Correspondence Sent
03/21/2005	130	Notice Of Filing Transcript
03/23/2005	133	Correspondence Received
03/24/2005	131	Submitted on Court Reporter Motion Docket
03/25/2005	132	Order: Show Cause Motion - Dismissed as Moot
04/06/2005	134	Telephone Contact
04/22/2005	135	Correspondence Sent
05/05/2005	136	Correspondence Received
05/17/2005	137	LCt Order - Post Judgment
05/18/2005	138	Correspondence Received
05/26/2005	139	Steno Certificate - Tr Request Received
06/06/2005	140	Notice Of Filing Post-Judgment Transcript
06/13/2005	143	LCt Pleading - Post-Judgment
06/16/2005	144	Notice Of Filing Post-Judgment Transcript
06/17/2005	141	Telephone Contact
06/17/2005	142	Telephone Contact
07/26/2005	145	LCt Order
07/29/2005	146	Post-Judgment Motion Concluded
08/08/2005	147	Motion: Extend Time - Appellant
08/09/2005	148	Motion: Expedite Appeal
08/09/2005	149	Brief: Appellant
08/10/2005	150	Oral Arg Advise Ltr Sent
08/16/2005	152	Submitted on Administrative Motion Docket
08/16/2005	153	Submitted on Administrative Motion Docket
08/16/2005	154	Order: Extend Time - Appellant Brief - Grant
08/16/2005	155	Order: Expedite - Grant
09/21/2005	161	Transcript Filed
09/23/2005	163	Prosecutor Advisory - No Brief
09/28/2005	165	Transcript Filed
10/19/2005	175	Brief: Appellee

Date	No.	Event	
10/20/2005	176	Oral Arg Advise Ltr Sent	+
11/15/2005	170	Submitted on Case Call	+
11/15/2005	177	Oral Argument Audio	+
12/22/2005	182	Opinion - Per Curiam - Unpublished	+
12/22/2005	183	Opinion - Dissent	+
02/01/2006	184	Application for Leave to SCt	+
02/09/2006	185	Supreme Court - File & Record Sent To	+
02/09/2006	186	COA and TCt Received	+
05/24/2006	187	Supreme Court: Answer - SCt Application/Complaint	+
05/02/2007	188	Supreme Court Order: Deny Application/Complaint	+
05/02/2007	189	Supreme Court - File Ret'd by - Close Out	+

Exhibit 6E - Craighead 2002 Appeal Brief

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Court of Appeals No. 243856

Lower Court No. 00-7900-01

-vs-

MARK TALBORT CRAIGHEAD

Defendant-Appellant.

______________________________/

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

____

VALERIE R. NEWMAN (P47291)
Attorney for Defendant-Appellant

____

APPELLANT'S BRIEF ON APPEAL
(ORAL ARGUMENT REQUESTED)

STATE APPELLATE DEFENDER OFFICE

BY: VALERIE R. NEWMAN (P47291)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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The Defense Case (at the Evidentiary Hearing) 6
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Post Conviction Proceedings 13

I. WHERE THE DETROIT POLICE OFFICERS VIOLATED MR. CRAIGHEAD'S CONSTITUTIONAL RIGHTS BY ARRESTING HIM WITHOUT PROBABLE CAUSE AND ILLEGALLY HOLDING HIM UNTIL HE ADOPTED AN INCRIMINATING STATEMENT THIS STATEMENT MUST BE SUPPRESSED AS THE FRUIT OF THE ILLEGAL ARREST. **14**

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SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT **29**

VRN*Brief on Appeal.doc*20935 August 9, 2005
Mark Craighead

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People v LaVearn, 448 Mich 207; 528 NW2d 721 (1995) ... 25

People v Lewis, 160 Mich App 20; 408 NW2d 94 (1987) ... 19

People v Mitchell, 138 Mich App 163; 360 NW2d 158 (1984) ... 19

People v Reed, 393 Mich 342; 224 NW2d 867 (1975) ... 19

Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) ... 24; 25

Taylor v Alabama, 457 US 687; 102 S Ct 2664; 73 L Ed 2d 314 (1982) ... 22; 23

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court by jury trial and a Judgment of Sentence was entered on August 5, 2002. A Claim of Appeal was filed on August 9, 2004 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated February 26, 2004, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

13-53846-tjt Doc 13803-5 Filed 10/27/23 Entered 10/27/23 14:32:28 Page 5 of 70

STATEMENT OF QUESTIONS PRESENTED

I. WHERE THE DETROIT POLICE OFFICERS VIOLATED MR. CRAIGHEAD'S CONSTITUTIONAL RIGHTS BY ARRESTING HIM WITHOUT PROBABLE CAUSE AND ILLEGALLY HOLDING HIM UNTIL HE ADOPTED AN INCRIMINATING STATEMENT MUST THIS STATEMENT MUST BE SUPPRESSED AS THE FRUIT OF THE ILLEGAL ARREST?

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

II. WAS TRIAL COUNSEL CONSTITUTIONALLY INEFFECTIVE IN FAILING TO PRESENT AN EXPERT WITNESS REGARDING THE PHENOMENON OF FALSE CONFESSIONS?

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Introduction/Case Overview

Mark Craighead is currently incarcerated after having been convicted by jury of manslaughter[1] (MCL 750.321) and felony firearm (MCL 750.227b) in the shooting death of Mr. Craighead's good friend Chole Pruitt. (Trial Transcript Volume 4 (T 4[2]) 3-4) There was no physical or eyewitness evidence that pointed to Mark Craighead being involved.

The only evidence that supported this conviction, as stated by the prosecutor in opening statements, was a statement (T 1, 213-219), which the police claimed Mr. Craighead made while in custody. The statement indicated that the shooting occurred during a struggle over a gun.

The evidence, however, showed that Mr. Pruitt had been shot multiple times, not at close range (from a distance of about four feet according to the medical examiner). At least two of the shots appeared to have been fired while Pruitt was prone on the ground, as determined by the spent bullets found lodged in the underside of the carpeting beneath where the body was found. (T 2, 45)

Further, the statement did not address why Mr. Pruitt's truck was driven into Redford and set on fire or why it appeared that someone had been searching certain areas of the apartment.

Mr. Craighead did not kill Pruitt and did not know who had. In 1997, he was working the night shift at Sam's Club on June 26th to June 27th and the building was locked during his shift, as it always was, so he could not have left undetected. He did not tell the police that he shot Pruitt and only signed the statement because his interrogator, Barbara Simon, told him he would

[1] The jury acquitted Mr. Craighead of first- and second-degree murder.

[2] This was a four day trial with the fourth day being a continuation of jury deliberations. The trial volumes begin with Volume 1, June 19, 2002 and go through Volume 4 (verdict) June 25, 2002.

be in prison for the rest of his life if he did not sign it. After being arrested, held overnight and not being allowed contact with anyone, he felt he had no choice but to comply with the police.

Pre Trial Proceedings

The defense moved prior to trial to suppress the police statement that Mr. Craighead adopted after being arrested at his home three years after the crime had occurred and being held incommunicado, despite his brother's presence at the police station.

The pretrial proceedings dealt primarily with the Officer James Fisher's re-investigation into the case, which began in 2000[3].

The police arrest Mr. Craighead

On June 20, 2000 Fisher went to Mr. Craighead's home along with his supervisor Billy Jackson. (EH I, 19-20) Although Mr. Craighead was not at home, Fisher spoke with someone who told him where he might be found. The police left but returned after they were unable to locate Mr. Craighead. (EH I, 20-21)

The police were on Mr. Craighead's front porch when Mr. Craighead and his brother arrived home. Fisher introduced himself to Mr. Craighead and asked him to come with him to the Homicide Department to talk about the Pruitt case. Mr. Craighead indicated he was willing to talk with the police but wanted to come to the station the following day.

Fisher told Mr. Craighead that was unacceptable and he wanted to talk with him now. Fisher told Mr. Craighead that he, Fisher, "needed to do it today" and would not allow Mr. Craighead to do as he wanted, which was to come to the station the next day. (EH I, 53) Fisher refused to allow him to come to the station the following day because he had "deemed in my mind that he was a suspect." (EH I, 21) However, the police never told Mr. Craighead he was a suspect in the homicide. (EH I, 54, 89)

Fisher refused to allow Mr. Craighead to enter his home and let Mr. Craighead know that he was going to accompany him to the station without further discussion. (EH I, 73-74) After Fisher did not allow Mr. Craighead to refuse his request to immediately accompany him to the station, Mr. Craighead "didn't put up too much of a hassle." According to Fisher, Mr. Craighead then went with him and Jackson voluntarily and was not handcuffed. (EH I, 22) Fisher described the interaction as he told Craighead he was going to the station with the police and Craighead complied. (EH I, 74)

Fisher arrived at the police station with Mr. Craighead around 7:00 pm. They talked a bit, and, according to Fisher, Mr. Craighead's information did not add up to him because it was not consistent. Fisher therefore decided to have Investigator Simon talk with Mr. Craighead and he had no further interaction with him after about 9:00 pm. (EH I, 24-27)

Fisher told Simon that he thought Mr. Craighead was lying (EH I, 65, 66) and believed that he told Simon that Mr. Craighead "was staying." (EH I, 71) According to Fisher, Craighead was not free to leave once he was in the squad room. He told Craighead he was staying and he based that decision on inconsistencies in what Craighead was saying. (EH I, 70) Fisher told Simon that Craighead was staying prior to Simon interviewing him because Fisher believed Mr. Craighead to be the prime suspect based on his subjective conclusion that Mr. Craighead was not being truthful. (EH I, 74-75, 80)

Lieutenant Billy Jackson went with Fisher to Mr. Craighead's home. At that point of their investigation they had not excluded other people as suspects, but their main focus was on Mr. Craighead and he was their starting point. (EH I, 87) According to Jackson, the Detroit police do not necessarily obtain arrest warrants if they have probable cause to arrest someone. (EH I, 86)

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[3] The crime occurred in 1997.

Jackson was on the porch with Fisher when Mr. Craighead arrived home. He and Fisher did not allow Craighead into his home and did not tell him he was a suspect. (EH I, 89) While talking with Mr. Craighead he used his radio to see if a scout car was available. Scout cars are good back-up and Jackson likes to have one if possible because sometimes people do not believe he is a police officer. (EH I, 91-92)

The police investigation

During the course of the three year investigation, the police interviewed 25 people. Mr. Craighead, who was a good friend of Pruitt's, was interviewed twice. According to Fisher there was no physical evidence linking Mr. Craighead to this incident. (EH I, 45)

A Mr. Gibson was the only person of the 25 interviewed to bring up Mark Craighead. Gibson claimed that Mr. Craighead and Mr. Pruitt were trying to sell drugs together. (EH I, 12-13) Fisher reviewed Gibson's statement but was unable to recall if he actually spoke with him. (EH I, 28-29) Further, Fisher did not recall making any notes during his investigation. (EH I, 30)

Fisher spoke with the deceased's nephew and a female. He took no written notes of these interviews.

Mr. Pruitt's nephew Charles told Fisher the same information he had told Investigator Tate in 1997. (EH I, 7, 8, 9-10) Pruitt's nephew told Fisher that he saw his Uncle on June 25th and that there was a black male in his vehicle with him. He did not really see the passenger's features. (EH I, 10-11) When the police interviewed Carlton Pruitt in 1997, he told them he saw someone with Chole Pruitt that day and described the person he saw as a short, light-complected black male, which according to Fisher, could describe Mr. Craighead. (EH I, 14-15)

From reviewing the witness statements, Fisher determined that he "needed to look at" Mr. Craighead. (EH I, 11-12) Fisher wanted to "look at" Mr. Craighead based on statements

that Mr. Craighead and Mr. Pruitt were best friends, which meant that Mr. Craighead would have had access to Mr. Pruitt's apartment and perhaps knowledge that Mr. Pruitt had recently settled a lawsuit for a large sum of money.[4]. (EH I, 14)

Fisher testified that another important fact for him was that Mr. Craighead, at the time of the incident, lived at 23644 Schoolcraft and Mr. Pruitt's vehicle was found in Redford Township, which, according to Fisher, was around 1 to 1-1/2 miles from Craighead's home. (EH I, 17-18) However, Fisher admitted that assuming that mile roads were so named because there was a mile from one to the other, that Pruitt's truck was actually found farther than 1 – 1 ½ miles from Mr. Craighead's home. (EH I, 46-47) At trial there was testimony that the distance was anywhere from 3 ½ to 5.8 miles.[5].

The Interrogation

Barbara Simon first saw Mr. Craighead when Jackson and Fisher brought him to the Homicide department on June 20th but did not speak with him until June 21st. (EH II, 5, 6, 13) She spoke with Mr. Craighead in order to obtain a statement from him. (EH I, 6) Simon took Mr. Craighead for a polygraph examination around 2:00 or 3:00 am and interrogated him sometime after the polygraph. (EH II, 9, 20)

On day three of the evidentiary hearing Simon was unable to attend due to an illness and the person who administered the polygraph also failed to show for the hearing. The defense waived their presence. (EH III, 3-4)

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[4] James Fisher testified to obtaining a copy of a bank check in the name of Chole Pruitt for $7000.00 and that the majority of the money was deposited to Pruitt's credit union account. $2000.00 was taken out in cash.

[5] At trial, Detroit Police Investigator Ronald Tate, who was initially in charge of the investigation and interviewed Mr. Craighead twice, testified that Mr. Craighead lived 3 ½ to 5 miles away from where Mr. Pruitt's truck was found. (Trial Transcript Volume 2, 103) Milton Craighead, Sr. also testified about this distance, finding that it was 5.8 miles from Mr. Craighead's home to where Pruitt's vehicle was found. (T3, 43-44)

The Defense Case (at the Evidentiary Hearing)

Randle Craighead, Mr. Craighead's brother, was with Mr. Craighead on that Tuesday when the police were at Mr. Craighead's house. Mr. Craighead spoke with the police for about twenty minutes out on his front porch and told the police he was willing to come to the station the next day to talk with them. Mr. Craighead told the police he had been working all day and had not had a lot of sleep. (EH III, 9-11)

When the police told Mr. Craighead he had to go downtown with them immediately, Mr. Craighead asked if he could go inside his home to change clothes and call an attorney. The request was refused. (EH III, 12-14)

Randle followed the police and his brother downtown. He waited from 6:30 to 11:30 pm to talk with his brother but was not allowed to do so. (EH III, 17)

Michael Heslip was at Mr. Craighead's house when the police arrived initially and when they returned. He saw the police talking with Mr. Craighead and standing in front of the door. (EH III, 30-32)

Milton Craighead Sr., Mr. Craighead's father, spoke with Fisher and asked him why he was holding his son and asked if his son had seen an attorney. (EH III, 43) He also called and spoke with Investigator Richardson who told him that his son was being held for murder. (EH III, 44)

Mr. Craighead testified that he was working the 5:00 am to 3:00 pm shift on the assembly line for Chrysler in June 2000. He woke for work at 3:00 am on June 20th, which was the day the police arrived at his home and took him to the station (EH III, 51-52) The officers did not allow him to go inside his home or call an attorney. (EH III, 81)

The Lower Court's Opinion

Judge Richard Hathaway gave his decision from the bench on February 21, 2001. (Opinion) The Judge first found that the police properly administered Miranda warnings to Mr. Craighead and that he was held less then 24 hours before giving a statement. (Opinion at 4-5)

The Court next found that "probable cause in this particular matter was in fact met" stating with regard to this issue:

> "I do believe that probable cause in this particular matter was in fact met; that the investigative officer in this particular case, I believe his name was Fisher, did tell this Court that it was his understanding and belief that this particular defendant was with Mr. Pruitt on the day that he passed; that they were going to be involved in some type of enterprise; that the victim's car was found approximately a mile and a half from the residence of the defendant in this particular cause.
>
> I do believe that probable cause in fact has been met for the appropriate arrest in this particular cause." (Opinion at 5)

The Judge next found that the statement was voluntarily given in that although Mr. Craighead was tired he was not "lacking in food or water." (Opinion at 5-6)

In conclusion the Judge noted that this was a "unique case; that the police in this particular cause decided to re-look at this particular defendant after a few years' time lapsed." (Opinion 6) He then sua sponte granted bond to Mr. Craighead who was charged with first-degree murder, an offense for which the trial court may deny pretrial release without reason. MCR 6.106 (B)(1)(a)(i). (Opinion at 6-7)

Trial Proceedings

Chole Pruitt was shot and killed in his apartment sometime during the evening of June 26, 1997 or early morning hours of June 27, 1997. His body was found on June 27, 1997 by two painters who accidentally went to the wrong apartment and entered after finding the door

unlocked. (T 1, 245-247) The painters called the apartment manager, who was a friend of Pruitt's before he moved in, and, according to the deceased's father, may have had a relationship with him. (T 1, 243, 247; T 2, 9)

The apartment manager, Ms. Miller, had an apartment close to Pruitt's and had not received any complaints about gun shots. (T 2, 13-14) After seeing the body on the floor of the apartment she called the police. (T 2, 7) She was aware that Pruitt had some previous problems with people tampering with his vehicle. (T 2, 16)

The evidence technician who processed Pruitt's apartment found no signs of forced entry into the complex or Pruitt's apartment. (T 2, 41) He found no usable fingerprints on the premises. (T 2, 43) He referred to the disarray in the bedroom of Pruitt's apartment as selective searching as there were no signs of typical ransacking. (T 2, 42, 55) He recovered jewelry from Pruitt's body. (T 2, 56-57)

The evidence technician found bullet strikes in bi-fold doors in front of the dryer and in the dryer. (T 2, 43) He recovered two fired bullets and 4 spent bullets. Once the body was removed he "examined the floor and recovered two fired bullets that were --- had passed apparently through the body, into the carpeting, and were lodged between the carpet underside and the floor of the hallway." (T 2, 45, 48) He also found two boxes of live ammunition in Pruitt's apartment; ammunition for a 38 caliber and a 30 caliber weapon. (T 2, 58)

Pruitt died as a result of multiple gunshot wounds. (T 2, 65) He had 2 gunshot wounds in his back, was shot through the left thigh and through the right side of his neck. (T 2, 62-64) There was no evidence of close range firing. (T 2, 64)

Melvin Howard knew Pruitt and Mr. Craighead and knew that they were close friends. (T 2, 74-75) He saw Pruitt on June 26th and Pruitt was at Howard's home when Milton Craighead Sr. stopped over that same day. (T 3, 39, 42)

Ronald Tate was the Officer in Charge of this case in 1997. (T 2, 79, 83) He twice interviewed Mr. Craighead, once in 1997 and again in 1999. Tate testified that both times Mr. Craighead told him that he and Pruitt were friends and they went to lunch on June 26, 1997 and he dropped him off late in the afternoon. (T 2, 80-81, 82)

Tate later clarified this testimony after refreshing his memory by reviewing the written statements. Mr. Craighead had told him that he was not sure what day he had gone to lunch with Pruitt and thought it had been either the Wednesday or Thursday before he had learned of Pruitt's death. (T 2, 92) Mr. Craighead told him that Pruitt had come by his house and they had gone to Friday's for drinks sometime in the late afternoon. Pruitt then dropped Mr. Craighead off at Mr. Craighead's home. Mr. Craighead later learned that Pruitt next went to Melvin Howard's home. (T 2, 93, 97)

Mr. Craighead told Tate during both interviews that he worked at Sam's Club in Farmington Hills. (T 2, 97)

Although Pruitt was shot with 44 caliber bullets, the police did not recover a 44 caliber weapon and did not recover any weapon that could have fired 44 caliber bullets. (T 2, 85-86, 88, 103) All four of the recovered bullets were fired from the same weapon. (T 2, 162)

According to Tate, Mr. Craighead lived, at the time of the incident, 3 ½ to 4 miles from where Pruitt's burned-out truck was found in Redford[6]. (T 2, 103) Milton Craighead Sr. found the distance between Mark Craighead's home and Pruitt's burned-out vehicle to be 5.8 miles.

On June 20, 2000 Investigator James Fisher and Lieutenant Jackson went to Mr. Craighead's home to speak with him about Pruitt's death. (T 2, 145) Mr. Craighead was willing to talk with the officers but wanted to speak with them the next day and was pretty adamant about waiting until the next day to speak with them because it was late and he had been working all day. (T 2, 148-150) Fisher wanted Mr. Craighead to come to the police station immediately and denied making any reference to a scout car coming to take him to the police station. (T 2, 150) According to Fisher, Mr. Craighead agreed to go to the police station and rode with the officers while his brother followed. (T 2, 150-151) Mr. Craighead's brother was not allowed onto the Homicide floor of the station. (T 2, 151)

Mr. Craighead was held in the Ninth Floor lock-up overnight and a decision was made to have Investigator Simon question Mr. Craighead. (T 2, 154-155) Fisher had Investigator Simon question Mr. Craighead because her interrogation skills were better than his and Fisher hoped that because of her skills Mr. Craighead would say something. (T 2, 156-157)

Fisher himself had no conversation regarding the case with Mr. Craighead. (T 2, 158)

Investigator Barbara Simon first spoke with Mr. Craighead at the police station on June 20, 2000. (T 2, 112) Mr. Craighead was in police custody on June 20th but she did not interview

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[6] On June 27, 1997 at approximately 2:35 am Redford police officer Lawrence Turner responded to a call about a car fire. The vehicle was a 1996 Chevy Tahoe registered to Chole Pruitt. (T 2, 18-20) Turner saw only one set of tire tracks and could not tell if the steering column of the vehicle was damaged. (T 2, 20, 22)

Leslie Wedge, the Redford Township Fire Marshall, found that gasoline was poured on the inside of the truck in two separate places and the fire was set from the inside. (T 2, 26-27) A 38 caliber handgun was found in the truck. (T 2, 27-28)

him at that time. Instead, he was held overnight and she interviewed him on June 21st. (T 2, 117-118, 121-122)

Simon interrogated Mr. Craighead on June 21st after he waived his rights and agreed to speak with her. (T 2, 106-108) She testified that she wrote out the questions she asked and his answers and then had Mr. Craighead review and sign the statement she had written out. (T 2, 109) The written document was read in its entirety into the record and the relevant transcript pages are attached as Appendix A. (T 2, 110-112) The relevant substance of the admitted document was that Mr. Craighead had been at Pruitt's home, they argued, but he could not remember why, Pruitt had a gun, they fought over the gun, the gun went off and Pruitt was shot, Mr. Craighead ran out of the apartment and went home. When specifically asked about the truck the statement indicates that Mr. Craighead drove the truck to Redford although he could not say where in Redford he had left it. *Id.*

Martin Ryzak was working as the business manager for Sam's Club in Farmington Hills in June 1997. (T 3, 8) Mr. Craighead worked as a full-time employee during that same time on the night shift, which ran from either 9:00 pm to 5:00 am or 10:00 pm to 6:00 am. (T 3, 9) The building was locked down at night. (T 3, 10, 13) Mr. Craighead was a good employee who generally worked Tuesday through Saturday. (T 3, 12, 14) There were no hourly time records for that time period because they had been damaged and subsequently discarded when a sprinkler head was damaged. (T 3, 11)

Randle Craighead was out with his brother running errands on June 20, 2000 and they returned to his brother's home to find two men on the porch. The two men identified themselves as police officers and said they wanted to talk with Mark about Chole's murder. (T 3, 21) Mark

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invited the officers into his home and they said no, that they wanted to speak with him downtown. (T 3, 22) Randle followed them to police headquarters. (T 3, 25)

Michael Heslip was at Mr. Craighead's home when the police arrived on June 20th. (T 3, 35) Michael heard the police tell Mark that if he did not come with them they would radio for a scout car. (T 3, 38)

Mark Craighead lived at 23644 Schoolcraft in 1997 and worked the night shift as a stock man at Sam's Club. (T 3, 49-50) The week of Pruitt's death he worked Tuesday through Saturday. (T 3, 57)

Mr. Craighead was very good friends with Pruitt and saw him shortly before he was killed. Pruitt had come by his home and they went for drinks at Friday's. A lot of things had been happening to Pruitt and Pruitt wanted to move. (T 3, 55-56) Mr. Craighead did not see Pruitt again after their outing to Friday's. (T 3, 57-58)

Mr. Craighead did not kill Pruitt and did not know who had killed him. (T 3, 61, 72-73)

On June 20, 2000 Mr. Craighead was working at Chrysler and had worked the 5:00 am to 3:00 pm shift. (T 3, 62) He went downtown with the police because he did not want a confrontation with them. (T 3, 64-65)

The officers questioned him in the car and in the station and he told them he did not know anything more than he had already told them. (T 3, 67-68) Nothing in the statement that Simon read was true. He signed the statement because he was broken down and Simon told him he would otherwise be there for the rest of his life. (T 3, 87, 89)

Following jury instructions the jury sent out two notes. The jury wanted to know if there was a paycheck stub or evidence that Mr. Craighead had worked a 40 hour work week, wanted

Mr. Craighead's statement and wanted written instructions on second-degree murder and manslaughter. (T 3, 169, 174)

Post Conviction Proceedings

Appellate counsel filed a timely motion for new trial raising the issues of new evidence and misleading evidence with regard to the initial ruling on the Motion to Suppress Mr. Craighead's statement. Judge Jones, who was the trial judge but not the Judge who presided over the Walker hearing, denied the motion. In denying the motion Judge Jones never ruled on the merits of the claims instead stating "I cannot change with (sic) Judge Hathaway has already decided. That you'll have to take to the Court of Appeals." (Hearing Transcript 5/17/05, 9) In response to argument about Officer Fisher's misrepresentations to Judge Hathaway at the suppression hearing, Judge Jones stated "I listened to it at trial, I would not have gone along with what I heard at trial at all. That's out of my hands." *Id.* at 11. (Order denying Motion for New Trial attached as Appendix B)

Following this ruling, appellate counsel filed a Motion for Reconsideration, which also added additional issues to the original New Trial Motion. This Motion was denied without hearing in a written Order issued June 27, 2005. (Order attached as Appendix C)

Mr. Craighead now appeals by right from his convictions and files this brief asking the Court to vacate the convictions or, in the alternative, reverse the convictions and remand for a fair trial.

I. WHERE THE DETROIT POLICE OFFICERS VIOLATED MR. CRAIGHEAD'S CONSTITUTIONAL RIGHTS BY ARRESTING HIM WITHOUT PROBABLE CAUSE AND ILLEGALLY HOLDING HIM UNTIL HE ADOPTED AN INCRIMINATING STATEMENT THIS STATEMENT MUST BE SUPPRESSED AS THE FRUIT OF THE ILLEGAL ARREST.

A. Issue Preservation and Standard of Review

This issue was preserved by trial counsel's motion to suppress the statement and the evidentiary hearing held on this issue as well as appellate counsel's timely filed post conviction motion on this issue. See, generally, Lower Court Records, Evidentiary Hearing Transcripts and Post Conviction Transcripts.

Because this is preserved constitutional error, reversal is required unless the prosecution establishes that the error is harmless. *People v Carines,* 460 Mich 750, 763-64; 597 NW2d 130 (1999)

B. The Constitutional Provisions

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." United States Const, Am IV

The Michigan Constitution, 1963 similarly states in relevant part:

> "Sec. 11. The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." Mich Const 1963, Art 1, sec 11.

C. Systemic Problems with the DPD Come to Light - The Detroit Police Department and the Federal Court Consent Judgment -

The facts bear out that Officers Fisher and Jackson arrived at Mr. Craighead's home knowing they did not have probable cause to arrest him. Knowing they could not handcuff him and arrest him without probable cause, Fisher and Jackson engaged instead in a subterfuge whereby the officers would force Mr. Craighead to come with them and then could say he accompanied them voluntarily. The trial court never addressed this aspect of the arrest.

What happened at Mr. Craighead's home is not in dispute. When Mr. Craighead arrived home with his brother the police were on his front porch waiting for him. The officers refused Mr. Craighead entry into his home and were unrelenting in their "requests" that he go to the police station with them immediately, refusing to allow him to come downtown the following day after he got some rest and could speak with an attorney. The police gave no reason why this need was immediate given that three years had passed since the shooting incident and Mr. Craighead had remained in Detroit, was available, had cooperated with the police in the past and remained cooperative.

Unfortunately, the police conduct in this case was all too familiar and has been found to be blatantly illegal. This is borne out by two particular documents. The first is the June 5, 2002 letter to Corporation Counsel Ruth Carter from Steven H. Rosenbaum, Chief Special Litigation Section of the United States Attorney's Office. In the June 5th letter, Attorney Rosenbaum indicated that the Detroit Police Department:

> "**defines an arrest as 'a taking of an individual into custody for further investigation**, booking or prosecution', **this policy implicitly permits the arrest of an individual with less than probable cause as a means to facilitate an investigation**. Indeed, some former DPD employees informed us that it was acceptable practice to arrest suspects without probable cause and then continue to investigate the case to develop probable cause prior to arraignment. **Gathering additional evidence after an arrest in**

> **order to establish probable cause for that arrest is unconstitutional. County of Riverside v McLaughlin**, 500 U.S. 44, 56 (1991)" (emphasis added)(Letter attached as Appendix D)

The second location for an explanation is the Consent Judgment that Judge Julian Abele Cook entered, which required, among many other relevant requirements, that officers must be instructed "that the **'possibility' that an individual committed a crime does not rise to the level of probable cause**." (emphasis added) The Consent Judgment further instructed that the officers be given:

> "examples of scenarios faced by DPD officers and interactive exercises that illustrate proper police-community interactions, including scenarios which distinguish an investigatory stop from an arrest by the scope and duration of the police interaction; **between probable cause, reasonable suspicion and mere speculation; and voluntary consent from mere acquiescence to police authority**." (emphasis added) (Consent Decree attached as Appendix E)

The facts of this case bear out all too well the problems that were infecting the Detroit Police Department at the time of this investigation and which ultimately led to entry of the Consent Judgment. Officers Fisher and Jackson engaged in a textbook list of illegal tactics in order to extract an incriminating statement from Mr. Craighead because they believed, i.e., speculated that he was responsible for the shooting.

There can be no question but that Mr. Craighead was under arrest from the moment he arrived home. He did not voluntarily go with the police downtown; he merely acquiesced to the police authority. He was held incommunicado as evidenced by the police refusing his brother, who accompanied him to the station, to have contact with him.

Further, even if not under arrest at his home, Fisher admitted that he did not even try to obtain a warrant until after Mr. Craighead signed the incriminating statement and that Mr. Craighead was under arrest the moment he arrived at the station. (EH I, 50, 70-71, 72) Given

Fisher's testimony that he had no discussions with Mr. Craighead about the case, nothing happened to justify Mr. Craighead's detention even if the initial contact was voluntary. (T 2, 144)

Contrary to the trial court's assertion that he may have been tired but was not "actually lacking in any sleep" (Opinion at 5-6) is the testimony of Officers Fisher and Simon. Fisher brought Mr. Craighead to the station at 7:00 pm and had no contact with him after 9:00 pm. Simon had no contact with Mr. Craighead until the next day (6/21) when she took him for a polygraph examination around 2:00 or 3:00 am. (EH II, 20) Mr. Craighead had been up since 3:00 am on 6/20, worked the entire day, was running errands after work, was arrested and brought to the station and was taken for a polygraph at 2:00 or 3:00 am. One can only conclude that given the circumstances he had little or no chance for any sort of relaxing sleep as he had been awake for most, if not all, of the 24 hours prior to being taken for the polygraph examination.

The officers arrested Mr. Craighead without probable cause in order to continue the investigation in a manner that was suitable to them. The DPD's internal policies allowed for arrests without probable cause. However, those internal policies were and are unconstitutional. This Court can not and should not allow the illegal police practices to be condoned. Mr. Craighead's convictions must be reversed.

D. Officer Fisher Did Not Have Probable Cause to Arrest Mr. Craighead

Officers Fisher and Jackson lacked probable cause to arrest Mr. Craighead. With or without a warrant, the Fourth Amendment requires that an arrest be supported by probable cause. *Whitely v Warden,* 401 US 560, 566; 91 S Ct 1031; 28 L Ed 2d 306 (1971); US Const, Am IV. Michigan law parallels the federal constitutional standard. *See* Mich Const 1963, art 1, § 11; MCL 764.15 (d).

Probable cause to arrest exists when the facts and circumstances within the officers' knowledge are sufficient to a prudent person, or one of reasonable caution, to believe that the suspect has committed or is committing a felony. *People v Mitchell,* 138 Mich App 163, 167; 360 NW2d 158 (1984). Facts which constitute mere suspicion, inarticulate hunches and vague beliefs of criminal involvement do not amount to probable cause. *See, e.g., United States v. Arivizu,* 534 US 266; 122 S Ct. 744; 151 L Ed 2d 740 (2002) (hunch does not rise to level of probable cause). Where there is no probable cause to arrest, but the police take a defendant into custody for investigatory purposes, any evidence obtained as a result of that unlawful detention or any statement made while unlawfully detained must be suppressed. *People v Lewis,* 160 Mich App 20, 25; 408 NW2d 94 (1987). The prosecution bears the burden of demonstrating probable cause for a warrantless arrest. *People v Reed,* 393 Mich 342; 224 NW2d 867 (1975).

Here, the prosecution never established that the police had probable cause to believe that Mr. Craighead had committed a crime at or prior to the moment that Mr. Craighead signed the incriminating statement, which was signed over 12 hours after his illegal arrest. In fact, Officer Fisher's testimony demonstrates that far from having probable cause to arrest he merely had a suspicion based on reviewing the police work of other officers that Mr. Craighead was the perpetrator. Further, even if Fisher believed he had probable cause to arrest, there is no excusing his failure to present the evidence he had to a judge for issuance of an arrest warrant. Fisher's failure to do so is especially troubling given that the crime had occurred three years prior to his deciding that Mr. Craighead was the perpetrator, Mr. Craighead remained a Detroit resident and working member of the community and there was no evidence of any circumstances justifying Fisher's actions of arresting Mr. Craighead without a warrant.

Fisher based his belief that Mr. Craighead shot Chole Pruitt on two main premises, one of which was faulty and one of which was the same information that other officers had reviewed and had not deemed worthy of further investigation let alone probable cause for an arrest.

The falsity that Mr. Craighead lived approximately 1 to 1-1/2 miles from where Mr. Pruitt's vehicle was found was the primary fact that Fisher used to support his belief that Mr. Craighead committed this killing. This "fact" was also central to the trial court's finding that probable cause existed for the arrest. This is a faulty premise in that Fisher himself admitted that in taking a rough calculation of mile road to mile road; it was farther than 1 to 1-1/2 miles from Mr. Craighead's home to the vehicle. At trial Officer Tate, the original officer in charge of the case and the officer who had twice interviewed Mr. Craighead (T 2, 79, 83), testified that it was 3 ½ to 4 miles from Mr. Craighead's home to where the vehicle had been found. (T 2, 103) Mr. Craighead's father testified to the distance being 5.8 miles. There can be no doubt that Fisher, who claimed at the evidentiary hearing that he drove the route in his police vehicle and the distance was 1 to 1 ½ miles, ((EH I, 17-18, 46-47) lied about the distance involved and used that lie as his main premise for the claim that he had probable cause to arrest Mr. Craighead.

Fisher's review of the police statements and discussions with someone who saw Mr. Pruitt with a black male who could have been Mr. Craighead adds nothing to the probable cause analysis. Being with someone at some point in the day prior to the person being shot that night does not rise to the level of probable cause for an arrest, especially when it is undisputed that the two were good friends and regularly spent time together.

The third point the Judge mentioned in determining that there was probable cause to arrest Mr. Craighead was the witness statement of Mr. Gibson, taken in 1998, that he thought that Mr. Pruitt and Mr. Craighead may have been trying to sell drugs together. This was an

unsubstantiated claim and one the police knew of since the start of the investigation. It is also a claim that is irrelevant to the police theory that Mr. Pruitt was killed by someone who knew he had recently received a monetary settlement.

The trial court further failed to take into account the circumstances surrounding the arrest. Officer Jackson admitted that the Detroit Police do not always obtain a warrant even when they have probable cause for an arrest. Jackson's statement underlies the problems besieging the Detroit police department and the citizens of the City whose rights are being trampled every day by a cavalier attitude toward the Constitution. There is no justification for failing to obtain a warrant in this case where the incident happened three years prior, the police suspect is a life long resident of Detroit who lives and works in the City, the suspect has been cooperative in the past and was willing to be cooperative with these officers and there is nothing to indicate any immediate need for arrest. The officers' forceful actions speak volumes about what happened in this case and the legal strength of their case at the time of arrest. There is absolutely no justification for failing to request and obtain an arrest warrant. The only reason the police did not submit a warrant request was because they knew there was no probable cause for an arrest. The police also knew that they had to wear down Mr. Craighead if there was any hope of obtaining an incriminating statement from him, which explains the surprise tactics and the desire to have him in their custody without access to family members or an attorney.

Fisher, while testifying that Mr. Craighead voluntarily accompanied him to the station, admitted that once he was at the station Mr. Craighead was not free to leave. He testified that Mr. Craighead was under arrest at that point because Fisher thought Mr. Craighead's answers to his questions were inconsistent with other evidence. Inconsistency is the same reason Fisher gave for wanting to question Mr. Craighead after reviewing the witness statements that the police

had previously obtained. Again, Fisher's subjective beliefs do not and can not pass for probable cause.

E. Evidence obtained incident to the arrest should have been suppressed.

Under the fruit of the poisonous tree doctrine, evidence obtained through exploitation of an illegal detention is subject to suppression. *Wong Sun v United States,* 371 US 471, 486; 83 S Ct 407, 416; 9 LEd2d 441 (1963). The test is whether the challenged evidence has been obtained by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint. *Id.* Three factors to be considered in determining whether the causal chain is sufficiently attenuated are: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *United States v Green,* 111 F3d 515, 521 (7th Cir. 1997), citing *Brown v Illinois,* 422 US 590, 603-04; 95 S Ct 2254; 45 L Ed 2d 416 (1975).

Applying these factors to Mr. Craighead's case, there can be no doubt that his statement was the fruit of the illegal arrest:

> (1) The statement was given only after Mr Craighead was held incommunicado for a significant period of time.
>
> (2) There were no intervening events other than the Miranda warnings. Miranda warnings do not cure an illegal arrest, and do not by themselves break the causal link between the illegal arrest and the statement, although they can be a factor to be considered. The United States Supreme Court has firmly established that the fact that a confession may be "voluntary" for purposes of the Fifth Amendment, in the sense that Miranda warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest. *Brown v Illinois, supra,* 422 US at 602-603; *Taylor v Alabama,* 457 US 687; 102 S Ct 2664; 73 L Ed 2d 314 (1982).
>
> (3) Arrests for investigation of a crime on mere suspicion are considered flagrant misconduct. *See Brown,* 422 US at 605; *Taylor,* 457 US at 689-690. Here, as in those cases, "the police effectuated an investigatory arrest without probable cause... and involuntarily

> transported petitioner to the station for interrogation in the hope that something would turn up." *Taylor,* 457 US at 693.

Because this is preserved constitutional error, reversal is required unless the prosecution establishes that the error is harmless. *People v Carines,* 460 Mich 750, 763-64; 597 NW2d 130 (1999). The prosecution cannot meet that burden. Mr. Craighead's unrecorded statement that he shot Mr. Pruitt after a struggle for the gun was the only evidence to support his conviction for manslaughter and felony firearm. Consequently, there is no argument that can be put forth that the statement was cumulative to other evidence or that its admission was otherwise harmless error. Mr. Craighead's convictions must be reversed.

II. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN FAILING TO PRESENT AN EXPERT WITNESS REGARDING THE PHENOMENON OF FALSE CONFESSIONS.

Issue Preservation and Standard of Review.

Mr. Craighead may raise this ineffective assistance of counsel claim for the first time on appeal because it involves a constitutional error that likely affected the outcome of the trial. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999) (defendant may raise ineffective assistance of counsel for the first time on appeal, with review limited to mistakes apparent in the record). The performance and prejudice prongs of an ineffective assistance of counsel claim are mixed questions of law and fact that are reviewed de novo. *Strickland v Washington*, 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Blackburn v Foltz*, 828 F2d 1177, 1181 (6th Cir. 1987).

Analysis.

Mr. Craighead had the right under the federal and state constitutions to the effective assistance of counsel. U.S. Const., amend VI; Const. 1963, Art. 1, § 20; *Strickland*, 466 US at 668. To prevail on an ineffective assistance of counsel claim, a defendant must meet two criteria. He must first "show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra*, at 687. In so doing, the defendant must overcome a presumption that counsel's performance was the result of sound trial strategy. *Id.* at 690. Second, the defendant must show the deficient performance was prejudicial. *Id.* at 687. Prejudice is established where there is a reasonable probability that, but for counsel' error,

the result of the proceeding would have been different. *Id.* at 694; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

As the prosecutor stated in opening statements and the Judge stated in post conviction proceedings, the statement attributed to Mr. Craighead was the primary, if not the sole piece of, evidence upon which a conviction could rest in this case. Mr. Craighead's defense was two pronged. First, he could not have committed the crime because in June 1997 he was working from the evening hours of June 26th until the early morning hours of June 27th and was unable to leave the premises without being detected because the building in which he worked was locked for the shift. Unfortunately for Mr. Craighead the actual time cards had been destroyed. Although he provided evidence that he worked during the week in question, he could not supply proof for the exact day/time period in question due to the destruction, by the company, of the actual time cards.

The second part of his defense was that although he signed the statement that Simon wrote out, thereby impliedly adopting the truth of it, he did so only because he was worn down and felt he had no choice but to acquiesce to what had been written for him. Given the imperfections with the alibi defense, it was critical that the jury was presented with something upon which to base an understanding of why someone would falsely confess to killing someone. As the prosecutor told the jury in rebuttal closing argument, why would Mr. Craighead say he did something that he did not do? (T 3, 136-137) Counsel, however, failed to present any such testimony.

The occurrence of false confessions is surprisingly common within the criminal justice system and society at large. See, Kassin, *Confessions: Psychological and Forensic Aspects*, International Encyclopedia of Social and Behavioral Sciences (2001). Aggravating the

widespread incidences of false confessions is the erroneous belief that a confession is an indisputable indication of guilt. Because it is so difficult for fact finders to fathom why anyone would willingly confess to a crime they did not commit, expert testimony on false confessions is critical, especially in cases where that confession is the only incriminating evidence.

Experts agree that during interrogations even well-intentioned officers can often end up producing false confessions. Kanabe, George. *Why Judges and Juries Should Have Access to Complete Electronic Recordings of Police Interrogations: Following Illinois's Example.* Findlaw's Legal Commentary, August 13, 2003. The police, as in this case, often lead suspects to believe that they have no other option but to confess. Those who initially assert their innocence, as Mr. Craighead did, come to the realization that denial will offer them no escape from police interrogation and they turn to anything that will allow them to escape the police questioning – sometimes a false confession. Kanabe, *supra.*

According to Steven Drizin, a professor at Northwestern University School of Law and an authority on false confessions, "it's a reaction to a feeling of utter hopelessness and despair that virtually anything I say about my innocence is going to be ignored, and my only way out of this interrogation room is to accede to the interrogator's demands." Marks, Alexandra. *Why People Confess to Crimes they Didn't Do*. The Christian Science Monitor, Dec. 5, 2002.

Other suspects may truly stop believing in their own innocence, in spite of the fact that they have committed no crime. Kanabe, 2003. "This is particularly likely to happen when the interrogator tells the suspect that incriminating evidence has been retrieved that undeniably identifies the suspect as the perpetrator of the crime in question – and when the interrogation is prolonged." Kanabe, 2003.

After Chole Pruitt was killed in June of 1997, Mark Craighead was fully cooperative with the police. He spoke with Investigator Tate on August 29, and a second time more than a year later on March 18, 1999. Investigator Tate testified at trial that during the second interview Mr. Craighead gave him the same information concerning his knowledge about the events surrounding Mr. Pruitt's death, consistent with their first meeting. (T 2, 97).

Circumstances surrounding both Mr. Craighead's arrest and the statement he gave to Investigator Simon suggest that it was at the very least improperly persuaded, or worse, aggressively coerced from him. On June 20, 2000 Mr. Craighead had worked a ten-hour shift on the Chrysler assembly line from 5:00 a.m. until 3:00 p.m. (EH III, 52). Hungry and still operating on a mere three hours of sleep, he arrived home in shorts and a dirty t-shirt to find Investigator Fisher and Lieutenant Jackson waiting on his porch around 6:00 in the evening. (EH III, 64).

Although Mr. Craighead was told he was not under arrest and that he was only needed for questioning at 1300 Beaubien, he was not allowed to leave once he went downtown with the officers, and he was not allowed to speak with anyone. (EH III, 81). At some point he was placed in a room at squad seven and left there for approximately three hours. (EH III, 85). Mr. Craighead testified at the Walker Hearing that Investigator Simon let him out of the room at 11:00 that night and lied, telling him that a witness had given her a written statement, that he was seen riding with Chole Pruitt the day he was killed. (EH III, 89). Mr. Craighead was given a polygraph examination sometime between 2:00 and 3:00 a.m., and then he was taken to a custody cell on the ninth floor of 1300 Beaubien. (EH III, 96-97). It was approximately 11:00 a.m. when Investigator Fisher brought Mr. Craighead back down to squad seven so that Investigator Simon could interrogate him further. (EH III, 99).

At this point Mr. Craighead had been locked up, with no outside contact and had consistently maintained his innocence and lack of any knowledge regarding his friend's death. His resolve, however, was being steadily and systematically worn away. The statement adopted, which bears little relationship to the actual facts behind the shooting[7], is not worthy of belief, let alone reliable as a sufficient basis for conviction.

Because of the difficulty people have believing and/or understanding why someone who is innocent would confess to a crime, the importance of expert testimony on this issue cannot be overstated. It is the job of an expert to explain things to the jurors that are outside of ordinary knowledge. *People v Boyd*, 65 Mich App 11 (1975). *See also* MRE 702.

In this case, expert testimony on false confessions could have prevented an innocent man from the injustices of a wrongful conviction. Mr. Craighead's "confession" does not match the facts of the crime. An expert would have helped the jury understand why Mr. Craighead, who had nothing to do with Chole Pruitt's death, would have "confessed" to such a crime. Given that false confessions result in a significant number of wrongful convictions, and given that defense

---

[7] The evidence showed that Mr. Pruitt had been shot multiple times and not at close range (from a distance of about four feet according to the medical examiner). The statement indicates that he was shot in a struggle over the gun. The statement thus indicates one shot at close range. At least two of the multiple shots borne out be the physical evidence appeared to have been fired while Pruitt was prone on the ground, as determined by the spent bullets found lodged in the underside of the carpeting beneath where the body was found. (T 2, 45)

Further, the statement did not address why Mr. Pruitt's truck was driven into Redford and set on fire or why it appeared that someone had been searching certain areas of the apartment.

counsel failed to present this relevant and critical evidence to the jury, Mr. Craighead is entitled to a new trial where he is allowed to present an expert witness on false confessions.

SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

WHEREFORE, for the foregoing reasons, Defendant-Appellant Mark Craighead asks that this Honorable Court vacate his convictions or, in the alternative, reverse the convictions and remand this case for a fair trial. Additionally, oral argument should be had in this matter so that counsel can address the Court's questions and/or concerns about the issues raised in this appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: ______________________

VALERIE R. NEWMAN (P47291)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: August 9, 2005

APPENDIX A

THIRD JUDICIAL CIRCUIT COURT - CRIMINAL DIVISION

STATE OF MICHIGAN

COPY

THE PEOPLE OF THE STATE OF MICHIGAN,

vs. Case No. 00-007900

MARK T. CRAIGHEAD,

Defendant.

05 P

JURY TRIAL

BEFORE THE HONORABLE VERA MASSEY JONES
CIRCUIT COURT JUDGE

Detroit, Michigan - Thursday, June 20, 2002

APPEARANCES:

For the People: FELEPE HALL (P58533)
Frank Murphy Hall of Justice
Wayne County Prosecutor's Office
1441 St. Antoine, 12th Floor
Detroit, Michigan 48226-2302
(313) 224-5777

For the Defendant: STEVEN F. FISHMAN (P23049)

Court Reporter: JANICE I. PAYNE, CSMR 3521

(313) 224-2487

AUG 12 2004

APPELLATE DEFENDER OFFICE
Processed
Notice of Filing Sent
Clerk

1 (By Mr. Hall)

2 0 Could you read the statement that Mr. Craighead gave to

3 you?

4 A Yes.

5 Question: "What can you tell me

6 about the fatal shooting of Mr. Chole Pruett?"

7 Answer: "I was over to Chole's

8 apartment. It was just me and Chole. We got into

9 an argument. I can't recall what the argument was

10 about. Choie had a gun. We got to fighting over

11 the gun. I got the gun away from Chole. I

12 panicked and I fired the gun. After Chole was

13 shot, I didn't know what to do. I ran out of the

14 apartment. I went home. I was scared. I didn't

15 know what to do."

16 Question: "Mr. Craighead, when you

17 left Mr. Pruett's apartment, did you take

is anything?"

19 Answer: "No."

20 Question: "Mr. Craighead, did you

21 take Mr. Pruett's truck?"

22 Answer: "Yes. I drove it over to

23 Redford. I don't remember what street I drove the

24 truck to."

25 Question: "How long have you known

5

S

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S

1 Mr. Pruett?"

2 Answer: "I have known Chole for

3 about four or five years. He was going with my

4 sister-in-law, Samantha."

5 Question: "Have you and Chole ever

6 had a fight before?"

7 Answer: "No, never. We were close

8 friends."

9 Question: "What happened to the

10 gun?"

11 Answer: "I don't remember."

12 Question: "Mr. Craighead, did I

5

13 threaten you in any way to make a statement?"

14 Answer: "No;" and he signed his

15 name "Mark Craighead."

16 Question: "Mr. Craighead, did I

17 promise you anything to make a statement or answer

18 any questions?"

19 Answer: "No;" and he signed his

20 name "Mark Craighead."

21 Question: "Mr. Craighead, were you

22 deprived of food or the use of the restroom?"

23 Answer: "No;" and he signed his

24 name "Mark Craighead."

25 Question: "Mr. Craighead, are you

S

1 on any type of medication?"
2 Answer: "No;" and he signed his
3 name "Mark Craighead."
4 Question: "Mr. Craighead, is the
5 statement you gave and the questions you answered
6 true?"
7 Answer: "Yes;" and he signed his
8 name "Mark Craighead." Then he signed his name
9 "Mark Craighead," and put the date 6/21/2000; the
10 time 11:50 a.m.
11 Q Do you know when Mr. Craighead was brought down to --
12 I'm sorry, strike that.
13 Where were you when you interviewed Mr.
14 Craighead?
15 A Homicide, fifth floor, Squad 7, I believe.
16 Q Do.you know when he was brought to that location?
17 A I think the first time I seen him was on the 20th.
18 Q Did you have any contact with him prior to him giving
19 that statement?
20 A Yes.
21 Q Did you interview him prior to giving that statement?
22 A No.
23 Q So your contact with him wasn't in relation to talking
24 to him about anything regarding the case?
25 A No, not at that time.

APPENDIX B

STATE OF MICHIGAN Third Judicial Circuit Court Criminal Division	ORDER DENYING / GRANTING MOTION	Case No. 00-7900

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

Mark Craighead
Defendant

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

at Detroit in Wayne County on 5-17-05

PRESENT: Honorable Vera Massey Jones
Judge

A Motion for : new trial having been filed; and

---

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

IT IS ORDERED THAT the Motion for ________________ be and is hereby ☑ denied ☐ granted.

[signature]
Judge

A TRUE COPY
CATHY M. GARRETT
WAYNE COUNTY CLERK
BY M Cray
DEPUTY CLERK

ORDER DENYING / GRANTING MOTION

FORM #7 (12 / 97)

APPENDIX C

20935t
RECEIVED

JUL 25 2005

APPELLATE DEFENDER OFFICE

STATE OF MICHIGAN

IN THE WAYNE COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

MARK TALBORT CRAIGHEAD,

Defendant-Appellant.

______________________________________/

Court of Appeals No. 243856
Circuit Court No. 00-7900-01

Honorable Vera Massey Jones

PRAECIPE FOR MOTION AND ORDER/JUDGMENT

TO THE ASSIGNMENT CLERK: Please place Defendant's

MOTION FOR RECONSIDERATION AND/OR TO AMEND MOTION FOR NEW TRIAL

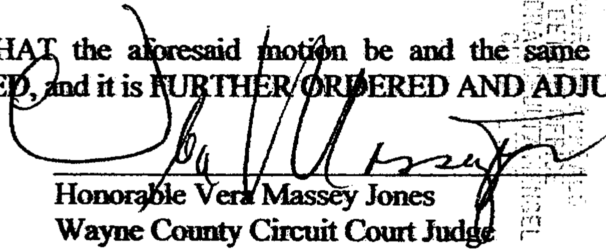
On the motion calendar for **hearing on the pleadings.** This motion is to be heard by JUDGE VERA MASSEY JONES.

TO COURT CLERK: Have the following Order/Judgment completed and signed by Judge and check 1 or 2 below, whichever is applicable.

ORDER/JUDGMENT

DATED: 6-27-05

1. IT IS HEREBY ORDERED THAT the aforesaid motion be and the same is hereby ✓ DENIED/_____ GRANTED, and it is FURTHER ORDERED AND ADJUDGED



Honorable Vera Massey Jones
Wayne County Circuit Court Judge

Date: 6-27-05

APPROVED AS TO FORM AND SUBSTANCE BY COUNSEL FOR:

VALERIE NEWMAN (P 47291)
Defendant's Attorney
Telephone No. (313) 256-9833

WAYNE COUNTY PROSECUTOR
Plaintiff's Attorney

Telephone No.

DATE::

Receipt Acknowledge of above
By______________
Date______________
Court of Appeals Detroit Office

APPENDIX D

June 5, 2002

Ms. Ruth Carter
Corporation Counsel
City of Detroit
660 Woodward Avenue, Suite 1650
Detroit, MI 48226-3491

Re: Investigation of the Detroit Police Department

Dear Ms. Carter:

As you know, the Civil Rights Division and the United States Attorney's Office for the Eastern District of Michigan are jointly conducting an investigation of the Detroit Police Department (DPD), pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141. We greatly appreciate the cooperation of the City of Detroit and the DPD thus far in this investigation.

Our investigation covers three areas: Use of force policies and practices of the DPD; DPD holding cell conditions, policies and practices; and DPD arrest and detention policies and practices. We identified our preliminary concerns regarding the use of force policies and practices of the DPD in our letter of March 6, 2002. We identified our concerns regarding DPD holding cells in a letter regarding emergent conditions on April 25, 2001, and provided more extensive comments and technical assistance recommendations regarding DPD holding cell conditions, policies and practices in our April 4, 2002 letter.

In this letter, we identify several areas of concern regarding DPD arrest and detention policies and practices, along with our recommendations for addressing these concerns. Important aspects of our fact-gathering process have yet to be completed, most notably completing our review of relevant DPD documents. Therefore, this letter is not meant to be exhaustive, but rather focuses on significant concerns identified in our review of the DPD's policies and procedures, a preliminary review of the documents that the DPD has produced and interviews with over 100 DPD employees. Please note that we may identify additional issues, and that the concerns discussed below do not relate to the use of force and holding cell components of our investigation.

I. Background

In March of 2000, former United States Attorney Saul Green met with former DPD Chief Benny Napoleon, other DPD command-level staff and supervisors from federal law enforcement agencies to discuss DPD arrest policies and procedures. The meeting was called because the United States Attorney's office had received reports of unconstitutional arrest and detention practices within the DPD homicide section. In response, the DPD agreed to end these arrest and detention practices and to institute a training program to ensure future compliance with constitutional mandates.

Our review to date raises concerns that the DPD may be (1) making warrantless arrests without probable cause; (2) arresting and detaining witnesses and family members of suspects without proper judicial authority; and (3) inappropriately delaying probable cause hearings before a judge or magistrate. Our interviews of DPD personnel indicate that, with the exception of Wayne County Prosecutors having spoken at a homicide roll call, the DPD has not instituted any policy changes or formal training program to address these concerns. We recognize that the new leadership in the DPD intends to address these issues.

Appendix p. 190

As our investigation initially focused on the homicide section, the numbers presented in this letter reflect arrests and detentions in that section. Although arrest and detention concerns were identified throughout the DPD, the homicide section is one of the special commands where the arrest and witness detention concerns were most prevalent. The special commands include homicide as well as the other sections of the major crimes division and the narcotics bureau. The special commands are located in the First Precinct in the Headquarters Building. Individuals detained by the special commands were lodged, or housed, in the First Precinct until the cells were closed in September 2001. Special command detainees are now lodged in any precinct with available space. The closure of the cells in the First Precinct does not change our analysis as 1) the individual investigator in charge of a particular case and that investigator's supervisor continue to be responsible for the detainee irrespective of location, and 2) the DPD has not changed its problematic arrest and detention policies and practices.

II. Arrest Policies and Practices

DPD arrest policies and procedures contain imprecise, ambiguous and contradictory language. The policies as written, coupled with a lack of supervision, allow for the unconstitutional arrest of witnesses and suspects.

A. Arrest of witnesses

We recommend that the DPD amend and clarify its policies to comply with the law governing arrest. An arrest occurs when an officer's words or actions would convey to a reasonable person that he or she is not free to leave.[1] California v. Hodari D., 499 U.S. 621, 628 (1991). Therefore, an officer's subjective intent is not a factor in the evaluation. This inquiry is based on all of the circumstances surrounding the encounter. Florida v. Bostick, 501 U.S. 429, 437 (1991). Thus, an individual may be under arrest whether uncuffed on the street, guarded by officers in a special command or locked in a precinct holding cell, so long as a reasonable person would conclude that he or she is not free to leave.

According to DPD policy an arrest is defined "as a taking of an individual into custody for further investigation, booking or prosecution."[2] Under DPD policy, "an arrest is not valid unless the arresting officer actually has the intent to make an arrest according to the definition of 'arrest'."[3] DPD policy further states that witnesses should be detained at the scene of a crime investigation and/or transported to the Headquarters Building for interviewing.[4] These policies implicitly authorize DPD employees to detain witnesses involuntarily for questioning. Some DPD employees, who acknowledge that witnesses are detained involuntarily for questioning, stated that even though a witness is not free to refuse transport to or leave from the command, they do not consider the witness to be under arrest.

We recommend that the DPD revise and clarify its investigative policies and eliminate any authorization or instruction to detain witnesses, absent a valid material witness order.[5] We further recommend that the DPD utilize appropriate law enforcement procedures that include techniques for both on-scene and station house interviews of witnesses. The procedures must safeguard voluntary participation by witnesses.

The new policies and procedures should be circulated to all precincts and commands. The DPD Manual should be updated to reflect the changes. The DPD should provide training on the new policies and procedures to all levels of command. All training should be documented to clearly identify who was trained, the date they were trained, and how the training was conducted. Finally, audits should be conducted to ensure compliance with the new procedures.

B. Arrest of suspects

The DPD does not adequately define arrest or probable cause, although DPD policy correctly states that probable cause is required for an arrest.[6] As previously mentioned, the DPD defines an arrest as "a taking of an individual into custody for further investigation, booking, or prosecution."[7] This policy implicitly permits the arrest of an individual with less than probable cause as a means to facilitate an investigation. Indeed, some former DPD employees informed us that it was acceptable practice to arrest suspects without probable cause and then continue to investigate the case to develop probable cause prior to arraignment. Gathering additional evidence after an arrest in order to establish probable cause for that arrest is unconstitutional. County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

Furthermore, DPD policy states that "a very substantial possibility that the person to be arrested has committed a crime" is sufficient for probable cause.[8] This is problematic because it does not set an objective standard. Probable cause requires the officer have information "sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." Michigan v. DeFillippo, 443 U.S. 31, (1979) (citations omitted). DPD policy also implicitly sets a lower standard by referring to the possibility that a crime was committed, rather than a probability.

Within any given police department there will be examples of individuals who are arrested and then discharged from police custody without being charged with a crime. However, the large number of individuals arrested and later discharged by the DPD indicates that arrests may have been made without probable cause. The 1998 FBI Uniform Crime Report revealed that in 1998 the DPD arrested three times as many individuals for homicides as the number of homicides in the City of Detroit. In that same year, the DPD solved only 47% of it's homicide cases. This trend continued in 1999 and 2000.[9]

While more than one person may be involved in a homicide, which could increase the number of arrests per homicide, our preliminary document review indicates that this does not explain this discrepancy. For example, in one month in 2001, 76 individuals were arrested and initially charged with homicide.[10] Of the 76, only 30% were formally charged with homicide. Of the 53 individuals not formally charged with homicide, 23% were held for over 48 hours, one for 91 hours, or almost four days.

DPD employees informed us that a suspect may be discharged from police custody if probable cause is not attained within a reasonable period of time after the arrest.[11] If and when probable cause is attained, the suspect may be re-arrested. As discussed above, arresting individuals without probable cause and then investigating to obtain probable cause is not constitutional. Other DPD employees revealed that some suspects are not actually released from the precinct for lack of probable cause, but instead are removed from the holding cell and taken into another area of the precinct while the investigator completes new arrest documentation indicating a new arrest date and time and returns the individual to the holding cell, with no apparent additional basis for an arrest.

Two DPD policies that require supervisory review of probable cause are not being applied to the special commands in the Headquarters Building. The first requires the Officer-in-Charge (OIC) of the precinct station desk to review the circumstances of each arrest.[12] The second requires each precinct commanding officer to review the details of the case for every individual lodged and later discharged. [13]Although DPD employees informed us that the supervisors in the special commands were expected to know who was arrested, on what case, and for what reason, this review process was not routinized or documented in the special commands.

We recommend that the DPD amend and clarify its definition of probable cause. The DPD should revise and clarify its arrest policies to eliminate any reference to an arrest as an investigative tool.

We recommend that the DPD ensure that the policies requiring supervisory review of probable cause are applied to the special commands. The consistent application of existing DPD policies will require a supervisory and precinct review of probable cause when a detainee is lodged by an investigator in a special command. Furthermore, the case file should clearly indicate every individual arrested in the course of an investigation by name, address, probable cause statement, date of arrest, date of discharge, arresting officer and supervisor approving the detention.

The new policies and procedures should be circulated to all precincts and commands. The DPD should provide training on the new policies and procedures to all levels of command. All training should be documented to clearly identify who was trained, the date they were trained, and how the training was conducted. Finally, audits should be conducted to ensure compliance with the new procedures.

III. Detention Policies and Practices

When a detainee is arrested, the DPD requires that the detainee be formally processed before being placed in a precinct holding cell. As part of the processing procedure, DPD policy requires that an arrest ticket be completed. An arrest ticket records an individual's personal information as well as the charge on which he/she is lodged, or detained in a holding cell. If the individual is a police witness, the investigator is required to identify that information on the arrest ticket and to attach the court order authorizing the witness' detention to the arrest ticket.

The DPD does not ensure that detainees are moved out of its custody in a systematic and timely manner. The lack of a systematic process permits the unconstitutional detention of individuals in DPD custody. The DPD precinct cells were designed and are intended to operate as temporary holding facilities. Regardless of a detainee's destination,[14] the DPD needs to implement a system that will process all detainees and ensure their timely movement out of DPD custody.

A. Individuals lodged as police witnesses

A witness who is subpoenaed to testify in a criminal case is a material witness. Pursuant to the U.S. Constitution and Michigan Law, only a court has the authority to decide whether an individual is a material witness and whether that material witness should be committed to a jail pending his/her testimony.[15] DPD policies regarding material witnesses are inconsistent. Although the DPD does not identify material witnesses as such, the DPD describes four categories of police witnesses, all of whom are detained to ensure their testimony in a criminal case[16] and all of whom require a court order prior to their detention in a precinct cell.[17] This policy also states that the DPD does not have the authority to detain a police witness without a court order for more than 12 hours.[18] The policy implies that an eleven hour detention without a court order is acceptable. Yet another DPD policy specifically requires DPD detention officers to check the admission cards of all police witnesses on a daily basis and to contact the OIC regarding the lack of a court order or expected date of release.[19] These inconsistencies in DPD policies implicitly allow for the illegal detention of individuals classified as police witnesses.

DPD employees have informed us that individuals merely suspected of being a witness or merely suspected of knowing the whereabouts of a suspect are arrested, lodged and held as police witnesses in precinct cells without a court order or access to judicial review. However, even if the DPD enforced its policy requiring a court order to arrest or detain police witnesses, individuals would remain improperly

detained in DPD custody because not all witnesses are classified as witnesses when they are arrested. Indeed, DPD employees informed us that some witnesses are listed as being charged with the crime with which they are believed to have information.

Some witnesses are appropriately classified as police witnesses and lodged pursuant to a court order. We spoke to several such police witnesses who were sentenced prisoners removed from a state correctional facility. The police witnesses we spoke to had been in the holding cells for several months even though DPD facilities are designed and operated for temporary placement only.

We recommend that the DPD revise its policies regarding police witnesses to eliminate conflicting elements and to comply with the U.S. Constitution and Michigan Law. The DPD should not allow any individual classified as a police witness to be lodged without a court order. If an investigator does not have a court order, the OIC of the precinct desk should refuse to lodge the witness. Similarly, if a witness without a court order is detained at a special command, the investigator's supervisor should ensure that the individual is immediately released.

The DPD should arrange for any police witness held for an extended period of time to be lodged in a facility designed for extended stays.

B. Individuals charged with a crime

Judicial review of a warrantless arrest is required as soon as is reasonably feasible.[(20)] DPD policy requires DPD employees to obtain judicial review of a warrantless arrest "within the time period required by law" or "within a reasonable period of time."[(21)] Despite this written policy, several DPD employees informed us that they have 48 hours from the time of arrest to seek judicial review as a matter of course. Some DPD employees stated that they used the 48 hour period to investigate for probable cause and/or to seek a statement from the detainee. Some DPD employees stated that they were allowed 72 hours if an individual was charged with a felony. During our February 2002 tour, we were informed by a DPD employee that a woman recently had been detained at the 12th precinct for five days before presentment for judicial review.

DPD employees have informed us that after an arrest, the arresting officer completes the necessary paper work including a warrant request. The submission of a warrant request to the precinct's court liaison begins the arraignment process. Each day, the court liaison files the requests with the prosecutor's office, who in turn schedules the detainee for arraignment. In a case involving a special command, the arresting officer does not submit the warrant request because the case is turned over to an investigator in a special command. The assigned investigator determines when to submit the warrant request and may delay this process to interview the detainee or conduct other additional investigation. DPD employees cite investigator unavailability as the primary cause for delay in the arraignment process.

DPD Special Order 95-47 attempts to create a system to ensure a timely arraignment by requiring notification and responsibility at multiple levels of command. The Special Order states that it is the responsibility of the investigator in charge of the case or the investigator's supervisor to ensure that a detainee is arraigned within the "time period required by law." If a detainee is not arraigned within 24 hours, the policy requires that "the command holding the detainee" notify the deputy chief or an executive duty officer. Upon executive review, if permission to hold the detainee beyond 24 hours is granted, the arrest ticket is to be marked accordingly and an inter-office memo is to be sent to the affected deputy chief. The Special Order requires deputy chiefs to prepare a monthly report to the chief "detailing the circumstance of detainees held over 24 hours." Our preliminary document review reveals no notations indicating executive review of arrest tickets of individuals detained over 24 hours.

Interviews with DPD employees confirm that the policy is not practiced.

Prior to the closing of the holding cells in the First Precinct, DPD detention officers at that facility were required to record all detainees held for 36 hours or more.(22) However, the policy only authorized the OIC to contact the investigator in charge of the case or the investigator's supervisor, notify him or her that the detainee had been in custody for 36 hours or more and record the notification. The OIC was not authorized to send the detainee to court or release the detainee if an investigator was in charge of the case, although the OIC did have this authority if a non-investigator was the officer in charge of the case. The policy also required a written authorization for prisoners held over 48 hours by the commanding officer of the unit responsible for the prisoner. Our preliminary document review reveals no notations indicating executive review of individuals detained over 48 hours. Interviews with DPD employees further confirm that it is not uncommon for DPD detainees to be held over 48 hours. Similarly, our preliminary document review revealed that in one month in 2001, of the 83 individuals either detained on a charge of homicide or as a police witness without a writ, 29% were detained for more than 48 hours.

We recommend that the DPD examine its policies and repeal or amend policies that are fully or partially in conflict with the U.S. Constitution and Michigan Law. The DPD should circulate the revised policies, provide training to all affected levels of command, and document the training of DPD employees as described in Section 2(B) above. Audits should be conducted to ensure compliance with the new procedures.

We recommend that the DPD develop a routine and systematic process to ensure that a detainee will be presented for judicial review as required by the U.S. Constitution and Michigan Law. The process should be triggered when an individual is lodged in a precinct and proceed independent of an investigator's oversight. An investigator's unavailability should not affect the detainee's arraignment process.(23)

If a detainee's arraignment does not occur as part of this systematic process, DPD policy should designate the individual responsible for contacting the investigator's supervisor regarding this delay. Upon notification, the supervisor should be required to submit a written review of the detention, specifying the probable cause for the arrest, the reasons for the delay in arraignment and the steps identified to ensure imminent arraignment. If the supervisor's investigation reveals that the detainee's arraignment was delayed without good cause, the supervisor should authorize the detainee's release. This entire process should be documented and contained in the case file.

C. Holds

An arrest ticket is prepared for every detainee lodged in a precinct cell. The arrest ticket records an individual's personal information as well as a criminal charge. There is a separate arrest ticket for each charge. An arrest ticket marked with a "hold" indicates that a detainee should not be released if the charge on the particular arrest ticket is resolved, as the detainee has additional pending charges.

Pursuant to DPD policy,(24) individuals detained by special commands are not permitted to clear outstanding warrants or holds until arraignment or discharge by the special command. Our preliminary document review reveals that in one month in 2000, several individuals with outstanding traffic warrants were held by a special command for several days before being released by the special command. The DPD should not prevent a detainee from clearing a traffic warrant while using the existence of the traffic warrant to justify an individual's continued detention.

We recommend that the DPD amend its warrant policy. All detainees with warrants should be presented to the court where the warrant was lodged in a routine and timely manner. The interest or charge of a special command should not affect the time frame in which the warrant is vacated. A legitimate material witness order will serve to hold a detainee for a special command after the traffic warrant is vacated.

D. Restrictions

The DPD does not have a policy that identifies appropriate circumstances for restricting an individual's telephone or visiting privileges. An investigator is able to deny telephone and visitation privileges to a witness or a suspect in a precinct holding cell without a documented explanation or review of the decision. The investigator need only relay the name of the individual and the type of restrictions to a detention officer who recorded the restrictions in a log book.[25] Some DPD employees informed us that a detainee with telephone restrictions would not be permitted to telephone an attorney.

We recommend that the DPD develop policies that do not unreasonably restrict a detainee's access to telephone calls or visitors. Although the DPD may identify special circumstances that require reasonable restrictions, the policy should: 1) identify the circumstances that permit a restriction; 2) require a written record; and 3) be subject to review. Copies should be kept at the precinct of detention and in the case file. The policy also should clearly articulate that it does not prevent a detainee from communication with an attorney.

E. Record Keeping

DPD arrest and detention record-keeping practices are insufficient. Without accurate record-keeping, the DPD cannot review the status of detainees held in DPD custody to determine the basis or length of detention. Poor record-keeping also makes oversight of the arrest and detention process difficult.

DPD policy requires that each detention be recorded on three separate documents, the arrest ticket, the log book/desk blotter and the computerized data base.[26] Prior to its closing, the First Precinct was required to maintain a fourth record for each detainee, a prisoner admission card.

In one month in 2001, we found that of the 94 persons arrested and charged with a homicide[27] or as a police witness in connection with a homicide: 26% had no arrest tickets; 35% had no prisoner admission cards; 8% were never entered in the database; and 48% did not appear in the log book. Arrest tickets frequently did not have all of the required information completed, such as the "Initial Charge" or "Final Charge" or the date and time a particular detainee was discharged or turned over to another agency. As a result, there is no log or data base that accurately reflects each individual arrested by the DPD.

We recommend that the DPD develop a system which ensures the complete and uniform documentation of each person held in DPD custody. The system should allow the DPD to evaluate the detainee population in terms of length of detention, timely presentment to a judicial officer and ratio of arrests to judicial findings of probable cause. We also recommend that the DPD develop an audit process which regularly evaluates detainee documentation for accuracy and completion.

Thank you again for the continued cooperation of the Law Department and the DPD. We look forward to working with you and the DPD.

Sincerely,

Steven H. Rosenbaum
Chief
Special Litigation Section

Jeffrey G. Collins
United States Attorney
Eastern District of Michigan

cc: The Honorable Kwame M. Kilpatrick
Chief Jerry A. Oliver, Sr.

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1. A brief investigatory stop based upon reasonably articulable suspicion is not an arrest. Terry v. Ohio, 392 U.S. 1, 21 (1968).

2. Detroit Police Department General Procedures(GP), Volume III, Chapter 9, Section 7.

3. GP, Volume III, Chapter 1, Section 8.2. DPD policy does seem to recognize that there is an objective standard for an arrest in a limited context. Specifically, DPD policy states that a court may find that a Terry stop has become an arrest if an individual has been detained for an undue length of time (the policy recommends no more than 20 minutes) or if an individual is transported to another location. GP Volume III, Chapter 1, Section 4.7. However, this provision only addresses when a Terry stop becomes an arrest, not the more generalized question of when an arrest has occurred.

4. GP, Volume III, Chapter 9, Sections 1, 3.2, 5.1(f) and 8.

5. The detention of material witnesses will be discussed in Section III(A) below.

6. GP, Volume III, Chapter 1, Section 16.1.

7. GP, Volume III, Chapter 1, Section 7.

8. GP, Volume III, Chapter 1, Section 16.2.

9. 1998 FBI Uniform Crime Report indicates that the DPD reported 1,310 homicide arrests but only 430 homicide cases. Similarly, the Michigan State Police Uniform Crime Report indicates that in 1999, the DPD reported 1,152 homicide arrests for 415 homicides and in 2000, the DPD reported 1,217 homicide arrests for 396 homicides.

10. The initial charge is the charge for which the DPD officer indicates the individual is being detained. A final, or formal charge, is the charge sought by the DPD on a warrant presented to a judicial officer.

11. One DPD employee claimed that the additional arrest tickets caused by the temporary release and re-arrest of homicide suspects explains the unusually high number of homicide arrests reflected in the FBI Uniform Crime Report. This does not account for the large discrepancy and raises concerns that arrests are being made without probable cause, as discussed above.

12. GP, Volume III, Chapter 2, Section 1.

13. GP, Volume III, Chapter 2, Section 106.

14. Detainees may be arraigned, released, sent to a specific court to have a warrant vacated or lodged at another facility.

15. MCL § 767.35.

16. "1. Hostile Witness: A hostile is a non-involved eye witness to a crime but refuses to testify when subpoenaed.

2. Protective Custody Witness: This classification of witness is a person who comes forth to testify but requests protective police custody because of life-threatening circumstances.

3. Co-defendant Witness: A co-defendant witness is a person charged with a crime awaiting trial or sentence on one case and declares himself a witness to another case.

4. Declared Witness: A declared witness is a person charged with a crime awaiting trial or sentence on one case and declares himself a witness to another case." Detroit Police Department Standard Operating Procedure (SOP) S-100.

17. "A prisoner classified as a police witness will not be detained in our custody unless said witness is committed by authority of an Affidavit For Order Detaining Prisoner/Material Witness document signed by a 36th District or Recorder's Court judge." SOP S-100(I)(B)(4).

18. Id at (II)(E)(1).

19. SOP C-300.

20. County of Riverside v. McLaughlin, supra.

21. DPD Legal Advisor Update 01-01 issued March 22, 2001 and DPD Legal Advisor Update 92-02 issued May 15, 1992. Although the Legal Advisor Updates state that it is unreasonable to delay judicial review for the purpose of gathering additional evidence to justify the arrest, the DPD did not change its definition of arrest or clarify its arrest policies. See discussion in Section II(B) above.

22. SOP C-301.

23. Delaying arraignment for investigative purposes violates the Supreme Court's ruling in Riverside, supra.

24. GP, Volume III, Chapter 2, Section 19.4/19.5.

25. The log book was the practice in the now-closed First Precinct cells; we are unclear as to the practice in the precincts.

26. The data base generates a unique central booking number for each charge lodged against a detainee.

27. The number of individuals charged with homicide is the sum of individuals charged with murder, homicide and manslaughter.

APPENDIX E

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) No. 03-72258
)
CITY OF DETROIT, MICHIGAN) HON. Julian Abele Cook
and the DETROIT POLICE)
DEPARTMENT,)
)
Defendants.)

Consent Judgement
Use of Force and Arrest and Witness Detention

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I. DEFINITIONS

1. As used in this Agreement:

a. The term "actively resisting" means the subject is making physically evasive movements to defeat an officer's attempt at control, including bracing, tensing, pulling away, or pushing.

b. The term "arrest" means a seizure of greater scope or duration than an investigatory or <u>Terry</u> stop. An arrest is lawful when supported by probable cause.

c. The term "auditable form" or "auditable log" means a discrete record of the relevant information maintained separate and independent of blotters and other forms maintained by the DPD.

d. The term "canine apprehension" means any time a canine is deployed and plays a clear and well-documented role in the capture of a person. The mere presence of a canine at the scene of an arrest shall not be counted as an apprehension.

e. The term "canine bite ratio" means the number of apprehensions accomplished by means of a dog bite divided by the total number of apprehensions (both with and without a bite).

f. The term "canine deployment" means any situation, except in cases involving an on-leash article search only, in which a canine is brought to the scene and either: i) the canine is released from the police car in furtherance of the police action; or ii) the suspect gives up immediately after an announcement is made that if he/she does not surrender the canine will be released.

g. The term "City" means the City of Detroit, including its agents, officers and employees.

h. The term "Collective Bargaining Agreements" means the labor agreements by and between the City and the Detroit Police Officers Association, the Detroit Police Lieutenants and Sergeants Association, the Detroit Police Command Officers Association, the Police Officer Labor Council, and Local 2394 of the American Federation of State, County, and Municipal Employees in effect on the effective date of this Agreement.

i. The term "command investigation" means an investigation conducted by a DPD officer's or employee's supervisor.

j. The term "complaint" means an allegation from any source of any misconduct by DPD personnel.

k. The term "conveyance" means any instance when the DPD transports a non-DPD employee for any purpose.

l. The term "critical firearm discharge" means each discharge of a firearm by a DPD officer with the exception of range and training discharges and discharges at animals.

m. The term "DOJ" means the United States Department of Justice and its agents and employees.

n. The term "DPD" means the Detroit Police Department, its agents and its employees (both sworn and unsworn).

o. The term "DPD unit" means any officially designated organization of officers within the DPD, including precincts and specialized units.

p. The term "discipline" means a written reprimand, suspension, demotion or dismissal.

q. The term "effective date" means the day this Agreement is entered by the Court.

r. The term "escorting" means the use of light physical pressure to guide a person, or keep a person in place.

s. The term "FTO" means a field training officer.

t. The term "force" means the following actions by an officer: any physical strike or instrumental contact with a person; any intentional attempted physical strike or instrumental contact that does not take effect; or any significant physical contact that restricts the movement of a person. The term includes the discharge of firearms; the use of chemical spray, choke holds or hard hands; the taking of a subject to the ground; or the deployment of a canine. The term does not include escorting or handcuffing a person,

with no or minimal resistance. Use of force is lawful if it is objectively reasonable under the circumstances and the minimum amount of force necessary to effect an arrest or protect the officer or other person.

u. The term "hard hands" means using physical pressure to force a person against an object or the ground, or the use of physical strength or skill that causes pain or leaves a mark.

v. The term "hold" means any outstanding charge(s) or warrant(s) other than those which serve as the predicate for the current arrest.

w. The term "IAD" means the section of the DPD that investigates serious uses of force and allegations of criminal misconduct by DPD employees.

x. The term "including" means "including, but not limited to."

y. The term "injury" means any impairment of physical condition or pain.

z. The term "investigatory stop," or "Terry stop," means a limited seizure. An investigatory stop is lawful when supported by reasonable suspicion and narrowly tailored in scope and duration to the reasons supporting the seizure.

aa. The term "material witness" means a witness subpoenaed to testify in a criminal case.

bb. The term "misconduct" means any conduct by a DPD employee that violates DPD policy or the law.

cc. The term "non-disciplinary corrective action" means counseling, training or other action apart from discipline taken by a DPD supervisor to enable or encourage an officer to modify or improve his or her performance.

dd. The term "OCI" means the Office of the Chief Investigator, which has responsibility for investigating external complaints.

ee. The term "parties" means the DOJ, the City and the DPD.

ff. The term "police officer" or "officer" means any law

enforcement officer employed by the DPD, including supervisors.

gg. The term "prisoner injury" means an injury, or complaint of injury, that occurs in the course of taking or after an individual was taken into DPD custody that is not attributed to a use of force by a DPD employee.

hh. The term "probable cause" means a reasonable belief that an individual has committed, is committing, or is about to commit an offense.

ii. The term "prompt judicial review" means the presentment of an arrestee before a court of appropriate jurisdiction for a probable cause determination as soon after an arrest as is reasonably feasible. A reasonably feasible time period is the period of time necessary to schedule the arraignment and complete the administrative processing of the arrestee and shall not exceed 48 hours of the arrest, absent extraordinary circumstances.

jj. The term "proper use of force decision making" means the use of reasonable force, including proper tactics, and de-escalation techniques.

kk. The term "reasonable suspicion" means the specific facts and reasonable inferences drawn from those facts to convince an ordinarily prudent person that criminality is at hand.

ll. The term "seizure," or "detention," means any restriction on the liberty interest of an individual. A seizure occurs when an officer's words or actions convey to a reasonable person that he or she is not free to leave.

mm. The term "serious bodily injury" means an injury that involves a loss of consciousness, extreme physical pain, protracted and obvious disfigurement, protracted loss or impairment of the function of a body part or organ, or a substantial risk of death.

nn. The term "serious use of force" means any action by a DPD officer that involves: i) the use of deadly force, including all critical firearms discharges; ii) a use of force in which the person suffers serious bodily injury or requires hospital admission; iii) a canine bite; and iv) the

use of chemical spray against a restrained person.

oo. The term "shall" means that the provision imposes a mandatory duty.

pp. The term "supervisor" means a sworn DPD employee at the rank of sergeant or above and non-sworn employees with oversight responsibility for DPD employees.

II. GENERAL PROVISIONS

2. This Agreement is effectuated pursuant to the authority granted the DOJ under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"), to seek declaratory or equitable relief to remedy a pattern or practice of conduct by law enforcement officers that deprives individuals of rights, privileges or immunities secured by the Constitution or federal law.

3. In its Complaint, the United States alleges that the City and the DPD are engaging in a pattern or practice of unconstitutional or otherwise unlawful conduct that has been made possible by the failure of the City and the DPD to adopt and implement proper management practices and procedures.

4. This Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1345. Venue is proper in the Eastern District of Michigan pursuant to 28 U.S.C. § 1391.

5. This Agreement resolves all claims in the United States' Complaint filed in this case concerning allegations of a pattern or practice of conduct resulting in unconstitutional or otherwise unlawful uses of force and arrest and detention practices by the DPD in violation of 42 U.S.C. § 14141. The DOJ, the City and the DPD have resolved the DOJ's claims regarding the conditions of confinement in DPD holding cells in a separate Agreement, to be filed concurrently with this Complaint and Agreement with the United States District Court for the Eastern District of Michigan.

6. In September 2000, the Mayor of Detroit and other interested persons requested that the DOJ review the DPD's use of force. This request indicated the City's commitment to minimizing the risk of excessive use of force in the DPD and to promoting police integrity. Based, in part, on these

requests, the DOJ initiated an investigation in December 2000, of the use of force and conditions in DPD holding cells pursuant to its authority under Section 14141. The investigation was expanded in May 2001, to include the DPD's arrest and detention policies and practices.

7. DOJ's investigation was conducted with the full cooperation of the City. During the investigation, in keeping with the Attorney General's pledge to provide technical assistance, the DOJ made recommendations for changes in the DPD's policies and procedures regarding use of force, conditions in DPD holding cells, and arrest and detention in the form of three technical assistance letters of March 6, 2002, April 4, 2002 and June 5, 2002, several meetings with the Chief of Police and DPD command staff regarding the substance of the technical assistance letters, and participation in working groups created by the DPD to facilitate reform. The DPD is currently in the process of revising its policies and procedures to address the issues identified by the DOJ. The DOJ and the City believe this Agreement, rather than contested litigation, represents the best opportunity to address the DOJ's concerns.

8. Nothing in this Agreement is intended to alter the lawful authority of the DPD to use reasonable and necessary force, effect arrests and file charges, conduct searches or make seizures, or otherwise fulfill its law enforcement obligations in a manner consistent with the requirements of the Constitutions and laws of the United States and the State of Michigan.

9. Nothing in this Agreement is intended to alter the Collective Bargaining Agreements or impair the collective bargaining rights of employees under State and local law. Nothing in this Agreement is intended to amend or supercede any provision of State or local law, including the City Charter. The DOJ and the City have attempted to draft this Agreement to avoid impairing the rights of the Detroit Police Officers Association, the Detroit Police Lieutenants and Sergeants Association, the Detroit Police Command Officers Association, the Police Officer Labor Council, and Local 2394 of the American Federation of State, County, and Municipal Employees under the Collective Bargaining Agreements. However, a determination that any such right is impaired shall not excuse the City and the DPD from a failure to implement any provision of this Agreement.

10. This Agreement shall constitute the entire integrated agreement of the parties regarding use of force and arrest and detention practices. With the exception of the technical assistance letters described in paragraph 7, no prior drafts or prior or contemporaneous communications, oral or written, shall be relevant or admissible for purposes of determining the meaning of any provisions herein in any litigation or any other proceeding.

11. This Agreement is binding upon the parties, by and through their officials, agents, employees, and successors. The parties are interested in providing clear lines of authority: In the event of a dispute among officials, agents, employees, or agencies of the City, the Mayor of Detroit is the final authority on behalf of the City as it pertains to this Agreement. This Agreement is enforceable only by the parties. No person or entity is intended to be a third-party beneficiary of the provisions of this Agreement for purposes of any civil, criminal, or administrative action, and accordingly, no person or entity may assert any claim or right as a beneficiary or protected class under this Agreement. This Agreement is not intended to impair or expand the right of any person or organization to seek relief against the City or its officials, employees or agents for their conduct or the conduct of DPD officers; accordingly, it does not alter legal standards governing any such claims, including those under Michigan law. This Agreement does not authorize, nor shall it be construed to authorize, access to any City, DPD or DOJ documents by persons or entities other than the Court, the DOJ, the City, and the Monitor.

12. The City is responsible for providing necessary support to the DPD to enable it to fulfill its obligations under this Agreement.

13. The City, by and through its officials, agents, employees and successors, is enjoined from engaging in a pattern or practice of conduct by employees of the DPD that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

III. USE OF FORCE POLICY

A. General Use of Force Policies

V. ARREST AND DETENTION POLICIES AND PRACTICES

A. Arrest Policies

42. The DPD shall revise its arrest policies to define arrest and probable cause as those terms are defined in this Agreement and prohibit the arrest of an individual with less than probable cause.

43. The DPD shall review all arrests for probable cause at the time the arrestee is presented at the precinct or specialized unit. This review shall be memorialized in writing within 12 hours of the arrest. For any arrest unsupported by probable cause or in which an arraignment warrant was not sought, the DPD shall document the circumstances of the arrest and/or the reasons the arraignment warrant was not sought on an auditable form within 12 hours of the event.

B. Investigatory Stop Policies

44. The DPD shall revise its investigatory stop and frisk policies to define investigatory stop and reasonable suspicion as those terms are defined in this Agreement. The policy shall specify that a frisk is authorized only when the officer has reasonable suspicion to fear for his or her safety and that the scope of the frisk must be narrowly tailored to those specific reasons.

45. The DPD shall require written documentation of all investigatory stops and frisks by the end of the shift in which the police action occurred. The DPD shall review all investigatory stops and frisks and document on an auditable form those unsupported by reasonable suspicion within 24 hours of receiving the officer's report.

C. Witness Identification and Questioning Policies

46. The DPD shall revise its witness identification and questioning policies to comply with the revised arrest and investigatory stop policies. The DPD shall prohibit the seizure of an individual without reasonable suspicion, probable cause or consent of the individual and require that the scope and duration of any seizure be narrowly tailored to the reasons supporting the police action. The DPD shall prohibit the conveyance of any individual to another location without reasonable suspicion, probable cause or

consent of the individual.

47. The DPD shall develop the revised witness identification and questioning policies within three months of the effective date of this Agreement. The revised policies shall be submitted for review and approval of the DOJ. The DPD shall implement the revised witness identification and questioning policies within three months of the review and approval of the DOJ.

48. The DPD shall document the content and circumstances of all interviews, interrogations and conveyances during the shift in which the police action occurred. The DPD shall review in writing all interviews, interrogations and conveyances and document on an auditable form those in violation of DPD policy within 12 hours of the interview, interrogation or conveyance.

D. Prompt Judicial Review Policies

49. The DPD shall revise its policies to require prompt judicial review, as defined in this Agreement, for every person arrested by the DPD. The DPD shall develop a timely and systematic process for all arrestees to be presented for prompt judicial review or to be released.

50. The DPD shall require that, for each arrestee, a warrant request for arraignment on the charges underlying the arrest is submitted to the prosecutor's office within 24 hours of the arrest.

51. The DPD shall document on an auditable form all instances in which the request for an arraignment warrant is submitted more than 24 hours after the arrest. The DPD shall also document on an auditable form all instances in which it is not in compliance with the prompt judicial review policy and in which extraordinary circumstances delayed the arraignment. The documentation shall occur by the end of the shift in which there was 1) a failure to request an arraignment warrant within 24 hours, 2) a failure to comply with the prompt judicial review policy, or 3) an arraignment delayed because of extraordinary circumstances.

E. Hold Policies

52. The DPD shall revise its hold policies to define a hold as that term is defined in this Agreement and require that all holds be documented. The policy shall establish a timely and systematic process for persons in DPD custody who have holds issued by a City of Detroit court to have those holds cleared by presenting the arrestee to the court from which the warrant was issued or the setting and posting of bond where applicable. The fact that an arrestee has not been arraigned or charged on the current arrest shall not delay this process.

53. The DPD shall document all holds, including the time each hold was identified and the time each hold was cleared. The DPD shall document on an auditable form each instance in which a hold is not processed within twenty-four hours on a daily basis.

F. Restriction Policies

54. The DPD shall develop a policy regarding restricting detainee's access to telephone calls and visitors that permits individuals in DPD custody access to attorneys and reasonable access to telephone calls and visitors.

55. The DPD shall require that such restrictions be documented and reviewed at the time the restriction is issued and reevaluated each day in which the restriction remains in effect. The DPD shall document on an auditable form any violation of the restriction policy by the end of the shift in which the violation occurred.

G. Material Witness Policies

56. The DPD shall revise its material witness policies to define material witness as that term is defined in this Agreement and remove the term "police witness" from DPD policies and procedures.

57. The DPD shall obtain a court order prior to taking a material witness into DPD custody. The DPD shall document on an auditable form the detention of each material witness and attach a copy of the court order authorizing the detention.

H. Documentation of Custodial Detention

58. The DPD shall revise its arrest and detention documentation to require, for all arrests, a record or file to contain accurate and auditable documentation of:

a. the individual's personal information;
b. the crime(s) charged;
c. the time and date of arrest and release;
d. the time and date the arraignment warrant was submitted;
e. the name and badge number of the officer who submitted the arraignment warrant;
f. the time and date of arraignment;
g. the time and date each warrant was lodged and cleared, if applicable; and
h. the individual's custodial status, e.g., new arrest, material witness or extradition.

I. Command Notification

59. The DPD shall require the commander of the precinct and, if applicable, of the specialized unit to review in writing all reported violations of DPD arrest, investigatory stop and frisk, witness identification and questioning policies and all reports of arrests in which an arraignment warrant was not sought. The commander's review shall be completed within 7 days of receiving the document reporting the event. The commander's review shall include an evaluation of the actions taken to correct the violation and whether any corrective or non-disciplinary action was taken.

60. The DPD shall require the commander of the precinct and, if applicable, of the specialized unit to review in writing all violations of DPD prompt judicial review, holds, restrictions and material witness policies on a daily basis. The commander's review shall include an evaluation of the actions taken to correct the violation and whether any corrective or non-disciplinary action was taken.

VI. EXTERNAL COMPLAINTS

61. The DPD and City shall revise their external complaint

pursuit;

i. the proper duration of a burst of chemical spray, the distance from which it should be applied, and emphasize that officers shall aim chemical spray only at the target's face and upper torso; and

j. consideration of the safety of civilians in the vicinity before engaging in police action.

C. Firearms Training

113. The DPD shall develop a protocol regarding firearms training that:

a. ensures that all officers and supervisors complete the bi-annual firearms training and qualification;

b. incorporates professional night training, stress training (i.e., training in using a firearm after undergoing physical exertion) and proper use of force decision making training in the bi-annual in-service training program, with the goal of adequately preparing officers for real life situations;

c. ensures that firearm instructors critically observe students and provide corrective instruction regarding deficient firearm techniques and failure to utilize safe gun handling procedures at all times; and

d. incorporates evaluation criteria to determine satisfactory completion of recruit and in-service firearms training, including:

i) maintains finger off trigger unless justified and ready to fire;

ii) maintains proper hold of firearm and proper stance; and

iii) uses proper use of force decision making.

D. Arrest and Police-Citizen Interaction Training

114. The DPD shall provide all DPD recruits, officers and supervisors with annual training on arrests and other police-citizen interactions. Such training shall include and address the following topics:

a. the DPD arrest, investigatory stop and frisk and witness identification and questioning policies;

b. the Fourth Amendment and other constitutional

requirements, including:

i) advising officers that the "possibility" that an individual committed a crime does not rise to the level of probable cause;
ii) advising officers that the duration and scope of the police-citizen interaction determines whether an arrest occurred, not the officer's subjective, intent or belief that he or she affected an arrest; and
iii) advising officers that every detention is a seizure, every seizure requires reasonable suspicion or probable cause and there is no legally authorized seizure apart from a "Terry stop" and an arrest; and

c. examples of scenarios faced by DPD officers and interactive exercises that illustrate proper police-community interactions, including scenarios which distinguish an investigatory stop from an arrest by the scope and duration of the police interaction; between probable cause, reasonable suspicion and mere speculation; and voluntary consent from mere acquiescence to police authority.

E. Custodial Detention Training

115. The DPD shall provide all DPD recruits, officers and supervisors with annual training on custodial detention. Such training shall include DPD policies regarding arrest, arraignment, holds, restrictions, material witness and detention records.

116. The DPD shall advise officers that the DPD arraignment policy shall not be delayed because of the assignment of the investigation to a specialized unit, the arrest charge(s), the availability of an investigator, the gathering of additional evidence or obtaining a confession.

117. The DPD shall advise officers that whether an individual is a material witness and whether that material witness should be committed to custody is a judicial determination.

F. Supervisory Training

118. The DPD shall provide supervisors with training in the

Exhibit 6F - 2010 Appeal Docket

COA 301465
MSC 144415

PEOPLE OF MI V MARK T CRAIGHEAD
Lower Court/Tribunal
WAYNE CIRCUIT COURT
Judge(s)
JONES VERA MASSEY

Docket   Case Documents

Case Information

Case Header

Case Number

COA #301465   MSC #144415

Case Status

MSC   Closed
COA   Case Concluded; File Archived

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1

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Plaintiff

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2

CRAIGHEAD MARK T
Defendant

Attorney(s)

Professor Imran Syed
#75415

COLLAPSE ALL EXPAND ALL

12/06/2010	1	Delayed App for Leave - Criminal	+
07/14/2010	2	Order Appealed From	+
12/06/2010	4	Motion: Waive Fees	+
12/06/2010	5	Transcript Filed By Party	+
12/09/2010	6	Defective Holding File Letter	+
12/17/2010	7	LCt Order	+
05/26/2011	8	Telephone Contact	+
05/26/2011	9	Answer - Application	+
06/15/2011	18	Motion: Reply to Answer	+
06/15/2011	30	Reply to Answer - Panel Grtd Mot to File	+
06/21/2011	13	Submitted on Administrative Motion Docket	+
06/22/2011	14	Order: Waive Fees - Grant	+
06/22/2011	15	Telephone Contact	+
06/22/2011	16	Telephone Contact	+

06/23/2011	17 Telephone Contact	+
06/23/2011	19 Pleadings Returned	+
06/28/2011	20 Correspondence Sent	+
11/10/2011	23 Correspondence Received	+
11/21/2011	28 Submitted on Special Motion Docket	+
11/22/2011	29 Order: Application - Deny - Delayed App for Leave	+
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01/27/2012	33 COA and TCt Received	+
02/08/2012	34 Supreme Court: Answer - SCt Application/Complaint	+
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10/05/2012	36 Supreme Court Order: Deny Application/Complaint	+
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01/25/2013	40 Supreme Court Order: Reconsideration - Deny	+
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Exhibit 6G - Craighead 2010 Appeal Application

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Appellee

Court of Appeals No. 301465
Lower Court No. 00-007900

vs.

MARK T. CRAIGHEAD,

Appellant

MICHIGAN INNOCENCE CLINIC
University of Michigan Law School
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DELAYED APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF FACTS EXPLAINING DELAY

Mr. Craighead submits this delayed application for leave to appeal because factors beyond his control prevented him from filing it within twenty-one days of the trial court's order denying his motion for relief from judgment. In particular, the transcripts of the final hearing on Mr. Craighead's motion, which included the only statement of the court's findings and order on the record, were not available until August 16, 2010. The trial court did not issue any written order or opinion other than its findings and order delivered orally at the July 14, 2010, hearing. Mr. Craighead could not properly support this application for leave to appeal without having the transcript of the July 14, 2010, hearing. He therefore could not file this application until the transcript became available, some 33 days after the trial court denied the motion for relief from judgment.

In addition, since Mr. Craighead is currently represented by the Michigan Innocence Clinic at the University of Michigan Law School, law students must be heavily involved in the drafting of this application for leave to appeal. When undersigned counsel received the transcript after August 16, 2010, the Fall Term had not yet started. Only once students began working in the Innocence Clinic after Labor Day 2010 was it possible to assign students to review the transcript and begin work on this application. This Court and the Michigan Supreme Court have long recognized that the value of student practice justifies flexibility as to appellate deadlines.

In any event, this application for leave to appeal is filed well within the one-year period for filing a delayed application.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-appellant Mark T. Craighead appeals from the July 14, 2010, oral order of the Wayne County Circuit Court denying his motion for relief from judgment on the merits. (Evidentiary Hearing Transcript 117-123, July 14, 2010.) In light of the compelling newly discovered evidence of Mr. Craighead's innocence, and the near certainty that this evidence would have led to a different outcome at trial, Mr. Craighead asks that this Court grant this application for leave to appeal, reverse the denial of his motion for relief from judgment, and order a new trial in this case.

JURISDICTION

This Court has jurisdiction over this delayed application for leave to appeal pursuant to MCR 6.509(A), which provides for an application for leave to appeal from the trial court's denial of the defendant's motion for relief from judgment. MCR 6.509(A) provides that the twelve-month time limit of MCR 7.205(F)(3) applies to any delayed application for leave to appeal. Mr. Craighead's motion for relief from judgment was denied on July 14, 2010. Accordingly, this delayed application for leave to appeal is filed within the twelve-month period set forth in MCR 7.205(F), and this Court therefore has jurisdiction.

STATEMENT OF QUESTION INVOLVED

At his trial, Mr. Craighead presented an alibi defense, namely that he was in Farmington Hills working his usual overnight shift at Sam's Club, which locked the overnight shift workers into the store, at the precise time the crime was occurring in Detroit. During deliberations, the jury asked for documentary proof that Mr. Craighead worked that particular night, but such proof was not available because Sam's Club had, by the time of trial, lost the employment records that would have shown whether Mr. Craighead worked that particular night.

At an evidentiary hearing this year, Mr. Craighead presented newly discovered phone records from Sam's Club proving that Mr. Craighead made four phone calls from inside the locked store the night of the crime, including one call at the precise time the victim's truck was set on fire in Redford Township. Mr. Craighead also presented testimony from the two recipients of those four phone calls, both of whom confirmed that no one from Sam's Club other than Mr. Craighead would have been calling them in the middle of the night.

The question presented, therefore, is:

In light of this newly discovered evidence, did the trial court apply an improper legal standard and then erroneously deny the motion for relief from judgment?

The Trial Court answers, "No."

The Defendant-Appellant answers, "Yes."

STATEMENT OF FACTS

After a jury trial in the Third Judicial Circuit Court, County of Wayne, Case No. 00-007900-01, Judge Vera Massey Jones presiding, Mark Craighead was convicted on June 25, 2002, of voluntary manslaughter, MCL 750.321, and possession of a firearm in the commission of or attempt to commit a felony, MCL 750.227b. On August 5, 2002, Judge Jones sentenced Mr. Craighead to 40 months to 15 years on the conviction for voluntary manslaughter and to a consecutive 24 months for felony firearm. Mr. Craighead is currently on parole, residing at 16147 Inverness, Detroit, MI 48221.

In November 2009, Mr. Craighead filed a motion for relief from judgment based on newly discovered evidence showing that he was at work at the time the crime was committed. The trial court held a two-day evidentiary hearing on the motion on June 30, 2010, and July 14, 2010. The trial court orally denied the motion at the end of the July 14, 2010, hearing. (Evidentiary Hearing Transcript 117-123, July 14, 2010.)

Mr. Craighead seeks leave to appeal the trial court's decision.

INTRODUCTION TO THE RELEVANT FACTS

Mark Craighead served more than seven years in prison for a crime that he did not commit. As the newly discovered evidence now shows, Mr. Craighead could not have killed Chole Pruett in Detroit on the night of June 26–27, 1997, because he was locked inside a Sam's Club store in Farmington Hills where he was employed, more than twenty-four miles from the scene of the crime, at the time that the killing occurred. Specifically, the phone records newly discovered by the Michigan Innocence Clinic establish that Mr. Craighead made a telephone call from Sam's Club to his friend, Isaac "Ike" Griffin (a well-known sports radio personality known as "MegaMan"), just eight

minutes before Mr. Pruett's truck was discovered by police, engulfed in flames, in a vacant lot behind an elementary school in Redford Township.

Mr. Craighead's conviction at trial was based entirely on an alleged "confession" taken by Investigator Barbara Simon of the Detroit Police Department.[1] Mr. Craighead's alleged "confession"—the only evidence that the prosecution presented at trial linking him to the killing—is completely inconsistent with the physical evidence discovered at the scene. This purported "statement" describes none of the distinctive facts of the crime—e.g., the posture or location of the body; number of shots fired; or caliber or type of weapon used. It recounts only in vague terms nothing more than a struggle and an accidental discharge of a gun. But the scene suggested a brutal and deliberate execution-style killing.[2] Moreover, despite evidence of "selective searching" in some rooms of the apartment, police never recovered any fingerprints. (Trial Tr 43–44, 55, June 20, 2002.)

---

[1] As the extensive record at trial and on appeal reflects, Mr. Craighead allegedly made this "statement" to investigator Barbara Simon more than three years after the crime occurred. (Trial Tr 105–112, June 20, 2002.) Before Mr. Craighead's interview with investigator Simon—his third with Detroit police regarding Mr. Pruett's death—investigator Ronald Tate, the original officer-in-charge, had twice interviewed Mr. Craighead and twice dismissed him as a suspect. (Trial Tr 78–79, 80–82, June 20, 2002.)

[2] Sergeant David Babcock, of the Detroit Police Department Forensic Services Division, investigated the crime scene at 3210 East Vernor on June 27, 1997. (Trial Tr 37–38, June 20, 2002.) Sgt. Babcock observed at least three "impact wounds, very suggestive of bullet wounds" on the body, and found two bullets that had passed through a closet door and struck a clothes dryer. (*Id.* at 42.) He found two more bullets lodged in the carpet beneath the body—suggesting the victim was shot at least twice after falling to the floor. (*Id.* at 45.) Dr. Cheryl Loewe, of the Wayne County medical examiner's office, conducted the postmortem exam. (*Id.* at 60–62.) She reported that one bullet passed through the victim's neck from right to left; one entered the right lower back and exited near the navel; one entered the right buttock and exited below the navel; and one passed through the right thigh from back to front. (*Id.* at 62–64.) She concluded that a person with such injuries would have died within minutes. (*Id.* at 64.) She found no evidence of contact wounds or close-range firing; no stippling, soot, or powder burns—as would presumably have resulted from a struggle over a gun ending with an accidental discharge. (*Id.* at 64–65.)

Despite finding .380 ammunition at the scene and a .380 caliber pistol in Mr. Pruett's car, police never found the .44 caliber murder weapon. (*Id.* at 27–28, 58, 88, 103.)

Mr. Craighead was not arrested until some three years after Chole Pruett was killed, and the case did not come to trial until five years had elapsed from the killing. At his trial in 2002, Mr. Craighead's defense was that the statement extracted by Barbara Simon was false and that he was at work at the Sam's Club in Farmington Hills the night Mr. Pruett was killed in Detroit.

At the 2002 trial, a manager from Sam's Club, Martin Ryzak, confirmed that Mr. Craighead was, in fact, employed by Sam's Club in Farmington Hills at the time of Mr. Pruett's murder, and that he usually worked the overnight shift five nights a week, with Sundays and Mondays off. (Trial Tr 8-10, June 24, 2002.) However, given the time lapse between the crime and the trial, Mr. Ryzak could not recall whether Mr. Craighead had worked the overnight shift of Thursday night/Friday morning on June 26-27, 1997. (*Id.* at 13-14, 16.) Mr. Ryzak further testified that he could not produce a record of the exact days and hours that Mr. Craighead worked during the week in question, because those records had been destroyed by a water sprinkler accident. (*Id.* at 11.)

At trial, Mr. Craighead argued that Mr. Ryzak's testimony about Mr. Craighead's usual schedule and work routine, as well as Mr. Craighead's own testimony that he was not present at the scene of the crime when it occurred, provided reasonable doubt sufficient to establish Mr. Craighead's lack of presence at the time and place where the killing occurred. (*Id.* at 121-22.) But as soon as the court excused the jury to deliberate, the jury sent a note out asking the court, "Is there a paycheck stub or solid evidence that a forty-hour week was worked?" (*Id.* at 170–71.) The Court answered that the jury had to

deliberate and render its verdict on the basis of the evidence presented. (*Id.*) The jury then convicted Mr. Craighead of manslaughter.

Newly discovered phone records, finally received by the Michigan Innocence Clinic in 2009 and presented to the trial court in 2010, but unavailable and unknown to Mr. Craighead, his trial counsel, or his appellate counsel, now conclusively substantiate Mr. Craighead's alibi. These records provide clear documentary proof that Mr. Craighead was locked in at work at Sam's Club in Farmington Hills on the night Mr. Pruett was killed in Detroit, and that he made a phone call to Ike Griffin just minutes before Mr. Pruett's burning truck was found in Redford Township. Moreover, the phone records from Sam's Club show that Mr. Craighead made at least four calls from store phones while working his regular night shift hours on June 26–27, 1997.

DETAILED STATEMENT OF FACTS

Relevant Evidence at Trial Regarding Timing and Mr. Craighead's Alibi

Melvin Howard last saw Chole Pruett around four or five o'clock in the evening on Thursday, June 26, 1997, the day before Mr. Pruett's body was discovered. (Trial Tr 70–71, June 20, 2002.) Mark Craighead last saw Mr. Pruett on either June 25, 1997, or June 26, 1997, around four or five o'clock in the afternoon. Mr. Craighead and Mr. Pruett went out to Friday's at Evergreen and Ten Mile in Southfield, Michigan, to have a few drinks and talk. (*Id.* at 54–55.) Mr. Pruett then dropped Mr. Craighead off at Mr. Craighead's home around six or seven o'clock in the evening, because Mr. Craighead had to go to work at either eight or nine o'clock. (*Id.* at 57.)

At 2:35 a.m. on June 27, 1997, Officer Lawrence Turner of the Redford Township police department responded to a call of a vehicle fire. (Trial Tr 17–18, June 20, 2002.) Officer Turner found the vehicle behind a school at 19990 Beech Daly Road, fully engulfed in flames. (*Id.* at 18–19.) After the fire was extinguished, Officer Turner identified the vehicle as a 1996 Chevy Tahoe owned by Chole Pruett. (*Id.* at 19–20.) Officer Turner observed only one set of vehicle tracks leading to the area where he found the truck on fire.

Late in the afternoon of Friday, June 27, 1997, around 3:00 p.m., Erhonda Gray-Miller called the police after she saw Mr. Pruett's body inside his apartment at 3210 East Vernor Street in Detroit. (*Id.* at 5–6, 8.) Mr. Pruett's apartment is more than sixteen miles from the place where Officer Turner found Mr. Pruett's truck on fire. (See Map of 3210 East Vernor, Detroit, to 19990 Beech Daly, Redford Township, Appendix A (App. B to Motion for Relief from Judgment).)

Martin Ryzak worked as a business manager at the Sam's Club on Haggerty Road in Farmington Hills in June and July 1997. (Trial Tr 7–8, June 24, 2002.) Mr. Ryzak testified that during the month of June 1997, Mr. Craighead worked in the freezer section at Sam's Club, doing "overnight merchandising," on the night shift from 9:00 p.m. to 5:00 a.m. or 10:00 p.m. to 6:00 a.m. (*Id.* at 9.) The Sam's Club at 24800 Haggerty Road was at least eight miles from the spot where Officer Turner found the truck on fire in Redford Township and more than twenty-four miles from Chole Pruett's apartment in Detroit. (See Map of 19990 Beech Daly, Redford Township, to 24800 Haggerty Road, Farmington Hills, Appendix B (App. C to Motion for Relief from Judgment); Map of

3210 East Vernor, Detroit, to 24800 Haggerty Road, Farmington Hills, Appendix C (App. D to Motion for Relief from Judgment).)

Mr. Ryzak recalled that Mr. Craighead had Sundays and Mondays off in order to match his wife's schedule, and he worked the other five days of the week. (*Id.* at 9–10.) He further stated that Mr. Craighead was a full-time employee working on the night shift; that the freezer area needed restocking each night; that Thursday and Friday were the busiest nights of the week due to the need to restock in advance of heavy shopping on Friday and Saturday; and that Mr. Craighead was a good employee who always showed up for work. (*Id.* at 12–14.)

Mr. Ryzak also testified that, in accord with company policy, the doors of the store were locked and the alarm was set during the night shift, whether or not a manager was present in the store. Any person leaving the store would have set off an alarm that would signal both the local police and the Sam's Club home office in Bentonville, Arkansas. (*Id.* at 10.) The records of the Farmington Hills police department do not record any alarms or calls from the Haggerty Road Sam's Club on June 26 or 27, 1997. (See Ev Hr'g Tr 36-37, June 30, 2010; Farmington Hills Police Department FOIA Request and Response, Appendix D (App. E to Motion for Relief from Judgment).)

As discussed above, Mr. Ryzak also testified that the detailed work records from June 1997 had been lost in a sprinkler malfunction, so there was no way to prove to a certainty that Mr. Craighead worked the night of June 26-27, 1997, and Mr. Ryzak could not remember that particular night from five years earlier (Trial Tr 11, 13-14, 16, June 24, 2002.) Therefore, when the jury during deliberations sent out a note asking for

documentary proof that Mr. Craighead actually worked that night, the court replied that the jury had to rely only on the evidence actually introduced. (*Id.* at 170-171).

Procedural History After Trial

Mr. Craighead appealed his conviction by right to this Court and argued: (1) that the court should have suppressed his police statement as the fruit of an illegal arrest by the Detroit police department; and (2) that his trial counsel failed to call an expert witness on the subject of reasons for false confessions, denying him the effective assistance of counsel. This Court affirmed Mr. Craighead's conviction over a strong dissent from Judge Whitbeck, who would have reversed because Mr. Craighead's statement was the fruit of an arrest without probable cause. *People v Craighead*, No 243856 (Mich App, Dec 22, 2005) (Whitbeck, CJ, dissenting), lv den 474 Mich 1124 (2007).

Mr. Craighead filed no motions for relief from judgment prior to the motion denied by the trial court on July 14, 2010.

Newly Discovered Phone Records and Hearing Testimony

The Michigan Innocence Clinic, after months of requests and negotiations, obtained in August 2009 the Sam's Club telephone records for the Farmington Hills store for June and July 1997. The newly discovered phone records show that calls were made from phones in the store to telephone number (313) 393-9153 at 12:19 a.m. and 2:27 a.m. on June 27, 1997 (the latter call just 8 minutes before Chole Pruett's truck was found fully ablaze in Redford Township). (Sam's Club Ameritech Telephone Bill, June-July 1997, Appendix E, at page 9, line 12 and page 21, line 25 (App. F to Motion for Relief

from Judgment).) Archived copies of the Ameritech Detroit Metropolitan White Pages show that this number belonged to Marilie Griffin, residing at 500 River Place in Detroit for the entire period between September 1996 and September 1998. (Ameritech Detroit White Pages, 1996-1997, Appendix F (App. G to Motion for Relief from Judgment).)

The person at (313) 393-9153 who received those calls from Sam's Club that night was Isaac "Ike" Griffin, who was at the time a well-known Detroit sports radio personality. See George B. Eichorn, *Detroit Sports Broadcasters: On the Air* (Arcadia Publishing, 2003) at p. 97 (describing sports and radio career of Ike "Mega Man" Griffin). Mr. Griffin testified at the evidentiary hearing that he is Marilie Griffin's son, that he was a longtime friend of Mark Craighead, that he lived in his mother's home at 500 River Place in June 1997, and that (313) 393-9153 was therefore his home telephone number at the time. (Hr'g Tr 96-97, 102-105, June 30, 2010.) Mr. Griffin specifically testified that Mr. Craighead sometimes called him at Mr. Griffin's mother's home during breaks from Mr. Craighead's work on the night shift. (*Id.* at 97.) Mr. Griffin did not know anyone other than Mr. Craighead who worked at Sam's Club and he never received phone calls placed from the store by anyone else. (*Id.* at 105-106.)

Store telephone records also show calls at 11:01 p.m. and 11:02 p.m. on June 26, 1997, to telephone number (313) 836-5230. (See Sam's Club Ameritech Telephone Bill, June-July 1997, Appendix E, at page 9, lines 10–11 (App. F to Motion for Relief from Judgment).) Randle Craighead—Mr. Craighead's brother—has owned and used this telephone number continuously since 1985. (Hr'g Tr 40-41, June 30, 2010); see also Randle Craighead People Search Results, Appendix G (App. K to Motion for Relief from Judgment).) Randle Craighead had this phone number throughout the month of June

1997, and he still has this number today. (Hr'g Tr 40.) Randle Craighead did not know anyone other than his brother who worked at Sam's Club in Farmington Hills, and he never received phone calls placed from the store by anyone else. (*Id.* at 42.)

At the evidentiary hearing, John Wojnaroski, a forensic polygraph examiner, testified to a polygraph he administered to Mark Craighead on June 30, 2010.[3] (Hr'g Tr 20, July 14, 2010; June 30, 2010 Polygraph Examination Report, Appendix L, at 2.) During the exam, Mr. Wojnaroski questioned Mr. Craighead to determine whether he knew if anyone else placed the calls to Isaac Griffin and Randle Craighead on June 26 and 26, 1997. (Hr'g Tr 20, July 14, 2010.) In response to the question, "Other than you, do you know of anyone else who made any of those four phone calls from Sam's Club?" Mr. Craighead responded "no." (*Id.* at 22.) Mr. Craighead was then asked whether he was lying in response to his first answer; Mr. Craighead responded that he was not lying. (*Id.*) Finally, he was asked whether he knew of "anyone else who worked at Sam's Club, other than [him], who could have made those four phone calls?" (*Id.* at 22-23) Again, Mr. Craighead replied, "no." (*Id.* at 23.) At the evidentiary hearing, Mr. Wojnaroski testified that Mr. Craighead replied truthfully in response to each of those questions. (*Id.* at 23; June 30, 2010 Polygraph Examination Report, Appendix L, at 2.)

In addition to providing documentary proof of Mr. Craighead's alibi, this newly discovered evidence only further highlights the lack of evidence in support of Mr.

[3] At the evidentiary hearing, the trial court refused to admit evidence that Mr. Craighead had passed an April 29, 2009 polygraph exam, also administered by Mr. Wojnaroski. (*Id.* at 24-25.) With respect to that exam, Mr. Wojnaroski reported that Mr. Craighead responded truthfully in saying that he did not know who caused Mr. Pruett's fatal injuries, that he did not cause Mr. Pruett's fatal injuries, and that he was not present when Mr. Pruett was shot. (April 29, 2009 Polygraph Examination Report, Appendix L, at 1 (App. O to Motion for Relief from Judgment).)

Craighead's conviction at his original trial. Indeed, the prosecution never presented any physical evidence linking Mr. Craighead to the crime. Moreover, Lieutenant Billy Jackson of the Detroit Police Department conceded at a pretrial evidentiary hearing that of the *twenty-five* witnesses he interviewed, *none* linked Mr. Craighead to Chole Pruett's death. (Ev Hr'g Tr 81, 86–87, Dec. 13, 2000.)

At the time of his trial and appeal, neither Mr. Craighead, nor his trial counsel, nor his appellate counsel knew of, or could have with reasonable diligence discovered, the phone records documenting the specific phone calls that Mr. Craighead made from Sam's Club on the night of June 26–27, 1997. (Hr'g Tr 20-26, 46-55, June 30, 2010; 144, July 14, 2010.) As Mr. Craighead testified, he could not remember in 2002—more than five years after what from his perspective was just another unremarkable night at work—whether he had made phone calls from work that night, at what time, or to whom. Mr. Craighead testified that he could not remember a specific conversation in which he informed his trial counsel that he sometimes made telephone calls from work, though he "thought [he] told all [his] attorneys." (Hr'g Tr 72, June 30, 2010.) However, given that it took the Michigan Innocence Clinic many months to obtain those records from Ameritech, it is highly improbable that trial counsel could have, with reasonable diligence, obtained them in time for trial. (See Latoya Antonio Affidavit, Appendix H (App. L to Motion for Relief from Judgment); Judd Grutman Affidavit, Appendix I (App. M to Motion); Chad Ray Affidavit, Appendix J (App. N to Motion for Relief from Judgment).) The prosecution also stipulated that the Michigan Innocence Clinic served at least seven subpoenas to obtain the Farmington Hills Sam's Club phone bill for June and July 1997. (Hr'g Tr 12, June 30, 2010.)

Moreover, as Valerie Newman, Mr. Craighead's counsel on appeal, testified, she received purported phone records from Sam's Club at the time of Mr. Craighead's appeal, in response to a subpoena. (Hr'g Tr 49-50, July 14, 2010.) Ms. Newman reviewed those records and supplied them to Mr. Craighead and to Mr. Craighead's father to review, but none of them found any relevant calls listed in these records that Sam's club disclosed. (*Id.* at 50-57.)

For reasons unknown to anyone, the purported records supplied by Sam's Club in 2002 were incomplete and did not contain any of the calls shown in the newly discovered records finally received from Ameritech, by the Michigan Innocence Clinic, in 2009. (*Id.* at 91.) Despite the diligent efforts by appellate counsel to uncover evidence in Mr. Craighead's defense, neither Ms. Newman nor Mr. Craighead could have known at the time they received the records that they were not in fact complete, and did not contain the crucial, specific call records which would ultimately prove Mr. Craighead's innocence. Had trial counsel pursued the same line of investigation as appellate counsel, he would have certainly received these same incomplete and unhelpful records in response.

Trial Court Ruling on Motion for Relief from Judgment

Mr. Craighead, represented by the Michigan Innocence Clinic, filed his motion for relief from judgment in November 2009, raising the claim that the trial court should grant Mr. Craighead a new trial because the newly discovered evidence of the phone calls he made from Sam's Club conclusively demonstrated his innocence, and because neither he, nor his trial counsel, nor his appellate counsel, could have with reasonable diligence discovered the records at the time of his trial or appeal. Mr. Craighead further raised an

alternative claim that, if the trial court found the records not newly discovered because they could have been found with reasonable diligence, then trial counsel and appellate counsel were ineffective for failing to discover and present those records. Based on the testimony of trial and appellate counsel at the subsequent hearings on his motion, Mr. Craighead does not argue the second claim any further in this appeal.

On July 14, 2010, the trial court denied Mr. Craighead's motion for relief from judgment, issuing its findings of fact and final order on the record, at the conclusion of the second evidentiary hearing on the motion. (See Hr'g Tr 117-123, July 14, 2010.) The trial court found that the records were not newly discovered; that in its opinion the records did not establish Mr. Craighead's innocence; and moreover that the records would not have caused a different outcome at trial.

In supporting its opinion that the records were not newly discovered, Judge Jones stated: "So, you haven't sustained your burden to show me that this would actually show—first of all, I can't really say it's newly discovered. Because I think if Steve Fishman [trial counsel] had known about it, he would have found it." (*Id.* at 122; emphasis added.) In explaining her opinion that the records did not establish Mr. Craighead's innocence, Judge Jones stated: "If I had confidence that the evidence that the defendant presents me now actually shows that he made phone calls on the date and time in question, if I believe that, if I had the least bit of confidence in it, I would grant your motion; but I don't." (*Id;* emphasis added.)

The only reason Judge Jones gave for not being confident that Mr. Craighead made the phone calls in question is that the phone bill revealed that the same two phone numbers (Isaac Griffin's and Randle Craighead's) were called several times during other

nights that month and, on one occasion, within minutes of each other at 1:37 p.m. and 1:38 p.m. on May 15, that is, during the day shift. (*Id.* at 10-11; see also Sam's Club Ameritech Telephone Bill, April-May 1997, Appendix K, at page 37, line 16-17; Hr'g Tr 10-11, July 14, 2010.) In other words, because two calls were made back-to-back to Randle Craighead and Isaac Griffin during a day shift, Judge Jones announced that she had no reason to believe that it was Mr. Craighead who made the four calls to Randle Craighead and Isaac Griffin during the night shift of June 26-27, 1997. <u>But neither Mr. Craighead nor Mr. Ryzak ever testified that Mr. Craighead worked **exclusively** on the night shift</u>, and it is hardly surprising that an employee who works night shifts would occasionally work a day shift as well.

The uncontroverted facts remain that Randle Craighead and Isaac Griffin received multiple phone calls from Sam's Club during the night shift of June 26-27 (and during multiple other night shifts that month as well), that the night shift workers were locked into Sam's Club, and that neither Randle Craighead nor Isaac Griffin knew anyone other than Mark Craighead who would be calling them from Sam's Club in Farmington Hills, much less anyone else who would be calling them in the middle of the night.

Finally, in holding that the records would not have caused a different outcome at trial, Judge Jones stated: "But then beyond that, let's say that [Fishman] got stonewalled or whatever, but <u>does it actually show or would it cause a different result in this trial? And you've got a problem showing that he's the one who made these calls because you can't convince me of that. And I'm not going beyond a reasonable doubt. If I thought there was a reasonable opportunity that he had been the one who made these, I'd go with him."</u> (*Id.* at 123; emphasis added.) Judge Jones also stated: "<u>The jury didn't ask for</u>

phone records.... [T]hey said, is there any proof that he was at work that day." (*Id.* at 118; emphasis added.)

STANDARD OF REVIEW

A trial court's ruling on a motion for relief from judgment under MCR 6.500, similar to a motion for new trial, is reviewed for abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236, 250 (2003). The findings of fact that supported the ruling are reviewed for clear error. *Id.* Underlying questions of law are reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

A trial court abuses its discretion when it "chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272, 283 (2008) (citation omitted. In reviewing a ruling on a motion for new trial, this Court "examine[s] the reasons given by the trial court. . . . Where the reasons given by the trial court are inadequate or not legally recognized, the trial court abused its discretion." *People v Leonard*, 224 Mich App 569, 580, 569 NW2d 663, 669 (1997) (citation omitted).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. CRAIGHEAD'S MOTION FOR RELIEF FROM JUDGMENT GIVEN THE UNCONTROVERTED EVIDENCE ESTABLISHING THAT MR. CRAIGHEAD WAS LOCKED INTO SAM'S CLUB IN FARMINGTON HILLS THE NIGHT THE CRIME WAS COMMITTED IN DETROIT

The trial court abused its discretion when it denied Mr. Craighead's motion for relief from judgment. Mr. Craighead presented the trial court with compelling new

evidence that resolves any reasonable doubt about his whereabouts on the night Chole Pruett was murdered. This new evidence shows conclusively and without any contradiction that Mr. Craighead was working twenty-four miles away from the crime scene and making phone calls from work to well-known sports radio personality Isaac "Mega Man" Griffin and to his brother, Randle Craighead, during the relevant hours on June 26 and 27. Since the night shift workers were locked in and one of the phone calls was made just minutes before the burning truck was found in Redford Township, Mr. Craighead could not have committed this crime.

The Ameritech phone bills, the testimony from Randle Craighead and Isaac Griffin, and the results of Mr. Craighead's polygraph exam are newly discovered evidence requiring that Mr. Craighead be given a new trial. See *People v Cress*, 468 Mich 678, 692, 664 NW2d 174, 182 (2003). This evidence meets all four requirements outlined in *Cress*: (1) it is newly discovered; (2) it would result in a different result on retrial; (3) it is not cumulative of trial evidence; and (4) it could not have been discovered at trial through reasonable diligence. *Id.*

The trial court clearly and unreasonably erred in its findings on the *Cress* factors, leading to a result "outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217. Specifically, the trial court denied the new trial solely because the phone records show that Mr. Craighead also called Isaac Griffin and Randle Craighead during a day shift and, from that fact, the trial court decided that it could not be "confident" that Mr. Craighead was the one who called Isaac Griffin and Randle Craighead during the night shift of June 26-27.

Judge Jones' reasoning was, with all due respect, completely irrational. The fact that the phone bills shows that Mr. Craighead made multiple phone calls to both Isaac Griffin and Randle Craighead throughout the month, including during a day shift, in no way undermines the uncontroverted fact that phone calls were made from Sam's Club to both Isaac Griffin and Randle Craighead the night of the killing, including one just before the victim's burning truck was found in Redford Township, and that both Mr. Griffin and Randle Craighead confirmed that no one other than Mark Craighead ever called them from Sam's Club, much less called them in the middle of the night.

Accordingly, this Court should grant leave to appeal so that the trial court's ruling may be reversed and Mr. Craighead may be granted the new trial to which he is entitled.

A. Mr. Craighead's New Evidence Is Newly Discovered

The trial court clearly erred by not finding that the evidence Mr. Craighead presented at his evidentiary hearing is "newly discovered."

Perhaps the most important factor in deciding whether "the evidence itself, not merely its materiality, was newly discovered," *Cress*, 468 Mich at 692, is whether the defendant and his counsel knew about the evidence at trial. See *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663, 670 (1996). However, the defendant must have known or should have known that the evidence actually existed; it is not enough that he knew an allegedly exculpatory piece of evidence had the *potential* of coming to fruition. See *People v Baldwin*, No 236855 (Mich App Sept 23, 2003) (holding that trial court erred in finding other person's confession to defendant's alleged crime was not newly discovered evidence, where trial court's only reason was that other person's "potential

involvement in the case was known at trial"). This Court also has held that evidence is newly discovered evidence where it was not reasonably possible for the defendant to present it at trial. See *People v Baydoun*, No 281972, (Mich App Jan 12, 2010) (subsequent confessor's "whereabouts were unknown at the time of defendant's trial").

Here, the trial court never explicitly ruled that the Ameritech phone bills and testimony presented at Mr. Craighead's hearing were not in fact "newly discovered." The court did, however, imply as much in its ruling. The court stated that "I can't really say it's newly discovered. Because I think if Steve Fishman [Mr. Craighead's trial counsel] had known about it, he would have found it." (Hr'g Tr 122, July 14, 2010). This is the trial court's only statement concerning the newly discovered evidence prong of the *Cress* test.

Mr. Craighead clearly satisfies the first prong of the *Cress* test, and the trial court's (apparent) finding to the contrary is a *non sequitur*. The trial court's statement that trial counsel would have found the records if he had known about them has nothing to do with whether the records are newly discovered evidence now. The fact is that trial counsel did not know about the phone records and therefore did not try to obtain them. Mr. Craighead also did not know about the phone records. When he went to trial five years after the killing of Chole Pruett, Mr. Craighead had no memory of the night of June 26-27, 1997, much less any memory of whether he made any personal phone calls that night from work.

In fact, it was only in 2009, after the Michigan Innocence Clinic obtained the Ameritech phone bills, that Mr. Craighead discovered that he had made calls from Sam's Club phones on the night of June 26-27, 1997. As Mr. Craighead testified, "[t]he only

reason I remember is because the documents were produced in front of me. I seen that I made those phone calls." (Hr'g Tr 82, June 30, 2010.) It clearly would be error to hold Mr. Craighead responsible for knowing, at trial, about the existence of an exculpatory phone bill when in fact all he knew, at most, was that five years earlier he occasionally made personal phone calls from Sam's Club phones while at work there. In any event, the trial court did not make such a holding and instead found the first prong not satisfied solely for the irrelevant reason that trial counsel would have tried to find the phone bills if he had known about them.

Not only were Mr. Craighead and his trial counsel unaware at trial of the existence of this evidence, it is clear that they could not have learned about the phone records by the time of trial because when appellate counsel tried to get the phone records, she was given an incomplete set of phone records that did not include the hundreds of phone calls made to Detroit by Sam's Club employees (Hr'g Tr 47-49, 54-55, 87-88, July 14, 2010.) In fact, it took many months of extraordinary effort on the part of a team of Michigan Innocence Clinic students, (see Antonio Affidavit, Appendix H (App. L to Motion for Relief from Judgment); Judd Grutman Affidavit, Appendix I (App. M to Motion for Relief from Judgment); Chad Ray Affidavit, Appendix J (App. N to Motion for Relief from Judgment), including at least seven subpoenas to Walmart and AT&T, to obtain the correct phone bill. (Hr'g Tr 12, June 30, 2010.) Trial counsel cannot possibly be faulted for failing to spend months trying to get a phone bill with a looming trial date.

Mr. Craighead has clearly shown that he did not and could not have known at trial about the new evidence he presented at his evidentiary hearing; neither he nor his trial counsel knew that he had made personal phone calls from Sam's Club on that particular

night five years earlier and, even if they had known, there is no reasonable prospect that they could have obtained the correct phone bill in time for trial. The phone bill was finally obtained, after many months of effort, in August 2009, and only then was it discovered for the first time that Mr. Craighead had made personal phone calls the night of the killing from Sam's Club phones. Therefore, the trial court erred in finding that the evidence presented at Mr. Craighead's evidentiary hearing was not newly discovered.

B. Mr. Craighead's Newly Discovered Evidence Would Cause the Jury to Reach a Different Outcome if Presented at Retrial

The trial court erred when it ruled that the newly discovered evidence, proving that Mr. Craighead was at work the night of the murder, would probably not convince a jury to acquit Mr. Craighead. The records documenting Mr. Craighead's phone calls to his brother and his friend almost certainly would have resulted in his acquittal as it would have provided the evidence the jury was looking for to confirm his already strong alibi.

1. The phone records, if presented to a jury, would result in Mr. Craighead's acquittal on retrial.

Mr. Craighead demonstrated, as he was required to do, that the new evidence upon retrial would probably cause a different result. *Cress*, 486 Mich at 692. Michigan courts have recognized that new evidence corroborating a defendant's alibi satisfies this criteria. See, e.g., *People v Burton*, 74 Mich App 215; 253 NW2d 710 (1977) (holding that newly discovered witness testimony corroborating alibi warranted new trial).

The newly discovered evidence in this case consists of phone records that corroborate Mr. Craighead's lack-of-presence defense. Indeed, as objective,

documentary evidence, the records are even more concrete and compelling than the witness testimony in *Burton*. See 74 Mich App at 253.

Courts also weigh the relative weakness of the inculpatory evidence presented at trial against the relative strength of the exculpatory evidence newly presented, and the effect such new evidence might have on a second jury. *Id.* at 223. The case against Mr. Craighead was extremely thin. The prosecution presented no physical evidence and no eyewitnesses tying Mr. Craighead to the crime, despite a multi-year investigation that included at least 25 witnesses. (Ev Hr'g Tr 87, Dec. 13, 2000.) As both the majority of this Court and the dissent in the direct appeal concluded, there was not even probable cause to arrest Mr. Craighead until he made a statement to the police on June 20, 2000, some three years after the killing. *Craighead*, No. 243856 (Dec 22, 2005) at *2 (majority concluding Mr. Craighead's initial statements to police provided probable cause); *id.* at *5 (dissenting judge finding "very little in the record to sustain a finding that the prosecution sustained its burden of showing probable cause for a warrantless arrest at Craighead's home on the evening of June 20, 2000).

In fact, the only evidence of guilt at trial was the vague, non-particularized statement Mr. Craighead gave to investigator Barbara Simon after hours of interrogation. (Trial Tr 110, June 20, 2002.) This "confession," describing an accidental shooting following a struggle over the gun, was entirely inconsistent with the forensic evidence, which concluded that Mr. Pruett was killed following premeditated, execution-style gunshots fired from above his prone body. The exculpatory power of the phone records crushes any evidence of Mr. Craighead's guilt presented at trial. In contrast to the prosecution's weak inculpatory evidence against Mr. Craighead, the Sam's Club phone

records provide strong evidence of his innocence that would lead any reasonable jury to acquit him of this offense.

Evidence of the jury's decision-making processes, documented in notes submitted to the trial court, provide valuable insight into what the jury was thinking during deliberations, and the ease or difficulty with which it reached its verdict. See *Anton v State Farm Mut. Auto Ins. Co.*, 238 Mich App 673, 689; 607 NW2d 123, 132 (1999) (finding jury's two notes issued with its verdict indicated jury properly considered the issues before it and did not act on passion or prejudice); *Fry v Pliler*, 551 US 112, 125; 127 S Ct 2321; 168 L Ed 2d 16 (2007) (quoting *United States v Varoudakis*, 233 F3d 113, 127 (1st Cir 2000) (looking to jury's note that it was at an "impasse" as a sign that it was uncertain about defendant's guilt). Here, Mr. Craighead's jury was clearly focused on the question of whether there were any records supporting Mr. Craighead's alibi when it sent out a note stating: "<u>Is there a paycheck stub or solid evidence that a forty-hour week was worked?</u>" (Trial Tr 170-71, June 24, 2002 (emphasis added).) The jury could not have given a clearer indication that it was looking for proof of Mr. Craighead's alibi, but ultimately, without documentary evidence that he was at work that particular night, convicted him. Given the jury's pointed request for this crucial type of evidence, it almost certainly would have arrived at a different outcome had it seen the phone records.

2. <u>The trial court erred in ruling that the newly discovered evidence would not likely cause a different result at trial</u>.

The trial court's reasoning in holding that the Sam's Club phone records would not likely result in an acquittal if presented to a jury was irrational. It's clear that the trial court simply failed to grasp the significance of the phone records.

The trial court ignored the evidentiary standard for granting a new trial in reaching its determination. The appropriate question is whether the new evidence, if presented at retrial, would probably result in a different result. By using terms such as "convince" and "confidence" in referring to whether the records conclusively show that Mr. Craighead placed the calls from Sam's Club, the trial court raised the evidentiary burden from probability to near-certainty. While the evidence actually does meet the near-certainty threshold, see infra at 26-29, the trial court erred in requiring that the evidence meet this standard in order to merit a new trial.

While the trial court's opinion makes it clear that it did not properly apply this *Cress* factor, even if it was correct in its application, it was unreasonable in finding that the new evidence would not have resulted in a different outcome at trial. Rather than examining the implications of the phone records, the trial court chose instead to hinge its opinion on irrelevant details from the evidentiary hearing and faulty logical leaps.

The trial court gave considerable weight to Randle Craighead and Isaac Griffin's estimates of how often Mr. Craighead called them. Each testified that Mr. Craighead called them from Sam's Club regularly during his shifts, testimony which was substantiated by the phone records. Yet because they testified that Mr. Craighead called them more frequently than was reflected on the entire phone record, the trial court claimed that the witnesses were "exaggerating." (Hr'g Tr 119-120, July 14, 2010.)

These witnesses' supposedly inaccurate estimates of how often Mr. Craighead called them from work, given in testimony thirteen years after the period in question, have no relation to the significance of the phone record evidence. In fact, it is likely that the witnesses' estimates were accurate, and that Mr. Craighead's other calls simply did

not show up on the records because they were placed from other phone lines, or from cellular phones, or made at times when he was not working at Sam's Club. For example, Randle Craighead only stated that Mr. Craighead called him "two to three times a week;" he never claimed that each of those two to three calls per week all occurred while his brother was at work. (Hr'g Tr 45, June 30, 2010.)

But even if Randle Craighead and Isaac Griffin did exaggerate the frequency with which Mr. Craighead called them from work, their testimony in no way negates the incontrovertible documentary evidence that calls were placed to each of them on the day and time in question—the same time Mr. Pruett was killed in Detroit. By concentrating on whether the witnesses may have given inaccurate estimates of how often Mr. Craighead called them, the trial court failed to grasp the indisputable implications of this new evidence—that if Mr. Craighead was at Sam's Club in Farmington Hills working the night of June 26-27, 1997, he could not possibly have killed Mr. Pruett.

To put it simply, given that there is now indisputable evidence that Isaac Griffin and Randle Craighead were called on the night of June 26-27, 1997, and given that both Mr. Griffin and Randle Craighead testified, without the slightest contradiction, that no one else other than Mark Craighead ever called them from Sam's Club in the middle of the night, how often Mr. Craighead called them on other nights is completely irrelevant.

In rejecting the exculpatory value of the newly discovered phone bill, the trial court placed the most weight on the fact that the phone bill shows that several phone calls were also placed from Sam's Club to Randle Craighead and Isaac Griffin during the day shift. (Hr'g Tr 119, July 14, 2010.) The trial court suggested from this fact that perhaps other people at Sam's Club called these two individuals. (*Id.* at 123.) Because Mr.

Craighead testified that he regularly worked night shifts, the trial court reasoned that daytime records of calls to Randle Craighead and Isaac Griffin proved that these two people may have had phone relationships with other Sam's Club employees. (*Id.*) That conclusion makes no logical sense for several reasons.

First, while it is true Mr. Craighead did testify that he typically worked night shifts (Hr'g Tr 59-60, June 30, 2010.), neither he nor anyone else testified that he only worked at Sam's Club during night hours. Night shift workers are sometimes called upon to work occasional day shifts, and vice-versa. The night shift was the only shift relevant to the time Chole Pruett was murdered.

Second, the trial court ignored both Randle Craighead's and Isaac Griffin's undisputed testimony that **the only person who ever called them from Sam's Club was Mark Craighead**, (Hr'g Tr 42, 105-106, June 30, 2010), testimony consistent with Mr. Craighead's truthful polygraph responses. (*Id.* at 22-23; June 30, 2010 Polygraph Examination Report, Appendix L, at 2.)

Third, the phone records show that two of the daytime calls that Judge Jones spotted on the phone bill were placed to Isaac Griffin and Randle Craighead in immediate succession—on May 15, 1997, a call was placed from Sam's Club to Mr. Griffin's phone number at 1:37 p.m.; then, at 1:38, one minute later, a call was placed to Randle Craighead from the same Sam's Club line. (Hr'g Tr, 10-11, July 14, 2010; see also Sam's Club Ameritech Telephone Bill, April-May 1997, Appendix K, at page 37, line 16-17; Hr'g Tr 10-11, July 14, 2010.) The fact that these two calls were made in immediate succession from the same phone line strongly indicates that the same person called them back-to-back. And the only person working at the Farmington Hills Sam's

Club at that time known to know both Randle Craighead and Isaac Griffin was Mark Craighead.

Especially given the uncontroverted testimony of Isaac Griffin and Randle Craighead that Mark Craighead was the only person who would be calling them from Sam's Club in Farmington Hills, the only rational conclusion from the back-to-back telephone calls to Randle Craighead and Isaac Griffin on May 15, 1997, is that Mark Craighead called his brother and his close friend during a day shift. It is completely irrational to conclude, as the trial court did, that this daytime phone call somehow proves someone else at Sam's Club was calling Isaac Griffin and Randle Craighead and that this unknown person who called during the day on May 15, 1997, was also there during the night shift on June 26-27, 1997.

The trial court's unreasonable disregard of the phone records is further illustrated by its appraisal of the jury note, determining that because "the jury didn't ask for phone records," the new evidence is worthless. (Hr'g Tr 118, July 14, 2010.) At Mr. Craighead's trial, the jury sent out a note during deliberations asking whether there was "a paycheck stub or solid evidence that a forty-hour week was worked." (Trial Tr 170-71, June 24, 2002.) The jury was clearly seeking any kind of documentary evidence that could confirm Mr. Craighead was at work when Mr. Pruett was killed.

Indeed, even the trial court conceded that the jury was looking for "proof that [Mr. Craighead] was at work that day." (Hr'g Tr 118, July 14, 2010.) The phone records constitute exactly this proof. In fact, they are even more conclusive than a paystub, which would only reflect hours worked over a one or two-week period; <u>the phone records link Mr. Craighead to the Sam's Club at the exact time that the crime was occurring</u>.

The jury struggled with Mr. Craighead's alibi issue enough to request additional information about it, and the note strongly indicates that, had the jury been presented with such evidence at trial, it likely would have reached a different outcome. The trial court's misunderstanding of the jury's real concern, and the fact that the phone records go directly to that concern, is further indication that the court clearly erred in its ruling.

If a jury had the opportunity to hear this new evidence that directly refuted the prosecution's theory of Mr. Craighead's guilt, it is not only likely but nearly certain that it would not have returned a conviction. The trial court's ruling that the phone records would make no difference if presented at a retrial is both clearly erroneous and an abuse of the court's discretion.

C. Mr. Craighead's Newly Discovered Evidence Is Not Cumulative

The new evidence presented to the trial court in Mr. Craighead's evidentiary hearing also is not cumulative. "[E]vidence of a distinct probative fact is not cumulative to evidence of another fact, although both facts support the same issue." *People v Duncan*, 414 Mich 877, 881; 322 NW2d 714 (1982). Evidence is typically deemed cumulative when it affirms evidence of a similar type already presented at trial. See *People v Nixon*, No 266033 (Mich App Mar 1, 2007) (finding that a fourth alibi witness was cumulative to the three alibi witnesses who had already provided similar testimony regarding defendant's whereabouts).

The question of Mr. Craighead's whereabouts on the night Chole Pruett was killed was hotly disputed at his trial. These newly discovered records put this dispute to rest. The phone records directly corroborate Mr. Craighead's assertion that he was at

work at the time that Mr. Pruett was killed and the truck was stolen. No other documentary evidence was available to be presented to prove this fact at trial. While trial counsel made an effort to present the most common form of documentary evidence —Mr. Craighead's timecard—that evidence was not available due to a sprinkler accident, which destroyed Mr. Craighead's timecard from that week. (Trial Tr 11, June 24, 2002.) No other evidence presented at trial proves what these phone records prove—that Mr. Craighead was at work, locked in until the next morning, at the time of the crime.

Mr. Craighead's appellate attorney, who had received incorrect phone records from Sam's Club in response to her subpoena, testified at the evidentiary hearing that had she instead received the correct Ameritech phone bill, she would not have considered it to be cumulative. (Hr'g Tr 66-67, July 14, 2010.) Moreover, the prosecution conceded at this hearing that the evidence was not cumulative, noting that "it is qualitatively different than the evidence that was presented at trial, even though it was a defensive alibi, and even though it would supplement the defensive alibi." (*Id.* at 101.)

Perhaps the clearest proof that the evidence is not cumulative is that the jury specifically asked for documentary evidence that Mr. Craighead was at work the night of the killing by sending out a note during deliberations: "Is there a paycheck stub or solid evidence that a forty-hour week was worked?" (Trial Tr 170-71, June 24, 2002.) The jury asked for such documentary evidence because Mr. Craighead was unable to present any at trial. The newly discovered Sam's Club phone records are certainly not cumulative to evidence presented at trial.

D. Mr. Craighead's Newly Discovered Evidence Could Not Have Been Discovered at Trial through Reasonable Diligence

Finally, the existence and importance of the Sam's Club phone records was not and could not have been reasonably known to Mr. Craighead or trial counsel. "Reasonable diligence" in investigation is judged by whether trial counsel was aware of the facts necessary to prompt a more thorough investigation. See, e.g., *People v Deering*, No 274208 (Mich App Dec 11, 2008) (trial counsel was in possession of witness' criminal history and failed to investigate, which does not demonstrate "reasonable diligence" for purposes of newly discovered evidence).

In this case, trial counsel could not reasonably have deduced that a viable alternative to the missing timecard would be phone records from the night in question. Timecards and paystubs are common business records which track employee schedules, but company phone records are not a likely place to find evidence of presence for an employee such as Mr. Craighead, who did not work in an office, especially since such employees are not normally permitted to make personal long-distance phone calls using the company phone. Trial counsel took the most logical steps to establish Mr. Craighead's alibi: he investigated and pursued timecard evidence, and when the timecard proved to have been destroyed by accident, counsel presented testimonial evidence establishing Mr. Craighead's normal work schedule and explaining the missing timecard. (Trial Tr 9-11, June 24, 2002.)

Even if trial counsel could have been expected to know the importance of the Sam's Club phone records, the effort required to finally obtain these records went beyond what would be considered reasonable diligence for a trial attorney. Mr. Craighead's appellate attorney, Valerie Newman, attempted to obtain this evidence when she

subpoenaed Sam's Club's phone records. (Hr'g Tr 49-50, July 14, 2010.) She scrutinized the store's phone log in an attempt to determine whether any of the numbers reflected on it matched the numbers Mr. Craighead could have called. (*Id.* at 53-54). But what Ms. Newman did not know was that the Sam's Club records she received captured only a fraction of the calls made from the Farmington Hills store, and despite Ms. Newman's best efforts, Mr. Craighead's presence at that Sam's Club could not be verified from that incomplete call log.

The complete phone bill was finally obtained when three student attorneys at the Michigan Innocence Clinic, assigned to Mr. Craighead's case, spent six months in constant communication with Sam's Club headquarters in Bentonville, Arkansas, and phone companies AT&T and Ameritech, attempting to obtain the phone records for June 26 and 27, 1997, for the phones located in the Farmington Hills Sam's Club store. (Antonio Aff., Appendix H (App. L to Motion for Relief from Judgment); Grutman Aff., Appendix I (App. M to Motion for Relief from Judgment); Ray Aff., Appendix J (App. N to Motion for Relief from Judgment).) The process took numerous subpoena requests, as the prosecution has stipulated (Hr'g Tr 12, June 30, 2010), and countless communications via phone and fax to coordinate Sam's Club cooperation in providing the phone records. The students persisted in requesting the documents despite Walmart's assertions that the phone records were not available. Walmart initially refused to cooperate with the students as they attempted to obtain the phone records from AT&T (Antonio Aff., Appendix H (App. L to Motion for Relief from Judgment)), and AT&T initially failed to provide complete records when subpoenaed. (*Id.*) Finally, even once the records were located by AT&T Ameritech, it took an additional month of negotiation to persuade

AT&T to provide hard copies of the documents, rather than corrupted, unusable files via email. (Ray Aff., Appendix J (App. N to Motion for Relief from Judgment).) The efforts of the student attorneys at the Michigan Innocence Clinic to chase down the remote possibility that Mr. Craighead might have made personal long-distance phone calls using the company phone on a particular night years ago go beyond what could be considered reasonable efforts by trial counsel in investigating and preparing for an upcoming trial.

At the evidentiary hearing, the prosecution did not dispute this prong of the *Cress* test. The prosecution noted in its closing argument that Ms. Newman "could not [have been] more diligent" in her efforts to obtain the Sam's Club outgoing call records. (Hr'g Tr 110, July 14, 2010.) That Ms. Newman was still unable to locate the calls Mr. Craighead made from Sam's Club perfectly illustrates that reasonably diligent effort could not have uncovered this evidence before trial.

In short, the newly discovered phone records easily meet the four-part test of newly discovered evidence.

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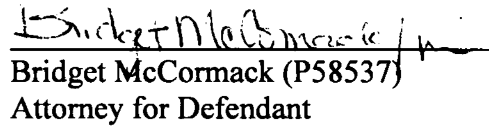
CONCLUSION

Therefore, this Court should grant this application for leave to appeal, reverse the trial court's denial of Mr. Craighead's motion for relief from judgment, and order a new trial at which a jury may consider the phone records as proof that Mr. Craighead could not have committed the killing of Chole Pruett.

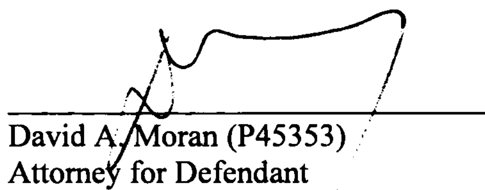
Dated: December 3, 2010

Respectfully Submitted,

MICHIGAN INNOCENCE CLINIC



Bridget McCormack (P58537)
Attorney for Defendant



David A. Moran (P45353)
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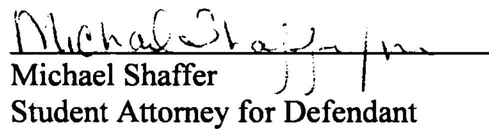
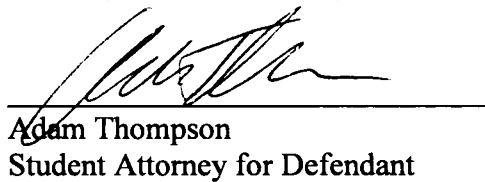


Michael Shaffer
Student Attorney for Defendant



Adam Thompson
Student Attorney for Defendant

Katherine O'Connor
Student Attorney for Defendant

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Exhibit 6H - Plaintiff-Appellee's Brief in Opposition to Defendant's Delayed Application for Leave to Appeal

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Court of Appeals
No. 301465

MARK T. CRAIGHEAD,
Defendant-Appellant.

Third Circuit Court No: 00-007900

PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO DEFENDANT'S DELAYED APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

The People accept defendant's statement of jurisdiction

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

For a new trial to be granted on the basis of newly discovered evidence, it must not be cumulative, the evidence itself, not just its materiality, must be newly discovered, it must make a different result probable on retrial, and could not have been discovered with reasonable diligence. The records here are merely newly available and offer cumulative support to defense testimony that he was working when the crime occurred. Is this evidence newly discovered?

The People answer: NO.
Defendant answers: YES.

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COUNTERSTATEMENT OF FACTS

The People accept only those portions of defendant's statement of facts that are in conformance with MCR 7.212(c)(6), which requires that "[a]ll material facts, both favorable and unfavorable, must be fairly stated without argument or bias." The People provide additions and/or corrections below and in the brief.[1]

Defendant states that he has served more than seven years for a crime that he did not commit. Defendant was convicted and his conviction was upheld by this court.[2]

Defendant refers to his confession as "alleged." (Defendant's brief, p 2). Defendant confessed. A Walker hearing was held in the trial court challenging the conviction. The confession was challenged on appeal. Defendant's conviction was affirmed.[3]

Attorney Steven Fishman testified that defendant never told him that he regularly made phone calls from Sam's Club when he was working. Fishman testified that had defendant told him, he would have asked him whether he made the calls from a land line, and if so would have subpoenaed the records from Wallmart. If stonewalled, he would have filed a motion in front of the trial court and had confidence the court would not have been happy that the records had not been turned over. Fishman testified that if the calls were made from a cell phone, he would have tried to find the records to show the calls were made. (EH, 6.30.10, 27-28).

---

[1]The People first note that the defendant has consistently confused this Statement of Facts for argument.

[2]*People v Craighead,* No. 243856 (Mich App, December 22, 2005).

[3]The confession is a fact in the case rather than an unproven allegation. Defendant makes a similar comment in footnote one of the same page, stating ". . .Mr. Craighead allegedly made this 'statement' to investigator Barbara Simon. . . ." Again, there is nothing "alleged" about the confession. The fact of the confession has been litigated and proven

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The defendant testified that his regular shift at Sam's Club was a midnight shift. He worked from nine to five and on the weekends, which meant Friday, Saturday, and Sunday, he worked ten to six. Defendant testified that if June 26th was a Friday, he would have worked ten to six. Defendant believed that he worked on the night on June 26th. He testified that he worked the same days every week, Tuesday through Saturday. He had Sundays and Mondays off. (EH,6.30.10, 59-60).

Defendant testified that Sam's Club had a policy about locking employees in at night who worked the night shift. Defendant testified that they could not get out of the store unless they notified the manager, and he guessed that the manager had to notify the right people. A manager was able to unlock the doors to let someone out if necessary. He understood that a silent alarm would sound and he was told it went to Bentonville. The trial court suggested getting someone from Sam's Club who could testify as to what was going on at the time. (EH, 6.30.10, 60-67).

Defendant testified that he regularly called Ike Griffin from Sam's Club. Defendant testified he probably called Ike Griffen once or twice a month. He testified that he called his brother, Randall Craighead, one to three times a month. (TT, 6.30.10, 68-71).

Defendant agreed that he did not tell the investigator on August 29, 1997 that he was regularly making phone calls when he was working. Defendant testified that he did not tell Detective Tate when he was interviewed the second time that he had made phone calls from the customer service desk. Defendant testified that he told his attorney Val Newman that he had made calls from the customer service desk at Sam's Club and he thought that he gave her the phone numbers. He thought he told all his attorneys. Defendant testified that he gave Val Newman the same information that he gave to the Innocence Clinic–he told her he made the calls

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and gave her some phone numbers. He did not know if he gave her the specific numbers at issue here. Defendant thought that Van Newman had done a great job for him, but was "probably" suing her for malpractice. He also sued Otis Culpepper, but not Steve Fishman or Stuart Freedman. (EH, 6.30.10, 80-83).

Isaac Griffin testified that he had specific recollections of talking to defendant in June, 1997. Griffin testified that he spoke to defendant every day. (EH, 6.30.10).

Mary Kay Miles, the Keeper of the Records for the Farmington Police Department admitted that she had personal knowledge that Sam's Club would actually call in alarms and had no idea whether Sam's Club followed their policies in that. regard. Miles testified that she searched no other dates than those she was given. (EH, 6.30.10, 38-39).

Randall Craighead recalled receiving phone calls from his brother when he was working the night shift at Sam's Club. He also testified that employees were locked in the store during their night shift and that a manager would have to let an employee out if they needed to leave. Craighead testified that a silent alarm would sound and the alarm went to Bentonville, Arkansas. To his knowledge, the alarm did not go to the police department. Craighead testified that he talked to defendant most nights but not every night. He later testified that defendant called him twice a week on the land line and cell phone. He could not specifically say that he spoke to him on those days. Craighead never went to the police with this information after defendant was charged. (EH, 6.30.10, 42-49).

The trial court issued its ruling:[4]

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[4]The courts ruling bears precise quoting as to the issue pertaining to newly discovered evidence because defendant has misconstrued the ruling.

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. . .I was unimpressed by the records. I had questions in my mind during trial when they tried to say, well, he was locked in. I still say to this day, common sense and everyday experience has taught me that people want to get out of someplace, they will. And then we've got employees who sign in for other people. So. . .

The jury didn't ask for phone records. The jury said, this man sits up here and claims he was at work.

Most of us have to sign in, sign out, swipe something. There's some kind of record. So they said, is there any proof that he was at work that day?

And what you try to present to me are these phone records, and claim that they prove that he was at work that day.

I listened very carefully, and I try to take very careful notes. But I asked my court reporter, since it has been sometime, to please type me a transcript of the testimony that we had before.

And I'm on page 45 of that transcript, and it deals with the testimony of Mr. Craighead's brother on page 45. And there was a question asked: "Mr. Craighead, do you have any recollection of talking to your brother on either June 26th or 27th of 1997?" Answer: "I talked to him most nights when he was working there. I couldn't tell you an exact date."

"So you regularly talked to him?" "Yes."

"So you talked almost every night?" Answer: "No, not every night."

"Question: "But almost? How many times a week did he call you?" Answer: "Maybe two or three times a week."

So I got the impression that he talked to him on a very regular basis. And he also had indicated he was upset about that because he's calling–he worked days, and his brother is calling him near midnight.

Now, I don't know what kind of brother relationship they had. But if I was calling my sister like that, she'd put an end to it. You know, I've got to go to sleep.

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But when I look at the records–because the first thing she put in were only records that showed two or three sheets of the phone records. Now I have examined the entire phone records, and I don't see any indication that any calls were made two or three times a week.

But what I did find that causes a problem in my mind was this June 10th, 3:24 p.m. telephone call to his brother. And his brother claims he doesn't know anybody else who could have called him. And people have tried to say, well, although Mr. Craighead, the defendant, claimed that he worked the night shift, either 6:00 to something, or 9:00 to something, or 10:00 to something–and now I'm hearing from the attorneys trying to testify, well, maybe he got called in. I don't know that. The prosecutor has pointed out on her records other calls.

And the other thing that's really kind of strange is when we get to Mr. Griffin, Mr. Griffin testified that he could call him anytime he wanted. And the calls to Mr. Griffin, like one minute, and then I only see one or two calls here. Oh, he called me all the time.

So, people are exaggerating, and I get uncomfortable when people exaggerate. I want to have confidence in what they're telling me that I can believe them.

* * *

If I had confidence that the evidence that the defendant presents me now actually shows that he made phone calls on the date and time in question, if I believe that, if I had the least bit of confidence in it, I would grant your motion, but I don't.

When I look through all these records, I don't see enough telephone calls. I listened to the people who talked, who testified on his behalf. They exaggerated. Or if they didn't exaggerate, he made all these telephone calls from his cellphone. And then, why wasn't I presented with cellphone records? If you all claim–although I didn't know anything about cellphones until you started talking about it. I don't know whether he had a cellphone or not.

So, you haven't sustained your burden to show me that this would actually show–first of all, I can't really say it's newly

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discovered. Because I think if Steve Fishman had known about it, he would have found it. Okay?

But then beyond that, let's say that he got stonewalled or whatever, but does it actually show or would it cause a different result in this trial? And you've got a problem showing that he's the one who made these calls because you can't convince me of that. And I'm not going even beyond a reasonable doubt. If I thought there was a reasonable opportunity that he had been the one who made these, I'd go with him.

And therefore, the newly discovered evidence is not sufficient for me to grant you a new trial, and your motion is denied.

(EH, 7.14.10, 117-123).

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ARGUMENT

I.

For a new trial to be granted on the basis of newly discovered evidence, it must not be cumulative, the evidence itself, not just its materiality, must be newly discovered, it must make a different result probable on retrial, and could not have been discovered with reasonable diligence. The records here are merely newly available and do not prove what the purport to prove. The evidence offered is not newly discovered

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Defendant claims entitlement to a new trial due to what he calls newly discovered evidence on a motion for relief from judgment. .

Standard of Review

The People agree with defendant's standard of review. The standard of review is for an abuse of discretion. In the federal system, it is often stated that an abuse of discretion occurs:

- when a relevant factor that should have been given significant weight is not considered;
- when an irrelevant or improper factor is considered and given significant weight, or
- when all improper and no improper factors are considered, but the court in weighing those factors commits a clear error judgment, which does not mean that the appellate court simply substitutes its judgment for that of the trial court, but that the decision of the trial court is "not within the range of options from which one would expect a reasonable trial judge to select."

See *United States* v *Van Dreel*, 155 F3d 902 (CA 7, 1998); *Kern* v *TXO Production Corp.*, 738 F2d 968, 970 (CA 8, 1984); *United States* v *McNeil*, 90 F3d 298 (CA 8, 1996).

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Discussion

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that (1) the evidence, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the defendant could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. *People v Johnson,* 451 Mich 115, 118, n 6 (1996); *People v Cress,* 468 Mich 678 (2003); *People v Miller,* 211 Mich App 30 (1995). Courts generally disfavor motions for a new trial based on newly discovered evidence and, as a result, such motions should only be granted with caution. United States v. Turns, 198 F.3d 584, 586 (6th Cir.2000).

Defendant has the burden of showing that the evidence is both newly discovered and material. *People v Van Camp,* 354 Mich 593 (1959); *People v Williams,* 118 Mich App 266 (1982). A defendant cannot meet the burden that the evidence is newly discovered if he knew about the evidence at the time of trial. *United States v Hawkins,* 969 F 2d 169, 175 (CA 6, 1992); *United Statess v DiBernardo,* 880 F 2d 1216, 1224 (CA 11, 1989). The "key" to determining whether the evidence is "newly discovered" or only "newly available" is to ascertain when the defendant found out about the information he proposes is newly discovered. *United Staes v Glover,* 21 F 3d 133, 138 (CA 6, 1994). In *Glover,* the defendant was convicted of possessing cocaine with the intent to distribute. After trial, he filed a motion for new trial based on newly discovered evidence. In support of the motion, defendant submitted an affidavit from a witness who claimed to have placed the cocaine in def4ndant's kitchen stove where it was found by the police. This witness had claimed the Fifth Amendment at trial, refusing to testify. He only changed his mind after being separately convicted on a drug offense. The *Glover* court

denied the motion for new trial, holding that the defendant failed to show that the evidence "was discovered after trial" where he acknowledged that he was aware of the witness's testimony before trial. The court noted that while the testimony "may have been newly available, it was not in fact 'newly discovered evidence'. . ." *Id.,* at 138.

In *Smith v United States,* 996 F2d 1219 (CA 7, 1993), the defendant filed a motion for a new trial based on newly discovered evidence of three medical reports, which purportedly detailed his incompetency to stand trial. The claim was rejected, and the Seventh Circuit affirmed, noting that most of the information was not "newly discovered, " and defendant could not establish the materiality of his "new" evidence. The trial court already knew of defendant's diagnosed Bi-Polar Disorder and about his medication. The only new information was the diagnosis of "Possible Paranoid Schizophrenia," which was not material because it added little to the court's understanding of the defendant's competency, the court noting that judges base their decisions not on medical jargon, but on explanations of a defendant's symptoms, and the same symptoms were revealed previously.

Defendant has misrepresented the ruling of the Honorable Very Massey Jones by stating that

> The only reason Judge Jones gave for not being confident that Mr. Craighead made the phone calls in question is that the phone bill revealed that the same two phone numbers (Isaac Griffin's and Randle Craighead's) were called several times during other nights that month and, on one occasion, within minutes of each other at 1:37 p.m. and 1:38 p.m. on may 15, that is, during the day shift. . .But niether Mr. Craighead nor Mr. Ryzak ever testified that Mr. Craighead worked exclusively on the night shift, and it is hardly surprising that an employee who works night shifts would occasionally work a day shift as well."

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(Defendant's "Statement of Facts", p 13).

Defendant also makes a similar statement in his argument, at p 15.

The court's decision here was based on a lack of evidence presented by the defendant. Simply stated, the defense did not prove its entitlement to relief. Here, the real dilemma for defendant is that the trial court based its ruling on a number of factors. Those factors, that the defendant has conveniently ignored, included:

- Randall Craighead testified that he spoke to the defendant regularly, maybe two or three times a week. The court stated: "But when I looked at the records–because the first thing she put in were only records that showed two or three sheets of the phone records. Now I have examined the entire phone record, and I don't see any indication that any calls were made two or three times a week. (EH, 7.14.10, 119).

- The calls earlier in the day, including one at 3:24 p.m. The court noted that the prosecutor pointed out other calls also and rejected "the attorney's trying to testify" that defendant may have worked other shifts **because there was no evidence to substantiate that claim**. (Emphasis added). (EH, 7.14.10, 119-120).

- Isaac Griffin testified that defendant called him all the time. The records only showed that he called Griffin once or twice. (EH, 7.14.10, 120, 122).

- The defense witnesses were exaggerating, which made the trial court uncomfortable in terms of their credibility. (EH, 7.14.10, 120).

- The court had no confidence that the defendant made the calls on the date and time in question. (EH, 7.14.10, 122).

- If the defense witnesses were not exaggerating, the calls could have been made from a cellphone, and the court was not presented with any cellphone records. (EH, 7.14.10, 122).

- If trial counsel Fishman had known about the records, he would have found them. (EH, 7.14.10, 122).

Here, the defendant's "story" was that he worked the midnight shift. Not one word came

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out of defendant's mouth that gave any indication that he worked at any other time. So, under the defendant's theory, no other calls should have come out of Sam's Club at any other time because no one other than him could have made those calls. Yet, a number of calls were made during the day that defendant could not explain, and indeed, did not even notify the trial court of their existence. Additionally, the defendant and the defense witnesses grossly exaggerated the number of calls made, in direct contradiction to their own evidence.

a. The evidence is merely newly available, not newly discovered

Evidence cannot be newly discovered if the defendant has knowledge of said evidence. This is knowledge that was uniquely within his personal knowledge and why he chose not to share that knowledge with trial counsel is incomprehensible. Here, at the very most, all the evidence defendant alleges to be newly discovered is merely newly available. He never told his trial counsel about the records. (EH, 6.30.10, 27-28).

Other than his self serving statements, there is no evidence that defendant made those phone calls. The records show only that the calls were made. We now know that calls were made when defendant was not working. We also know that defendant and his witnesses have exaggerated the number of calls. For example, Isaac Griffin, III in his affidavit stated "Mark and I often spoke on the phone and Mark would frequently call me during late night and early morning hours while he was working, either to chat or to discuss plans for the next day. . .I knew that Mark called me from his work at Sam's Club in Farmington Hills, Michigan. . . ." (Defendant's Exhibit H). Issac Griffen testified that he specifically recalled talking to defendant on the night in question. That testimony bordered on the perjuries and was certainly ludicrous–that he had "a lot of recollections" of talking to defendant in June, 1997. When asked

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what dates, his response was a lot of dates. He then said he spoke to him every day. (EH, 6.30.10, 109). Griffen and defendant were such great friends that they no longer talked after Griffen moved to Miami. (EH, 6.30.10, 113). The records do not support Griffen's testimony.

The FOIA request from the Farmington Hills police Department is similarly newly available. Moreover, the FOIA request and response show nothing pertaining to this case. The FOIA response only denies the request because "[T]he records you have requested do not exist within the records of this agency under the name or description given." The reply from the Farmington Hills Police Department does not state the records never existed and does not mean that no runs were made. It only means that the Farmington Hills Police Department has no such records to disclose under FOIA. In short, the FOIA response has no meaning under the auspices of newly discovered evidence in light of the failure of the defense here to produce any evidence specifically from Sam's Club as to their policies and procedures regarding whether the doors are in fact locked at night and whether alarms sound, where the notification goes, etc.

b. The evidence is cumulative

This evidence that defendant seeks to admit as newly discovered is cumulative to the alibi evidence he already presented. Defendant has already presented an alibi defense–that he was at work when the crime occurred. Similarly, the evidence is cumulative. Martin Ryzak was a business manager at the Farmington Hills Sam's Clubwhere defendant worked. Defendant worked in the freezer/cooler and did overnight merchandising, which started at 9:00 p.m. to 5:00 a.m., or 10:00 p.m. until 6:00 a.m. Defendant generally had Sundays and Mondays off, but he worked the other five days of the week, with Thursday and Friday nights being the busiest. Ryzak testified that during the night shift, they "predominantly" lock the employees in the

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building and set the alarm. The only way a person could get out without triggering the alarm is if a manager let him out. Ryzak maintained that defendant, who was a good employee, was working at Sam's Club on the night crew in June, 1997, but he was not present during his shift. Ryzak had no independent recollection of June, 1997, and could not recall if defendant worked that evening. (TT, 6/24/02, 8-17). Defendant testified that the victim dropped him off somewhere around six or seven o'clock, and that he went to work that night at eight or nine o'clock. He got home from his shift early Friday morning. He heard that something had happened to the victim on Saturday morning. (TT, 6/24/02, 57-58).

c. The evidence, with reasonable diligence could have been discovered at trial.

This evidence, obtained by means of subpoenas and under FOIA with reasonable diligence the evidence could have been discovered prior to trial. Defendant, if he regularly made phone calls from work, as is asserted by Mr. Griffen, certainly had a responsibility to inform his trial and appellate attorneys of such. The lack of reasonable diligence rests squarely on defendant's shoulders.

d. Whether a different result on retrial is likely cannot be determined on this record

Finally, defendant must show the likelihood that a different result was probable upon retrial. Defendant confessed to killing the victim. That confession is valid evidence against him. When that evidence is considered in conjunction with the weak evidence presented at the evidentiary hearing (the relative few calls as compared to the witnesses testifying to frequent calls), along with the failure to present evidence and the calls made during the day, a different result on retrial is not only not likely, but is a virtual certainty.

On this record, defendant not only fails, but he fails miserably.

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RELIEF

WHEREFORE, the People respectfully request this Honorable Court to deny defendant's delayed application for leave to appeal.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals

/S/ JANET A. NAPP
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Dated: May 26, 2011
JAN/jf

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Exhibit 6I - Reply Brief in Support of 2010 Application for Leave to Appeal

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Appellee

Court of Appeals No. 301465
Lower Court No. 00-007900

vs.

MARK T. CRAIGHEAD,

Appellant

WAYNE COUNTY PROSECUTOR'S OFFICE
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Janet A. Napp (P40633)
Wayne County Prosecutor
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MICHIGAN INNOCENCE CLINIC
University of Michigan Law School
By: Bridget M. McCormack (P58537)
David A. Moran (P45353)
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REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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Mr. Craighead replies to the prosecution's Brief in Opposition to Application for Leave to Appeal, which this Court filed on May 26, 2011.

I. Mr. Craighead did not know about the phone calls placed from Sam's Club at the time of his trial, nor did he learn of their existence until the phone records were uncovered in July, 2009; the phone records thus constitute newly discovered evidence.

The prosecution claims that the phone records showing that Mr. Craighead was working at Sam's Club in Farmington Hills the night the homicide took place in Detroit cannot be newly discovered evidence because Mr. Craighead at some point would have known that he called Randle Craighead and Isaac Griffin from Sam's Club that night. Prosecution brief at 9, 13-14. **But, Mr. Craighead was not arrested and tried until some five years after the crime and thus had no idea at the time of trial that he had made phone calls from work that night, including a phone call at almost the precise time the victim's truck was set on fire in Redford Township.**

It was not until the Michigan Innocence Clinic finally obtained the complete phone records from Ameritech—some seven years after his trial ended and more than twelve years after the calls were actually made—that Mr. Craighead learned that he called his friend and brother from inside Sam's Club on the night of the killing.

The prosecution correctly notes that the key to distinguishing newly discovered from newly available evidence is to determine when the defendant found out about the evidence in question. *See State v Glover*, 21 F3d 133, 138 (CA 6, 1994). In *Glover*, for instance, the defendant was not permitted to rely upon the alleged "newly discovered" testimony of a witness who refused to testify at the original trial because the defendant knew the substance of that witness's testimony at the time of trial. *Glover* at 138-39.

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The logic of *Glover* is inapplicable where a defendant is *unaware* of the information at the time of his trial, but comes to discover it once his court proceedings have ended. Thus, information that a defendant thinks may exist but does not know for certain at the time of trial may constitute newly discovered evidence. *See, e.g.*, *People v Baldwin*, No 236855 (Mich App Sept 23, 2003) (noting that while an alternate suspect's "potential involvement" in the crime was known at the time of trial, his confession still constituted newly discovered evidence because it did not come to light until after the trial ended); *see also People v Rao*, No 289343 (Mich App Dec 7, 2010) (finding newly discovered evidence existed where defendant argued at trial that a child's skeletal injuries were due to a metabolic disorder rather than abuse, but did not receive conclusive proof of this fact until obtaining exculpatory X-rays of the child's ribs, two years after the trial's end).

The circumstances of *Baldwin* and *Rao* precisely echo the situation in Mr. Craighead's case. Unlike the defendant in *Glover*, who knew the substance of the alleged newly discovered evidence before trial, when Mr. Craighead went on trial some five years after the killing, he had no memory at all of whether he had made phone calls that night. **Mr. Craighead testified at the hearing that he had no recollection of calling Mr. Griffin or his brother on the night of June 26-27, 1997, until the phone records were produced in 2009, when Ameritech returned the phone bill listing Isaac Griffin's and Randle Craighead's numbers among the outgoing calls from Sam's Club.** Hr'g Tr 82 (June 30, 2010).

The prosecution claims that Mr. Craighead "chose" not to inform his trial counsel about the calls. Prosecution brief at 13. But, there is no record support for this claim; the unrebutted testimony from the evidentiary hearing established that Mr. Craighead did not remember making the calls until "the [phone bills] were produced in front of me." *Id.* At most, Mr. Craighead

could only have told Mr. Fishman that the calls *might* have been made and that the records of these calls *might* exist, because he did not recall making them when he was charged and tried years after the fact.

Mr. Craighead did eventually recall the *possibility* that he may have made calls that night, and his appellate counsel, Valerie Newman, obtained phone records from Sam's Club during his direct appeal. Hr'g Tr 49-50 (July 14, 2010). But those phone records turned out to be incomplete and did not show the calls that Mr. Craighead made, so Mr. Craighead had no idea whatsoever that he had actually made phone calls the night of the killing until the Michigan Innocence Clinic finally obtained the complete records from Ameritech in August 2009.

In sum, Mr. Craighead at the time of trial and his direct appeal had no idea that he had made any calls that night. Indeed, his appellate counsel, Ms. Newman, testified that she had told Mr. Craighead, based on the incomplete phone records she had received from Sam's Club, that he had not made any phone calls. *Id.*

Given the timing of when Mr. Craighead became aware of these records, this evidence unquestionably passes the "newly discovered" threshold articulated in *Glover*.

II. Mr. Craighead and his witnesses did not exaggerate during their testimony: phone records in evidence show that Mr. Craighead frequently called his brother Randle and friend Isaac Griffin during his nighttime shift at Sam's Club, including at the time Chole Pruett was murdered in Detroit.

The prosecution argues that Judge Jones based her decision on "a number of factors" that "the defendant has conveniently ignored." Prosecution brief at 12. However, at least four of the prosecution's seven points address exactly the same "factor": Judge Jones' opinion that Isaac Griffin and Randle Craighead exaggerated when recalling, thirteen years later, the number of times they spoke with Mr. Craighead while he worked at Sam's Club in 1997.

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Mr. Craighead did not ignore Judge Jones' unreasonable interpretation of this testimony; instead he addressed it directly in his application for leave to appeal. *See* Application for Leave to Appeal at 13-14. Mr. Craighead repeatedly emphasized the following uncontradicted evidence: that Randle Craighead and Isaac Griffin were called from phones at the Farmington Hills Sam's Club on the night of June 26-27, 1997, during the hours Chole Pruett was killed in Detroit and his truck was burned in Redford Township; and that, while they could not specifically remember their conversations with Mr. Craighead that night thirteen years earlier, Isaac Griffin and Randle Craighead knew no one besides Mr. Craighead who would have called them from that store, much less anyone else who would have called them in the middle of the night. *See id.*

Whether Isaac Griffin and Randle Craighead recalled with perfect accuracy how often Mr. Craighead called them thirteen years earlier is both beside the point and understandable. First, they were testifying thirteen years after the fact. It is not surprising that these two witnesses may not have remembered, in 2010, exactly the number of times Mr. Craighead called them in 1997.

Second, Mr. Craighead may have called his brother and Mr. Griffin from phone lines not reflected in the Sam's Club bills, or from cellular phones, or even at times when he was not working at Sam's Club. Randle Craighead, for example, stated that Mr. Craighead called him "two to three times a week" from his workplace, but never claimed that Mr. Craighead made all of these calls from Sam's Club phones. Hr'g Tr 45 (June 30, 2010). Randle Craighead also testified that his brother often called Randle's cellular phone from work, not just his landline. Hr'g Tr 48 (June 30, 2010). Because Randle's cell phone would have had a different number, the

portions of the Sam's Club phone bills showing calls to Randle Craighead's landline would not represent every time Mr. Craighead called his brother while he was working.

The prosecution argues that that Judge Jones was correct to find that Isaac Griffin exaggerated his testimony, arguing that "Isaac Griffin testified that defendant called him all the time," yet "[t]he records only showed that he called Griffin once or twice." Prosecution brief at 12. This claim not only mischaracterizes Mr. Griffin's testimony, it is simply wrong. Though Mr. Griffin did testify that he talked with Mr. Craighead "all the time," he clarified his testimony immediately after by referring to Mr. Craighead's "many . . . crazy calls" in the middle of the night because Mr. Craighead was "a little bored" during his late-night shift. Hr'g Tr 97 (June 30, 2010). It is reasonable that the frequency of out-of-the-ordinary events, such as late-night phone calls, would be more pronounced in a person's memory than that of everyday events. And, the prosecution's assertion that the bills show that "[Mr. Craighead] called Griffin once or twice" is clearly contrary to the record. Mr. Griffin was called twice from Sam's Club on June 27, 1997, alone—just two of the **nine** calls to Isaac Griffin reflected on the three Sam's Club phone bills admitted into evidence.

It is undisputed that Mr. Craighead talked often with Mr. Griffin, a close friend, and his brother Randle, and it was never claimed that Mr. Craighead only talked to his brother and friend from Sam's Club phones or at times while he was working his shift. It is unfair to find these witnesses not credible solely because the phone bills reflect only a portion of the calls between Mr. Craighead and his brother and friend thirteen years earlier.

In fact, the three Sam's Club Ameritech phone bills admitted during the July 14 evidentiary hearing plainly show that Mr. Craighead called his brother Randle and Isaac Griffin from work on numerous occasions, a noteworthy fact considering the late hour of Mr.

Craighead's usual shift and the fact that Sam's Club rules did not allow him to make personal calls. *See* Hr'g Tr 42 (June 30, 2010). **To be exact, Mr. Craighead called his brother and friend from Sam's Club phones nineteen times between May 8 and July 19, 1997**. At the request of Mr. Craighead's counsel, the Michigan Innocence Clinic, the trial court admitted into evidence the phone bill dated July 25, 1997, which contains records of four calls made to Isaac Griffin and Randle Craighead on the night Chole Pruett was killed. Ev Hr'g Tr 4 (July 14, 2010). The prosecution then admitted the bills dated May 25, 1997, and June 25, 1997, that is, the bills for the two months prior to the night in question. *Id.* at 10-12.

The three bills admitted into evidence show a substantial number of calls made to Mr. Griffin's number ((313)-393-9153) and Randle Craighead's number ((313)-836-5230) from Sam's Club phones during Mr. Craighead's regular, overnight shift, which he worked every week Tuesday through Saturday.[1] *See* Trial Tr 7-8 (June 24, 2002).

---

[1] The bills show that Mr. Craighead made the following calls to his brother and friend from May-July 1997:

(1) Thursday, May 8, 1:51 a.m. to I. Griffin (May 25 bill, Page 15, Line 4);
(2) Thursday, May 15, 1:37 p.m. to I. Griffin (May 25 bill, Page 37, Line 16);
(3) Thursday, May 15, 1:38 p.m. to R. Craighead (May 25 bill, Page 37, Line 17);
(4) Thursday, June 5, 12:34 a.m. to R. Craighead (June 25 bill, Page 14, Line 20);
(5) Sunday, June 8, 12:05 a.m. to I. Griffin (June 25 bill, Page 44, Line 22);
(6) Tuesday, June 17, 4:03 p.m. to R. Craighead (June 25 bill, Page 18, Line 26);
(7) Tuesday, June 17, 11:02 p.m. to R. Craighead (June 25 bill, Page 32, Line 2);
(8) Tuesday, June 17, 11:37 p.m. to R. Craighead (June 25 bill, Page 32, Line 4);
(9) Wednesday, June 18, 12:45 a.m. to I. Griffin (June 25 bill, Page 18, Line 37);
(10) Thursday, June 26, 11:01 p.m. to R. Craighead (July 25 bill, Page 9, Line 10);
(11) Thursday, June 26, 11:02 p.m. to R. Craighead (July 25 bill, Page 9, Line 11);
(12) Friday, June 27, 12:19 a.m. to I. Griffin (July 25 bill, Page 9, Line 12);
(13) Friday, June 27, 2:27 a.m. to I. Griffin (July 25 bill, Page 21, Line 25);
(14) Monday, June 30, 3:52 p.m. to R. Craighead (July 25 bill, Page 6, Line32);
(15) Monday, June 30, 11:27 p.m. to R. Craighead (July 25 bill, Page 10, Line 1);
(16) Friday, July 4, 1:18 a.m. to I. Griffin (July 25 bill, Page 11, Line 1);
(17) Thursday, July 10, 3:24 a.m. to R. Craighead (July 25 bill, Page 39, Line 8);
(18) Friday, July 18, 11:01 p.m. to I. Griffin (July 25 bill, Page 23, Line 55);
(19) Saturday, July 19, 1:56 a.m. to I. Griffin (July 25 bill, Page 15, Line 16).

Mr. Craighead testified that he regularly called Ike Griffin from Sam's Club. *See* Hr'g Tr 68-71 (June 30, 2010). He elaborated on what "regularly" meant—he testified that he probably called Ike Griffin once or twice a month and his brother Randle one to three times a month from Sam's Club. *Id.* As the phone records show, Mr. Craighead actually underestimated the number of calls he made from work. **The facts that Mr. Craighead's brother and friend did not know with perfect accuracy the exact number of times Mr. Craighead called them from work thirteen years earlier (when they would have no way of knowing whether Mr. Craighead was calling using a work phone or his personal phone), their testimony that these calls were regular and frequent is uncontested and entirely supported by the newly discovered phone bills.** The hard evidence presented in these phone records, rather than undermining this testimony, actually bolsters it.

The bottom line from these phone bills is that they prove, beyond any doubt, that Mr. Craighead was at work in Farmington Hills on the night of June 26-27, 1997, that he called his brother Randle Craighead and his friend Isaac Griffin, neither of whom knew anyone else at that Sam's Club (much less, anyone else who would call them from there in the middle of the night), and that Mr. Craighead therefore could not have killed Chole Pruett more than 20 miles away in Detroit, nor burned Mr. Pruett's truck in Redford Township at the exact time he was calling Mr. Griffin from Sam's Club.

III. The prosecution erroneously claims that the calls placed to Isaac Griffin and Randle Craighead during the daytime prove that calls were placed to these individuals when Mr. Craighead was not working.

The prosecution seizes upon the handful of calls made to Isaac Griffin and Randle Craighead from Sam's Club during daytime hours. Citing these calls, the prosecution broadly contends, "We now have evidence that calls were placed when [Mr. Craighead] was not

working," suggesting that someone besides Mr. Craighead made these calls. See Prosecution brief at 13. There is no evidence to support this theory.

First, neither Mr. Craighead nor any other witness ever testified at trial or the evidentiary hearing that Mr. Craighead worked night shifts exclusively. It is common knowledge that night shift workers are occasionally called upon to work day shifts and vice-versa. It is also common knowledge that night shift workers are occasionally on the premises of the workplace during the day (for example, to pick up a paycheck or attend a training meeting). The existence of daytime calls does not change the critical fact that Mr. Craighead made calls from Sam's Club on the night of Mr. Pruett's killing. It simply is not the case, and Mr. Craighead has never argued (as the prosecution insists), that "no other calls should have come out of Sam's Club at any other time." Prosecution brief at 13.

Second, in construing the daytime calls as evidence that Mr. Craighead was not the caller on the night of Mr. Pruett's death, the prosecution completely ignores the most logical inference to be drawn from these records—that **Mr. Craighead was the caller on each of these occasions.** It is uncontroverted that neither Isaac Griffin nor Randle Craighead knew anyone else who worked at the Farmington Hills Sam's Club aside from Mr. Craighead. Two daytime calls made in immediate succession on May 15, 1997—to Mr. Griffin at 1:37 p.m., and then to Randle Craighead one minute later—corroborate this inference, as it is nearly impossible that any other person knew both of these witnesses and would call them back-to-back.

IV. <u>The phone record evidence is not cumulative, and the prosecution conceded as much during the evidentiary hearing.</u>

The prosecution contends that the phone records are cumulative to the evidence Mr. Craighead presented at trial, because the records support the same alibi defense he presented then. Prosecution brief at 15. As argued in his application, however, the records provide

conclusive documentation that Mr. Craighead was at Sam's Club making phone calls at the time of Mr. Pruett's murder, as he has always maintained, and no evidence of this nature was ever presented to the jury. Application for leave to appeal at 26-27. **Indeed, the prosecution conceded that the phone records are not cumulative** during the evidentiary hearing:

> **I can say [the phone record is] not cumulative.** I think it is qualitatively different than the evidence that was presented at trial, even though it was a defensive alibi, and even though it would really supplement the defensive alibi . . . . But I do think it is different. **I cannot say it is cumulative**.

Hr'g Tr 101 (July 14, 2010) (argument of prosecutor) (emphasis added).

The prosecution's new position that the records are cumulative is unconvincing. *See* Prosecution brief at 14-15. This Court should endorse the position that the prosecution articulated at the evidentiary hearing: the phone records are certainly not cumulative.

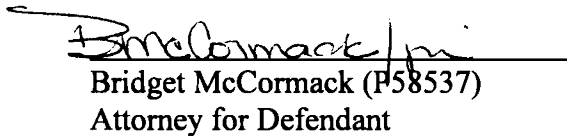
Conclusion

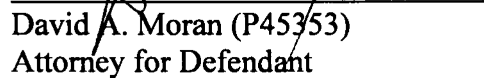
For the reasons above and those set forth more fully in his application for leave to appeal, Mr. Craighead respectfully asks this Court to reverse the trial court's denial of Mr. Craighead's motion for relief from judgment, and order a new trial at which a jury may consider the phone records as proof that Mr. Craighead could not have committed the killing of Chole Pruett.

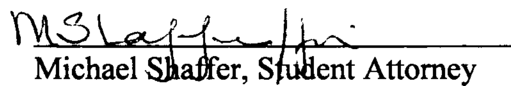
Dated: June 14, 2010

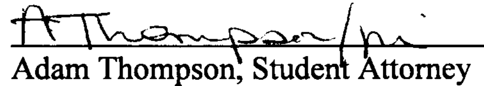
Respectfully Submitted,

MICHIGAN INNOCENCE CLINIC


Bridget McCormack (P58537)
Attorney for Defendant


David A. Moran (P45353)
Attorney for Defendant


Michael Shaffer, Student Attorney


Adam Thompson, Student Attorney

Katherine O'Connor, Student Attorney

Exhibit 6J - November 22, 2011 Court of Appeals Order

Court of Appeals, State of Michigan

ORDER

People of MI v Mark T. Craighead

Docket No. 301465

LC No. 00-007900-FC

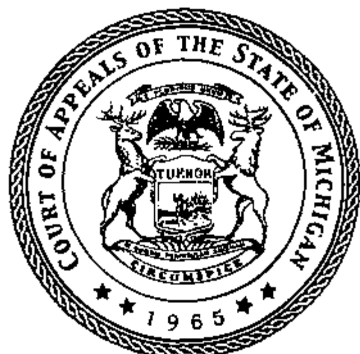
William B. Murphy, C.J.
Presiding Judge

David H. Sawyer

Joel P. Hoekstra
Judges

The motion for leave to file a reply to the answer is GRANTED and the reply filed on June 15, 2011, is accepted for filing.

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



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

NOV 22 2011

Date

Chief Clerk

Exhibit 6K - October 5, 2012 and January 25, 2013 Supreme Court Orders

Order

Michigan Supreme Court
Lansing, Michigan

October 5, 2012

144415

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 144415
COA: 301465
Wayne CC: 00-007900-FC

MARK T. CRAIGHEAD,
Defendant-Appellant.

____/

On order of the Court, the application for leave to appeal the November 22, 2011 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).

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

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.

October 5, 2012

Corbin R. Davis
Clerk

t0927

Order

Michigan Supreme Court
Lansing, Michigan

January 25, 2013

144415(38)

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 144415
COA: 301465
Wayne CC: 00-007900-FC

MARK T. CRAIGHEAD,
Defendant-Appellant.

____/

On order of the Court, the motion for reconsideration of this Court's October 5, 2012 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

CAVANAGH, J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

MCCORMACK, J., not participating because of her prior involvement in this case as counsel for a party.

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.

January 25, 2013

Clerk

d0122

Exhibit 6L - Hearing Transcript on Ricks

1 UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
2 SOUTHERN DIVISION

3

IN RE: . Case No. 2:13-53846-tjt
4 . Chapter 9
CITY OF DETROIT, MICHIGAN, .
5 .
Debtor. .
6 .
. . . .
7

8

9

10 **TRANSCRIPT OF HEARING ON CITY OF DETROIT'S MOTION FOR ENTRY OF AN ORDER ENFORCING THE BAR DATE ORDER AND CONFIRMATION**
11 **ORDER AGAINST DESMOND RICKS**

12

13

14 BEFORE THE HONORABLE THOMAS J. TUCKER
UNITED STATES BANKRUPTCY JUDGE
15

WEDNESDAY, MARCH 20, 2019
16 DETROIT, MICHIGAN

17

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Proceedings recorded by electronic sound recording;
25 transcript produced by transcription service.

1 (Time Noted: 1:34 p.m.)
2 THE COURT CLERK: Please rise. This Court is back
3 in session.
4 You may be seated.
5 Court will call the matter of the City of Detroit,
6 Michigan, case number 13-53846.
7 THE COURT: All right. Good afternoon to each of
8 you. Would you enter your appearances for the record,
9 please, starting with counsel for the City?
10 MR. SWANSON: Thank you, Your Honor. Marc Swanson
11 on behalf of the City of Detroit.
12 MR. HARRINGTON: Good afternoon, Your Honor.
13 James J. Harrington on behalf of the Plaintiffs Ricks.
14 THE COURT: All right. Good afternoon again,
15 everyone. This is the hearing, as you know, on the City of
16 Detroit's motion seeking relief against Desmond Ricks et al.,
17 motion for entry of an order enforcing the bar date order and
18 confirmation order, et cetera.
19 I have reviewed the papers filed by the parties
20 regarding this -- relating to this motion. I have also done
21 some review of the record of the U.S. District Court in the
22 lawsuit that's pending over in District Court, which is
23 referred to and discussed in the motion and related papers.
24 So, Mr. Swanson, let me hear from you first.
25 MR. SWANSON: Good afternoon. Plaintiff Desmond

1 Ricks is suing the City on account of a claim which arises
2 from alleged unlawful events in 1992, and an alleged unlawful
3 conviction in 1992. The claims against the City are, in
4 Plaintiff's own words, based on the City's alleged policies
5 that were in effect, quote, "In and before March 5, 1992."
6 Reading from paragraph 81 of the complaint.
7 The claim is further based on alleged unlawful and
8 unconstitutional actions taken by the City's police officers
9 in 1992. It's undisputed that the alleged unlawful
10 conviction was in 1992, the actions by the City's police
11 officers were in 1992, and the City's alleged unlawful
12 policies were those in place in 1992, and the City didn't
13 file for bankruptcy until 2013, 21 years later. Yet,
14 Plaintiff claims that its claim is not barred by the City's
15 bankruptcy case and didn't arise until 2017.
16 And why does Plaintiff make this assertion? Well,
17 Plaintiff asserts that the proper test for the Court to
18 determine when the claim arose is the right to payment test.
19 That is the leading argument on page 1 of the Plaintiff's
20 objection to the City's motion.
21 As this Court knows, and as this Court has wrote
22 about, that test holds that a bankruptcy claim does not
23 accrue until the cause of action is ripe under non-
24 bankruptcy law. So under applicable federal law or
25 applicable state law.

1 This Court, however, rejected that test in an
2 opinion that's cited in the City's reply filed on Friday.
3 And instead of the right to payment test, the Court adopted
4 the fair contemplation test.
5 And under that test, a claim is considered to have
6 arisen pre-petition if the creditor could have ascertained
7 through the exercise of reasonable due diligence that it had
8 a claim at the time the petition is filed.
9 And as this Court wrote, this test allows the
10 Court to examine all the circumstances surrounding a
11 particular claim: The Debtor's conduct, the parties' pre-
12 petition relationship, the parties' knowledge, the elements
13 of the underlying claim, and use its best judgment to
14 determine what is fair to the parties in context.
15 Now, attached as exhibit 17 to the City's reply
16 was a very recent District Court decision in the case *Sanford*
17 *v. City of Detroit*. That case has many factual similarities
18 to the case here today. It's an alleged unlawful conviction
19 case. The alleged unlawful conviction occurred before the
20 City filed for bankruptcy. The conviction was not overturned
21 until after the City exited from bankruptcy.
22 And the plaintiff in that case, Sanford, asserted
23 that the City's alleged customs, policies, and practices,
24 resulted in his unlawful conviction. And that's the same
25 type of claim that the Plaintiff here is making against the

1 City.

2 And *Sanford* advanced the exact same argument that

3 the Plaintiff here is making to support its argument that the

4 claim is not subject to the Plan. And that's the argument

5 that the pre-petition conviction was not overturned until

6 after the City exited bankruptcy, and, thus, the cause of

7 action was not ripe under non-bankruptcy law until after the

8 City exited bankruptcy, and, thus, it was not subject to the

9 City's Plan.

10 The Federal District Court rejected that argument,

11 and stating that Mr. Sanford certainly contemplated the

12 factual bases underlying the claims raised in his complaint

13 since he attempted repeatedly to argue actual innocence

14 before the State Court since at least 2008, insisting that

15 his confessions were falsely obtained, concocted, and

16 coerced.

17 *Sanford* correctly points out that he could not

18 have sued the City until his convictions were set aside,

19 which did not happen until after the bankruptcy.

20 But the courts that have considered the question

21 uniformly have concluded that claims based on pre-petition

22 malicious prosecutions were barred, notwithstanding that the

23 Plaintiff could not file suit on his claims until his

24 criminal conviction was overturned. The case is on all fours

25 with the facts here.

1 And despite this Court's adoption of the fair
2 contemplation --
3 THE COURT: There's actually an even more recent
4 case from the District Court similar to this case and similar
5 to *Sanford*, which maybe you're familiar with. I happened to
6 cross it recently. It was decided March 6, 2019. It's
7 called *Monson*, M-O-N-S-O-N, *versus City of Detroit, et al*.
8 It's 2019 Westlaw 1057306, 1057306.
9 MR. SWANSON: Wow.
10 THE COURT: A decision by Judge Michelson, very
11 similar to *Sanford,* and same result as *Sanford*. I happened
12 to cross it when I was looking for something else.
13 And so there's two District Judges in two
14 different cases, the District Court for this District, that
15 have ruled the way you've described as characterized as
16 *Sanford* and as you want the Court to rule in this matter.
17 And so I want to make both parties aware of that
18 case, that *Monson* case. Were you aware of that?
19 MR. SWANSON: I had run across it, Your Honor.
20 THE COURT: Okay. Well, so those are two cases
21 where the City defended an action brought against it in
22 District Court and raised the argument that you're raising in
23 this Court now on this motion in the District Court as a
24 defense and let the District Court decide the issue.
25 Why didn't the City let the District Court -- or

1 why isn't the City leaving it to the District Court in this
2 case, in the Ricks case, to decide the issues raised by this
3 motion?
4 MR. SWANSON: Your Honor, I apologize. I don't
5 have a great answer for you. I was told by the City that
6 this claim had been asserted in the District Court and to
7 file a motion with you. I never had any discussion about
8 filing a motion in the --
9 THE COURT: Well, let me ask you this: Do you
10 know why the City waited until January 30, 2019, to file this
11 motion in this Court when the case, the District Court case
12 against it by the Ricks, the Ricks parties, was filed back in
13 August 2017? A year and a half or so, the City waited to
14 seek relief from this Court. Do you know why that is?
15 MR. SWANSON: I don't know why that is.
16 THE COURT: The City, I noticed in looking at the
17 District Court record, the pending case, the Ricks case in
18 the District Court, the City filed a motion for summary --
19 the City and all Defendants filed a motion for summary
20 judgment in that case. I'm sure you're familiar, as is your
21 opposing counsel, with that.
22 And in that motion -- and that was that, that was
23 filed on -- the City's motion was filed on February 6th, and
24 it raised a whole bunch of arguments, but one of the
25 arguments it raised was, the City of Detroit raised the same

1 argument that you're making in this current motion in its
2 summary judgment motion filed in the District Court.
3 And I did see that, and I did see the response to
4 that that was filed on March 6, 2019, by the Plaintiffs, the
5 Ricks plaintiffs, to that motion.
6 Now, in that response, the Ricks Plaintiffs argue
7 the fair contemplation test and they argue that they should
8 prevail on that fair contemplation test. They make their
9 arguments there, and that's in a brief that they filed on
10 March 6, 2019, docket number 99 in the District Court case,
11 case number 17-12784.
12 So they made that argument about the fair
13 contemplation test on March 6th. And that, of course, was
14 before your reply brief was filed in this case pointing out
15 the fair contemplation test, so forth, on March 15.
16 So we've got this issue, or these issues, being
17 raised simultaneously, essentially, in both cases, this
18 bankruptcy case and the District Court case. Why shouldn't I
19 leave it to the District Court to decide this issue, as was
20 done in the *Monson* case and in the *Sanford* case, as those
21 Courts decided?
22 MR. SWANSON: Well, Your Honor, this Court has, of
23 course, jurisdiction over the Plan, can enforce the Plan, has
24 jurisdiction over the bar date order, and the City's moving
25 and asking for relief in this Court. I don't -- I don't --

1 THE COURT: Now, the District Court is aware that
2 you are doing this, I see from the District Court papers. I
3 saw there was a motion for extension of time, and the
4 District Court recently denied that motion.
5 And then in the course of that motion, and the
6 papers filed in that motion, and the District Court's ruling
7 on that motion, it's clear the District Court is aware the
8 City is making this same argument in this case, in this
9 bankruptcy case. And just didn't really say that this Court
10 shouldn't do that or, should or shouldn't do that, but just
11 basically noted it.
12 So it's just, you know, perhaps the City had a
13 deadline, I assume they had a deadline to file any summary
14 judgment motion in the Ricks case in District Court that they
15 had to meet, and I can understand that.
16 And when you file a motion for summary judgment,
17 you want to put in all your arguments. But by the time the
18 City filed its summary judgment motion in the District Court
19 case, you had already made the motion in this case.
20 MR. SWANSON: Yeah. And I checked before I came
21 here today. I believe the deadline for the City to file its
22 summary judgment motion in the District Court case was
23 February 6th, and I believe that it filed its motion --
24 THE COURT: And you filed it on the deadline?
25 MR. SWANSON: Not me.

1 THE COURT: Yeah.
2 MR. SWANSON: Yeah.
3 THE COURT: Right. The City Law Department.
4 MR. SWANSON: City Law Department filed it on
5 February 6th. And I saw that motion. I saw -- I did check
6 the docket last week. I saw that it had not been ruled on by
7 the District Court. I wasn't aware that the City --
8 THE COURT: It looks like there's a deadline --
9 the briefing isn't done yet. I think there's a deadline of
10 March 27th for reply briefs to be filed in connection with
11 those motions --
12 MR. SWANSON: Sure.
13 THE COURT: -- in the District Court. So it will
14 be sometime after that, presumably, before the District Court
15 makes any ruling on those motions.
16 But you want this court to go ahead and rule,
17 presumably, now, today, on your motion, and in your favor, as
18 a means, in your view, of what would shortcut and make
19 necessary the District Court ruling on this issue in the
20 District Court case.
21 MR. SWANSON: Yes, Your Honor.
22 THE COURT: Are there other cases like this
23 floating around out there in District Court where this same
24 issue is at play?
25 MR. SWANSON: Not that I'm aware of.

1 THE COURT: Okay. Well, so perhaps you saw and
2 reviewed the summary judgment brief filed by the Ricks
3 Plaintiffs in the District Court. That is the brief in which
4 they filed on March 6th in which they argued fair
5 contemplation. That is that Ricks' claim was not within his
6 fair contemplation at the time the bankruptcy petition was
7 filed in the City's bankruptcy case. Did you read that
8 brief?
9 MR. SWANSON: I may have glanced at it, but I
10 don't --
11 THE COURT: Okay.
12 MR. SWANSON: I did not look at it in any detail.
13 THE COURT: Well, it's only a couple --
14 MR. SWANSON: Yeah.
15 THE COURT: It's a couple pages long.
16 MR. SWANSON: Yeah.
17 THE COURT: But we'll hear, presumably, the same
18 kind of arguments, the same arguments, and maybe other
19 arguments, here from Mr. Harrington on that subject.
20 But, you know, in your opening motion and in the
21 response filed by the Ricks Plaintiffs to your motion, nobody
22 argues anything about the fair contemplation test. Nobody
23 says a word about it. It only gets discussed, you know,
24 application of it and what the test means and requires and
25 everything else, in your reply, right? In this case.

1 MR. SWANSON: That's true.
2 THE COURT: Okay. So my only clue at the moment
3 about what the Ricks Plaintiffs are going to argue about fair
4 contemplation is in what they filed in the District Court
5 case that I've just alluded to.
6 So I did read your reply brief, of course, and I
7 looked at the exhibits you attached to that in support of
8 your argument that Mr. Ricks was claiming innocence and
9 claiming all the facts that he needed to know as claims of
10 innocence and wrongful imprisonment and everything else long
11 before the City filed its bankruptcy petition in 2013. I did
12 review those exhibits.
13 Do you want to say anything about those things or
14 that subject further before we hear from Mr. Harrington?
15 MR. SWANSON: Yes, Your Honor. I'd like to go
16 through the exhibits, because I think they certainly go to
17 Mr. Ricks fairly contemplating that he had a claim against
18 the City prior to the City's bankruptcy filing.
19 The first exhibit here is a deposition transcript
20 from Mr. Ricks on May 21, 2018. The portions that were
21 excerpted from the deposition, however, talk about events in
22 Mr. Ricks' own words which occurred in 2009. So Mr. Ricks
23 describes in 2009 that he saw -- this is in Exhibit 1. He
24 saw an ad in the Bar Journal with the name of the expert
25 witness he used on the ballistic issue in 2009. A gentleman

1 by the name of David G. Townsend. And the ad is at Page 32
2 of 108 at Docket 13021.
3 And Mr. Ricks describes in 2009 his efforts to
4 contact Mr. Townsend because he believed that he had been
5 wrongfully convicted and he believed that the ballistics test
6 was a factor in that wrongful conviction.
7 The next exhibit, Your Honor, is a letter from the
8 state appellate defender officer dated August 6th, 2009. And
9 they write to Mr. Ricks --
10 THE COURT: That's exhibit 2, right?
11 MR. SWANSON: That's exhibit 2.
12 THE COURT: Yeah.
13 MR. SWANSON: I write in response to your letters
14 regarding the Detroit Crime Lab. The State Appellate
15 Defender Office is undertaking a complete review of our Wayne
16 County clients to determine whether tainted evidence from the
17 Detroit Crime Lab resulted in your -- resulted in conviction.
18 Again, it would certainly appear here Mr. Ricks
19 had made a claim to the State Appellate Defender Officer --
20 Office that a tainted crime lab played a -- played a role in
21 his conviction.
22 Exhibit number 3, Your Honor, is another letter
23 dated February 11, 2010 from the same sender, the State
24 Appellate Defender Office, which writes to Mr. Ricks: "You
25 have expressed interest in having our office review your case

1 for potential Detroit Crime Lab issues." Again, Mr. Ricks is
2 asserting that some malfeasance with the Detroit Crime Lab
3 resulted in his conviction.
4 Exhibit 4, Your Honor, dovetails with Exhibit 1.
5 This is a letter from David Townsend, the expert Mr. Ricks
6 used in his 1992 trial and ultimate conviction, writing to
7 Mr. Ricks that he was going to the prison to try to visit Mr.
8 Ricks but couldn't get there.
9 Exhibit 5, Your Honor, is a email dated June 22,
10 2011 and June 23, 2011. The bottom email is from a lady
11 named Claudia Whitman, and Ms. Whitman was a investigator who
12 was working on Mr. Ricks' behalf. Her official title, I
13 believe, is Director of National Capital Crime Assistance
14 Network, and she is writing here to a U.S. attorney about
15 contacting the University of Michigan Innocence Clinic to
16 work on Mr. Ricks' claim. And this is in 2011.
17 Exhibit 6 is correspondence between the lady, Ms.
18 Whitman, that I just identified, and another man named
19 Roberto Guzman, who is a Senior Legal Assistant at the
20 People's Task Force to Free the Wrongfully Convicted, again
21 another individual that was working on Mr. Ricks' case,
22 talking about sending him, to Mr. Ricks, a letter regarding
23 some ballistic testing to the prison where Mr. Ricks was
24 incarcerated and that material not getting through to Mr.
25 Ricks.

1 Exhibit 7, again, some correspondence between Mr.
2 Guzman, the assistant at the People Task Force to Free the
3 Wrongfully Convicted, and Claudia Whitman, the investigator,
4 discussing efforts to contact some of the original agents who
5 made Mr. Ricks' arrest in 1992.
6 Exhibit 8 is a letter dated February 1, 2012, from
7 Mr. Ricks to the Bureau of Alcohol, Tobacco, and Firearm. He
8 states quite clearly in the second paragraph on Page 1: "I
9 have been incarcerated for the past 20 years for a crime that
10 I did not commit, but recently, I've been blessed to have the
11 assistance of Ms. Claudia Whitman. She is the Director of
12 NDRAN of Cure ND -- NDRAN of Cure, which is a national
13 organization that reaches out to aid and assist the
14 wrongfully convicted."
15 And this is a letter where he essentially requests
16 that the Bureau provide him with access to the agents that
17 arrested him.
18 Page 2 of that letter also talks about Mr. Ricks,
19 in the middle there, having an affidavit from the independent
20 firearms examiner, David G. Townsend, the individual
21 identified in exhibit 1 and exhibit 4, in which he says that
22 the two slugs that he was given to test did not have any
23 blood or other trace evidence.
24 At the end of the letter he has a PS there which
25 says: "I wrote to the United States Attorney, Barbara L.

1 McQuaid, and she directed me to you."
2 Exhibit 9 is that letter to Ms. McQuaid, or is one
3 of the letters to Ms. McQuaid, and this is written, again,
4 June 13th, 2012, a year before the City filed for bankruptcy,
5 written by David Moran, who I believe was a lawyer at the
6 Michigan Innocence Clinic, and Sally Larson, a student
7 attorney at the University of Michigan Innocence Clinic. So
8 at that time Mr. Ricks had the University of Michigan
9 Innocence Clinic working on his behalf trying to overturn his
10 alleged unlawful conviction.
11 Exhibit 10 --
12 THE COURT: This letter says in the first
13 paragraph: "We do not represent Mr. Ricks," --
14 MR. SWANSON: Oh. Right.
15 THE COURT: -- "but are investigating his claims
16 of innocence," et cetera. So I'm not sure what that means
17 exactly, if they were investigating claims of innocence of
18 Mr. Ricks on his behalf. I don't know why they said they
19 weren't representing him, but they were investigating his
20 claim.
21 MR. SWANSON: Yes.
22 THE COURT: Okay.
23 MR. SWANSON: And I think the complaint makes a
24 reference to the Michigan Innocent Clinic playing a critical
25 role in his, in his -- in overturning his conviction.

1 So to the extent they were representing him, they
2 were certainly working on his behalf, to the extent there is
3 a difference, I suppose.
4 Exhibit 10 is a letter from the Michigan Innocence
5 Clinic. This is six days after they wrote to Ms. McQuaid,
6 June 19, 2012, and this is to the City of Detroit Law
7 Department FOIA coordinator requesting, you know, it's a FOIA
8 request for information related to the homicide that he was
9 convicted of.
10 Exhibit 11, more emails between Sally Larson, who
11 was the student attorney who signed the letter to Ms.
12 McQuaid on behalf of the Michigan Innocence Clinic, to
13 Claudia Whitman, the investigator. And in this letter the
14 parties are discussing the possibility of rerunning
15 ballistics from the 1992 conviction.
16 Exhibit 12, I believe, is similar.
17 Exhibit 13, another letter dated September 24,
18 2012, again, from Mr. Ricks to Ms. Larson, the student
19 attorney at the University of Michigan Law School and
20 Michigan Innocence Clinic, talking about new case law which I
21 believe Mr. Ricks asserts could or would help in overturning
22 his unlawful conviction.
23 Exhibit 14, these are emails between the Michigan
24 Innocence Clinic, again Ms. Sally Larson and Ms. Claudia
25 Whitman, regarding their notes on discussion of, you know,

1 ballistics experts.
2 Exhibit 15 --
3 THE COURT: I noticed that exhibit 14 has as part
4 of it a copy of notes that Ms. Larson made of the phone
5 conversation that she had with David Townsend on October 2,
6 2012, where they're talking about the ballistics evidence and
7 problems with it, and so forth.
8 MR. SWANSON: Yeah, in the Detroit Crime Lab.
9 THE COURT: Go ahead.
10 MR. SWANSON: Thank you.
11 Exhibit 15, is another set of emails between the
12 Michigan Innocence Clinic and Claudia Whitman, again talking
13 about ballistics and the bullets and, you know, that same
14 subject matter.
15 Exhibit 16 is a letter from Mr. Ricks dated
16 December 12, 2012, where one of the alleged witnesses in the
17 Plaintiff's complaint, named in the Plaintiff's complaint,
18 Ms. Strong, where he's writing to her, again discussing the
19 case and potential misidentification of him by Ms. Strong.
20 And so -- and this is -- this is -- there's more
21 that's similar to this. We only attached --
22 THE COURT: I noticed in that letter, exhibit 16,
23 the letter from Mr. Ricks to Ms. Strong, he does complain
24 about the police, and he refers to what the police did to me,
25 and he's angry and frustrated about what the police did to

1 me. And he says -- he talks about the Detroit Crime Lab was
2 closed down in 2008 for doing bad testing on evidence, such
3 as guns and bullets. I'm hoping that they will retest the
4 evidence in my case, and so forth.
5 The next -- the last page of his letter he says:
6 "The police have been running wild in Detroit doing all sorts
7 of corrupt and unethical things to lock people up. Whether
8 innocent or not, they don't care." That's the last page of
9 the exhibit 16 letter to Mr. Ricks to Ms. Strong.
10 Anyway, go on.
11 MR. SWANSON: Well, Your Honor, I believe going
12 through those 16 exhibits we have conclusive evidence that
13 the claims Mr. Ricks is asserting in his complaint against
14 the City were within his fair contemplation well before the
15 City filed for bankruptcy.
16 When this Court applies the fair contemplation
17 contest it looks at a number of things:
18 The debtor's conduct. The debtor's conduct here
19 all occurred in 1992.
20 The relationship between the parties is another
21 factor that the Court looks at. The relationship between the
22 parties all occurred in 1992.
23 The Court also looks at the parties' knowledge.
24 Well, here, Mr. Ricks, he's demonstrated that he knew of this
25 potential claim probably from the minute that he alleges he

1 was unlawfully arrested, and certainly well before the City's
2 bankruptcy case, because the Michigan Innocence Clinic was
3 investigating this on his behalf. He was contacting experts.
4 He was contacting witnesses. All the while professing his
5 innocence and professing that issues with the Detroit Police
6 Department and Detroit Crime Lab led to his unlawful
7 conviction.
8 And, Your Honor, these are the same claims and
9 facts that formed the basis for Mr. Ricks' complaint against
10 the City of Detroit. And sure, Your Honor, all of the
11 factors --
12 Oh, I guess, finally, this is a *Monell* claim that
13 the Plaintiff here is asserting against the City of Detroit,
14 and *Monell* holds municipalities may be held liable for the
15 constitutional violations of their employees only where the
16 municipality's policy or custom led to the violation, and
17 there can be no liability under *Monell* without an underlying
18 constitutional violation.
19 All of the constitutional violations that Mr.
20 Ricks is complaining about occurred in 1992, 21 years before
21 the City filed for bankruptcy.
22 And as exhibits 1 to 16 demonstrate, Mr. Ricks
23 knew of the factual bases, or at least was asserting the
24 factual bases for these alleged constitutional violations
25 well before the City filed for bankruptcy.

1 In short, Your Honor, all of the factors
2 considered under the fair contemplation test demonstrate that
3 the claims that were asserted by Ricks against the City arose
4 no later than 1992, and, thus, were subject to the discharge
5 in the City's Plan and the bar date order.
6 The City would thus respectfully request that this
7 Court enter an order dismissing the City of Detroit with
8 prejudice from the Federal District Court lawsuit asking the
9 Plaintiff -- requiring the Plaintiff to dismiss the City of
10 Detroit with prejudice from the lawsuit.
11 THE COURT: With respect to the *Monell*, what you
12 characterize as the *Monell* claims, the claims against the
13 City that are asserted in the U.S. District Court complaint,
14 first amended complaint, I know accrual -- the accrual test
15 is not the test here, and I understand that. I've written
16 about that, as you know, in the published opinion that you
17 cite in your brief.
18 But in terms of when a claim, a *Monell* claim
19 accrues in this kind of situation, is it correct to say that
20 in the case of someone wrongfully imprisoned, wrongfully
21 convicted, wrongfully imprisoned, because of violations of
22 that person's constitutional rights by police is the sort of
23 the theory that's alleged here, and then seeking liability
24 against the municipality because of its policies and
25 practices and so forth, does that claim only accrue when

1 there has been a reversal, vacation, dismissal of the
2 charges, conviction against the claimant? I'm talking about
3 accrual here not -- accrual under non-bankruptcy law, not
4 when it arises for purposes of it being a bankruptcy claim.
5 Is that the case?
6 MR. SWANSON: Your Honor, I have not researched
7 that. I know that in the opinion that we cited, the *Sanford*
8 opinion, the District Court there, I believe, said that
9 *Sanford* correctly points out that he could not have sued the
10 City until his convictions were set aside, which did not
11 happen until after bankruptcy.
12 THE COURT: All right. I see. So that's the
13 answer that the Court in the *Sanford* case gives to that.
14 MR. SWANSON: Yeah. And I have nothing to add to
15 that to support it or deny it.
16 THE COURT: All right. Anything else you'd like
17 to say?
18 MR. SWANSON: No, Your Honor.
19 THE COURT: All right. Thank you.
20 Mr. Harrington?
21 MR. HARRINGTON: Yes, Your Honor. Thank you.
22 If I may speak briefly on the accrual as you were
23 asking in the non-bankruptcy setting?
24 THE COURT: Sure.
25 MR. HARRINGTON: Yes, Your Honor, you are correct

1 in the sense that the claim has not accrued until the
2 conviction has been set aside.
3 I mean, think about the practical ramifications if
4 say somebody like Mr. Ricks was to have filed his 1983 *Monell*
5 claim in 1990, 1995, the first thing that's going to be met
6 with is a simple 12(b)(6) motion. I mean, there's --
7 THE COURT: Well, you cite the *Heck* case --
8 MR. HARRINGTON: Yes, we do.
9 THE COURT: -- in your response to the City's
10 motion in this case. Is it the *Heck* case, that Supreme Court
11 case, that stands for this proposition that a *Monell* type
12 claim in this kind of a situation, wrongful imprisonment,
13 wrongful conviction, does not arise until the conviction is
14 set aside?
15 MR. HARRINGTON: That is accurate, Your Honor.
16 THE COURT: It is. Okay.
17 MR. HARRINGTON: Now --
18 THE COURT: It doesn't sound like the City
19 disputes that, really, so. All right.
20 MR. HARRINGTON: I don't think they do, because
21 it's -- I think you're just getting a little bit of context
22 because this is bankruptcy and that's -- what we're talking
23 about is non-bankruptcy with the accrual of the claim.
24 But it kind of dovetails and tailors into what
25 we're talking about here with the fair contemplation, because

1 as counsel was walking through all of these exhibits talking
2 about what Mr. Ricks was doing in contacting and really
3 professing his innocence, all he's doing is trying to build a
4 case.
5 And I think that is a distinction, that he's
6 trying to build a case, as opposed to being able, really, to
7 file a case. And what was to happen if he files a proof of
8 claim without this determination that it was a wrongful
9 conviction? The policy implications are very, very
10 interesting.
11 What is he really supposed to do? He files this
12 claim, and he could face possible sanctions because he
13 doesn't have a claim. He doesn't have a case until it's been
14 set aside.
15 I mean, if we were to go through and take a vote
16 on everybody in prison who believes that they were wrongfully
17 convicted, I think we'd see a pretty strong showing of hands.
18 And I don't think the policy and the underlying
19 intent of all of this is to put that type of a burden on all
20 of these inmates to say, hey, if you think you've got a, you
21 know, possible claim, although you might get sanctioned for
22 filing a frivolous either lawsuit or notice of claim, you
23 better -- you better do it. And I don't think that's the
24 intent. So I think --
25 THE COURT: Well, Mr. Ricks had filed a proof of

1 claim in the City's bankruptcy case by the bar date, which I
2 think was February 13, 2014, or thereabouts. If he had done
3 that, and, of course, that was a time when his conviction had
4 not yet been set aside. That happened in 2017, it seems
5 undisputed in this case. But it hadn't happened yet. He was
6 still trying to get it -- get relief, get it set aside, get
7 freed, but he hadn't been yet.

8 So if he had filed a proof of claim then, it seems
9 to me in terms of that sort of bankruptcy world it would be
10 deemed a contingent claim. That is, it's a claim that's
11 contingent upon obtaining -- setting aside of the conviction,
12 which had not happened yet.

13 And if that contingency doesn't come to pass, then
14 he would -- the City would never -- could never possibly owe
15 him a debt on a *Monell*-type claim.

16 But if it did come to pass later, at a later date,
17 the City might. Or at least his claim wouldn't be subject to
18 dismissal, in effect, or rejection on the ground of *Heck,*
19 that it hadn't accrued yet.

20 In bankruptcy when a contingent claim is filed it
21 doesn't necessarily get disallowed just because it's a
22 contingent claim, but there is a provision in the Bankruptcy
23 Code for estimating contingent claims under certain
24 circumstances where you don't know if the contingency will
25 happen, or not yet.

1 And so there's a process for estimating for
2 purposes of claims allowance in the bankruptcy case.
3 So it's not enough when somebody files a
4 contingent claim like that, in this scenario I'm -- the
5 hypothetical scenario I'm describing, the City, it's not
6 enough for the City to have objected to that just on saying
7 it's contingent, the conviction hasn't been set aside yet, so
8 there's no claim accrued, so we owe them nothing.
9 It's not enough, because if the contingency occurs
10 later, that argument goes out the window. So the claim, the
11 contingent claim has to be estimated. That's the idea there.
12 Okay.
13 MR. HARRINGTON: Understood. And I don't --
14 THE COURT: So it's not -- it's not just that the
15 claim would have been rejected out of hand in the bankruptcy
16 case only because it was then contingent. You see what I'm
17 suggesting?
18 MR. HARRINGTON: In concept, yes.
19 THE COURT: Okay.
20 MR. HARRINGTON: But I don't think that applies
21 here. And how tenuous of a claim, or as you would maybe say,
22 how tenuous of a contingency would be allowed, would be okay,
23 would not be sanctionable or deemed to be a frivolous filing
24 with the Court. I mean, I mean, how far --
25 THE COURT: That's part of what bankruptcy courts

1 have to figure out when they are doing this type of claims
2 estimation process on a contingent claim that I've -- or on
3 an unmatured or contingent, either one, claim that I've been
4 describing to you.
5 MR. HARRINGTON: Right.
6 THE COURT: It's not necessarily an easy thing to
7 do.
8 MR. HARRINGTON: And that's what I'm --
9 THE COURT: It's not a -- there's no science to
10 that. It's not a scientific precision.
11 MR. HARRINGTON: Well, and that's what I'm getting
12 at. Because what would have to happen is would be literally
13 a whole almost a trial within a trial on the evaluation of
14 Mr. -- the viability of his claim, and so we would literally
15 have a trial within a trial to determine how viable this is.
16 Because if that was the case, and if everybody who
17 is currently incarcerated at the hands of the Detroit Police
18 Department for, let's just say, you know, gross mishandling
19 of evidence -- and I'm not -- I'm not casting stones, I'm
20 just saying let's just assume that for this discussion. How
21 many people would have to come forward and literally try
22 their case to say, Your Honor, look at my contingencies, if
23 this, and this, and then this, this, this, and this actually
24 come to fruition, then I'm going to have a great case.
25 And so where are we with that? What is -- and

1 that's why I think when this Court, this Bankruptcy Court,
2 today, can look at all of the circumstances surrounding, and
3 I think with this imprisonment case it presents a bit of a
4 different picture, because without -- no matter what Mr.
5 Ricks thinks, no matter what he knows, no matter what he
6 says, what he researches, if he doesn't have the exoneration,
7 there is no claim. So I guess the question really for the
8 Court is, is how tenuous, I mean, how many times are
9 convictions really turned over?
10 So my position to the Court is, is that if you are
11 even looking at this, which I would ask you -- what I would
12 suggest that it doesn't apply, but if you're looking at this
13 as to the contingencies by as far removed in the, really, the
14 likelihood of him actually getting a conviction overturned
15 for somebody who has spent over 20-some years in prison, it
16 almost never happens.
17 So you're talking about, really, the Hail Mary of
18 all Hail Mary's happening and that's the contingency that
19 the, that the City wants you to, if you're going to apply
20 this contingency-type of analysis, they would look at this as
21 like a cover the eyes, and we're almost in March madness,
22 cover the eyes, inbound pass, without looking over the
23 shoulder and it's the swish and we win by one at the buzzer,
24 and --
25 THE COURT: You know, though, really, what you're

1 arguing sounds like an argument in substance. An argument
2 against the fair contemplation test, rather than an argument
3 that says courts, Bankruptcy Courts should use the accrual
4 test, and the case law has rejected that. I have rejected
5 that.
6 Many bankruptcy cases have rejected that accrual
7 test as inconsistent with Congressional intent in the very
8 broad definition of claim that's in the Bankruptcy Code. And
9 you know that, because you've read -- you've read my opinion
10 in the City of Detroit case, I assume, that's cited.
11 MR. HARRINGTON: Yes.
12 THE COURT: And you've read the *Sanford* case, I
13 assume?
14 MR. HARRINGTON: Yes.
15 THE COURT: And have you read the *Monson* case?
16 MR. HARRINGTON: I have not.
17 THE COURT: Okay.
18 MR. HARRINGTON: I will.
19 THE COURT: It's very similar to *Sanford*.
20 MR. HARRINGTON: And I would love it if the Court
21 did apply the accrual test, because then this would be
22 extremely easy.
23 But under the reasonable contemplation, or the --
24 I'm sorry, the fair contemplation test, as we look at it to
25 the Ricks case, I think creates a situation where how can he

1 reasonably contemplate that he has a claim? Even in his
2 mind, he knows what he did. He knows what he didn't do.
3 But, in order to get -- I mean, the mountains that
4 have to be moved for that to happen is really, I mean, there
5 is his subjective belief and then there is a reasonable
6 belief, and if we look at this, how could he -- we know that
7 he got out and he was exonerated. But as we sit here
8 evaluating it before it could happen, how could we reasonably
9 believe, in light of all of the evidence, in light of what we
10 know, in light of 20-some years having been in prison, how
11 could we reasonably believe that he has a cause of action?
12 And so I guess even when you apply the fair
13 contemplation test, I believe that under the authority -- and
14 I appreciate the --
15 THE COURT: Well, what about -- in relating to
16 that question, what about what David Townsend was saying, as
17 of October 2, 2012, in his phone call with Sally Larson of
18 the Michigan Innocence Project, about the ballistics tests
19 and the ballistics evidence in Mr. Ricks' case?
20 MR. HARRINGTON: Yeah.
21 THE COURT: That's exhibit 14 --
22 MR. HARRINGTON: No, I --
23 THE COURT: -- to the City's reply brief.
24 MR. HARRINGTON: No, I understand.
25 THE COURT: You've seen it.

1 MR. HARRINGTON: Yes. I know. Where he's talking
2 about how, I think it was about the soft lead and talking --
3 correct me if I'm wrong. Right? Where he's talking about
4 the soft lead, he would expect to have seen more damage to
5 the, to the bullet. He's just providing evidence in support
6 of that.
7 And look, I don't disagree that that evidence
8 brings it closer to whether or not he has a claim, but
9 there's still an incredible hurdle that has to be overcome to
10 get the conviction over --
11 THE COURT: Is it fair to say that at least as
12 early as the time frame 2009 through 2012, time frame of
13 these exhibits that are attached to the City's reply, that
14 Mr. Ricks and his ballistics consultant, Mr. Townsend, and
15 the people at the Michigan Innocence Clinic, Project Clinic
16 that we're investigating this case for Mr. Ricks, with him,
17 all had reasons to believe that the ballistics evidence in
18 this case was simply wrong and bad evidence, and upon
19 retesting would lead to, it would lead to setting aside the
20 conviction?
21 MR. HARRINGTON: Okay. If I can break --
22 THE COURT: Now, that last part is a little
23 trickier than the first part of my question.
24 MR. HARRINGTON: Right. Because the last part of
25 your question --

1 THE COURT: You got to find the bullets.
2 MR. HARRINGTON: Well --
3 THE COURT: The real bullets you got to find.
4 MR. HARRINGTON: Right. But the last part of what
5 you just said is to overturn the conviction which presumes
6 that you can anticipate, number one, what a judge is going to
7 do, what an appellate court is going to do, and what the
8 highest court would do. So that presumes quite a bit.
9 And one thing that my father taught me, who is an
10 attorney, is you never presume ever, ever, ever what a judge
11 is going to do. So I think all that he can really assume is
12 that he is building and trying to build a case.
13 I mean, it's clear, there's no doubt he's trying
14 to, one, he's trying -- not trying to build a case, trying to
15 get out of prison for a crime he never committed.
16 But number two, he's trying to build evidence to
17 do just that. But to make -- to have that evidence and to
18 take that leap to say that he knows, reasonably knows, that a
19 judge is going to side with him I think is way too far
20 tenuous and it comes back to the Hail Mary and it doesn't
21 fall within the fair contemplation because it is so tenuous.
22 Because it would require --
23 THE COURT: In your view, when did it become not
24 so tenuous? When in time?
25 MR. HARRINGTON: When he was --

1 THE COURT: What event and when did it happen that
2 it became not so tenuous? We know in 2017 there came a time
3 when the conviction was vacated, I presume, or charges were
4 dismissed. It was over. He was freed. But at some point
5 before that event it must have become apparent that he had a
6 strong case for vindication.
7 MR. HARRINGTON: I will say this, and I know
8 you're going to say, Mr. Harrington, now you're arguing
9 accrual, but this is a rare circumstance where I believe the
10 roads have merged, and I believe that at the time that that
11 reversal of the conviction came down, was inked at that time,
12 and maybe even I would go so far as to say after all
13 appellate remedies have been expired, at that point in time
14 would be the time when we would apply his contemplation of
15 the claim.
16 Going through the fair contemplation analysis, I
17 think we get to the same location that you do under the
18 accrual, because otherwise to apply to, to -- because really
19 what it requires is, is it requires Mr. Ricks to have a
20 reasonable belief that the judge is going to set aside the
21 conviction. And I don't know a person in this world that
22 could ever reach that conclusion. It's just not possible.
23 And also, I'm not trying to go backwards or
24 sideways on anything. You know, or position obviously is
25 that we would ask that you deny the City's motion, or

1 alternatively abstain and have this heard by the District
2 Court, as one of the other cases have, and plus that this
3 case --
4 THE COURT: Well, wait a minute. You're saying if
5 I'm not inclined to -- if I'm not going to rule for you, I
6 should -- I should not rule and let the District Court
7 decide. But otherwise, you want me to decide.
8 MR. HARRINGTON: Judge, I'm just being an
9 advocate.
10 THE COURT: I mean, you can't do that. You can't
11 argue that. You want this Court to decide this, or don't
12 you?
13 MR. HARRINGTON: I want you to decide this, Your
14 Honor.
15 THE COURT: All right.
16 MR. HARRINGTON: I think I'm right on the
17 position.
18 THE COURT: But you want this Court to decide it.
19 You don't want me to abstain.
20 MR. HARRINGTON: No, Judge, I want you to decide
21 it.
22 THE COURT: Okay. All right. All right.
23 Well, so when -- the conviction was vacated, I
24 guess. Is that the right term?
25 MR. HARRINGTON: Yeah. Yeah. It was over --

1 yeah. Overturned.
2 THE COURT: What's the correct terminology of what
3 happened? Some circuit judge, some Michigan circuit judge
4 vacated the conviction? What was it?
5 MR. HARRINGTON: For lack of a better term, I'm
6 just, I'm going to go with the --
7 THE COURT: Maybe it's in your first amended
8 complaint. But what happened exactly?
9 MR. HARRINGTON: May I have just one second, Your
10 Honor?
11 THE COURT: Yeah. Uh-huh.
12 MR. HARRINGTON: Because I don't believe that I --
13 THE COURT: I'm looking at paragraph 78 of your
14 first amended complaint. It's exhibit 6 to the City's motion
15 in this case, docket 13,000.
16 Well, it says when he was released. Paragraph 78
17 says the day he was released from prison. Paragraph 79 says
18 June 1, 2017, charges were dismissed by the Wayne County
19 Prosecutor's Office. Maybe it doesn't say when the
20 conviction was actually vacated, or what. Or is it in there
21 somewhere?
22 MR. HARRINGTON: I'm looking, as well, Your Honor.
23 I apologize for not having it in my --
24 THE COURT: I thought I saw somewhere, maybe I'm
25 thinking of a different case, but where some state court

1 vacated the conviction, ordered a new trial, did something.
2 MR. HARRINGTON: Just a moment, Your Honor.
3 THE COURT: Yeah. Uh-huh.
4 (Pause)
5 MR. HARRINGTON: What I do have, Your Honor, is
6 there is exhibit 4. It looks like it was exhibit 4 to the
7 City of Detroit's motion dated June 1st, 2017, of a
8 motion/order of nolo -- I apologize for lack of
9 pronunciation, but *nolle p-r-o-s-e-q-u-i*, meaning that
10 they're not going to prosecute, and the case was dismissed
11 without prejudice. And I think for --
12 THE COURT: Okay. Hold on one second. I'm
13 looking at the City's exhibit 4, it's docket 13,000 in this
14 case. Hold on.
15 MR. HARRINGTON: I'm sorry, Your Honor.
16 THE COURT: It's docket number 13,000 in this
17 case. The motion, City motion, I'm looking at it. It's
18 exhibit 4 you've just cited me to, right?
19 MR. HARRINGTON: It looks like -- I apologize. It
20 looks like it's exhibit -- if you look at exhibit 6, it's the
21 amended complaint, and it's exhibit 4 to the amended
22 complaint.
23 THE COURT: Oh, I see. Yeah. All right. I think
24 I'm there. Hold on.
25 MR. HARRINGTON: And that looks like the order.

1 THE COURT: Okay. It's State of Michigan, Third
2 Judicial Circuit, Wayne County, motion/order of *nolle*
3 *prosequi,* and there is a motion, I presume, by the
4 Prosecutor's Office, and an order granting that motion,
5 saying the motion is granted and the case is dismissed
6 without prejudice, June 1, 2017, signed by the judge. That's
7 what you're talking about, right?
8 MR. HARRINGTON: Yes.
9 THE COURT: Okay. So that would be when the,
10 basically when the City moved to dismiss the case and --
11 criminal case, and the judge granted it.
12 At some point before that date was there --
13 there's a conviction, a judgment of conviction and sentence
14 on the books before -- it must have been, something must have
15 been done with it before there could be a dismissal of the
16 case. I mean, I'm just assuming, I'm guessing that that's
17 got to be true. Was there some order that preceded this June
18 1, 2017 order that vacated the conviction, for example? Do
19 you know?
20 MR. HARRINGTON: I don't know. At the -- I could,
21 I'd be happy to give you more procedural history on
22 supplemental briefing and I could limit it to two pages.
23 THE COURT: Well, I'm kind of working my way
24 backwards a little bit in time chronologically. And what I'm
25 trying to get to is, part of what I'm trying to get to is, at

1 some point -- assuming there was an order at some point in,
2 let's say in some time in 2017, before June 1, vacating the
3 conviction ordering a new trial, doing something that took
4 the conviction off the books and restored the case as a
5 pending criminal case that had to be dealt with, there must
6 have been a motion, a briefing, some sort of presentation to
7 the Court, even if it was just a stipulation between Mr.
8 Ricks and the Prosecutor's Office, something that triggered
9 that action by the Court.
10 And I'm asking, you know, what was that, and when
11 was that filed? And in sort of working backwards it's, you
12 know, at some point, at least potentially, at some point
13 before there was actually an order vacating the conviction,
14 there must have been a reasonable anticipation by Mr. Ricks
15 or his attorneys that the conviction would be vacated.
16 MR. HARRINGTON: Can I make a comment?
17 THE COURT: And the question is: When did that
18 happen?
19 MR. HARRINGTON: Let me make a comment.
20 Hypothetically, if there was some type of motion
21 for a new trial, based on either newly discovered evidence or
22 something of that kind, and let's say the judge granted --
23 and I'm, and I'm -- literally, Judge, I'm just speaking out
24 of -- off the cuff. If there was some type of motion for a
25 new trial, and say the judge granted it, I think you're

1 asking me, Mr. Harrington, okay, I see this order where
2 they're saying they're not going to prosecute anymore, but we
3 do know that there was a conviction, so we have this window
4 of time.
5 What happened in that window to get us to this
6 order that says no conviction? Was there a motion for new a
7 trial that was granted by the judge? Was there some, as you
8 say, stipulation?
9 And as I stand here today, Your Honor, I don't
10 have the answers to that. I could have those answers to you
11 on extremely short order. I can limit it to one to two pages
12 of just bullet point dates with the appropriate exhibits for
13 you to examine. I just don't have those at my fingertips
14 now, and I --
15 THE COURT: Well, the record in -- strictly
16 speaking, the record in this bankruptcy case, I think, does
17 not show when there was this new testing of bullets, which I
18 thought I remembered that there was new testing of bullets,
19 that showed that the bullets, the actual bullets that were
20 recovered from the deceased victim's body were not a match to
21 the gun that was connected to Mr. Ricks through his mother.
22 But there may be something about that in the
23 District Court record, which, of course, has -- you know, the
24 motion for summary, the cross motions for summary judgment
25 have a million exhibits. There's tons of stuff in there, and

1 I didn't go and look through all that. But do you know that?
2 Was there new testing that basically triggered this relief
3 from the conviction?
4 MR. HARRINGTON: Well, I know that -- yes, I know
5 that there is testing from David Ballish, who is a retained
6 expert. I know there is -- here's what I don't know, and I
7 know you want answers to this and I don't know the dates of
8 when that occurred.
9 And from listening to this Court, I do think that
10 it's important that we have those dates because I think it
11 would help analyze this. But I don't have those dates, Your
12 Honor.
13 THE COURT: You don't know offhand if there's
14 anything in the record of the District Court that I can look
15 at to get me to get that information? I know if we dig, it
16 might be in there.
17 But I'm asking whether you happen to know offhand
18 where that may be, where that is in there. I presume it
19 would be, if it's anywhere, it would be in one or more of the
20 summary judgment exhibits.
21 MR. HARRINGTON: We would -- we would have to
22 consult with the motion, cross motions.
23 THE COURT: As I said, there's a lot of exhibits
24 there.
25 MR. HARRINGTON: Right. We had two people from

1 our appellate department --
2 THE COURT: Yeah.
3 MR. HARRINGTON: -- writing it. And I'm more of
4 trial counsel on the case --
5 THE COURT: Okay.
6 MR. HARRINGTON: -- and so I'm not going to -- I'm
7 not going to make anything up and I'm not going to
8 misrepresent and just say, yeah, it's there and just hope it
9 is. But I would -- I'm making an oral request, I guess, to
10 be able to issue the Court supplemental briefing on these
11 just narrow issues and for the factual basis.
12 THE COURT: Your view, I take it from what you've
13 said, of the fair contemplation test as applied in this case
14 is that the issue is at what point did Mr. Ricks first have
15 enough information to give him -- to justify a reasonable
16 belief, reasonable belief, that his conviction would be set
17 aside?
18 MR. HARRINGTON: In June of '17 when --
19 THE COURT: No, I'm saying --
20 MR. HARRINGTON: Oh, I'm sorry.
21 THE COURT: -- that's your view of how the -- what
22 the issue is under the fair contemplation test in this case.
23 Is that right?
24 MR. HARRINGTON: Yes. When -- yes.
25 THE COURT: And --

1 MR. HARRINGTON: I mean, that's --
2 THE COURT: And how do we know when that was?
3 MR. HARRINGTON: That's what I was just going to
4 say.
5 THE COURT: Based on what's currently in the
6 record.
7 MR. HARRINGTON: Well, I guess what we can look at
8 is the order of the June -- exhibit 4 of the of first amended
9 complaint, that is exhibit 6, to the Defendant -- the City of
10 Detroit's motion where -- it would be June 1st, 2017, where
11 they're not going to prosecute.
12 Where that decision is made, I believe that would
13 be -- that would be the time. Because I -- and I think your
14 question, if I heard you correctly, was, Mr. Harrington,
15 based on the record that's in front of me, meaning the
16 motion, your response, and the reply. Is that what you're
17 asking?
18 THE COURT: Yeah. I'm not including the District
19 Court record at this point.
20 MR. HARRINGTON: That's what I thought.
21 THE COURT: Though this Court I think technically
22 can take judicial notice of anything that's filed as a matter
23 of public record over in that District Court case. It's
24 available to me electronically as I'm sitting right here at
25 my computer. But, yeah. Well, you're pegging it at the date

1 on which, the earliest date upon which the *Monell* claim could
2 have, could be deemed to have accrued. That's where you're
3 saying they merge. It's the same date.
4 MR. HARRINGTON: Yeah. Under the analysis of fair
5 contemplation versus accrual, whether you walk through the
6 steps of the fair contemplation, it ends up being the same
7 date as the accrual.
8 THE COURT: So how do we know though -- how do we
9 know that there wasn't some date or time before June 1, 2017,
10 and perhaps well before that time, when Mr. Ricks knew enough
11 of the facts, or knew facts that would give -- that would
12 justify a reasonable belief that his conviction would be set
13 aside?
14 MR. HARRINGTON: Sure. That's fairly -- I can
15 answer that. That's, in my mind, I think fairly simple.
16 Because if it's let's just say a set aside, and the
17 conviction was overturned, but let's say it comes about
18 through a motion for a new trial, well there is still a new
19 trial that is in place and the prosecutors could still have a
20 -- get a conviction.
21 And so if Mr. Ricks was to have immediately have
22 filed his 1983 *Monell* claim while this -- while the Wayne
23 County Prosecutor's Office still has the case open and
24 pending, well, if they go and get a conviction again, and
25 he's got his 1983 *Monell* claim, it all goes away. There is

1 no case. I mean, it's -- it would be summarily dismissed on
2 its face, really, by 12(b)(6). It wouldn't even -- I mean,
3 maybe Rule 56, but it would be -- it would be just gone.
4 THE COURT: Well, what I'm getting at is it seems
5 to me that the record before me in this bankruptcy case, that
6 is the papers filed by the City and by you, your side,
7 relating to this motion, including these exhibits attached to
8 the City's reply brief, maybe don't necessarily enable this
9 Court to answer the question: Was there a time before June
10 1, 2017, when Mr. Ricks had facts, knew facts, that would
11 justify a reasonable belief that his conviction would be
12 vacated and that he would not again be convicted?
13 You know, if, just hypothetically speaking, on,
14 you know, June 1, 2013, a month before the City filed its
15 bankruptcy case, facts came to light, facts became known that
16 made it clear that -- evidence and facts that made it clear
17 that Mr. Ricks was wrongfully convicted and that he -- that
18 the City had no -- or the county, county prosecutor had no
19 hope of convicting him in a new trial of this murder, then it
20 would seem to me under that hypothetical situation, clearly
21 under the fair contemplation test, the claim had to -- would
22 have to be deemed to have arisen at that time, pre-petition.
23 Do you see what I'm saying?
24 MR. HARRINGTON: Yeah. And if it -- can I add to
25 that, if I may?

1 THE COURT: So what I'm -- what I'm getting at is,
2 it seems to me the record doesn't, at present, doesn't
3 necessarily permit this Court to conclude that that time,
4 that time when that happened, that fair contemplation first
5 happened under the test you -- the way you framed the issue,
6 didn't have pre-petition before the June -- the July 2013
7 bankruptcy case filed.
8 MR. HARRINGTON: I agree with you. And if I may
9 add, for example, if there was something in the record where
10 the prosecutor's office walked into his cell and said, you
11 know, we've been looking over everything that you've
12 submitted to us. We've just got some paperwork to go over,
13 the City, Mr. Ricks, even though it wasn't our doing, screwed
14 up. You have a great case. We're going to do this
15 paperwork, your case will be dismissed, and then we want you
16 to file your 1983 claim against the City.
17 Now, pretty sure that didn't happen, but it would
18 -- I would be hard pressed to argue the position that I'm
19 arguing before this Court if those were the facts. Because
20 if at that time, and say, you know, I'm sorry the date and
21 year, the 2000 -- you know, pre-petition stuff, if that, if
22 that conversation happened under the reasonable contemplation
23 as to whether or not he has a case, he's being told by the
24 people prosecuting him that he does.
25 THE COURT: Well, but you don't have to go that

1 far to get to fair contemplation.
2 MR. HARRINGTON: I know. But --
3 THE COURT: I mean, there's some -- let me, let me
4 ask it this way. There's some event, or events, that
5 occurred that basically triggered or opened the door for Mr.
6 Ricks to get his conviction vacated and to be freed.
7 MR. HARRINGTON: Yes.
8 THE COURT: What was it? Was it new ballistic
9 testing? What was it?
10 MR. HARRINGTON: It was the culmination of all of
11 the evidence that he had been getting. But is the question
12 that you're asking me, is it what was the triggering event
13 through the court process that --
14 THE COURT: What occurred. What occurred that
15 made it possible, or even likely, or even inevitable, that
16 this conviction was going to be vacated? What occurred?
17 MR. HARRINGTON: Based on the record that you have
18 in front of you, I believe, Your Honor, that it is an
19 insufficient record to answer that exact question.
20 THE COURT: Is there anything in your first
21 amended complaint which is in the record here in this case
22 that would give any clues about that? That's a long
23 complaint, and I didn't read every paragraph, I confess. I
24 was looking at things, certain specific things in there at
25 the time, and didn't go through and read them all.

1 MR. HARRINGTON: Well, I'm going to start with,
2 again, with exhibit 4, which is the order that we've talked
3 about. You also have, you know, the exhibit 3. You also
4 have ballistics, you know, ballistics testing. Same with
5 exhibit 2, there's forensic laboratory testing. And those
6 are dated in March of 2017, November 2017. And then the
7 order of the dismissal, or the nolle prosecution, ending up
8 dismissing the case was June 1st of '17. So all three of
9 those pieces of evidence were obtained post-petition.
10 THE COURT: Okay. So you're pointing me to
11 exhibits to your first amended complaint that are in the
12 record in this case?
13 MR. HARRINGTON: Yes, Your Honor.
14 THE COURT: What about allegations in the first
15 amended complaint? Do any of those shed a light on the
16 timing of these events that triggered the vindication,
17 essentially, of Mr. Ricks?
18 MR. HARRINGTON: And specifically focusing on when
19 that date occurred?
20 THE COURT: What the events were and when they
21 occurred, or at least what the events were.
22 (Pause)
23 MR. HARRINGTON: I'm reading through paragraph 48
24 on page -- it looks like it's page 12, Your Honor.
25 THE COURT: I see that.

1 MR. HARRINGTON: That talks about testing done by
2 Detective Sergeant Dean Molnar. He conducted some type of,
3 it looks like, test in April, May of 2017.
4 THE COURT: I see that. Anything else?
5 MR. HARRINGTON: I'm going through it as I flip
6 the pages, Your Honor.
7 (Pause)
8 MR. HARRINGTON: On -- again, and I turn back to
9 paragraph 78 which you had previously identified, talking
10 about May 26 when he was released from the Ionia Correctional
11 Facility.
12 THE COURT: I mean, his conviction must have been
13 vacated, you would think, before that date, right? There's
14 nothing in the first amended complaint, is there, showing
15 what happened to his conviction in that way.
16 MR. HARRINGTON: And I've flipped through it and
17 I've read it, Your Honor. No, I don't -- I don't believe
18 that's in there. And as I've stated, I'd be, I'd be happy to
19 provide that with this Court.
20 THE COURT: All right. Anything else in the first
21 amended complaint you want to point me to?
22 MR. HARRINGTON: No, Your Honor.
23 THE COURT: Okay. What else would you like to say
24 about the motion, then?
25 MR. HARRINGTON: No, I have nothing else to add,

1 Your Honor. Thank you for being so well read.
2 THE COURT: All right. Thank you.
3 Mr. Swanson, you may briefly reply in support of
4 your motion, if you would like.
5 MR. SWANSON: Your Honor, two points. The first
6 is, I wanted to correct something I said earlier.
7 In the City's summary judgment brief in the
8 District Court case, docket number 91, case 17-12784, on page
9 34, the City does argue that Plaintiff's claims are barred by
10 the applicable statute of limitations because accrual occurs
11 when a plaintiff has a complete and present cause of action.
12 That is when the plaintiff can file suit.
13 The City thus argued that all of Plaintiff's
14 claims in the Federal District Court action, I guess,
15 including those against the City, were time-barred under the
16 applicable statute of limitations.
17 THE COURT: What does that have to do with
18 anything? What's the point of that, of the -- of you making
19 this point?
20 MR. SWANSON: Well, that the statute of
21 limitations would presumably run when the cause of action
22 accrued. And the City's arguing and --
23 THE COURT: When does the -- does the City make an
24 argument about when the cause of action accrued in that paper
25 there?

1 MR. SWANSON: Well, it argues that the -- that Mr.
2 Ricks was free to file suit in 1992 on all of his claims.
3 And because he didn't file suit then when the cause of action
4 accrued, that that all of the claims are barred by statute of
5 limitations.
6 THE COURT: Well, I must have misunderstood, then.
7 I thought the City, in connection with this motion, basically
8 was not disputing that the claim, the *Monell* claim, did not
9 accrue until the Ricks conviction was vacated, and that
10 didn't occur until 2017.
11 MR. SWANSON: The City has taken --
12 THE COURT: Isn't that what -- isn't that what you
13 were agreeing to?
14 MR. SWANSON: Well, I tried to say, Your Honor
15 I -- you know, I had not looked into that and had not taken a
16 position. I pointed the Court to a quote from the *Sanford*
17 case, but I didn't take a position on that issue in my
18 pleadings, and then I went --
19 THE COURT: Well, what's the City -- tell me in
20 more detail, what's the City's argument about this in the
21 City -- in the Ricks case.
22 MR. SWANSON: Sure.
23 THE COURT: The cause of action under *Monell*
24 accrued in 1992, is the City saying?
25 MR. SWANSON: In Michigan, a three-year statute of

1 limitations applies to federal claims brought under 43 U.S.C.
2 1983, citing a *Scott* decision from the Sixth Circuit.
3 THE COURT: Yes.
4 MR. SWANSON: And a *Wallace* decision from the
5 Supreme Court.
6 Quote, "Accrual occurs when the plaintiff has a
7 complete and present cause of action, and that is when the
8 Plaintiff can file suit," close quote.
9 The limitations period for Plaintiff's claim for
10 intentional infliction of severe emotional distress is also
11 three years, citing MCL 600.5805 subsection --
12 THE COURT: Focus on the *Monell* claims, would you?
13 MR. SWANSON: Sure. I think they --
14 THE COURT: That's the only claim that's asserted
15 against the City. *Monell* is, right?
16 MR. SWANSON: *Monell* is the only claim that's
17 asserted.
18 THE COURT: It's number one in the first amended
19 complaint.
20 MR. SWANSON: That's right.
21 THE COURT: What does the City say about the
22 statute of limitations with respect to that claim in their
23 summary judgment motion in the City case -- in the Ricks
24 case? Anything?
25 MR. SWANSON: In 1992, there was no bar to play to

1 bringing suit against the City of Detroit and its police
2 officers. Plaintiff failed to do so, and, therefore, his
3 claims are barred.
4 THE COURT: And the statute of limitations is how
5 long?
6 MR. SWANSON: Three years.
7 THE COURT: The City says?
8 MR. SWANSON: Yes.
9 THE COURT: Three years. Well, what about this
10 concept, is the City simply -- is the City saying the *Monell*
11 claims accrued in 1992 in that brief?
12 MR. SWANSON: Yes.
13 THE COURT: It is? Is there -- what authority is
14 there for that proposition?
15 MR. SWANSON: It cites *Scott v. Ambani*, 577 F. 3d
16 642, 646, a Sixth Circuit case, 2009.
17 THE COURT: What about the *Heck* case?
18 MR. SWANSON: The *Heck* case talks about malicious
19 prosecution. I don't necessarily think that applies to a
20 *Monell* claim against a municipality.
21 THE COURT: Okay. So now are you -- are you now
22 saying that the City, in support of this motion in this
23 Court, is now saying that the *Monell* claims asserted in count
24 1 of the first amended complaint of the City in the Ricks
25 action against the City accrued in 1992?

1 MR. SWANSON: Yes.
2 THE COURT: They did. Okay. Now that, of course,
3 is not an argument you made in your reply brief.
4 MR. SWANSON: That's correct.
5 THE COURT: Or in your motion. In your reply
6 brief you said accrual isn't the test.
7 MR. SWANSON: Yeah. We don't think accrual is the
8 test.
9 THE COURT: It's fair contemplation. It's not
10 accrual.
11 MR. SWANSON: Yeah.
12 THE COURT: You know, if the -- if the claim
13 actually accrued before the bankruptcy was filed, even under
14 the accrual test, this claim would be barred by the discharge
15 order. Right?
16 MR. SWANSON: That's correct. I think Plaintiff
17 is -- to the City it's really not relevant when the claim
18 accrued, because the Court does not apply the accrual test.
19 The Court looks at the facts and circumstances
20 underlying this claim. The Court, in its opinion --
21 THE COURT: Well, if the claim accrued under non-
22 bankruptcy law pre-petition, isn't it always going to be
23 deemed a pre-petition claim under the fair contemplation
24 test?
25 MR. SWANSON: I think Plaintiff here would argue

1 that even if it accrued it wasn't within Plaintiff's fair
2 contemplation until the conviction was overturned, and
3 thus --
4 THE COURT: You're not answering my question.
5 They're saying it didn't accrue until the conviction was
6 vacated. They're saying that, and they're citing *Heck*.
7 But my question is: Isn't it always going to be
8 the case that if a cause of action actually accrued under
9 applicable non-bankruptcy law before the bankruptcy petition
10 was filed, that claim is going to be deemed a pre-petition
11 claim under the fair contemplation test.
12 MR. SWANSON: The fair contemplation test does not
13 include as a factor the date that the claim actually accrued.
14 And thus, you know, I haven't thought of --
15 THE COURT: Well, it includes all relevant
16 circumstances.
17 MR. SWANSON: Yes.
18 THE COURT: Right?
19 MR. SWANSON: I mean, it --
20 THE COURT: All the circumstances surrounding a
21 particular claim, including the Debtor's conduct, the party's
22 pre-petition relationship, the party's knowledge, elements of
23 the underlying claim.
24 So I would think courts could consider if the
25 claim accrued under non-bankruptcy law, pre-petition,

1 certainly that would be a factor, if not conclusive, very
2 close to being conclusive, in establishing that it's a pre-
3 petition claim under the fair contemplation test, don't you
4 think?
5 MR. SWANSON: I'm not going to argue with that
6 point.
7 THE COURT: I'm trying to think. It's kind of
8 hard for me to think of a situation where that wouldn't be
9 the case.
10 So if the claim really did accrue before the
11 conviction, Mr. Ricks' conviction was vacated, or whatever
12 happened to it, that puts a whole new light on this issue, I
13 think.
14 MR. SWANSON: It very well might. In the Court's
15 opinion that I cited in my reply there was, I believe, some
16 uncertainty in terms of whether those claims had accrued
17 under non-bankruptcy law prior to the petition date. The
18 claims of Tanya Hughes, for one.
19 And this Court wrote, you know, that certainty is
20 not the standard. It's not the standard that the Plaintiff
21 knew for sure that the claim had accrued or that they for
22 sure had a claim that which could be asserted.
23 The Plaintiff here professed his innocence from
24 day one, and starting in 2011, he employed, or he utilized,
25 the services of an investigator, a paralegal, a team of

1 lawyers, and his previous expert, to prove his innocence. He
2 was -- he was telling all of these people that he had a claim
3 against the City of Detroit because he was unlawfully
4 convicted.
5 And he was pointing to the same evidence which
6 allegedly resulted in him being freed from prison. In his
7 own words he had a claim in 2011. We know it because he said
8 it.
9 Under the fair contemplation test rarely do you
10 get evidence that's this crystal clear that a Plaintiff knew
11 that they had a claim. I mean, he said it in the letter, and
12 people on his behalf were telling the U.S. District Attorney
13 that he had a claim. If that's not enough, I don't know what
14 does it. All of the conduct here, again, occurred in 1992.
15 We have the Plaintiff on record --
16 THE COURT: Is it enough under the fair
17 contemplation test for a claimant to subjectively think they
18 have a claim, or believe they have a claim, if that belief is
19 not objectively reasonable at the time?
20 MR. SWANSON: Yes.
21 THE COURT: You think it is?
22 MR. SWANSON: I think if the Plaintiff believes
23 that they have a claim against the City that's within their
24 fair contemplation. I mean, their subjective belief is part
25 of the fair contemplation test. What do they believe? Do

1 they believe they have a claim against the City or not? We
2 don't necessarily need all of the objective evidence to line
3 up before the bar date for this Court to hold that a claim
4 within the Plaintiff's fair contemplation against the City.
5 I mean, as this Court wrote, Congress included the
6 words "contingent," "unmatured," "disputed" within the
7 definition, Section 1015, of the term "claim."
8 This Court also wrote that Congress used those
9 words because it wanted to adopt the broadest definition of
10 claim possible.
11 I don't see how this Court could rule that a
12 plaintiff who was putting down in writing and telling people
13 prior to the City's bankruptcy case that he had a claim
14 against the City, that that claim wasn't within his fair
15 contemplation. I mean, he was asserting a claim. He was
16 telling people he had a claim. I don't know what else,
17 really, could cause the Court to rule that this was within
18 his fair contemplation.
19 Again, Your Honor, certainty is not the standard.
20 What Plaintiff continues to argue is that we have to wait
21 until this claim accrued under their theory of when accrual
22 occurred, and that's not the test. The test is fair
23 contemplation, and we should take it from Mr. Ricks' own
24 words. He knew he had a claim before the City filed for
25 bankruptcy.

1 Thank you.
2 THE COURT: All right. Thank you, both. I'm
3 going to rule on this motion now.
4 (Pause)
5 THE COURT: With respect to jurisdictional
6 matters. First of all, this Court has subject matter
7 jurisdiction over this bankruptcy case and this contested
8 matter that's represented by the City's current motion and
9 which, of course, is contested by the Ricks plaintiffs.
10 And this is a core proceeding, and all of this is
11 true for the very same reasons that I stated that the matters
12 before me in the published opinion that I'm going to cite
13 were covered by the Court's subject matter jurisdiction and
14 were core proceedings.
15 And also, by the way, proceedings in which the
16 Court reserved jurisdiction to rule in the confirmed Chapter
17 9 plan.
18 The case, the prior case, of course, is the case
19 that the parties are aware of and the City cited in its
20 papers, and that's *In re City of Detroit, Michigan*, reported
21 at 548 Bankruptcy Reporter 748, and in particular the section
22 of that opinion at page 753 to 754 that's labeled Roman
23 numeral II jurisdiction. I incorporate by reference what I
24 said there in that section, in that prior opinion, in this
25 bench opinion that I'm now giving as the basis for why the

1 Court has subject matter jurisdiction over this contested
2 matter and why this contested matter is a core proceeding.
3 That prior opinion I'll just, I'll refer to it as
4 this Court's 2016 opinion. That's the opinion that I just
5 cited.
6 And by the way, that was a decision of this Court
7 from 2016. It's the same opinion that was cited by the U.S.
8 District Court in the *Sanford* case, which the City has
9 attached to its reply brief, and which is reported at 2018
10 Westlaw 6331342, *Sanford versus City of Detroit,* a decision
11 of the U.S. District Court for this District from December 4,
12 2018. Judge Lawson is the district judge in that case.
13 That's the *Sanford* case, and I may refer to that, as well, in
14 this bench opinion.
15 Going back to my published 2016 opinion and
16 decision, however, I do reiterate and incorporate by
17 reference into this bench opinion, everything I said about
18 the applicable law, that is the law applicable to determining
19 whether a given claim or claims arose for bankruptcy purposes
20 before a bankruptcy petition was filed. And that discussion
21 is in the 2016 published opinion at 548 Bankruptcy Reporter
22 at pages 761 through 763.
23 In that part of the 2016 opinion, that's where
24 this Court discusses a couple of concepts that are key to the
25 issue before me on the present motion. And that is, first,

1 the concept and the rule of law, which is that in order to
2 have a pre-petition claim, that is a claim that is deemed to
3 have arisen before the filing of the bankruptcy case. It is
4 not necessary for the claim to have accrued under an
5 applicable non-bankruptcy law such that a lawsuit could be
6 filed on it and sustained in the sense that all the elements
7 of the cause of action had accrued before the bankruptcy
8 petition was filed.
9 At 548 Bankruptcy Reporter, at 762 to 763, I
10 discussed that. It's sometimes referred to as the accrual
11 test for determining when a claim arises. Another name for
12 it sometimes given in the case law is it's sometimes called
13 the, quote, "right to payment," unquote test. As described
14 in my prior opinion, 548 Bankruptcy Reporter, at 762 to 763,
15 that tests provides that a claim arises for bankruptcy
16 purposes only after each element of the claim has been
17 established.
18 It's essentially an accrual test. As I said,
19 however, and reiterate now, but as I said in the 2016
20 opinion, that test had been widely rejected. And this Court
21 rejected it in my 2016 opinion, and I do so now for the same
22 reasons and based on the same authorities that I cited in my
23 prior published opinion from 2016.
24 The second point is that instead of an accrual or
25 right to payment type test, or some other test among possible

1 tests for determining when a claim arises for purposes of --
2 for bankruptcy purposes, the Court adopts -- did adopt, and
3 reiterates now, that the correct test is the so-called fair
4 contemplation test.
5 And as I described it in my prior opinion,
6 including 548 Bankruptcy Reporter at 763, that test looks at,
7 quote: "Looks at whether there was a pre-petition
8 relationship between the debtor and the creditor, such as
9 contract exposure, impact, or privity, such that a possible
10 claim is within the fair contemplation of the creditor at the
11 time the petition is filed," unquote. That's at page 763 of
12 my prior opinion, and I'm omitting citations here on that.
13 I further said, and reiterate now, but I further
14 said in the prior opinion the following: Quote, "Under this
15 test a claim that's considered to have arisen pre-petition if
16 the creditor -- the creditor ascertained through the exercise
17 of reasonable due diligence that it had a claim at the time
18 the petition was filed. This test, which the Court will
19 refer to as the fair contemplation test, has the advantage of
20 allowing the Court to examine all the circumstances
21 surrounding a particular claim, the Debtor's conduct, the
22 party's prepetition relationship, the party's knowledge, the
23 elements of the underlying claim, and use its best judgment
24 to determine what is fair to the parties in context,"
25 unquote. That's 548 Bankruptcy Reporter at 763. And again,

1 I'm omitting citations.
2 Now, in saying this, and in adopting and
3 describing the fair contemplation test, one has to -- the
4 Court bears in mind and reiterates, as I discussed in the
5 prior -- the 2016 opinion, as well, that a claim as defined
6 in the Bankruptcy Code, Section 101, Sub 5, includes a right
7 to payment that is contingent and a right to payment that is
8 unmatured, so that it is possible to have a contingent claim,
9 or an unmatured claim, that still is a claim that has arisen
10 for bankruptcy purposes as of the bankruptcy petition date,
11 even though as of that date the creditor could not have
12 successfully filed suit and prevailed on such a claim under
13 applicable non-bankruptcy law because some event had not yet
14 occurred that had to occur in order for there to be a valid
15 claim that met all the elements under non-bankruptcy law for
16 such a claim.
17 And I discussed that, again, I reiterate what I
18 said in the prior opinion, in particular at pages 548
19 Bankruptcy Reporter, at 761 to 763, about that subject.
20 Now, the Ricks Plaintiffs here, in opposing the
21 City's present motion, have argued, among other things, that
22 under applicable non-bankruptcy law Mr. Ricks, Desmond Ricks,
23 that is, who is the Plaintiff who asserts a claim against the
24 City in Count 1 of the first amended complaint in the U.S.
25 District Court action, did not have any claim that had yet

1 accrued against the City of Detroit when the City of Detroit
2 filed its bankruptcy petition in this Chapter 9 bankruptcy
3 case in July 2013, because as of that time Mr. Ricks'
4 conviction, which he says was a wrongful conviction,
5 essentially was still on the books.
6 It had not been vacated or reversed or in any way
7 successfully challenged as of the date of the bankruptcy
8 petition in this Chapter 9 bankruptcy case, so that he could
9 not at that time, at the time of the bankruptcy petition,
10 have successfully prosecuted a civil claim against the City
11 of Detroit of the type, or types, that are alleged in Count 1
12 of the first amended complaint in the District Court action,
13 so-called *Monell*-type claims against the City.
14 Mr. Ricks argues that that is the applicable non-
15 bankruptcy law, and they, I believe, cite the *Heck* case for
16 that proposition.
17 Now, it develops during -- it develops during,
18 really, the City's reply portion of today's oral argument
19 that the City may now be contending, at least in this Court,
20 that the so-called *Monell* claims that Mr. Ricks is asserting
21 against the City in the District Court action actually
22 accrued much earlier than the date in which Mr. Ricks
23 obtained a vacation, or a reversal, or undoing of some sort,
24 under state law of his conviction, which happened,
25 apparently, in 2017.

1 I will assume for purposes of ruling on the City's
2 motion in this case that Mr. Ricks is correct, his counsel
3 and he are correct, in arguing that he did -- his claim, his
4 *Monell* claims against the City did not accrue under non-
5 bankruptcy law until his conviction was vacated, and that
6 this did not occur until some time in the first half of 2017.
7 So I am assuming for purpose of ruling on the
8 City's present motion, then, that Mr. Ricks did not have any
9 claim, so-called *Monell* claim, against the City of Detroit
10 that had accrued under applicable non-bankruptcy law as of
11 the date the City filed its bankruptcy petition in July 2013.
12 As I indicated, however, that's not the end of the
13 inquiry, because the accrual test, also known as the right to
14 payment test, as I discussed earlier, is not the applicable
15 test to determine when a claim or whether a claim has arisen
16 for bankruptcy purposes.
17 Now, as I further discussed in the 2016 opinion,
18 in detail, and as is true here, if it's undisputed, and it is
19 certainly correct, as the City points out and argues in its
20 motion, that if Mr. Ricks claims that he's asserting in the
21 District Court action against the City of Detroit did, in
22 fact, arise for bankruptcy purposes before the July 2013
23 bankruptcy petition date in this case, then those claims are,
24 in fact, barred by the discharge and by the confirmed plan
25 and by the claims bar date order in this bankruptcy case,

1 which the City cites and quotes from in detail in its opening
2 motion.
3 And so, if Mr. Ricks' claims against the City of
4 Detroit are deemed to have arisen for bankruptcy purposes
5 pre-petition, in other words, before the July 2013 bankruptcy
6 petition date in this case, then those claims are indeed --
7 have indeed been discharged and may not be pursued, and the
8 discharge injunction, and the injunction in the confirmed
9 plan in this case bar Mr. Ricks from pursuing such claims.
10 So back to the fair contemplation test. The City
11 points to 16 different exhibits, numbered exhibits 1 through
12 16, that are attached to its reply brief filed in this case
13 at docket number 13021, all of which I have reviewed and
14 which the City's counsel talked about in today's hearing, but
15 before the hearing, I did review those, as well.
16 And all of those documents, and certainly those
17 documents when taken in combination, do make clear, in my
18 view, that from -- during the time period June of 2009, or
19 roughly -- or rather, some time in 2009, all the way through
20 and as late as October of 2012 -- I'm sorry, all the way
21 through December of 2012, Mr. Ricks, Desmond Ricks, while he
22 was still in prison under the conviction for murder that was
23 later vacated and the charges which were later dismissed in
24 2017, Mr. Ricks, during this time period, this pre-bankruptcy
25 petition time period 2009 through December 2012, had reason

1 to know and to believe, and had knowledge of facts to know
2 and believe, that he had a claim, albeit a then contingent
3 claim, against the City of Detroit.
4 The type of claims that basically for claims that
5 led to his wrongful conviction and wrongful imprisonment for
6 roughly two decades or more, against the City of Detroit.
7 The claims admittedly were still contingent
8 because Mr. Ricks had not yet, as of the bankruptcy petition
9 date, obtained relief or vindication from his murder
10 conviction in State Court, so the claims had not accrued yet.
11 And that event had to occur before he could successfully
12 pursue the claims.
13 So it was a contingent -- they were contingent
14 claims as of the bankruptcy petition date, but he did have
15 reason.
16 And he could have ascertained through the exercise
17 of reasonable due diligence that he had a claim at the time,
18 existing prior to the time of the filing of the bankruptcy
19 petition in this Chapter 9 case, in July 2013.
20 Of course, all of the conduct, the allegedly
21 wrongful conduct that forms the basis of Mr. Ricks' claims
22 against the City, occurred in 1992. As the City correctly
23 points out, Mr. Ricks certainly knew that.
24 And all of the policies and practices of the City
25 that formed the basis of Mr. Ricks' *Monell* claims existed as

1 of March 1992. This is all alleged in the first amended
2 complaint of Mr. Ricks in the District Court.
3 And the exhibits submitted by the City show that
4 Mr. Ricks not only believed, but had reason to believe, that
5 he had a valid claim against the City and the police officers
6 involved in the investigation and prosecution of the murder
7 case against him that led to his conviction in 1992, that he
8 had a valid claim and he was working hard and diligently to,
9 as I think to use the term Plaintiff's -- Mr. Ricks' counsel
10 used in hearing today, to build that case, to build that
11 claim, build evidence for that claim.
12 But it was certainly well within his fair
13 contemplation, based upon the conduct of the Debtor that had
14 occurred back in 1992, the parties, the pre-petition
15 relationship between Mr. Ricks and the City and the City's
16 police personnel involved, and the knowledge that Mr. Ricks
17 had before this bankruptcy case was filed, it was certainly,
18 under all those circumstances, it was, in my view, within the
19 fair contemplation of Mr. Ricks that he had a claim, albeit a
20 contingent claim, against the City of Detroit that existed
21 before the bankruptcy, this bankruptcy case was filed.
22 And so the Court does rule, and in my view is
23 constrained to rule give the very broad scope of the
24 definition of claim under the Bankruptcy Code, as I discussed
25 in the 2016 opinion that I published. and the case law under

1 that definition, the Court is constrained to rule that the
2 claims asserted by Mr. Ricks in his first amended complaint,
3 Count 1 against the City in the District Court case, are pre-
4 petition claims, claims that arose for bankruptcy purposes
5 before the bankruptcy case here was filed.
6 As a result, under the confirmed plan and the
7 applicable law and the orders of this Court, Mr. Ricks'
8 claims against the City were discharged, and Mr. Ricks is
9 enjoined from pursuing or prosecuting any such claims by the
10 Court's orders and by the discharge injunction that applies
11 in this Chapter 9 bankruptcy case.
12 And so for those reasons, the City's motion will
13 be granted. I will enter an order granting that motion now.
14 Mr. Swanson, in looking at the proposed order that
15 was attached to your motion, I guess my first question is:
16 Do you still want the Court to enter the order in the form
17 that was attached to your motion, or do you have any
18 modifications to that proposed order that you want to ask me
19 to make?
20 MR. SWANSON: Your Honor, we would be fine with
21 this order. I think we've learned that two of the three
22 Plaintiffs are not asserting any claims against the City, so
23 --
24 THE COURT: I saw that you said that in your reply
25 brief.

1 MR. SWANSON: Yeah.
2 THE COURT: Does that require any change in the
3 order, though? Or you are saying it doesn't?
4 MR. SWANSON: No, I don't think it does.
5 THE COURT: I don't either.
6 MR. SWANSON: Yeah.
7 THE COURT: Now, what I will -- one thing I do
8 question or have concern about, and that is paragraph number
9 4 of your proposed order.
10 You go beyond -- in the order, you go beyond
11 requiring the Plaintiffs to dismiss the City from the pending
12 District Court action and enjoining them from asserting
13 claims.
14 In paragraph 4, you have the Court ordering that
15 the three Plaintiffs in the Ricks case are prohibited from
16 sharing in any distribution in this bankruptcy case.
17 Now, you said in your motion that none of these
18 parties have filed any proof of claim in the bankruptcy case,
19 timely or otherwise, and that's still true, I assume?
20 MR. SWANSON: Yes.
21 THE COURT: All right. So there's no possible way
22 given that, that they presently would have any argument to
23 share in any distribution of the bankruptcy case. So isn't
24 this paragraph 4 unnecessary?
25 MR. SWANSON: Yes.

1 THE COURT: All right. So take it out. I'll ask
2 you to -- well, here's what I'm going to do in terms of
3 substantive change to the order.
4 Paragraph 2 says, within five days of the entry of
5 this order, the three Ricks parties shall each dismiss, or
6 cause to be dismissed, et cetera, the City from the pending
7 District Court case.
8 The form I want to use is instead of saying five
9 days after order, I want to set a specific calendar date as
10 the deadline for that. And normally, I would say no later
11 than one week from the day, that would be March 27. So
12 that's the date I would pick.
13 Now, just logistically, is that, do you think,
14 going to be a problem for you logistically, Mr. Harrington,
15 for your side to comply if the deadline is March 27th?
16 MR. HARRINGTON: I'm pulling up my calendar, if I
17 may, Your Honor. If that's okay?
18 THE COURT: Sure.
19 MR. HARRINGTON: The 27th is fine.
20 THE COURT: All right. And I think that's
21 actually the date on which summary judgment reply briefs are
22 due in the District Court currently, in any case.
23 All right. So make that change to paragraph 2,
24 Mr. Swanson. It will say no later than March 27, 2019,
25 Desmond Ricks, et cetera, shall each, and so forth. You see

1 that?

2 MR. SWANSON: Yes, Your Honor.

3 THE COURT: All right. And you're taking

4 paragraph 4 out.

5 MR. SWANSON: Yes, Your Honor.

6 THE COURT: The rest of the order is fine. I'll

7 make some non-substantive changes in the first paragraph of

8 the order to recite the fact that the Court held a hearing

9 today, and for reasons stated by the Court on the record, and

10 so forth, that sort of stuff.

11 MR. HARRINGTON: Your Honor?

12 THE COURT: But I'll take care of that.

13 Now, let me -- I'm going to come to you in a

14 minute.

15 MR. HARRINGTON: Yes, Your Honor. Thank you.

16 THE COURT: Mr. Swanson, do you have any questions

17 about the form of the revised order to submit?

18 MR. SWANSON: No, Your Honor. Thank you.

19 THE COURT: All right. Now, Mr. Harrington, same

20 question to you, form of the order.

21 MR. HARRINGTON: Yes, Your Honor. With respect to

22 this case, there are other individual Defendants, the

23 officers involved, that aren't subject to this Court's ruling

24 and do have indemnity from the City of Detroit.

25 My problem with paragraph 3, it talks about

1 Desmond Ricks, Ms. Cobb, Ms. Ricks, are each permanently
2 barred, estopped, and enjoined, from asserting any claims
3 asserted in the --
4 THE COURT: I see what you're getting at.
5 MR. HARRINGTON: So I've got an issue with that.
6 THE COURT: Yeah. How would you change that
7 language to narrow that to make clear that this order is --
8 and certainly, I'm not ruling this way, and we're not -- the
9 order is not -- should not be interpreted to mean that these
10 Ricks parties are enjoined from pursuing their claims against
11 the individuals named in the pending action in their
12 individual capacity rather than in their official capacity.
13 MR. HARRINGTON: Sure. And it's quite simple. I
14 don't think paragraph 3 is necessary at all with a dismissal
15 order against the City. Well, then, it's quite simple. I
16 can't go take City property, but I can pursue through -- I
17 can pursue the officers, and the officers through their
18 bargaining agreement with the City, has indemnity.
19 So I pursue the officers, but then the City of
20 Detroit satisfies any judgment in the event that we prevail
21 against the officers on the claims.
22 THE COURT: Well, if the City indemnifies the
23 officers and ends up paying something in the case because
24 they're indemnified, in the capacity of indemnifying the
25 individual Defendants for claims asserted against them in

1 their individual capacity, then that's a matter -- that's not
2 a matter of right that the Plaintiffs have against the City,
3 the Ricks have against the City. That's, rather, at most, a
4 right that the individuals would have against the City.
5 Right?
6 MR. HARRINGTON: Right. But a broad
7 interpretation of paragraph 3 would affect the substantial
8 rights of my client.
9 THE COURT: Well, let's do this, and you tell me
10 why this doesn't take care of it.
11 I do want to keep an injunction in paragraph 3,
12 but change the wording a bit, and perhaps this. Paragraph 3
13 now instead would say, list the three individuals, and say,
14 each is -- are each permanently, and we don't need barred and
15 estopped, we'll just say permanently enjoined from asserting
16 claims asserted in the lawsuit -- well, or the rest of it.
17 Or claims arising from or related to the lawsuit
18 against the City of Detroit or the property of the City of
19 Detroit. That seems to me narrow enough to not create a
20 problem for you, but perhaps we can add a sentence that makes
21 it absolutely clear.
22 MR. HARRINGTON: I would like that, Your Honor.
23 THE COURT: How would you propose to word a
24 sentence to add to paragraph 3 to do that? What language
25 would you like?

1 MR. HARRINGTON: Why don't we start with, any and
2 all claims made by Plaintiff against the individual officers,
3 David Pauch, Donald Stawiasz, S-T-A-W-I-A-S-Z, and Robert
4 Wilson, are unaffected by this Court's ruling --
5 THE COURT: Hold on. Any and all claims made by?
6 MR. HARRINGTON: Plaintiffs against -- do you need
7 the names of the officers again, Your Honor?
8 THE COURT: I can get the names from the first
9 amended complaint.
10 MR. HARRINGTON: Thank you.
11 THE COURT: Right? It's the three that are listed
12 in the caption of the first amended complaint, right?
13 MR. HARRINGTON: Are unaffected by this Court's
14 ruling.
15 THE COURT: Or how about unaffected by this order?
16 MR. HARRINGTON: By this order.
17 THE COURT: Yes.
18 MR. HARRINGTON: And Plaintiffs may recover any
19 proceeds that would be paid or payable by the City of Detroit
20 through its appropriate collective bargaining agreement, or
21 otherwise indemnity.
22 I mean, it's how it works in all of these 1983
23 cases against the individual officer, because the only claim
24 --
25 THE COURT: Wait a minute. Claims unaffected by

1 this order. I would want to say, any and all claims made by
2 Plaintiffs against the three, and list the three individuals,
3 comma, in their individual capacity, parentheses, as opposed
4 to in their official capacity, are unaffected by this order,
5 period.
6 Now, you want to say more than that, and what's
7 the more than that? Why do we need to say Plaintiffs may
8 recover anything under the collective bargaining?
9 MR. HARRINGTON: The only reason that I say that
10 -- the only reason I feel the necessity to say that, is
11 because of how broad paragraph 3 of that order reads by
12 trying to say that we can't recover any City of Detroit
13 property, because in essence the way that this works and the
14 way that this case will go down the track is if we prevail,
15 or if there's a settlement, or if there's any payment to come
16 from these officers, it gets paid by the City.
17 THE COURT: But not because of -- again, not
18 because the Plaintiffs have any right against the City for
19 that.
20 Any right to indemnity is a right that's enjoyed
21 by the individuals against the City, not a right that the
22 Plaintiffs have against the City. That's the distinction,
23 right?
24 MR. HARRINGTON: Right. Yeah. Because it's the
25 bargaining agreement that the officers have by being a member

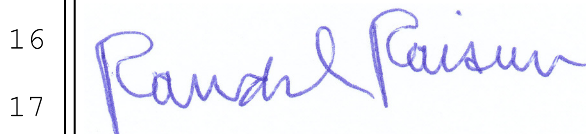
1 of the police force. It's like almost an insurance agreement
2 that they're going to pay for, you know, if they're sued --
3 THE COURT: How about this? Add -- the sentence
4 we've been talking about is fine up to the point where they
5 aren't affected by this order.
6 And then add a sentence that says something like
7 this, and we can play with the wording, but something like
8 this. This order does not -- well, what I want to say is
9 this order -- essentially, this order does not impair any
10 right to indemnity that the individual officers may have
11 against the City.
12 MR. HARRINGTON: Fine. Yeah. I'm fine with that.
13 THE COURT: Does that work?
14 MR. HARRINGTON: Something to that extent.
15 THE COURT: Does that work for you, Mr. Swanson?
16 MR. SWANSON: Yes.
17 THE COURT: All right. So let me let me get it
18 down and I'll read it all to you and you guys can make sure
19 it's good.
20 MR. SWANSON: Your Honor?
21 THE COURT: Just a second.
22 MR. SWANSON: Sure.
23 (Pause)
24 THE COURT: All right. So you want to say
25 something before I read it back to you?

1 MR. SWANSON: Yes. Am I responsible for putting
2 this in? I just want to make sure I take careful notes if I
3 have --
4 THE COURT: I'm going to read it now --
5 MR. SWANSON: I will.
6 THE COURT: -- and then you can comment or
7 question. How's that?
8 MR. SWANSON: All right.
9 THE COURT: Both of you.
10 All right. So now paragraph 3 will say, I'll try
11 to go through it. It will say: Desmond Ricks, Akilah Cobb,
12 and Desire'a Ricks, and then after that put a parenthesis and
13 say the, quote, Plaintiffs with a capital P, because we're
14 going to refer to that term later. Okay. Are each
15 permanently enjoined from asserting claims asserted in the
16 lawsuits or claims arising from or related to the lawsuit
17 against the City of Detroit or property of the City of
18 Detroit, period.
19 Then we add this sentence. Any and all claims
20 made by the Plaintiffs against, and then we'll name the three
21 individuals who are named as defendants in the -- individual
22 defendants in the District Court, Pauch, Stawiasz, Wilson,
23 whatever that is, their names, any and all claims made
24 against, and list those three names, A, B, or C, comma, in
25 their individual capacity, parentheses, rather than in their

1 official capacity, close paren, are unaffected by this order,
2 period.
3 Let me make sure you got that much, Mr. Swanson.
4 (Pause)
5 THE COURT: Okay. Then the next sentence will
6 say, it's still on paragraph 3, the next sentence will say,
7 this order does not affect any right to indemnity that the
8 individual officers -- not officers, let's say --
9 MR. HARRINGTON: The City may owe.
10 THE COURT: No. Hold on. In the sentence before
11 when we list the individuals, the three names, let's define
12 them with parentheses, the capital I, Individual --
13 Individuals, put that in quotes, close paren. Okay. So
14 after the three names put paren, the quote capital I,
15 Individuals, close quote and close paren. All right.
16 Then in the next final sentence it'll say, this
17 order does not affect any right to indemnity that the
18 Individuals, capital I, may have against the City, period.
19 So I'll read through it one more time and then
20 I'll ask for any questions or comments.
21 Paragraph 3. Desmond Ricks, Akilah Cobb, and
22 Desire'a Ricks, paren capital P, Plaintiffs, in quotes, close
23 paren, are each permanently enjoined from asserting claims
24 asserted in the lawsuit or claims arising from or related to
25 the lawsuit against the City of Detroit or property of the

1 City of Detroit, period. Any and all claims made by
2 Plaintiffs against, then the three names, A, B, or C, paren,
3 the capital I Individuals, in quotes, close paren, in their
4 individual capacity, paren, as opposed to their official
5 capacity, close paren, are unaffected by this order, period.
6 This order does not affect any right to indemnity that the
7 individuals may have against the City, period. End of
8 paragraph 3.
9 Now, first question. Mr. Swanson, did you get all
10 that down?
11 MR. SWANSON: Yes, Your Honor.
12 THE COURT: The second question is, did you have
13 any comments or questions about form?
14 MR. SWANSON: The only comment that I would have
15 is that the first added sentence we have paren, rather than
16 official capacity, close paren. I would propose to, after
17 that parentheses, define individuals there instead of after
18 their names.
19 THE COURT: That's okay with me. What about you,
20 Mr. Harrington?
21 MR. HARRINGTON: I don't really understand the
22 change. I think we're all talking about the same thing.
23 And just so we're all a hundred percent clear that
24 the spirit of all of this, whether we're saying potato or
25 potato, the spirit of all of this is that in the event that

1 there is a verdict against any one of these officers that any
2 issue of indemnity won't be encumbered or prohibited or
3 precluded in any way, shape, or form by this Court's ruling
4 on the City of Detroit claims. I just want to make sure that
5 that's clear. Right, counsel?
6 THE COURT: So, Mr. Swanson, why do you need this
7 change you've just asked for?
8 MR. SWANSON: I just thought it would -- it would
9 make clear that we're talking about the individuals in their
10 individual capacity and not their official capacity. If the
11 Court prefers, it's like what --
12 THE COURT: Let's leave it as-is.
13 MR. SWANSON: Sure.
14 THE COURT: Anything else?
15 MR. SWANSON: No.
16 THE COURT: What about you, Mr. Harrington?
17 Anything else?
18 MR. HARRINGTON: No, Your Honor.
19 THE COURT: All right. So the order, then, will
20 have the change to paragraph 2 that I mentioned, the new
21 paragraph -- the revised paragraph 3 that we talked about.
22 Paragraph 4 comes out. Paragraph 5 stays in, retaining
23 jurisdiction, that's fine.
24 And I'll ask Mr. Swanson to revise the order,
25 submit it. I'll wait for the presentment of the revised

1 order, since we've discussed it in detail here. And of
2 course before I sign it, I will make sure that it fully
3 complies with my ruling and what we've talked about here, and
4 I'll get that entered.
5 So that's it for today and for this matter. Thank
6 you.
7 MR. HARRINGTON: Thank you, Your Honor.
8 THE COURT CLERK: All rise.
9 (Time Noted: 3:41 p.m.)
10 * * * * *
11 CERTIFICATE
12 I, RANDEL RAISON, certify that the foregoing is a
13 correct transcript from the official electronic sound
14 recording of the proceedings in the above-entitled matter, to
15 the best of my ability.
16

17
18 ________________________________ October 24, 2023
19 Randel Raison
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25

Exhibit 6M - Hearing Transcript on Chancellor

1 UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
2 SOUTHERN DIVISION

3

IN RE:	.	Case No. 2:13-53846-tjt
	.	Chapter 9
CITY OF DETROIT, MICHIGAN,	.	
	.	
Debtor.	.	
	.	
. . . .	.	

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10 **TRANSCRIPT OF HEARING ON CITY OF DETROIT'S MOTION FOR ENTRY OF AN ORDER ENFORCING THE BAR DATE ORDER AND CONFIRMATION**
11 **ORDER AGAINST DARELL CHANCELLOR**

12
13
14

BEFORE THE HONORABLE THOMAS J. TUCKER
15 UNITED STATES BANKRUPTCY JUDGE

16 WEDNESDAY, OCTOBER 4, 2023
DETROIT, MICHIGAN

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14 Pearland, TX 77584
(713) 637-8864
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23 *Appeared via AT&T Conference Call.

24
Proceedings recorded by electronic sound recording;
25 transcript produced by transcription service.

1 (Time Noted: 1:30 p.m.)
2 THE COURT CLERK: Judge Tucker presiding.
3 THE COURT: Good afternoon to everyone. This is
4 Judge Tucker on the phone.
5 Let's call our case that's scheduled for 1:30
6 p.m., please.
7 THE COURT CLERK: We'll call the matter of the
8 City of Detroit, Michigan, case number 13-53846.
9 THE COURT: All right. Good afternoon again.
10 Let's begin by having entries of appearance for today's
11 hearing, first of all the attorney or attorneys for the City
12 of Detroit.
13 MR. SWANSON: Good afternoon, Your Honor. Marc
14 Swanson from Miller Canfield on behalf of the City of
15 Detroit.
16 THE COURT: All right. Good afternoon to you.
17 And the attorney for the Respondent, Darell
18 Chancellor, please?
19 MR. JOHNSON: Good afternoon, Judge. Ven Johnson
20 on behalf of Mr. Chancellor.
21 THE COURT: All right. Good afternoon to you.
22 And let me ask for the record, is there anyone else on the
23 phone who wants to enter an appearance in this case today?
24 (No response)
25 THE COURT: I hear nothing. So good afternoon.

1 This is the further continued hearing, continued from a week
2 ago to today, Wednesday afternoon of last week, regarding the
3 City of Detroit's motion for entry of an order enforcing the
4 bar date order and confirmation order against Darell
5 Chancellor.
6 For the record, that motion is filed at docket
7 number 13691 on the Court's docket in this case.
8 I have reviewed the motion, the response filed to
9 the motion by Mr. Chancellor, and the reply brief, or reply
10 filed by the City in support of the motion, plus the exhibits
11 that were filed with those papers.
12 So good afternoon. Let's hear from each side.
13 I'll begin with counsel for the moving party, Mr. Swanson.
14 MR. SWANSON: Thank you, Your Honor. Marc
15 Swanson, Miller Canfield, on behalf of the City.
16 Your Honor, the Plaintiff raises two arguments in
17 response to the City's motion, both of which fail.
18 The first argument is that the claim arose pre-
19 petition under the fair contemplation test. Plaintiff's
20 response in paragraphs 43 and 44 are the only two substantive
21 responses to the City's assertion that the fair contemplation
22 test applies and that the claim arose under it prepetition.
23 Plaintiff's response, however, is based on the
24 accrual test. In paragraphs 43 and 44 of the response,
25 Plaintiff argues that the accrual test applies and that the

1 Plaintiff could not have filed a claim until the conviction
2 was vacated in 2020.
3 Now, Plaintiff's argument for the accrual test,
4 and the argument that a claim did not arise until a
5 conviction was vacated, have been rejected by this Court in
6 prior opinions and by the District Court here.
7 District Court Judge Michelson in *Monson,* District
8 Court Judge Borman and Burton, District Court Judge Lawson
9 and Sanford, and also in the *General Motors* bankruptcy case,
10 which I believe was cited in the *Sanford* opinion.
11 In each of those cases, with very similar facts,
12 the District Court held that the claim was discharged.
13 Now, with respect to the facts in this case, all
14 of the key events occurred prior to the City's bankruptcy
15 case.
16 On November 1 of 2011, Chancellor alleges that he
17 was not there when surveillance was performed on, allegedly,
18 his mother's house.
19 He also says on that date, you know, the
20 description was way off. The person -- he weighed 180
21 pounds. The person -- or the person allegedly surveilled
22 weighed 180 pounds. He wore -- he weighed 245 pounds and had
23 glasses on.
24 November 2, 2011, is the date of the alleged false
25 affidavit.

1 May of 2012 is the date when Chancellor was
2 arrested.
3 Chancellor was tried in November of 2012. He was
4 convicted in November of 2012. He was sentenced in December
5 of 2012. He began his sentence in December of 2012.
6 And in 2013, before the City filed for bankruptcy,
7 Mr. Chancellor also filed an appeal.
8 All along the way, Chancellor was proclaiming his
9 innocence, as evidenced by court filings and deposition
10 testimony. And let's go through some of those court filings
11 and some of that evidence.
12 So when Chancellor was arrested, Chancellor stated
13 that he knew he was innocent. And how do we know that?
14 Because we can go to his deposition transcript, which was
15 attached as exhibit 6F to the City's motion.
16 He was asked during his deposition, "When you were
17 arrested, did you believe that you were innocent?"
18 His response, "I know I was innocent."
19 This is on Page 49 of the deposition transcript,
20 lines 16 through 18.
21 In that regard, during his deposition,
22 Chancellor's attorney asked him:
23 Question, "Without belaboring the point, Darell,
24 what did it feel like to go to trial and be accused of a
25 crime that you didn't commit?"

1 Answer, "I mean, it felt terrible. It feels more
2 terrible when you get found guilty of something you ain't
3 commit because it's like the justice system has failed you."
4 And that's his deposition transcript page 78,
5 lines 10 through 18.
6 During his trial, Chancellor testified and
7 proclaimed his innocence. And how do we know that? We can
8 turn to exhibit 6B, which is the trial transcript. He said
9 that the drugs were not his. He said that the guns were not
10 his. And he said it couldn't have been him because the
11 person who was identified in the affidavit was not him
12 because he was shorter and heavier. And that's page 78
13 through 84 of the trial transcript.
14 Mr. Chancellor also sent a letter to the judge who
15 was presiding over the State Court case, Judge Hathaway. In
16 that letter he said he had, quote, "Been locked up for six
17 months for something I know nothing about. The police got
18 the wrong person. The evidence and the facts will show that
19 I haven't did anything." That's exhibit 6H to the City's
20 motion, Your Honor.
21 On November 12, 2012, Chancellor was found guilty
22 of possession of cocaine. According to Chancellor, and in
23 the second amended complaint in the Federal Court action,
24 Judge Hathaway explicitly relied on Geelhood's false
25 statement that identified Chancellor as the person who was

1 seen selling drugs from the target address. Chancellor, of
2 course, denied during the trial and on appeal that Geelhood
3 had correctly identified him.
4 Chancellor was then sentenced on December 12,
5 2012, to a term of 14 years and 3 months to 30 years of
6 imprisonment.
7 Chancellor's attorney asked him what it felt like
8 to be, quote, "Wrongfully convicted." "Every single day, the
9 question, every single day you're in that prison cell, jail
10 cell, precinct cell, being accused and ultimately wrongfully
11 convicted of doing something you didn't do, Darell, every
12 day, all day. What did it feel like?"
13 Answer, "It felt terrible -- it feels terrible
14 when you know you ain't do something but you convicted for
15 it. It was."
16 And that is from Mr. Chancellor's deposition
17 transcript on page 83 and 84.
18 On January 18, 2013, Chancellor appealed his
19 conviction, and his conviction was later affirmed, and the
20 Court of Appeals rejected his argument that he was a victim
21 of a mistaken identity.
22 Your Honor, Chancellor's claim arose pre-petition
23 long before his conviction was vacated.
24 Again, Chancellor argues that his claim against
25 the City did not arise until his conviction was vacated in

1 March of 2020. That is the accrual test, Your Honor.
2 But as this Court has ruled, and the District
3 Court has uniformly ruled, the accrual test is not the test
4 to determine when a bankruptcy claim arises. The test to
5 determine when a bankruptcy claim arises is the fair
6 contemplation test.
7 Again, this exact same argument that Mr.
8 Chancellor raises has been raised repeatedly, and denied.
9 With respect to the District Court cases. I think
10 the *Sanford* case stated it quite well. In that case the
11 Court said, referring to *Sanford*, he certainly contemplated
12 the factual bases underlying the claims raised in the
13 complaint since he attempted repeatedly to argue actual
14 innocence before the State Courts since at least 2008
15 insisting that his confession was falsely obtained,
16 concocted, and coerced.
17 *Sanford* correctly points out that he could not
18 have sued the City until his convictions were set aside,
19 which did not happen until after the bankruptcy.
20 But the courts that have considered the question
21 uniformly have concluded that claims based on pre-petition,
22 malicious prosecutions, were barred, notwithstanding that the
23 plaintiff could not file suit on his claims until his
24 criminal conviction was overturned.
25 The Court in *Monson* and *Burton* and this Court have

1 all had very similar rulings and findings, and there are no
2 facts in this case which could cause the Court to come to a
3 different conclusion.
4 In short, Your Honor, under the fair contemplation
5 test, Chancellor's claim arose before the City's bankruptcy
6 filing, because prior to the City's filing Chancellor could
7 have ascertained through the exercise of reasonable due
8 diligence that he had a claim against the City.
9 Your Honor, the second argument that was raised by
10 Mr. Chancellor in his response to the City's motion was
11 regarding raising discharge as an affirmative defense.
12 Now, Chancellor cited a Sixth Circuit case,
13 *Makowski,* for the proposition that the City had an
14 affirmative obligation to cite bankruptcy discharge as an
15 affirmative defense.
16 And Chancellor is wrong on a few levels here.
17 First, that decision was issued in 2005, and since
18 then, the Federal Rules of Civil Procedure have been amended
19 and they no longer require that discharge be raised as an
20 affirmative defense.
21 The City cited and quoted the Advisory Committee
22 notes which explain quite clearly why discharge and
23 bankruptcy was deleted from the list of affirmative defenses
24 and why discharge and bankruptcy does not need to be raised
25 as an affirmative defense.

1 If that weren't enough, Your Honor, this Court has
2 had the chance to consider a similar argument in a previous
3 case.
4 And this court, citing to another Sixth Circuit
5 case, decided later, *Hamilton v. Hertz*, 540 F. 3d 367. And
6 this Court said, quote, "Even if the City had delayed raising
7 the bankruptcy discharge until after suffering an adverse
8 judgment on the Respondent's claims in the District Court
9 case, the City could not be deprived of the benefit of the
10 bankruptcy discharge. Any such adverse judgment would be
11 deemed void *ab initio* under binding case law in the Sixth
12 Circuit."
13 And, again, I don't think we need to go any
14 further than that to see that the Plaintiff's argument that
15 the City had to raise bankruptcy discharge as an affirmative
16 defense fails, Your Honor.
17 In short, Your Honor, there were two arguments
18 raised by the Plaintiff here, both of which have been
19 rejected repeatedly.
20 No court that I'm aware of has applied the accrual
21 test to these facts and I think many courts have commented
22 that the accrual test has been uniformly rejected.
23 And the second argument that the Plaintiff makes
24 is based on a Sixth Circuit case that is no longer applicable
25 because the rule cited by that case has been revised.

1 And this Court has also had the opportunity to
2 consider a similar argument, and based on the Sixth Circuit
3 case, *Hamilton*, how that the City had no obligation to raise
4 discharge as an affirmative defense.
5 And thus, both of these arguments fail and the
6 City would respectfully request that the Court enter an order
7 granting its motion.
8 THE COURT: All right. Thank you, Mr. Swanson.
9 Mr. Johnson, I'll hear from you now, please.
10 MR. JOHNSON: Thank you, Judge. Good afternoon.
11 We'll say that never did I think I would be arguing a motion
12 in Bankruptcy Court, so I appreciate the Court's indulgence.
13 When I hear the City argue about fair
14 contemplation tests it sounds so, under these circumstances,
15 so unfair under the facts and circumstances that existed for
16 Darell Chancellor.
17 It's "Darell," to correct the record. Darell
18 Chancellor.
19 As the Court knows, my client's conviction was
20 vacated on March 24, 2020. And I understand about what
21 accrual test means.
22 And for the record, and I know the Court knows
23 this probably, and that is for his lawsuit Darell Chancellor
24 had no lawsuit, had no claim, had no recognizable injury,
25 until his conviction was vacated; hence wrongful conviction.

1 How it works, and what would be inherently unfair
2 and unjust, would be for someone to argue, or to be
3 successful in arguing, that although my client did not have a
4 valid cause of action, and while he is falsely in prison
5 serving a wrongful sentence, like he was from December of
6 2012 through even the petition date, Judge, of July 18, 2013.
7 So, in other words, for those eight months, if we
8 were to use those dates, that somehow after his wrongful
9 conviction he was suppose to know, while he's serving in
10 state prison, that it was somehow fair that he should have
11 contemplated to watch the City of Detroit's bankruptcy
12 proceedings to know that no one, no layperson would ever
13 know, let alone a convicted -- a wrongfully convicted person
14 in state penitentiary, would ever know that he had to file a
15 claim under the bankruptcy even though he hadn't been -- his
16 conviction hadn't been acquitted -- or hadn't been entered
17 yet.
18 So when I hear the term "fair contemplation test,"
19 trying to attach that issue to this set of cases, is
20 absolutely, from my perspective, legally laughable.
21 I can read these other opinions. I cannot believe
22 -- and I read it, so I know it happened, what the other
23 courts have said. I can't -- I wasn't there and I didn't
24 argue it, and I'm really sad to see what they said, but that
25 is not, in and of itself, binding on this Court, as I

1 understand it.
2 And so how was it that Mr. Chancellor, wrongfully
3 serving a -- at that time for eight months a prison term on
4 something that ultimately he was found acquitted of years
5 later, yet he was supposed to know bankruptcy law. He was
6 supposed to get notice of the City of Detroit's bankruptcy
7 itself. It's not like the City sent it to him or that
8 anybody in prison would ever know that.
9 So there is no fair contemplation test that passed
10 here, Judge. It's not fair for this -- for the City to argue
11 that his claim is barred before he had a claim, before he
12 even would know of a bankruptcy, because he's removed from
13 society. There's no showing by the City that he should have
14 known about this, because there can be none.
15 And when we talk about fairness, then we can talk
16 about affirmative defenses. And affirmative defenses, the
17 way that they've always been interpreted as a 9 or 10-year
18 former defense lawyer, they're legal defenses that should be
19 raised immediately so that we can have these discussions and
20 these fights, if you will, beforehand.
21 And then in the event that there's need for
22 factual development, then we could -- we could have that
23 during discovery. And in this particular case there is no
24 other argument that a bankruptcy is a legal defense.
25 In a weird way, what I believe, going back to fair

1 contemplation test, Judge, of my client, notice that my
2 client's lawyers, me and my firm, who do civil rights
3 litigation, not just in Michigan, but across the country, we
4 never filed a motion or any claim with the City of Detroit
5 because we never, ever expected that such an argument would
6 be made that something that happened, a petition while my
7 client was in prison, wrongfully, seven years before he was
8 -- his conviction was vacated, that we should do something on
9 his behalf, because we never believed, nor should we, in my
10 opinion, had believed that this claim was ever barred.
11 So to hold that my client had -- should have
12 fairly contemplated such a thing when his pretty
13 sophisticated lawyers didn't contemplate it, because no way
14 would we think it could apply, is, again, I believe,
15 something that the City fails to show as a matter of law.
16 And so we'd ask the Court under these
17 circumstances, and not identical to other cases that I'm
18 aware of, but obviously the City will say that they're
19 similar, that's their opinion, but under these circumstances,
20 Judge, we believe that as a matter of law to hold Mr.
21 Chancellor that he fairly could contemplate the City's
22 bankruptcy when he was pursuing his appeal -- which is what,
23 by the way, his lawyer did, and I might add again on his
24 behalf, lawyers involved in filing an appeal from SADO, just
25 so the, so the Court knows, no one ever advised Mr.

1 Chancellor, nor should they have for that matter, that he
2 should have filed a claim with the -- for the City's
3 bankruptcy, if you will, with the Bankruptcy Court, while
4 they're fighting an appeal.
5 And then there was another appeal even after that,
6 I might add. And there was also a District Court action, a
7 habeas corpus.
8 So you had multiple layers of lawyers involved, no
9 one ever told him that, but somehow he's supposed to have
10 figured out on his own while he is wrongfully serving prison
11 time back in late 2012 and 2013.
12 So we ask the Court to please deny this motion.
13 Thanks, Judge.
14 THE COURT: Mr. Johnson, a question. You may have
15 -- and I may understand this incorrectly, but I thought I
16 heard you in your argument just now to suggest, among many
17 other things, that Mr. Chancellor being in prison at the time
18 the City filed its bankruptcy case in July of 2013, and in
19 jail thereafter for some time, that he wouldn't have known of
20 the City's bankruptcy.
21 If that -- if you're making that argument or that
22 claim now, that's the very first time Mr. Chancellor has made
23 that argument to this Court.
24 There's nothing at all about that in the written
25 response filed to the City's motion here. Nothing. No

1 argument about that at all, no assertion of that at all. Are
2 you saying -- are you trying to argue that now?
3 MR. JOHNSON: Well, absolutely, Judge. The City
4 has failed, as the moving party, has to obviously prove that
5 he did have notice. And they've shown nothing of what notice
6 would have been made knowable to Mr. Chancellor, and that
7 would be a crucial element of the fair contemplation test.
8 What has the City shown this Court to rule as a
9 matter of law that my client knew or should have known about
10 the City's petition and the bar date of 7/18/13? They've
11 done nothing. They're simply arguing that. So their
12 argument is, in essence, no different than mine.
13 THE COURT: All right. So I should -- you think I
14 should accept that as one of your arguments and consider the
15 merits of it even though it's being raised for the first time
16 in this oral argument and wasn't raised in the written
17 response?
18 MR. JOHNSON: Judge, we argued in our written
19 response that, if you will, that there's no way that Mr.
20 Chancellor knew about this or could know about this.
21 So I don't think -- maybe it wasn't stated exactly
22 how I just stated it, but I think the argument is the same.
23 So I don't believe it's being raised, if you will, for the
24 first time.
25 But again, that's the City's burden, Judge, when

1 they're moving as a matter of law on this.
2 THE COURT: Mr. Johnson, where in your written
3 response did you argue anywhere that there's no way that Mr.
4 Chancellor knew or could have known of the bankruptcy? I
5 didn't see that in there anywhere. Maybe I'm missing it.
6 Where is it?
7 MR. JOHNSON: Well, I guess first and foremost,
8 Judge, how would somebody in prison ever know about
9 bankruptcy proceedings anywhere as a matter of common sense,
10 first and foremost?
11 THE COURT: Mr. Johnson, excuse me.
12 MR. JOHNSON: Yes, sir.
13 THE COURT: Excuse me. That's not my question.
14 Answer my question. Where is it in your written paper?
15 Anywhere?
16 MR. JOHNSON: Well, on page 14, Judge, I'm looking
17 at paragraph 47 of my brief.
18 THE COURT: Hold on.
19 MR. JOHNSON: Even if Chancellor could -- I'm
20 sorry.
21 THE COURT: Hold on a minute.
22 MR. JOHNSON: Yes, sir.
23 THE COURT: Your response is filed, just for the
24 record, as docket 13699. Where are you pointing to in there
25 now?

1 MR. JOHNSON: On page 14, Judge, in paragraph 47.
2 THE COURT: Wait a minute. Page 14? There's no
3 Page 14.
4 MR. JOHNSON: Sorry, Judge. I apologize to the
5 Court. I was looking at the wrong thing. I apologize to the
6 Court.
7 THE COURT: So what's the answer? Is it in there
8 somewhere, or not?
9 MR. JOHNSON: Your Honor, I'm looking for it. As
10 I said to the Court, I don't think it was stated exactly how
11 I said it. But I'm reviewing it right now, Judge. I
12 apologize to the Court.
13 THE COURT: That's fine. Take your time.
14 MR. JOHNSON: Thank you, sir.
15 (Brief pause)
16 MR. JOHNSON: Let me double check that I have the
17 right thing now, Judge. Yes, Your Honor. In page 6, please,
18 under Roman numeral III argument.
19 THE COURT: I see page 6. Go ahead.
20 MR. JOHNSON: Thank you, Judge. 43, of course
21 these allegations are denied and Plaintiff's claim did not
22 accrue until his conviction was vacated on March 24, 2020;
23 44, it is undisputed -- it is disputed that under the fair
24 contemplation test Mr. Chancellor could have ascertained
25 through the exercise of reasonable due diligence that he had

1 a claim against the City. His claim did not accrue until it
2 was found that Officer Geelhood had committed fraud obtaining
3 the search warrant.
4 So what I said to this Court was exactly, fair --
5 under the fair contemplation test it is not fair, nor
6 established, that he could have ascertained through exercise
7 of reasonable due diligence that he had a claim against the
8 City.
9 And as the City told the Court in its argument,
10 they knew that Mr. -- as it pertains to this proceeding, they
11 knew that my client, Mr. Chancellor, was in prison starting
12 in December of '12 is what counsel told the Court, December
13 of 2012, which, of course, is about seven months before the
14 petition.
15 So I believe, yes, Judge, that we did present this
16 argument exactly in that fashion.
17 And I'm looking on Page 7 --
18 THE COURT: I don't -- I'm sorry. I'm sorry, I
19 don't see how paragraph 43 or 44 contains an argument or
20 asserts that Mr. Chancellor did not know of the City's
21 bankruptcy case.
22 MR. JOHNSON: Page 7, if I could, Judge, please,
23 in paragraph 45.
24 THE COURT: Well, all right. So now we're moving
25 to paragraph 45. Go ahead.

1 MR. JOHNSON: It is denied that the plan's
2 discharge provision applies to Mr. Chancellor as he did not
3 have a responsibility to file a proof of claim, as he did
4 not, under the fair contemplation test, have a reason to file
5 such a claim.
6 THE COURT: Yes.
7 MR. JOHNSON: So we were specifically arguing
8 about the fair contemplation test at the time when the
9 petition date was filed, 7/18/13, Judge.
10 THE COURT: Well, I think at least it's arguable,
11 anyway, that the fair contemplation test concerns whether in
12 this case Mr. Chancellor could have ascertained through the
13 exercise of reasonable diligence, due diligence, that he had
14 a claim against the City of Detroit having to do with this
15 wrongful conviction that he's been -- that he's alleged, not
16 whether he could have exercised, through reasonable due
17 diligence or otherwise, he could have ascertained that the
18 City had filed bankruptcy. That's a -- that's really a
19 different issue, isn't it?
20 MR. JOHNSON: I see it, Your Honor, as in an
21 exercise of due diligence did Mr. -- or should Mr. Chancellor
22 have known that he had a claim? He did not have a claim at
23 that time.
24 His claim that he had never materialized until
25 3/24/20, when his conviction was vacated. So he had no

1 claim. There was no claim to assert yet, and that's why the
2 accrual test is important under the facts and the
3 circumstances of this analysis.
4 It does matter because it absolutely, definitively
5 goes to what a normal person, or in this case, forgive me, a
6 reasonable person, with a good caveat again of this person
7 being in a federal penitentiary, wrongfully, should know
8 relative to what claim was he supposed to have filed when he
9 didn't have a claim, yet.
10 So in other words, he's supposed to file a
11 bankruptcy claim while he's in federal -- or state prison, in
12 July or so of 2013, even though he does not have a valid
13 cause of action, nor does he know that he's going to get one,
14 because many people obviously believe, and I guess I think
15 the evidence shows that many people are innocent yet
16 convicted, and yet, under this area of law he has nothing, no
17 claim until he gets it vacated, which is a huge process, as
18 the Court probably knows.
19 But he ultimately is -- his claim does accrue on
20 3/24/20, yet again, seven years before that, he's supposed to
21 know to file a bankruptcy.
22 I think that that flies in the face of truth and
23 logic. Most lay people don't know this, let alone somebody
24 who's now in a prison sentence for serving something for a
25 crime they didn't commit, that they're now supposed to figure

1 that out on their own.
2 THE COURT: All right. I think, you know, you're
3 going over ground you've already tread, and we got onto this
4 discussion when I was asking about an apparent argument
5 you're making today for the first time, I think, that Mr.
6 Chancellor did not have notice or knowledge of the City's
7 bankruptcy case.
8 Is there anything more you want to say about that
9 specific issue?
10 MR. JOHNSON: No, Judge. Thank you.
11 THE COURT: All right. Well, thank you, Mr.
12 Johnson.
13 Mr. Swanson, as I normally do, I'll give you a
14 brief opportunity as the moving party here to reply in
15 support of the motion, if you want.
16 MR. SWANSON: Thank you, Your Honor. Marc Swanson
17 on behalf of the City.
18 There was no argument about notice in the
19 Plaintiff's response. If Chancellor wanted to make an
20 argument about notice, you would think that at least once in
21 the response he would have used the word "notice," and notice
22 is not used at all in the response.
23 You know, similar arguments were made in *Burton*
24 and *Monson,* and in each of those cases the Court found that
25 plaintiff was an unknown creditor and the constructive notice

1 that was provided during the City's bankruptcy case with
2 respect to the bar date order, the plan, and the confirmation
3 order, which this Court has found time and time again to have
4 been valid, to constitute adequate notice.
5 With respect to fair contemplation. Mr. Johnson
6 said, you know, there was no lawsuit, there was no claim.
7 And I can agree, perhaps, that there wasn't a lawsuit until
8 2020, but there certainly was a claim. There was a
9 contingent claim.
10 One of the orders that we cited in our papers was
11 this Court's order in the Desmond Ricks matter, which the
12 Court held an oral argument on in 2019.
13 And during that oral argument a very similar
14 argument was asserted by the plaintiff's counsel and the
15 Court correctly said that that it was a contingent claim,
16 that even if under applicable state or federal law a claim
17 did not accrue until a conviction was vacated. For
18 bankruptcy purposes that's not the test.
19 The test is when the claim was fairly
20 contemplated, and it was fairly contemplated far before, and
21 at that point the plaintiff had a contingent claim, and that
22 should be what the Court finds here.
23 With respect to Plaintiff's argument on
24 affirmative defenses. Plaintiff raised nothing new.
25 Plaintiff didn't distinguish this Court's prior opinion,

1 didn't distinguish the Sixth Circuit's opinion in *Hamilton*,
2 and didn't attempt to rescue the citation to a old Sixth
3 Circuit case which cited a prior version of a rule which is
4 no longer applicable.
5 For those reasons, Your Honor, the City would
6 respectfully request that the Court enter an order granting
7 its motion.
8 THE COURT: All right. Thank you. One moment,
9 please.
10 (Pause)
11 THE COURT: All right. Thank you, both. I'm
12 going to do what I hope is a fairly brief and concise oral
13 ruling now on this motion. One moment.
14 (Pause)
15 THE COURT: All right. Thank you.
16 The motion has been argued both in writing and
17 orally in today's hearing, the motion by the City of Detroit,
18 for entry of an order enforcing the bar date order and
19 confirmation order against Darell Chancellor, or Darell
20 Chancellor, I think it might be pronounced.
21 For the record, again, that motion is docket
22 number 13691.
23 The respondent, Mr. Chancellor, through counsel,
24 filed a response to the motion, written response. The
25 response was filed at docket number 13699 on the Court's

1 docket.
2 The Court has reviewed that response, the exhibits
3 that were filed with it, as well as the exhibits filed with
4 the City's papers, as well as the City's reply brief at
5 docket 13714, and I have considered the arguments in today's
6 -- made in today's hearing.
7 The first thing I'll cover and I'll say is that
8 this Court, the Bankruptcy Court here, has subject matter
9 jurisdiction over this matter, and this matter is a core
10 proceeding in which this Court has authority and jurisdiction
11 to make a final decision on the motion.
12 The authority for that I won't go into great
13 detail about. What I'll do is cite and incorporate by
14 reference what I said in a couple of prior opinions in this
15 case about the subject of jurisdiction, core proceedings, and
16 those subjects, and also about the -- in these opinions about
17 the fact that this Court, in the plan of adjustment that was
18 confirmed by the Court, this Court retained jurisdiction to
19 rule on the very types of motions and disputes that's before
20 me with this motion and if necessary to enter injunctions to
21 further enforcing the confirmed plan of adjustment and other
22 orders of the Court in this case.
23 The earlier opinions of mine that cover this are,
24 first of all, the case of *In re City of Detroit, Michigan*,
25 548 Bankruptcy Reporter 748, a decision of mine from 2016

1 that's published, and that -- in particular, pages 753 and
2 754 of that opinion.
3 Again, I incorporate that discussion in the
4 section called Roman numeral II, Jurisdiction, in that
5 opinion by reference here and adopted and applied it in this
6 case, as well.
7 A second opinion on this subject is the decision
8 the Court made just a couple weeks ago, on September 18,
9 2023. That's the case -- again it's *In re City of Detroit,*
10 *Michigan*. It's not yet published in the Bankruptcy Reporter
11 as far as I know, but it is published. It's reported at 2023
12 WestLaw 6131465. It's also an opinion that is filed in this
13 bankruptcy case. It's at docket number 13738. Again, it's
14 September 18 of 2023.
15 The WestLaw citation for the jurisdictional
16 provisions is star pages 6 to 7. The citation of the version
17 that's published, or that's filed on the Court's docket at
18 13738, is .pdf pages 13 to 14 of that opinion.
19 Again, I incorporate by reference what the Court
20 said there about subject matter jurisdiction, core
21 proceedings, the Court's authority to make a final
22 determination in this kind of matter.
23 Moving to the merits now of this dispute.
24 First of all, I do find and conclude that the --
25 from the undisputed facts that the claims alleged against the

1 City of Detroit and against Office Steven Geelhood in his
2 representative capacity, in the cases that are now pending in
3 the U.S. District Court for this District, those cases, the
4 two cases are the ones cited in the City's motion at page 5,
5 paragraphs 12 and 13, copies of complaints from those cases
6 are Exhibit 6B and 6C of the City's motion.
7 Those claims alleged against the City and against
8 Officer Geelhood in his representative capacity in those
9 cases were, in fact, discharged by the discharge in the
10 City's confirmed plan of adjustment, and Mr. Chancellor is,
11 in fact, barred and enjoined from filing and prosecuting
12 those claims.
13 That is distinct from the claims, any claims
14 alleged against Officer Geelhood in his -- solely in his
15 individual capacity. Those were not -- they were not
16 discharged and are not enjoined. So there is that
17 distinction, and that's a distinction that was raised in the
18 written response filed by Mr. Chancellor.
19 These claims against the City and Mr. Geelhood in
20 his representative capacity all arose before the bankruptcy
21 petition was filed in this Chapter 9 case on July 18, 2013,
22 and, therefore, were discharged.
23 First of all, the fair contemplation test that the
24 parties have argued about does indeed apply, as opposed to
25 the so-called accrual test. I have already ruled that way in

1 prior opinions, and I reiterate that ruling now that the fair
2 contemplation test is the appropriate test to determine
3 whether a claim arose before or after the filing of a
4 bankruptcy petition.
5 A couple of places where I have ruled that way is,
6 first of all, in the City of Detroit case that I cited
7 earlier. The one that's 548 Bankruptcy Reporter 748, at page
8 763 of the Court's opinion.
9 In that case I ruled that the fair contemplation
10 test is the appropriate test to apply, and I discussed what
11 that test meant, and I incorporate that discussion and the
12 authority cited in that opinion by reference.
13 And the Court has applied that test in other -- in
14 deciding other motions in this bankruptcy case. But that's
15 really the leading case, by me at least, on that subject.
16 The fair contemplation test raises -- sets the
17 standard as being that a claim is considered to have arisen
18 pre-petition if the creditor could have ascertained through
19 the exercise of reasonable due diligence that it had a claim
20 at the time the bankruptcy petition is filed.
21 In my view, the answer here is clearly that, yes,
22 indeed, Mr. Chancellor could have, with the exercise of
23 reasonable diligence, ascertained that he had a claim against
24 the City of Detroit and against Mr. Geelhood in at least in
25 his representative capacity, before the City filed its

1 bankruptcy petition on July 18, 2013.
2 That's based upon the facts and events that
3 occurred that contribute to give rise to Mr. Chancellor's
4 claims.
5 The events that occurred in November 2011, May
6 2012, November 2012, including the conviction in the state
7 court, criminal conviction of Mr. Chancellor that occurred on
8 November 12 of 2012 for which he was sentenced to prison on
9 December 12 of 2012 and promptly thereafter did go to prison.
10 These events are described in detail, and I think
11 accurately so, in the City's motion. Again, docket 13691 at
12 paragraphs 20 to 38 of the motion.
13 Given those facts and events, all of which
14 occurred well before the City filed its bankruptcy petition
15 in July of 2013, it's clear to me that under the fair
16 contemplation test Mr. Chancellor could have ascertained
17 through the exercise of reasonable due diligence that he had
18 a claim against the City and against Mr. Geelhood in his
19 representative capacity before the petition was filed in this
20 bankruptcy case.
21 This test and this issue, that is whether the
22 claim arose pre-petition or not, is a distinct test and a
23 distinct issue from the question of whether or not a claimant
24 like Mr. Chancellor knew, or should have known, about the
25 City having filed bankruptcy, which is a different issue, and

1 I'm going to talk about that in a little bit.
2 This test -- this issue focuses on not that issue
3 but whether, rather, on whether the claimant, like Mr.
4 Chancellor here, could have ascertained with the --
5 reasonably ascertained or ascertained through the exercise of
6 reasonable due diligence that he had a claim at the time the
7 petition was filed.
8 The answer to that here is, yes, it's clear that
9 Mr. Chancellor knew of and believed to be true all the facts
10 that are recited in the City's motion that occurred before
11 the petition date.
12 He certainly knew, or thought he knew, and he
13 believed, that he was the victim of a wrongful conviction,
14 that he was the victim of a conviction that was obtained
15 through what he viewed at the time as false testimony by
16 Officer Geelhood, both in an affidavit that gave rise to --
17 that was used to get a search warrant at Mr. Chancellor's
18 mother's house in November of 2012, all the way through the
19 trial testimony of Officer Geelhood, that Mr. Chancellor
20 viewed as false.
21 He not only knew that and thought these things at
22 the time, but he also argued these things vociferously to the
23 courts, the state trial court, the State Court of Appeals, on
24 the appeal that he filed shortly after he filed his
25 conviction, and before -- and that appeal was filed before

1 the bankruptcy case was filed, as well.
2 The claims arose pre-petition here under the fair
3 contemplation test even though Mr. Chancellor's 2012
4 conviction, criminal conviction, was not vacated until March
5 24, 2020, and which, of course, was the date that was well
6 after the filing of the City's bankruptcy case in 2013.
7 Mr. Chancellor argues that his claims at issue did
8 not arise until his conviction was vacated in March of 2020
9 because his claims or cause of action under applicable law
10 did not accrue until that conviction was vacated in March of
11 2020.
12 This is, in effect, an argument seeking to --
13 asking the Court to apply the so-called right to payment or
14 accrual test for determining when a bankruptcy claim arose.
15 That accrual test is discussed by this Court in
16 its decision -- or opinion that I just cited a moment ago
17 about the fair contemplation test, 548 Bankruptcy Reporter,
18 at page 762.
19 And as the Court notes there, I think accurately
20 so, and it's still accurate, that test has been widely
21 rejected by the courts as not an appropriate test for -- not
22 the appropriate test for determining when a claim arises,
23 whether it arises before or after the bankruptcy.
24 As the City, I think, has correctly argued, as of
25 the bankruptcy petition date in this case, July 18, 2013, Mr.

1 Chancellor had a claim as that claim -- the term claim is
2 defined under the Bankruptcy Code, it's Section 101 of the
3 Bankruptcy Code, even though the claim at that time was
4 contingent, or unmatured, or both, because the claim could
5 not be pursued until the conviction was vacated later.
6 Contingent claims, unmatured claims, are expressly
7 part of what is a claim within the meaning of the Bankruptcy
8 Code for purposes of determining whether a claim arose pre-
9 petition or post-petition.
10 And the cases in which I've discussed that include
11 the case I cited a moment ago, 548 Bankruptcy Reporter, this
12 time at page 761, and also at page 762 of that opinion.
13 So even though the claim was -- excuse me. Even
14 though the claim was contingent and unmatured as of the
15 bankruptcy petition date, there still was a claim, and it
16 arose pre-petition under the appropriate test, which is the
17 fair contemplation test.
18 There are, as the City points out, a number of
19 similar cases that have applied the fair contemplation test
20 to find in cases and situations very similar to this one that
21 the claimant's claim arose before the filing of the
22 bankruptcy case and, therefore, it was barred and discharged.
23 Perhaps the closest case in terms of facts and the
24 discussion by the Court is the *Sanford* case cited by the
25 City, a decision of the District Court from this District

1 from 2018. That's *Sanford v. City of Detroit*, 2018 WestLaw
2 6331342, a decision from December 4, 2018, by the U.S.
3 District Court, Judge Lawson. It's star page 5 in the
4 WestLaw version of that opinion.
5 The Court discusses this subject, and I think the
6 discussion is applicable equally in this case, and fully
7 supports the Court's ruling now in this case.
8 I do want to talk about this notice issue that was
9 raised for the first time in today's hearing, in my view.
10 There seemed to be an argument or suggestion by
11 counsel for Mr. Chancellor in today's hearing that Mr.
12 Chancellor, who was in state prison, incarcerated in state
13 prison, when the City filed its bankruptcy case, may not have
14 had notice or knowledge of the City's bankruptcy case in time
15 to file a proof of claim, in time to pursue the claim through
16 the bankruptcy process, and at least certainly not as of the
17 bankruptcy petition date, July of 2013.
18 That argument, first of all, is an argument that's
19 made for the very first time in oral argument in the hearing
20 today by Mr. Chancellor. There's no hint of such an
21 argument, in my view, in the written response filed by Mr.
22 Chancellor to the motion.
23 That argument, in my view, then, has been
24 forfeited by Mr. Chancellor.
25 But even if not forfeited, in my view the argument

1 is without merit because of the unknown creditor concept.
2 Now, the City didn't brief this. They have argued
3 it in the hearing today in response to the new argument about
4 notice of the bankruptcy, but this concept and this -- the
5 concept of the unknown creditor is one that's out there in
6 the case law and it's in one of the reported published
7 opinions of this court in this very case. It was published a
8 little more than a year ago now and that is -- one moment.
9 That's the -- that's the case of *In re City of Detroit,*
10 *Michigan,* 642 Bankruptcy Reporter 807, a decision of this
11 Court from August 26, 2022.
12 In that case the Court talked about the unknown
13 creditor concept, beginning at page 810, 642 Bankruptcy
14 Reporter at 810.
15 There, the Court held, as numerous other courts
16 have held, that a creditor in a bankruptcy case that was an
17 unknown creditor, as the concept is defined by the case law,
18 at the time of the bankruptcy filing, is a creditor for which
19 the debtor has no duty to serve notice specifically, of the
20 bankruptcy specifically, upon.
21 But rather, one for whom notice of the bankruptcy
22 case by publication only is sufficient to put the creditor on
23 notice of the bankruptcy case for purposes of due process and
24 other concerns under the law.
25 At pages 810 to 811, at 642 Bankruptcy Reporter, I

1 talk about this concept and applied it in that case. It
2 applies equally here.
3 The concept of an unknown creditor is, one, a
4 creditor in which the claim against the City was readily
5 ascertainable by the City during the relevant time. That is,
6 during the time period as of the filing and thereafter in the
7 bankruptcy case.
8 And by readily ascertainable the case law requires
9 there whether the respondent, the creditor, communicated any
10 demand for payment or otherwise communicated to the City
11 before the bankruptcy was filed, the existence of a claim
12 against the City.
13 If not, then the creditor is deemed an unknown
14 creditor unless -- well, is deemed an unknown creditor and
15 the City may provide sufficient notice of the bankruptcy
16 filing for due process purposes and otherwise by publication.
17 This case of Mr. Chancellor's is a case of an
18 unknown creditor, and that at the time of the City's
19 bankruptcy filing, and at least until 2020 when Mr.
20 Chancellor's conviction was vacated that he filed, first
21 filed suit against the City for wrongful conviction related
22 claims.
23 Until then, he was not a known creditor to the
24 City. His claim, or claims, or existence of claims, were not
25 readily ascertainable by the City during that relevant time

1 period, and that is because there's simply no evidence or
2 argument made in the papers, or even today in the hearing by
3 Mr. Chancellor's counsel that Mr. Chancellor did anything to
4 communicate to the City that he believed he had a claim for a
5 wrongful conviction or wrongful conviction related claim
6 against the City at the time of the bankruptcy filing or any
7 time thereafter until 2020.
8 And so, being an unknown creditor he must be
9 deemed to have been given adequate notice of the City's
10 bankruptcy case by publication.
11 The Court noted in its decision in the earlier
12 case, 640 Bankruptcy -- 642 Bankruptcy Reporter, at 810, 811,
13 the fact the City did provide notice of its bankruptcy case
14 by publication properly.
15 And, of course, the City of Detroit filing
16 bankruptcy was no secret to anyone. It was very widely known
17 throughout the Detroit area, throughout Michigan, throughout
18 the United States, and beyond, at the time. It was the
19 largest municipal bankruptcy ever filed, I think still is,
20 the largest municipal bankruptcy ever filed in this country
21 and received enormous publicity.
22 And so given all of that -- and I should also
23 note, in the absence of any evidence provided by Mr.
24 Chancellor which he alleges or asserts that he didn't know of
25 the City's bankruptcy filing when it occurred, the argument

1 about notice, as I perceive it to have been made today, even
2 if not forfeited, is without merit and I must reject it for
3 the reasons that I have just stated.
4 So given that Mr. Chancellor's claims arose pre-
5 petition under the fair contemplation test, the claims
6 against the City and against Officer Geelhood in his
7 representative capacity were filed -- arose pre-petition
8 here. Those claims were discharged under the City's
9 confirmed plan of adjustment, both under the terms of the
10 plan and the order confirming that plan, that confirmed the
11 plan in November of 2013 -- I'm sorry, no, November 2014.
12 And those provisions are cited and quoted in
13 detail in a prior opinion of this court in the opinion I've
14 just been citing, the 642 Bankruptcy Reporter 807 opinion, in
15 particular at page 812. So I incorporate that reference --
16 that by reference.
17 The claims of Mr. Chancellor against the City and
18 Officer Geelhood in his representative capacity are barred
19 and enjoined under the bar date order that the City has
20 cited, the City's plan, and the order confirming plan. All
21 of that is confirmed by what I wrote at 642 Bankruptcy
22 Reporter, at page 812, among other places in the published
23 opinions of mine, citing those particular provisions in the
24 bar date order of the plan and the order confirming plan.
25 And so the claims are discharged and Mr.

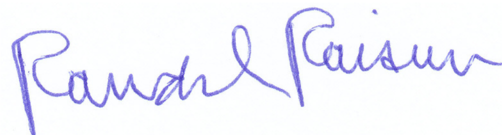
1 Chancellor is barred and enjoined already from pursuing them.
2 I will address briefly the argument of Mr.
3 Chancellor arguing that the City did not assert its
4 bankruptcy discharge as an affirmative defense in either of
5 the cases that are now pending in U.S. District Court, and I
6 presume also an argument that the City unreasonably delayed
7 in raising the issue of the bankruptcy discharge and
8 injunctions in the filing of this motion, and compared to the
9 timing and the time that the U.S. District Court cases have
10 been pending.
11 The City is correct, in my view, in everything
12 that it says and argues in its reply brief at docket 13714,
13 at pages 4 to 6, .pdf pages 4 to 6, of that -- of that brief
14 in responding to and refuting these arguments.
15 This Court held in the 642 Bankruptcy Reporter
16 case, at pages 812 to 813, citing the Sixth Circuit's
17 decision of *Hamilton v. Hertz,* that a bankruptcy debtor, like
18 the City of Detroit, has no duty to raise any sort of
19 affirmative defense or defense, or to do anything, in
20 response to claims being brought against it in a non-
21 bankruptcy court that have been discharged.
22 Any such action and any judgment, adverse judgment
23 suffered on such claims is void *ab initio* under the case law
24 and because of the bankruptcy discharge.
25 And so, it is simply not a valid argument to argue

1 anything like that the City's motion here is barred in any
2 way by the City's failure to plead as an affirmative defense
3 or otherwise raise, timely or otherwise, in the pending U.S.
4 District Court cases the discharge and bar date order and
5 injunction provisions that it's argued in this motion in this
6 Court.
7 And the City is also right that the 2010
8 amendments to Federal Rule of Civil Procedure 8(c)(1) did
9 eliminate from the list of affirmative defenses that had to
10 be pled in federal court actions generally the discharge, a
11 bankruptcy discharge. That's no longer in the rule as an
12 affirmative defense that must be pled for the reasons that
13 I've discussed.
14 And so the Court is bound to reject those
15 arguments by Mr. Chancellor.
16 This Court, this Bankruptcy Court, does have
17 jurisdiction and authority to specifically enjoin Mr.
18 Chancellor's continued prosecution of the claims against the
19 City and the claim against Officer Geelhood in his
20 representative capacity.
21 The Court's opinion from September 18 that I cited
22 -- this year that I cited earlier points that out. It cites
23 chapter and verse in the City's plan of adjustment, confirmed
24 plan of adjustment documents. The plan and the order
25 confirming plan.

1 And for that I'll cite to this Court's decision,
2 2023 WestLaw Reporter 6131465, again at star pages 15 and 7,
3 and again this Court's docket, that's docket 13738, at .pdf
4 pages 31 and 14.
5 And so for these reasons, the Court will grant the
6 City's motion in the form of the proposed order that the City
7 filed with the motion in substance, with one change.
8 And that, Mr. Swanson and Mr. Johnson, the
9 changes, I will go ahead and add a paragraph to what's in the
10 order, the proposed order, that does say, for the record, and
11 I think it's clear and really not disputed, that the order
12 does not apply to claims asserted by Mr. Chancellor against
13 Officer Geelhood in his individual, solely in his individual
14 capacity. I'll add that language myself.
15 So, Mr. Swanson, what I want you to do is simply
16 submit your proposed order as-is with no changes at all.
17 I'll take that and make changes to it, both substantive of
18 the type I just described and non-substantive. Non-
19 substantive being things like in the first paragraph reciting
20 the fact of today's hearing and so forth.
21 So you submit that, I'll waive presentment of
22 that, and I will take the order, revise it, and get it
23 entered, and the motion will be granted on that basis.
24 That's it. Thank you all.
25 (Time Noted: 2:33 p.m.)

1 CERTIFICATE

2 I, RANDEL RAISON, certify that the foregoing is a
3 correct transcript from the official electronic sound
4 recording of the proceedings in the above-entitled matter, to
5 the best of my ability.

6

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8 ________________________________ October 25, 2023
9 Randel Raison
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