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 REPLY IN SUPPORT OF MOTION FOR THE ENTRY OF AN ORDER ENFORCING THE BAR DATE ORDER AND CONFIRMATION ORDER AGAINST MARK CRAIGHEAD

The City of Detroit, Michigan ("City") files this Reply in support of its *Motion for the Entry of an Order Enforcing the Bar Date Order and Confirmation Order Against Mark Craighead* ("Motion," Doc. No. 13803) and in response to *Creditor Mark Craighead's Response in Opposition to City of Detroit's Motion for Entry of an Order Enforcing the Bar Date Order and Confirmation Order* ("Response," Doc. No. 13824). In support of its Reply, the City respectfully states as follows.

I. Introduction

Mark Craighead's ("Craighead") main arguments are that he did not need to file a proof of claim in the City's bankruptcy case because (1) his claims did not mature until his conviction was overturned, and (2) he did not know that the City allegedly had a practice of police misconduct. He also argues that the District Court should be allowed to adjudicate his claim because it has expertise in liquidating these types of claims.

For the first point, Craighead cites older cases from other jurisdictions to try to convince this Court that it and the District Courts that have considered the question settled on the wrong test for determining whether claims arose pre- or post-petition. However, Craighead does not mention that the accrual test upon which his older cases rely "has been widely rejected since it was adopted by the Third Circuit . . . and the Third Circuit itself later rejected this test," as this Court has pointed out. *In re City of Detroit, Mich.*, 548 B.R. 748, 762 (Bankr. E.D. Mich. 2016). None of the judges in the Eastern District of Michigan have adopted the accrual test. Instead, all have adopted the "fair contemplation" test, following this Court.

Assuming this Court continues to follow the "fair contemplation" test, Craighead only makes one erroneous argument as to why he should prevail–he says he could not contemplate that he had a claim against the City as opposed to the individual defendant officers. That argument is, however, contradicted by Craighead's state and appellate court filings where he directly asserted claims against the City years before the City filed for bankruptcy.

Finally, the District Court's expertise in liquidating claims such as those asserted by Craighead would only be relevant if Craighead could first show that he still possessed a claim to be liquidated. He cannot make this showing, though, for the reasons noted above.

Thus, the City's Motion should be granted.

II. Arugment

A. Application of the "fair contemplation" test shows that Craighead's claims arose pre-petition.

1. Courts selected the "fair contemplation" test to determine if a claim arose prepetition after careful consideration.

The "fair contemplation" test is the key issue in this matter. This Court previously described the fair contemplation test in some detail, stating

> [A]s explained in *In re Senczyszyn*, 426 B.R. 250 (Bankr. E.D. Mich. 2010), *aff'd*, 444 B.R. 750 (E.D. Mich. 2011):
>
> > The most widely adopted test, followed by *Parks* and *Dixon*, has been alternately termed the "fair contemplation," "foreseeability," "pre-petition relationship," or "narrow conduct" test. It looks at whether there was a pre-petition relationship between the debtor and the creditor, "such as contract, exposure, impact or privity," such that a possible claim is within the fair contemplation of the creditor at the time the petition is filed.
>
> Under this test, a claim is considered to have arisen pre-petition if the creditor "could have ascertained through the exercise of reasonable due diligence that it had a claim" at the time the petition is filed. This test, which the Court will refer to as the "fair contemplation test," has the advantage of allowing the Court to examine all of the circumstances surrounding a particular claim—the debtor's conduct, the parties' pre-petition relationship, the parties' knowledge, the elements of the underlying claim—and use its best judgment to determine what is fair to the parties, in context. As the *Huffy* court points out, "one approach may not fit all circumstances."

In re City of Detroit, Mich., 548 B.R. 748, 763 (Bankr. E.D. Mich. 2016) (some citations omitted). As noted in *Senczysyn*, a claim arises pre-petition under the fair

contemplation test if "a possible claim is within the fair contemplation of the creditor at the time the petition is filed." *Id.* (quoting *Senczyszyn*, 426 B.R. at 257) (emphasis added). The test does not require a creditor to know with certainty that it has a claim, nor know its exact details. The fair contemplation test balances the needs of bankruptcy law to resolve as many claims as possible with the requirements of due process. If a creditor "fairly contemplates" having a claim against a debtor, it must timely file a proof of claim so that bankruptcy law can achieve its goals.

Courts did not settle lightly on the fair contemplation test. *Id.* at 762; *Signature Combs, Inc. v. United States*, 253 F. Supp. 2d 1028, 1032-38 (W.D. Tenn. 2003). They rejected numerous alternatives along the way, including the accrual or "right to payment" test, before settling on the fair contemplation test (also known as the "foreseeability standard") as the most appropriate. *City of Detroit*, 548 B.R. at 762 (noting that the accrual test has been "widely rejected"); *see also Signature Combs*, 253 F. Supp. 2d at 1033; *In re Dixon*, 295 B.R. 226, 230 (Bankr. E.D. Mich. 2003). Under the fair contemplation test, a claim arises pre-petition if the acts giving rise to it occurred pre-petition and if the creditor has reason to be aware that a claim might lie against the debtor. *Signature Combs*, 253 F. Supp. 2d at 1037-38. Note that "awareness" of a possible claim is less than the "certainty" of having one. Where a creditor knows it has a contingent claim pre-petition, courts do not need the fair contemplation test to require it to file a proof of claim. The need to file is black-

letter bankruptcy law. *E.g.*, *Fidelity & Deposit Co. of Md. v. Hendon (In re Lays Packing Co., Inc.)*, 350 B.R. 420, 428-429 (Bankr. E.D. Tenn. 2006).

Courts have repeatedly applied this test. *E.g., Senczyszyn*, 426 B.R. at 257 (finding a claim arose prepetition because "a *possible* claim was within the fair contemplation of the State of Michigan at the time the petition was filed ") (emphasis added)); *City of Detroit*, 548 B.R. 748 (finding claims by Tanya Hughes and the No Fault Insurance Act claimants arose pre-petition because each clamant could fairly contemplate from its relationship with the City that it might have a claim). Indeed, since 2019, this Court has applied the test at least twice in circumstances similar to those here. Doc. Nos. 13025 (Ricks), 13751 (Chancellor). Transcripts of those hearings are attached to the Motion as **Exhibits 6L and 6M**.

2. The District Court properly applied the fair contemplation test in the *Sanford*, *Monson*, and *Burton* cases.

The District Court has faithfully applied the fair contemplation test in circumstances similar to those here. *Sanford* involved a plaintiff whose conviction had been vacated. *Sanford v. City of Detroit*¸ No. 17-13062, 2018 WL 6331342 at *5 (E.D. Mich. Dec. 4, 2018). Sanford's claims were within his fair contemplation because he knew he was injured pre-petition, as evidenced by his repeated assertions of innocence. *Id.* Further, he insisted his confession was falsely coerced by City police officers, similar to the allegations now leveled by Craighead. *Id.* Thus, he should have fairly contemplated that he had a claim against the City when the City

filed its bankruptcy petition. *Id.* Because he did not file a proof of claim, he was barred from participating in the City's bankruptcy case.

Monson is a similar wrongful conviction case. *Monson v. City of Detroit*¸ No. 18-10638, 2019 WL 1057306 at *6 (E.D. Mich. Mar. 16, 2019). Like Sanford, Monson had asserted his innocence; thus "the eventual invalidation of his conviction was within Monson's fair contemplation prior to the bankruptcy." *Id.* at *8. Like Sanford, his claim also was discharged.

In a third similar case, Burton also asserted his innocence pre-petition, so he was aware that his conviction was wrongful. *Burton v. Sanders*¸ No. 20-11948, 2021 WL 168543, at *4, 6 (E.D. Mich. Jan. 19, 2021). It is not clear from the opinion whether Burton knew that it was the actions of the Detroit Police that led to his conviction, but the Court had no problem concluding that Burton, knowing of his innocence, should have fairly contemplated that the City might be involved. *See id.*

In short, all three District Court cases agreed that prisoners allegedly wrongfully convicted pre-petition in proceedings involving the City of Detroit Police Department should have fairly contemplated that they had claims against the City and filed proofs of claim if they wished to participate in the City's bankruptcy case, and that having failed to do so, their later asserted claims were barred.

3. Craighead admits the fair contemplation test is the correct test, then proceeds to cite cases that do not apply that test, effectively arguing for a return of the "accrual" test.

Craighead readily admits that the fair contemplation test is the one used by courts in this circuit. Response, p. 6. But soon after that, his argument goes awry. He correctly quotes 11 U.S.C. § 101(5) for the definition of a claim in a bankruptcy case, then states that he "had no claim against the City, be it contingent or otherwise, unless and until his conviction was overturned." Response, p. 7. The issue is that Craighead misapprehends the definition of "contingent." As this Court explained,

> A "contingent debt is 'one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor.'" Thus, a right to payment need not be concurrently enforceable in order to constitute a claim that is dischargeable in bankruptcy.

City of Detroit, 548 B.R. at 762 (quoting *In re Parks*, 281 B.R. 899, 901-02 (Bankr. E.D. Mich.)). Here, Craighead held a contingent claim against the City when it filed for bankruptcy, with the "extrinsic event" being the overturning of his conviction. Because he held a contingent claim against the City, Craighead needed to file a proof of claim to preserve and realize on it. He did not.

Craighead continues down this path, noting that, outside of the bankruptcy context, a malicious prosecution claim does not accrue until a conviction has been set aside. Response, pp. 7-8 (citing *Heck* and related cases). He then cites to cases

from other jurisdictions, all but one from 2012 or prior,[1] to suggest that, even for bankruptcy purposes, a malicious prosecution claim only arises when it accrues. Response, p. 9-10. All of these cases rest on some form of the "right to payment" or "accrual test," though, which this Court noted has been repeatedly rejected. As this Court wrote,

> Th[e "right to payment"] test has been widely rejected since it was adopted by the Third Circuit in *Avellino & Bienes v. M. Frenville Co., Inc. (In re Frenville Co., Inc.)*, 744 F.2d 332 (3rd Cir.1984), and the Third Circuit itself later rejected this test. *See Jeld–Wen, Inc. v. Van Brunt (In re Grossman's, Inc.)*, 607 F.3d 114, 120 (3rd Cir.2010) (citations omitted) (overruling the "right to payment" test, and noting that "[t]he courts of appeals that have considered *Frenville* have uniformly declined to follow it").

City of Detroit, 548 B.R. at 762-63. The assertion that malicious prosecution claims cannot exist for bankruptcy purposes until they accrue is, by definition, an argument for a return to the accrual test. Craighead's citation to older cases cannot reinstate the accrual test, however.

Indeed, Craighead concedes that "The City cites a number of cases that come out the other way" (Response, p. 11), though he glosses over the fact that all are from this district. Craighead claims these cases are all distinguishable. His argument

[1] The exception is *McAtee v. Morrison & Frampton, PLLP*, 405 Mont. 269 (2021), cited at ECF 22, PageID.1165. The case, however, draws its holding from *Johnson v. Mitchell*, No. CIV S-10-1968 GEB, 2011 WL 1586069 (E.D. Cal. Apr. 25, 2011), which is among the other cases Craighead cites. *McAtee*, 405 Mont. at 274-75.

appears to run as follows: (1) after applying the fair contemplation test, the *Sanford* opinion cites the *Motors Liquidation* bankruptcy case as an example to reinforce its point; (2) Craighead believes *Motors Liquidation* can be distinguished from his case; (3) therefore, the accrual test should not be applied to Craighead's claim instead of the fair contemplation test. This argument fails for a number of reasons.

First and foremost, Craighead ignores that this Court chose the fair contemplation test without relying on *Motors Liquidation.* Thus, whether *Motors Liquidation* is distinguishable is irrelevant.

Second, Craighead's attempt to distinguish *Motors Liquidation* fails on its face. The claims asserted against "Old GM" in *Motors Liquidation* were based on a theory of *respondeat superior* to hold Old GM liable for the actions of its employees. *In re Motors Liquidation Co.*, 576 B.R. 761, 767 (Bankr. S.D.N.Y. 2017). Craighead claims that his situation is different because he alleges that both the City's employees and the City itself engaged in offensive conduct. Response, p. 11. But, this difference (if it is one) would only give Craighead even more reason to believe he had claims against the City, not less. The attempt to "distinguish" *Motors Liquidation* makes no sense.

Third, the *Sanford* court determined that Sanford's claim was within his fair contemplation, citing *Motors Liquidation* only as an explanatory example. *Sanford* did not rely on *Motors Liquidation* alone for its holding. Thus, even if *Motors Liquidation* were distinguishable (and it is not), it would not change the outcome of

the *Sanford* opinion. *Sanford*, 2018 WL 6331342, at *5-6. And, of course, even if *Sanford* were wrongly decided (and it was not), that would have no effect on this Court's selection of the fair contemplation test.

Craighead's attempt to undercut the fair contemplation thus falls short. His claims against the City are barred by the City's bankruptcy because they arose prepetition.

4. Craighead's contention that he could not know he might have a claim against the City is belied by his arguments to the state courts over a decade prior to the City's bankruptcy filing.

Craighead next tries (unsuccessfully) to show that his claims are not barred under the fair contemplation test. Response, p. 12. He claims that he only could contemplate having a claim against the City if he knew that the City had a "widespread practice" of employing inappropriate police procedures. But the claims in his complaint show that he should have contemplated having a claim against the City prepetition. Further, his prepetition trial and appellate court arguments show that he was making these arguments prior to the City's bankruptcy filings. Craighead rejoins that his prior court filings don't mean what they seem to say. His arguments fail.

Craighead alleges in his complaint and in his Response that he knew he was innocent and that City police officers improperly arrested and extracted a confession from him. Response, p. 5 ("[A]s he had maintained all along, he was working in a

locked warehouse at the time of the murder and could not have had anything to do with the crime." (citing Complaint, ¶¶ 115-16)); *see also* Complaint, ¶¶ 18, 112-13. This shows that he had to have imagined it was possible he would have a claim against the City as the employer of these officers.

Indeed, as the City noted in its Motion, he did. Craighead argued to the Michigan Court of Appeals in 2002 that the City had widespread issues in its police force, claiming there was evidence that "it was acceptable practice to arrest suspects without probable cause" [Motion, p. 11], that "[t]he facts of this case bear out all too well the problems that were infecting the Detroit Police Department[;] Officers Fisher and Jackson engaged in a textbook list of illegal tactics in order to extract an incriminating statement from Mr. Craighead" [*Id.*, p. 12], and that "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" [*Id*., pp. 12-13]. The City also recently received a copy of a motion Craighead filed with the state trial court which reinforces this conclusion[2] ("Motion to Suppress", **Exhibit 1**). In the Motion to Suppress, dated April 27, 2001 (a dozen years before the City filed for bankruptcy protection), Craighead argued extensively and forcefully that the City's police force was engaged in improper practices. Motion to Suppress, ¶¶ 11-22. Craighead thus cannot plausibly claim that

[2] The City sought these filings in early October; it took two months to receive them.

"he had no reason to foresee a claim against the City" when he repeatedly asserted claims against the City prior to the bankruptcy filing (Response, p. 12).

Craighead tries to downplay what these statements mean, asserting that they only relate to Fourth Amendment claims for false arrest, which claims he asserts would have lapsed prior to the City's bankruptcy filing. Response, pp. 12-13. This also fails, as his allegations and prior arguments implicate far more than just false arrest claims. First, in his Complaint, he alleges practices that go far beyond false arrest, *e.g.*, that his confession was illegally extracted from him. Response, p. 5. Second, his statements to the Court of Appeals alleged problems throughout the City police force; they were not limited to false arrest claims. Finally, and the most problematic for Craighead is that the fair contemplation test only requires the Court to decide whether a claim against the City was within Craighead's fair contemplation at the time the City filed for bankruptcy protection—*i.e.*, whether with reasonable due diligence, he could have determined that he had a claim. *City of Detroit,* 548 B.R. at 763. It does not require that Craighead actually knew he had a claim. Here, the facts alleged in the complaint and Craighead's arguments to the state courts show that he should have contemplated that he might hold a claim against the City beyond false arrest—*e.g.*, for the confession he alleges was illegally extracted and for the conviction that resulted from it. Craighead needed to file a proof of claim in the bankruptcy case if he wished to preserve these claims and possibly collect something

from them. He did not, and the time for doing so is long past. His claims are now barred; the City's Motion should be granted.

B. Because Craighead has no claim, allowing the District Court to "adjudicate the merits" is a waste of judicial time and resources.

Craighead closes his Response by asking this Court to allow the District Court to adjudicate the merits of his claim. If the Court agrees with the City (as it has in similar previous cases), then Craighead has no claim, and thus there is no need for the District Court to render an advisory opinion or expend further effort.

Craighead also accuses the City of making an "undeveloped argument" regarding this Court's exclusive jurisdiction to decide matters in the City's bankruptcy case and asserts that the City's jurisdictional argument is waived. Response, pp. 13-14. Craighead overlooks paragraph 11 of the Motion, where the City explains (with references to the Plan) this Court's jurisdiction over such matters. In any event, subject matter jurisdiction arguments "can never be forfeited or waived." *United States v. Satterwhite*, 893 F.3d 352, 356 (6th Cir. 2018). The City could not waive this argument any more than it can waive its discharge by silence. *In re City of Detroit, Mich.*, 642 B.R. 807, 812-13 (Bankr. E.D. Mich. 2022) (citing *Hamilton v. Herr (In re Hamilton)*, 540 F.3d 367, 373-76 (6th Cir. 2008)). Craighead is wrong.

III. Conclusion

For the reasons stated above, the City asks that its Motion be GRANTED.

Dated: December 11, 2023

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

By: /s/ Marc N. Swanson

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

EXHIBIT LIST

Exhibit 1	Motion to Suppress
Exhibit 2	Certificate of Service

EXHIBIT 1 – MOTION TO SUPPRESS

STATE OF MICHIGAN Third Judicial Circuit Court	PRAECIPE FOR MOTION	CASE NO. 00-7900

THE PEOPLE OF THE STATE OF MICHIGAN

-vs-

MARK CRAIGHEAD

Defendant

TO THE ASSIGNMENT CLERK:

Please place a Motion for (here state nature of motion in brief form) MOTION AND BRIEF FOR WALKER HEARING AND ADDITIONAL DISCOVERY

THES 11-14-2000

on the Motion Docket for ~~FRIDAY,~~ 10/27/~~00~~ before Judge RICHARD HATHAWAY

Date: OCTOBER 19 ~~XX~~ 2000

W. OTIS CULPEPPER (P23520)
Attorney for Defendant *Michigan State Bar #*

645 GRISWOLD #3963, DETROIT MI 48226
Address

313-963-5310
Telephone

NOTE: UNDER MCR 2.107(c)(1) or (2)

PROOF OF SERVICE
(7 Days notice required)

I swear that on October 19, 2000 I served a copy of the attached motion and praecipe upon the Wayne County Prosecutor, Third Judicial Circuit Court, Criminal Division Section by ~~(mail)~~ *(personal)* service. (Cross out one)

Sworn and subscribed before me

on: 10/19/00

Krystine A. Hugo
Notary Public KRYSTINE A. HUGO
MACOMB, ACTING IN WAYNE
County
07/31/02
My Commission Expires

W. Otis Culpepper
Attorney for Defendant W. OTIS CULPEPPER (P235

7 Day Noticed waived _____
Date

Prosecuting Official *Michigan State Bar #*

RECEIVED BY

PRAECIPE FOR MOTION

Form #1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Wayne County Circuit Court No. 00-7900
Hon. Richard Hathaway

v

MARK CRAIGHEAD,

Defendant.
_____/

WAYNE COUNTY PROSECUTING ATTORNEY
Attorney for Plaintiff

W. OTIS CULPEPPER (P23520)
Attorney for Defendant
_____/

PRAECIPE FOR MOTION/PROOF OF SERVICE

MOTION AND BRIEF FOR WALKING HEARING AND ADDITIONAL DISCOVERY

AFFIDAVIT OF COUNSEL

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

Wayne County Circuit Court No. 00-7900
Hon. Richard Hathaway

MARK CRAIGHEAD,

Defendant.
_____/

WAYNE COUNTY PROSECUTING ATTORNEY
Attorney for Plaintiff

W. OTIS CULPEPPER (P23520)
Attorney for Defendant
_____/

MOTION AND BRIEF FOR WALKING HEARING AND ADDITIONAL DISCOVERY

NOW COMES Defendant, MARK CRAIGHEAD, through his attorney, W. OTIS CULPEPPER, and asks this Court to hold Walker hearing and grant additional discovery in the above case, and states the following in support:

1. Defendant is currently charged with first-degree premeditated murder (MCL 750.316(1)(a); MSA 28.548(1)(a)), and felony firearm (MCL 750.227(b); MSA 28.424(2)).

2. In the afternoon hours on June 27, 1997, Chole Pruett was found at his apartment dead of four gunshot wounds (PE 4-5, 36-38).

3. Discovery indicates that on August 29, 1997, Detroit Homicide Investigator Ronald L. Tate interviewed Defendant at his residence and obtained a written statement, in which Defendant indicated that he had no knowledge or involvement in the shooting

death of the deceased.[1]

4. Discovery and information indicate that on March 18, 1999, Investigator Tate again interviewed Defendant at his residence, this time in the presence of his father, Milton Craighead, and obtained a written statement, in which Defendant again indicated no knowledge or involvement in the shooting death.[2]

5. In the early evening hours of June 20, 2000, two male Homicide Investigators, believed to be James Fisher and Jackson [first name unknown], went to Defendant's residence, and took Defendant to police headquarters for questioning about the shooting death.

6. The next day, June 21, 2000, Homicide Investigator Barbara Simon obtained a written statement from Defendant admitting to the shooting of the deceased (PE 9-15).

7. On June 23, 2000, Defendant was arraigned on the charges of first-degree premeditated murder, first-degree felony murder, and felony firearm, and was held without bond.

8. On July 6, 2000, preliminary examination was held in 36th District Court, before the Hon. Ted Wallace, and Defendant was bound over on the current charges, over defense objections (PE 39-48).

9. At the preliminary examination, the prosecution's proofs against Defendant were limited to stipulations regarding the cause and circumstances of death (PE 3-8), and

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[1] According to provided discovery materials, police interviewed ten (10) other civilian witnesses after the shooting of the deceased in 1997.

[2] Again, according to provided discovery materials, police interviewed or re-interviewed eleven (11) other civilian witnesses in 1998.

the testimony of Investigator Barbara Simon regarding the alleged confession of Defendant on June 21, 2000 (PE 8-15).

WALKER HEARING AND MIRANDA

10. In order to determine that admissibility of any incriminating statements, Defendant is entitled to a Walker hearing, at which he may take the stand and testify about the facts and circumstances of the alleged admissions, without waiving his right to remain silent at trial. Jackson v Denno, 378 US 368, 394 (1964); People v Walker, (On Rehearing), 374 Mich 331, 338 (1965).

11. The prosecution has the burden of proving a voluntary, knowing and intelligent waiver of constitutional rights regarding any claim of incriminating statements. Miranda v Arizona, 384 US 436, 444 (1966); Colorado v Connelly, 479 US 157, 167-168 (1986); People v DeLisle, 183 Mich App 713, 719 (1990); People v Daoud, 462 Mich 621, 634 (2000).

12. While an express waiver is not necessary, the court may not presume a waiver from a defendant's silence, or subsequent statements attributed to defendant. Miranda v Arizona, supra at 384 US 475. The court's "inquiry has two distinct dimensions":

> "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Moran v Burbine, 475 US 412, 421 (1986) (citations omitted).

Accord, People v Daoud, supra at 462 Mich 633.

13. Miranda warnings are required "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way". Id., at 384 US 444. People v Hill, 429 Mich 382, 384 (1987). "To determine whether a defendant was in custody at the time of interrogation, the totality of the circumstances must be examined. The key question is whether the defendant could reasonably believe that he was not free to leave." People v Blackburn, 135 Mich App 509, 518 (1984). Accord, People v Mayes, (After Remand), 202 Mich App 181, 190 (1993). Thus, "the terminology used to effectuate an arrest is not determinative". People v Cipriano, 431 Mich 315, 342 (1988).

ILLEGAL ARREST

14. "An investigatory arrest is an illegal arrest." People v Casey, 102 Mich App 595, 602 (1980), affirmed, 411 Mich 179 (1981). Likewise, "an arrest for questioning" is "an illegal police practice long condemned by the United States Supreme Court and the appellate courts of this state." People v Kelly, 231 Mich App 627, 633 (1998). Accord, Brown v Illinois, 422 US 590, 605 (1975); Dunaway v New York, 442 US 200, 212 (1979) ("Petitioner [defendant] was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room."); People v Hill, supra at 429 Mich 396; People v Washington, 99 Mich App 330, 335 (1980); People v Emanuel, 98 Mich App 163, 176 (1980) ("When defendant returned home, he was met by two policemen who were total strangers to him and who expressed a desire that defendant accompany them. We conclude that this situation was pregnant with the 'implication of obligation', and, as such, we cannot say that defendant voluntarily accompanied the police.").

15. A police officer may only arrest without a warrant if he has probable cause that a felony has been committed, and that the suspected person committed it. MCL 764.15(d); MSA 28.874(d). Probable cause to arrest exists if the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony. People v Oliver, 417 Mich 366, 374 (1983). Accord, People v Thomas, 191 Mich App 576, 579-580 (1991) ("Rumor and a known association with other suspects in a case, while certainly justifying investigation by the police into an individual's involvement in a crime, do not establish probable cause to believe that the person was involved in the commission of the offense.").

16. "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 (1987). Accord, People v Mosley, (After Remand), 400 Mich 181, 183 (1977) (New trial granted on findings "that the police lacked probable cause to arrest defendant and that the people failed to sustain the burden of showing that the confession was free of the primary taint of defendant's illegal arrest."); Dunaway v New York, supra at 442 US 219 (Reversal granted where: "No intervening events broke the connection between petitioner's illegal detention and his confession.").

17. In Brown v Illinois, supra at 422 US 602, the United States Supreme Court held that proof of Miranda warnings will not serve as a cure-all, validating an illegal arrest or detention of defendant, nor render admissible in evidence any fruits derived therefrom, including an otherwise voluntary confession:

> "If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or 'investigation', would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simply expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all', and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.'" (citations, footnote omitted).

Accord, Dunaway v New York, supra at 442 US 216-219; Taylor v Alabama, 457 US 687, 690 (1982); People v Casey, supra at 102 Mich App 603-604.

REQUEST FOR COUNSEL

18. Once the right to counsel is asserted, "the prosecutor and police have an affirmative obligation not to act in any manner that circumvents and thereby dilutes the protection afforded by the right to counsel". Maine v Moulton, 474 US 59, 170-171 (1985). Further, a request for counsel during custodial interrogation bars any additional interrogation initiated by police, and any subsequent statements by defendant without counsel. People v Paintman, 412 Mich 518, 524-526 (1982). In Michigan v Harvey, 494 US 344, 349 (1990), the United States Supreme Court reaffirmed this rule:

> "In Michigan v Jackson, 475 US 625, 89 LEd2d 631, 106 SCt 1404 (1986), the Court created a bright-line rule for deciding whether an accused who has 'asserted' his Sixth Amendment right to counsel has subsequently waived that right. Transposing the reasoning of Edwards v Arizona, 451 US 477, 68 LEd2d 378, 101 SCt 1880 (1981), ... we decided that after a defendant requests assistance of counsel, any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid, and evidence obtained pursuant to such a waiver is inadmissible in the prosecution's case in chief. Jackson, supra at 636, 89 LEd2d 631, 106 SCt 1404."

VOLUNTARINESS

19. Over and above all of this, the burden is on the prosecution to prove the "voluntariness" of the alleged confession itself. People v DeLisle, supra at 183 Mich App 719. Admission into evidence of an involuntary confession violates not only the Fifth Amendment, but also Due Process. Malloy v Hogan, 378 US 1, 6 (1964); Brown v Mississippi, 297 US 278, 286 (1936). An involuntary confession similarly violates Michigan constitutional provisions. People v Louzon, 338 Mich 146, 153-154 (1953) (privilege against self-incrimination); People v Hamilton, 359 Mich 410, 411 (1960) (due process).

20. "A finding that the Miranda waivers were voluntary, however, does not mean that the...statements necessarily pass constitutional muster." People v Sexton (On Remand), 239 Mich App 525, 536 (1999), rev'd on other grounds, 461 Mich 746 (2000). Accord, Miller v Fenton, 474 US 104, 110 (1985) ("Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogation, Miranda v Arizona, ... the Court has continued to measure confessions against the requirements of due process."). In other words, as indicated in United States v McCurdy, 40 F3d 1111, 1118 (10th Cir, 1994), a court deciding the admissibility of a defendant's confession "must determine both whether the officers complied with Miranda ... and whether the defendant's post Miranda statements were voluntary within the meaning of the due process clause". Accord, United States v Bradshaw, 935 F2d 295, 299 (DC Cir, 1991) (due process "requires that a confession be voluntary quite apart from whether or not Miranda's prophylactic procedures are followed.").

21. The test for voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is "the product of an essentially free and unconstrained choice by its maker," or whether defendant's "will has been overborne and his capacity for self-determination critically impaired..." Culombe v Connecticut, 367 US 568, 605 (1961). In People v Cipriano, supra at 431 Mich 334, the Michigan Supreme Court indicated that the trial court should consider, "among other things", the following factors:

> "...the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse." (Citations omitted).

With respect to "an unnecessary delay in bringing him [defendant] before a magistrate before he gave the confession", the United States Supreme Court stated in County of Riverside v McLaughlin, 500 US 44, 56-58 (1991):

> "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake."
>
> * * *
>
> "Everyone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail. One way to do so is to provide a judicial determination of probable cause immediately upon completing the administrative steps incident to arrest -- i.e., as soon as the suspect has ben booked, photographed, and fingerprinted."

22. Furthermore, in the seminal case of Bram v United States, 168 US 532, 542-543 (1897), the United States Supreme Court set forth the basic rule prohibiting confessions obtained by threats, or induced by promises:

> "'But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. ...'"

In People v Barker, 60 Mich 227, 296 (1886), the Michigan Supreme Court also stated long ago that only "[c]onfessions voluntarily made, not induced by threats, or by a promise or hope of favor, are admissible in evidence in criminal cases." "[C]oercion can be mental as well as physical, and...the blood of the accused is not the only hallmark of an unconstitutional inquisition". Blackburn v Alabama, 361 US 199, 206 (1960). Accord, People v DeLisle, supra at 183 Mich App 713. In Hayes v Washington, 373 US 503, 514 (1963), the United States Supreme Court stated "that even apart from the express threat, the basic techniques present here -- the secret and incommunicado detention and interrogation -- are devices adapted and used to extort confessions from suspects". And, it matters not whether the confession was induced by "direct or implied promises". Bram v United States, supra at 168 US 542-543. See, People v Conte, 421 Mich 704 (1984); People v Butler, 193 Mich App 63, 69 (1992).

23. "Involuntary confessions...may never be used, both because the police broke the law but more importantly because an involuntary confession is always of questionable 'trustworthiness'". People v Reed, 393 Mich 342, 355 (1975), cert. den., 422 US 1044 (1975).

FACTUAL AVERMENTS

24. Information and belief indicate that in June, 2000, Defendant was 41 years old, married with two children (ages 4 and 2), and living with his family at a house on Mettetal in Detroit. He was working at Chrysler's Mound Road engine plant, and within 2 or 3 weeks of completing the period required for permanent hiring. Defendant graduated from Redford High School in 1977, and had taken some college courses between 1977 and 1979. Defendant had no criminal record, and no experience with police investigators except on August 29, 1997, and March 18, 1999, when Investigator Tate had interviewed him at his home.

25. Information and belief also indicate the following facts. On Tuesday, June 20, 2000, Defendant went to work before 5:00 a.m., worked a ten-hour shift at the factory, returned home after 3:00 p.m., and then did some work at his home with a friend. At about 5:00 p.m., his brother came by, and they left to do an errand. While they were gone, two Homicide Investigators, believed to be Fisher and Jackson, came to his home unannounced and waited outside for his return.

26. Defendant returned home about 6:00 p.m. and, after being asked to identify himself, was told by the investigators that he had to come downtown to answer questions regarding the shooting of the deceased. Defendant explained that he had been working all day and had not eaten supper, and asked whether he could come downtown the next day right after work. The investigators told Defendant that he had no choice but to go tonight, and denied his requests to clean up, to enter his home, or to make a telephone call. When Defendant mentioned that he had previously been interviewed at his home, and that he

wanted his brother present during any questioning, the investigators indicated that he could either come with them in their car, or be brought downtown in a patrol car, and then one of the investigators used his radio to call a patrol car. At this point, Defendant went with the investigators to their car, and was driven downtown to police headquarters at 1300 Beaubien.

27. Investigators Fisher and Jackson began questioning Defendant in the car without Miranda warnings, and continued doing so at their office for the next hour or two, and were joined by Investigator Barbara Simon. The questioning of Defendant was aggressive almost from the start, and became hostile with the investigators indicating, among other matters, that they did not believe Defendant, and police had written witness statements saying that Defendant and the deceased were riding together on the day of his death.

28. Defendant was held incommunicado by police throughout the entire interrogation process. Defendant's brother had followed investigators in his own car to police headquarters, but was not allowed to accompany Defendant beyond the first floor, and was thereafter denied any access to Defendant. During questioning, police also denied Defendant's requests to leave or go home, to use the telephone, and to call his wife and a lawyer. At the end of their initial questioning of Defendant, investigators locked him in a small room alone for about three hours.

29. In the late hours of Tuesday, June 20, 2000, or the early hours of Wednesday, June 21, 2000, police removed Defendant from the small room for further questioning, primarily by Investigators Simon and Fisher. Other officers were intermittently present or

involved. This questioning involved threats and promises, both of which were contingent on Defendant's willingness to take a polygraph test to verify his statements, which had indicated a lack of involvement and knowledge. Defendant indicated to police that he did not want to take a polygraph test because he was tired, hungry, and upset, but eventually agreed to do so after his further requests for a lawyer and telephone calls were ignored by police, and investigators promised that he would be allowed to go home, and to work, if he immediately submitted to a polygraph test.

30. At around 1:00 a.m., Defendant was taken by Investigator Simon and another officer to an area on Brush for polygraphing, and was not returned to police headquarters until about 4:00 a.m.

31. Defendant was interrogated before and after polygraphing by the operator, identified only as Don. This officer told Defendant that he had failed the test, that the results could be used (or were evidence) against him, and that he should admit involvement or knowledge to avoid spending the rest of his life in prison without parole. Investigator Simon added, among other matters, that Defendant's wife and children would be looking for a new man if he did not stop lying, and admit to what he knew or had done.

32. Upon returning to police headquarters at about 4:00 a.m., Investigator Simon showed Defendant a rights form and a handwritten statement in question-and-answer form denying mistreatment, and told him that he would not be allowed to call anyone or leave until he signed both. Investigator Simon then took Defendant upstairs to the lockup. Defendant remained incommunicado in the lockup, without food and unable to sleep due to the cold and conditions in the cell, until Investigator Simon returned for him at about

11:00 a.m.

33. Investigator Simon reminded Defendant of her prior remarks, and assured him that he would be allowed to call someone to pick him up if he signed the rights form and statement denying mistreatment. Defendant signed the form, and each line of the statement, at about 11:17 a.m. on June 21, 2000. Defendant was then allowed to call his father to pick him up, but was arrested after the telephone call. Defendant was not taken to court for arraignment on the instant charges until June 22, 2000, at which time he was remanded to jail.

DISCOVERY REQUESTS

34. Discovery materials have been obtained and reviewed by undersigned counsel. These materials contain no reports regarding Defendant being picked up, arrested, and/or held for questioning by investigators on June 20 and 21, 2000. Also, there are no reports of Defendant being polygraphed by police on June 20 or 21, 2000.[3] Furthermore, contrary to what police reportedly told Defendant about having witness statements indicating that he was riding with the deceased on the day of his death, undersigned counsel has been unable to find any such witness statements, and would also note that the preliminary examination transcript shows that a prosecution witness testified to no knowledge of the person with whom the deceased was allegedly riding on the day of his death (PE 34).

35. Accordingly, the following discovery materials (if in existence), are needed and requested in advance of the Walker hearing:

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[3] On the other hand, discovery materials contain a report indicating that one Tiffany L. Moore was polygraphed (regarding the shooting of the deceased) on April 13, 1998.

(a) Any written reports, memoranda, orders, or instructions regarding the pick-up, arrest, or detention of Defendant for questioning or investigation prior to June 21, 2000;

(b) Any document indicating cause or reason for the pick-up, arrest, detention or questioning of Defendant on June 20-21, 2000;

(c) A list of all police officers, and any reports written or authorized by them, involved in the pick-up, arrest, detention, questioning or investigation of Defendant on June 20-21, 2000;

(d) The identity of all police officers involved in the polygraphing of Defendant on June 20 or 21, 2000, and any reports, memoranda, graphs, or other documents generated by them;

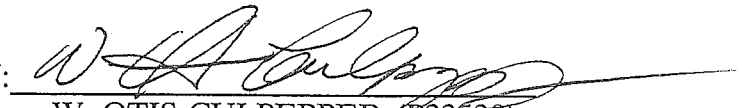
(e) Any tape recordings (audio or video) regarding the radio call, pick-up, arrest, detention, or questioning of Defendant on June 20-21, 2000; and,

(f) Any photographs, fingerprint cards or other booking or processing documents or records made or obtained by police regarding Defendant prior to June 21, 2000, at 11:17 a.m.

36. The prosecutor should also be required to provide for examination at the Walker hearing Investigators Fisher, Jackson and Simon, along with the polygraph operator identified as Don (last name unknown), and any other witnesses identified in the above discovery materials and requested by the defense in advance of hearing.

WHEREFORE, Defendant respectfully requests that this Honorable Court grant the requested discovery, hold a Walker hearing, require the prosecution to produce the above witnesses, and grant other just relief in the above case.

Respectfully submitted,

BY: 

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Dated: October 19, 2000

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Wayne County Circuit Court No. 00-7900
Hon. Richard Hathaway

v

MARK CRAIGHEAD,

Defendant.
_____/

WAYNE COUNTY PROSECUTING ATTORNEY
Attorney for Plaintiff

W. OTIS CULPEPPER (P23520)
Attorney for Defendant
_____/

AFFIDAVIT OF COUNSEL

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

W. OTIS CULPEPPER, being first duly sworn, deposes and states that he has read the foregoing motion and brief, and that the contents are true to the best of his knowledge, information and/or belief.

W. OTIS CULPEPPER

Subscribed and sworn to before me
this 19th day of October, 2000

KRYSTINE A. HUGO, Notary Public
Macomb County, Acting in Wayne, MI
My Commission Expires: 07/31/02

EXHIBIT 2 – 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 December 11, 2023, he served a copy of the foregoing *City of Detroit's Reply in Support of Motion for the Entry of an Order Enforcing the Bar Date Order and Confirmation Order Against Mark Craighead* with the court using the Court's ECF system which will provide notice of the filing to all counsel of record and also served the Reply upon counsel for Mark Craighead, via email:

Rachel Brady
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Chicago, IL 60607
Email: brady@loevy.com

DATED: December 11, 2023

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