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No. 21-1844

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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DEBORAH S. HUNT, Clerk

JIMMY BAUGH,	)	
	)	
Petitioner - Appellant,	)	
	)	ON APPEAL FROM
v.	)	THE UNITED STATES
	)	DISTRICT COURT
NOAH NAGY, Warden,	)	FOR THE EASTERN
	)	DISTRICT OF MICHI-
Respondent - Appellee.	)	GAN

OPINION

Before: GUY, MOORE, and CLAY, Circuit Judges.

CLAY, J., delivered the opinion of the court in which MOORE, J., joined. GUY, J. (pp. 28–32), delivered a separate dissenting opinion.

CLAY, Circuit Judge. Petitioner Jimmy Baugh was convicted of first-degree felony murder for the 2001 killing of Craig Landyczkowski ("Land") and sentenced to life in prison. *See* Mich. Comp. Laws § 750.316(1)(b). His conviction was based almost exclusively on the testimony of his codefendant, Robert Kwasniewski. Michigan courts affirmed Baugh's

conviction and sentence, and we denied Baugh habeas relief. After fourteen years in custody, Baugh discovered a never-before-seen statement that contradicted the material allegations of Kwasniewski's testimony. Michigan courts again provided no relief, so Baugh petitioned this court for leave to file a second or successive habeas petition, which we granted. The district court conducted an evidentiary hearing, then dismissed Baugh's petition. For the reasons set forth below, we **REVERSE** the district court's dismissal of Baugh's petition and **GRANT** Baugh a conditional writ of habeas corpus that will result in the vacation of his conviction and sentence unless the state of Michigan commences a new trial against him within 90 days after this judgment becomes final.

BACKGROUND

Factual Background

On December 3, 2001, Land left his Detroit home to buy beer. After Land purchased beer from a convenience store, he began riding his bike toward the intersection of Hayes and Novara Streets. A stolen Jeep veered in front of Land. The person in the front passenger seat exited the vehicle and told Land to hand over his money. When Land did not immediately comply, the thief shot Land in the leg with a .22 caliber bullet. Land fell to the ground and threw $29 in the direction of the shooter. **(*Id.*)** At this time, another vehicle started driving toward Land and the Jeep. The driver of the Jeep panicked and pressured the shooter to get back in the vehicle. The shooter fired one more bullet at Land, which struck his aorta. The shooter got back in the Jeep, which sped from the scene. Land died a few minutes later.

The next day, law enforcement arrested Robert Kwasniewski, Jimmy Baugh, Ricky Sailes, and Lafayette Dearing for an unrelated carjacking. Police found a .22 caliber shell casing in Kwasniewski's pocket. While they were detained, Kwasniewski and Baugh both made statements to Detective JoAnn Miller of the Detroit Police Department regarding Land's murder. According to Kwasniewski, Kwasniewski stole the Jeep and picked up Baugh, who "was a hundred dollars short on his rent and needed to hit a lick." (First Prelim. Exam. Tr., R. 10-2, PageID #237.) After finding a target, Kwasniewski stopped the Jeep, Baugh jumped out from the passenger seat, and robbed that person with a handgun. After this first robbery, Kwasniewski alleged Baugh spotted Land as a potential target and told Kwasniewski to follow him to "see what [he] got." (*Id.*, PageID #239.) After following Land for a bit, Baugh allegedly told Kwasniewski to hit Land with the Jeep. Instead, Kwasniewski "pulled in front of him, sort of blocking him in." (*Id.*, PageID #240.) According to Kwasniewski's statement, Baugh then "rolled down the window" and directed Land to hand over his money. (*Id.*) When Land hesitated, Baugh shot Land. Land "fell and threw his money" toward the Jeep. (*Id.*) Baugh exited the Jeep "to get the money" and he "let off another shot." (*Id.*) A white van appeared, so Baugh "jumped in the Jeep and mashed off." (*Id.*) As they escaped, Baugh fired two shots at the van. In sum, Kwasniewski's statement to the police indicated he was the driver and that Baugh first shot Land from inside the Jeep and fired the second, fatal shot, from outside the Jeep.

Baugh's account of the murder was markedly different. According to Baugh, Kwasniewski and

Lafayette Dearing, an accomplice in the December 4 carjacking, stole the Jeep. Dearing was the driver, Kwasniewski was in the front passenger seat, and Baugh was in the back seat. They "stopped at [a] gas station on Seven Mile [Road] and Hayes [Street]." (*Id.*, PageID #255.) Kwasniewski went into the gas station and noticed that Land "got some loot on him." (*Id.*) Against Baugh's protest, Kwasniewski and Dearing agreed to rob Land. Baugh recalled Land walking from the gas station, not riding a bike. As Dearing drove the Jeep toward Land, Kwasniewski rolled down the passenger window to initiate the robbery. Dearing cut off Land with the Jeep. Kwasniewski exited the vehicle from the front passenger seat and attacked him. Land "swung the bag he was carrying at [Kwasniewski]." (*Id.*) "That's when [Kwasniewski] shot him." (*Id.*) Land "fell, [Kwasniewski] got back in the truck[,] and [Dearing] drove off." (*Id.*) Dearing spotted a van or truck following them, but he evaded it. In essence, Baugh's account indicated Dearing was the driver, Kwasniewski was the shooter, and Baugh was a backseat passenger who wanted no involvement in the robbery.

Procedural Background

With these two statements, Michigan prosecutors charged Kwasniewski and Baugh with first-degree felony murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. On April 24, 2002, the Thirty-Sixth District Court of Michigan conducted a preliminary examination hearing for Baugh and Kwasniewski. Because they were codefendants, the court permitted Kwasniewski's statement to be used only against

Kwasniewski, and Baugh's statement to be used only against Baugh. The state called Ricky Sailes, the codefendant from the December 4, 2001, carjacking charge. The prosecutor asked Sailes if he knew Baugh or Kwasniewski, to which Sailes replied "no." Sailes was then dismissed. Based only on Kwasniewski's statement, the district court found probable cause to believe that Kwasniewski had committed first-degree felony murder. However, considering only Baugh's statement, the district court held the state's case lacked probable cause against Baugh and dismissed the first-degree felony murder charge without prejudice.[1]

Shortly thereafter, on June 20, 2002, the state offered Kwasniewski a plea agreement in which the state would dismiss Kwasniewski's carjacking charges in another suit and reduce his charge to second-degree murder instead of first-degree murder, leaving him subject to 18 to 40 years' imprisonment instead of the possibility of a life sentence. The state conditioned Kwasniewski's plea offer on his

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[1] Michigan Court Rule 6.110(F) concerns discharge of defendants when the judge finds no probable cause and provides that:

> If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense or reduce the charge to an offense that is not a felony.

M.C.R. 6.110(F).

willingness to testify against Baugh. Kwasniewski accepted the deal.[2]

On July 18, 2002, the Thirty-Sixth District Court of Michigan conducted a second preliminary examination for Baugh. Kwasniewski testified against Baugh this time, implicating Baugh as the shooter. His testimony differed from his earlier written statement in that he testified that Baugh exited the Jeep before directing Land to hand over his money. With the addition of Kwasniewski's testimony, the court found probable cause to believe Baugh had committed first-degree felony murder and bound over his case for trial.

Baugh proceeded to a jury trial, which began on January 13, 2003. Just before the trial began, the prosecutor submitted a surprise written statement from Kwasniewski's mother. Her statement said that the day after Land's homicide she heard Baugh "bragging about shooting this guy, and how he fell, and he robbed him of his chain." (Jury Trial Tr., R. 10-7, PageID #376.) The court asked the prosecutor why he was submitting the statement "so late," and he replied, "You know, Judge, because [Kwasniewski's mother] didn't really say much at the investigator subpoena. And I guess I forgot about it." (*Id*., PageID #382.) The court permitted the prosecution to use the statement. Additionally, the court did not allow defense counsel to inform the jury of the substantial nature of Kwasniewski's plea bargain, which supplanted

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[2] Kwasniewski served over 20 years in custody on his second-degree murder sentence and was discharged on May 5, 2022. *See* https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=309136.

a mandatory life sentence with a sentence of 18 to 40 years.

In a third blow to Baugh's defense, his trial counsel, James O'Donnell, intended to introduce into evidence a statement that an eyewitness to the murder, Gerves Crawford, made to the police at the scene, which seemingly implicated Kwasniewski as the shooter. Shortly before trial, the prosecutor shared his witness list with O'Donnell, which indicated that the prosecution intended to call Crawford to testify. Believing that he would have an opportunity to cross-examine Crawford, O'Donnell never identified Crawford as a witness for the defense. During a recess in the middle of opening statements, the prosecutor surprised O'Donnell by asking the court to exclude Crawford's statement because Crawford had recently passed away. No one had ever notified O'Donnell that the only eyewitness besides Kwasniewski had died.[3] The court excluded Crawford's statement.

During the trial, Detective JoAnn Miller took the witness stand. She read into evidence a statement she prepared on March 15, 2002, following her interview with Baugh. As mentioned above, Baugh told Detective Miller that Dearing drove the Jeep, Kwasniewski was the shooter, and Baugh was the backseat passenger. After Detective Miller's testimony, Kwasniewski took the stand. He, too, testified in conformity with his

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[3] Because Crawford's statement is inadmissible, the content is not relevant to the following analysis. Nevertheless, as explained below, the prosecution's scrupulous tactic of withholding the fact that Crawford died is relevant to whether Baugh has satisfied his burden of proving the prosecution suppressed evidence favorable to Baugh's defense.

previous testimony at Baugh's second preliminary examination that he was the driver and Baugh was the shooter. Kwasniewski further alleged that Baugh used a .22 caliber pistol to shoot Land.

Ultimately, a jury found Baugh guilty of first-degree felony murder. At his sentencing, Baugh maintained his innocence stating, "I am not the shooter. The shooter got away. The shooter is the one who said I did the killing." The trial court acknowledged that "[t]he jury elected to give a lot of weight to the credibility of Mr. Kwasniewski's testimony[.]" (Sent'g Tr., R. 10-11, PageID #1054.) For his first-degree felony murder conviction, Baugh was sentenced to life in prison.[4]

Baugh's conviction and sentence were affirmed on direct appeal and the Michigan Supreme Court declined to review his case. *People v. Baugh*, No. 247548, 2004 WL 2412692 (Mich. Ct. App. Oct. 28, 2004) (per curiam) (unpublished); *People v. Baugh*, 705 N.W.2d 29 (Mich. 2005). Baugh then sought relief from judgment, which was denied by the trial court, the Michigan Court of Appeals, and the Michigan Supreme Court. *See People v. Baugh*, No. 280250 (Mich. Ct. App. November 16, 2007); *People v. Baugh*, 750 N.W.2d 188 (Mich. 2008). Baugh next filed a habeas petition pursuant to 28 U.S.C. § 2254, which the district court denied and declined to issue a certificate of appealability. *Baugh v. Palmer*, No. 2:08-CV-13033, 2010 WL 3623175, at *13 (E.D. Mich. Sep. 15, 2010).

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[4] Baugh was sentenced to two to five years' imprisonment for his felon in possession conviction and a two-year consecutive sentence for his felony firearm conviction.

Parallel to Baugh's proceedings, Ricky Sailes was among the four individuals arrested for carjacking on December 4, 2001 (i.e., the day after Land's murder). Sailes pleaded guilty to carjacking and served approximately 13 years in prison. In approximately 2013, Sailes was released from prison, and was discharged from parole in 2015. In December 2015, Sailes allegedly mailed Baugh a statement that Sailes had made to Detective Miller on March 16, 2002, the day after Baugh made his statement to same detective. Sailes's statement provides:

> Q. What can you tell me about the shooting on Navara and Hayes?
>
> A. . . . [Kwasniewski] told me he had shot a white guy on Navara and Hayes. He told me Jimmy was driving and they pulled up on the white guy. He said he ask[ed] him for his money[.] He said the white guy didn't give him all of his money. The white guy started to run and [Kwasniewski] shot him. After he fell to the ground the white guy gave him all the money. Then Jimmie Baugh drove off.
>
> Q. What kind of gun did [Kwasniewski] have?
>
> A. A .22 he called Peggy Sue.
>
> . . .
>
> Q. Did [Kwasniewski] say how many times he shot the man?
>
> A. No.

Q. Who was with you when [Kwasniewski] told you this?

A. It was me, Jimmie Baugh and Lafayette Dearing.

Q. Where is the gun now?

A. I don't know. The last time I saw it was the night of the carjacking.

Q. Did [Kwasniewski] say why he shot the man?

A. No.

Q. Did Jimmie say anything while [Kwasniewski] was telling you this?

A. Jimmie said [Kwasniewski] shot the guy and he drove off.

(Sailes's Statement, R. 1, PageID ##18–19.) In short, Kwasniewski told Sailes that Baugh was driving the Jeep and Kwasniewski shot and killed Land.

On January 28, 2018, Baugh contacted his trial attorney, O'Donnell, asking if he was aware of Sailes's statement. In his letter to O'Donnell, Baugh stated that he had

> meticulously taken care of every piece of paperwork generated in relation to the Felony Murder case. Yet, it has recently come to my attention that there was a statement . . . which directly contradicts the statement and testimony given by the prosecution's sole eyewitness in this case[, Kwasniewski]. I have

> methodically, over the past several days, went through every piece of paper that I have, and I do not have nor do I remember ever having this statement. Neither does the transcripts from either Preliminary Examination or the trial indicate that a statement by [Sailes] was ever entered into evidence.

(Baugh Letter to O'Donnell, R. 10-13, PageID #1156.) O'Donnell immediately responded that he no longer possessed Baugh's case file, but he did not remember any statement from Sailes. O'Donnell wrote that if he had known of Sailes's statement, he certainly would have used it to impeach Kwasniewski.

In a second attempt to verify whether he had previously received Sailes's statement, Baugh submitted a Freedom of Information Act request to the Wayne County Office of the Prosecuting Attorney. His request was denied "because [it] could not locate the prosecutor's file." (FOIA Denial Letter, R. 10-13, PageID #1166.)

On February 3, 2016, Baugh telephoned his uncle. During the call, Baugh said, "I already got [Sailes's statement]. But the thing is I don't know where I got it from." (Evid. Hr'g Tr., R. 32, PageID #1698.) The next day, during a call to his nephew, Baugh reiterated, "I was going through some of my paperwork, and I found a statement that [Sailes] made to homicide where he told homicide that [Kwasniewski] told him that he did the shooting . . . ." (*Id.*, PageID #1704.) And again, Baugh stated, "I don't know who gave it to me. I don't know if it was in my armed robbery/carjacking case or if it was in the murder case. But I don't believe it was in the murder case." (*Id.*, PageID #1703.)

In 2016, Baugh again moved the Michigan district court for relief from judgment arguing that the newly discovered statement undermined confidence in his guilty verdict. The state court analyzed his claim under *People v. Cress*, 664 N.W.2d 174 (Mich. 2003), and *People v. Grissom*, 821 N.W.2d 50 (Mich. 2012), Michigan's analogues to *Brady v. Maryland*, 373 U.S. 83 (1963). The court found that he was not entitled to relief. In reaching this conclusion, the state court held that under either Kwasniewski's theory of events or Sailes's theory of events, Baugh could still be guilty of first-degree felony murder either as a principal (Kwasniewski's theory) or an aider and abettor (Sailes's theory). The Michigan Court of Appeals and the Michigan Supreme Court declined to review his case. *People v. Baugh*, No. 02-8915 (Mich. 3d Cir. Ct. Wayne Cnty. Jan. 27, 2017), *appeal dismissed*, No. 337811 (Mich. Ct. App. Sept. 15, 2017), *appeal denied*, 911 N.W.2d 703 (Mich. 2018).

Baugh then sought leave from this Court to file a second or successive habeas petition, which we granted. *In re Baugh*, No. 18-1848 (6th Cir. Dec. 17, 2018) (order). The district court held an evidentiary hearing in which Baugh, Sailes, O'Donnell, and Miller testified. Baugh testified that Sailes mailed him the statement sometime in December 2015. Corroborating Baugh, Sailes testified that he obtained a copy of the statement and eventually sent a copy to Baugh because he believed Baugh could benefit from it.

The district court dismissed Baugh's petition. First, the court found that Baugh could not have discovered Sailes' statement earlier through due diligence. However, because there was not clear and

convincing evidence that no reasonable juror would find Baugh guilty if Sailes's statement had been introduced, his petition was dismissed under 28 U.S.C. § 2244(b)(2)(B)(ii). Furthermore, the district court alternatively held that even if it reached the merits of Baugh's claim, it would have held the Michigan court's adjudication of Baugh's claim was entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, and the state courts did not unreasonably apply federal law. Baugh timely appealed.

DISCUSSION

I. § 2244(b)(2)(B) Second or Successive

A. Standard of Review

"In a habeas corpus appeal, we review the district court's legal conclusions de novo, but will not set aside its factual findings unless they are clearly erroneous. The standard for reviewing state-court determinations on habeas, by contrast, is governed by [AEDPA]." *Fleming v. Metrish*, 556 F.3d 520, 524 (6th Cir. 2009) (quoting *Ivory v. Jackson*, 509 F.3d 284, 291 (6th Cir. 2007)).

B. Analysis

The first question we must address is what framework applies to our review of Baugh's petition. Baugh and the state agree that Baugh's present petition constitutes a "second or successive" habeas petition subject to § 2244(b)'s gatekeeping requirements. We believe this question requires a closer look.

"[N]ot all second-in-time petitions are 'second or successive.'" *In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018) (quoting *In re Coley*, 871 F.3d 455, 456 (6th Cir. 2017)). Instead, "[t]he phrase 'second or successive petition' is a term of art," *Slack v. McDaniel*, 529 U.S. 473, 486 (2000), and the Supreme Court "has declined to interpret 'second or successive' as referring to all [] applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior [] application." *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007).

To determine whether a second-in-time petition constitutes a "second or successive" petition, we rely on the abuse-of-the-writ doctrine. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998); *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006). "The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus." *McCleskey v. Zant*, 499 U.S. 467, 470 (1991). A numerically second petition is "second" when it raises a claim that could have been raised in the first petition but was not, due to abandonment or neglect. *Id.* at 489; *Bowen*, 436 F.3d at 704. An application is not second or successive if it presents a claim that would have been unripe if it had been presented in an earlier application. *Panetti*, 551 U.S. at 945. Importantly, "a numerically second petition is not properly termed 'second or successive' to the extent it asserts claims whose predicates arose after the filing of the original petition." *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010). "In other words, if 'the events giving rise to the claim had not yet occurred' when the petitioner filed his original habeas petition,

his subsequent petition raising this claim need not meet § 2244(b)'s requirements." *Wogenstahl*, 902 F.3d at 627 (quoting *Jones*, 652 F.3d at 605).

In *Wogenstahl* we held that *Brady* claims are subject to § 2244(b)'s gatekeeping requirements because the factual predicate of the claim—the unlawful withholding of evidence— occurs before the petitioner files his first habeas petition. *Id*. at 627; *see also In re Jackson*, 12 F.4th 604, 608 (6th Cir. 2021). We reasoned that "[Wogenstahl's] claims were not unripe at the time he filed his initial petition because the purported *Brady* violations . . . had already occurred when he filed his petition, although Wogenstahl was unaware of these facts." *Wogenstahl*, 902 F.3d at 627–28. Other circuits have reached the same conclusion. *In re Will*, 970 F.3d 536, 540 (5th Cir. 2020) (per curiam) ("*Brady* claims raised in second-in-time habeas petitions are successive regardless of whether the petitioner knew about the alleged suppression when he filed his first habeas petition."); *Brown v. Muniz*, 889 F.3d 661, 674 (9th Cir. 2018) (same); *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009) (per curiam) (same); *but see Douglas v. Workman*, 560 F.3d 1156, 1193 (10th Cir. 2009) (holding that a prisoner's *Brady* claim is not subject to § 2244(b) when the prosecutor purposefully withholds exculpatory evidence.).

Upon further consideration, we respectfully believe that *Wogenstahl* was incorrectly decided. Congress's intention in enacting AEDPA was "to curb the abuse of the statutory writ of habeas corpus." H.R. Rep. No. 104-518, at 111 (1996) (Conf. Rep.); *see also Panetti*, 551 U.S. at 945 (noting the legislative purpose of promoting "finality"). But under *Wogenstahl*,

we do not further this purpose. Instead, *Wogenstahl* incentivizes prisoners to bring *Brady* claims without any evidence or else risk having a potential *Brady* claim reviewed under the heightened "second or successive" standards. This system "pit[s] the petitioner's interest in vigorously presenting the argument against counsel's interest in preserving their professional reputation[.]" *In re Hanna*, 987 F.3d 605, 615 (6th Cir. 2021) (Moore, J., dissenting).

We find it "illogical" to hold that the abuse of the writ doctrine is abused when a petitioner seeks vindication for a previously unknown *Brady* violation. *Storey v. Lumpkin*, 142 S. Ct. 2576, 2578 (2022) (Mem) (Sotomayor, J.). Rather, "[w]here a prisoner can show that the state purposefully withheld exculpatory evidence, that prisoner should not be forced to bear the burden of section 2244, which is meant to protect against the prisoner himself withholding such information or intentionally prolonging the litigation." *Workman v. Bell*, 227 F.3d 331, 335 (6th Cir. 2000) (en banc) (Merritt, J., dissenting). In fact, *Brady* claims seem to fall perfectly within the realm of claims that should *not* be considered "second or successive."

Although several other circuits have reached the same conclusion that we did in *Wogenstahl*, we likewise are not alone in second-guessing whether such holding was correct. *See, e.g., Scott v. United States*, 890 F.3d 1239, 1243 (11th Cir. 2018) ("Though we have great respect for our colleagues, we think *Tompkins* got it wrong: *Tompkins*'s rule eliminates the sole fair opportunity for these petitioners to obtain relief."); *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015) ("We acknowledge that Gage's argument for

exempting his *Brady* claim from the § 2244(b)(2) requirements has some merit. . . . But as a three-judge panel, we are bound to follow [circuit precedent]."); *Long v. Hooks*, 972 F.3d 442, 487 (4th Cir. 2020) (Wynn, J., concurring) (expressing doubt that *Brady* claims should be subjected to § 2244(b)'s gatekeeping mechanism, but ultimately following circuit precedent that held § 2244(b) applies).

Unfortunately, as ill-guided as *Wogenstahl* may be, it remains the law of our circuit, *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985), so we must hold that Baugh's petition alleging a *Brady* violation is "second or successive."

Under § 2244(b)(2)(B), a second or successive claim for habeas relief based on new facts must be dismissed unless:

> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. The district court held that Baugh could not have discovered Sailes's statement through due diligence, thereby satisfying the first prong, but that there was not clear and convincing evidence that no reasonable

factfinder would have found him guilty. Accordingly, the district court dismissed Baugh's current petition.

1. Factual Predicate was Previously Undiscoverable

As a threshold matter, the district court's factual finding that Baugh could not have previously discovered Sailes's statement is reviewed for clear error. *Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 840 (6th Cir. 2017). A finding is clearly erroneous when although there may be evidence to support it, "[the panel is] left with the definite and firm conviction that a mistake has been committed." *Caver v. Straub*, 349 F.3d 340, 351 (6th Cir. 2003) (alteration in original) (citation omitted). "If there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Black v. Carpenter*, 866 F.3d 734, 744 (6th Cir. 2017) (citation omitted). District courts are afforded "particular deference when its factual findings are based on credibility determinations." *Satterlee v. Wolfenbarger*, 453 F.3d 362, 367 (6th Cir. 2006).

The exact way in which Baugh came into possession of Sailes's statement is murky. The district court held an evidentiary hearing at which Baugh, Detective Miller, Sailes, and O'Donnell each testified. According to Baugh, Sailes waited until December 2015 to send the withheld statement because Sailes wanted to be out of prison and off probation before he got involved in Baugh's case. Baugh also testified that shortly after he received Sailes's statement, he sent a letter to O'Donnell asking if O'Donnell was ever aware of such statement. Baugh specifically mentioned that

he kept meticulous records from his criminal cases and that he was unable to locate Sailes's statement in his files. He explained at the evidentiary hearing that his purpose for contacting O'Donnell despite already obtaining the letter from Sailes was to verify that it was never in his case file.

O'Donnell corroborated Baugh's testimony, testifying himself that although he vividly remembered Baugh's case, he did not recall ever coming across Sailes's statement while representing Baugh. According to O'Donnell, his standard practice was to methodically review all the evidence shared by the prosecution and "ma[k]e notes on every single document." (Evid. Hr'g Tr., R. 32, PageID ##1605–06.) O'Donnell stated that if he had seen Sailes's statement in the discovery, he would have used it to argue a different theory of the case or to impeach Kwasniewski.

Next, Detective Miller testified that she could not remember any of the details of Baugh's case, but that her standard practice was to turn over all her interview notes to the prosecutor. She also verified that Sailes's statement was written in her handwriting.

Finally, Sailes testified that he corresponded with Baugh in prison as early as 2004. At one point, Sailes testified that he sent the withheld statement to Baugh while Sailes was still imprisoned. Later, Sailes testified that he never "ha[d] and opportunity to give [the statement] to [Baugh]" before his release. (Evid. Hr'g Tr., R. 32, PageID #1574.) When pressed on exactly when he sent the statement to Baugh, Sailes responded that "[i]t's possible" that he first mailed it after he was released from prison. (*Id.*, PageID #1576.)

The state argues that Baugh could have discovered Sailes's statement earlier if he had exercised due diligence. To make this point, the state relies almost exclusively on two recorded prison calls. In the first call from February 3, 2016, Baugh tells his nephew, "I already got [Sailes's statement]. But the thing is I don't know where I got it from." (*Id.*, PageID #1698.) The next day, in a second call, Baugh reiterated, "I was going through some of my paperwork, and I found a statement that [Sailes] made to homicide where he told homicide that [Kwasniewski] told him that he did the shooting . . . ." (*Id.*, PageID #1704.) And again, Baugh stated, "I don't know who gave it to me." (*Id.*, PageID #1704.) Besides these two calls, the state attempts to attack Sailes's credibility. It argues that Sailes's inconsistent testimony regarding when he shared the statement undermined any notion that the withheld statement was actually mailed to Baugh in December 2015.

We do not find the state's evidence compelling. First, nothing Baugh said during the two phone calls is necessarily inconsistent with his testimony. Baugh's testimony was that Sailes mailed him the statement in December 2015, several months before he made the calls to his uncle and nephew. Consistent with that timeline is the fact that Baugh contacted O'Donnell in January 2016 saying he could not find Sailes's statement in his records. Then, several months later, during the phone calls with his uncle and nephew, Baugh stated he did not remember where he obtained Sailes's statement; which is certainly different than saying he has had possession of Sailes's statement since 2004.

In any event, Baugh testified that he was lying to his uncle and nephew because he did not want to get Sailes tied up in additional criminal proceedings. This explanation is consistent with Baugh's other testimony that Sailes waited to contact Baugh until after he was released from prison and off probation. Surely, if Sailes waited to send the statement to avoid getting tied up with law enforcement, it is reasonable to accept Baugh's explanation that he was feigning ignorance as to where he obtained Sailes's statement in an attempt to keep Sailes removed from his habeas proceedings. As further support that Sailes did not want to be involved with Baugh's case, he testified at the first preliminary hearing that the did not know Baugh or Kwasniewski, even though he was a codefendant of theirs in the December 4 carjacking. Moreover, as the district court properly noted, Baugh had no reason to withhold this evidence until now. Sailes's statement would have been a valuable resource during his trial to impeach Kwasniewski or to argue a different theory of the case.

On balance, we agree with the district court's finding that Bough could not have discovered Sailes's statement earlier through due diligence.[5] Because the

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[5] As an extension of its argument that Baugh did, in fact, have Sailes's statement earlier than 2015, the state argues that Baugh's *Brady* claim is barred by the statute of limitations and is procedurally defaulted. Essentially, the state argues that because Baugh had Sailes's statement in his possession for many years, he has missed the one-year statute of limitation to file his habeas petition. Similarly, assuming Baugh has always possessed Sailes's statement, the state argues that Baugh procedurally defaulted his *Brady* claim by not raising it in his earlier appeal. Because we hold Baugh could not have previously discovered Sailes's statement, these arguments are inapplicable.

district court's finding was not clearly erroneous, we affirm the fact that Baugh could not have previously uncovered Sailes's statement.

2. Clear and Convincing Evidence that No Reasonable Factfinder Would Find Baugh Guilty

In addition to proving that the evidence could not have been discovered earlier, Baugh must also demonstrate that Sailes's statement, "viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Baugh] guilty" of first-degree felony murder. 28 U.S.C. § 2244(b)(2)(B)(ii). To be guilty of first-degree felony murder in Michigan, the state must prove:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including armed robbery].

People v. Carines, 597 N.W.2d 130, 136 (Mich. 1999) (alterations in original). A defendant can be guilty of felony murder under an aider or abettor theory "by participating in the underlying offense, i.e., the robbery, and [] the killing was within the scope of the robbers' common plan." *Id*. The district court helout at because Sailes's statement still implicated Baugh in the murder of Land as an aider or abettor—by driving

the Jeep to intercept Land's bike and helping Kwasniewski flee—no reasonable juror could find Baugh not guilty. We disagree.

At Baugh's trial, two theories of Land's murder were advanced. According to Kwasniewski, who the state court found to be the most important witness, Baugh was the shooter and Kwasniewski was the driver. Under this theory, Baugh could be guilty of first-degree felony murder as a principal. The second theory of Land's murder advanced at trial was offered by Detective Miller, who read into evidence Baugh's statement. According to her testimony, Dearing was the driver, Kwasniewski was the shooter, and Baugh was the unwitting backseat passenger. In fact, according to Detective Miller's testimony, Baugh repudiated the criminal conspiracy to rob Land, saying, "No, man, f**k that." (Trial Tr., R. 10-8, PageID #697.) Detective Miller even testified that she did not think Baugh was being untruthful in his statement. Under this theory, a jury could *not* find Baugh guilty of first-degree felony murder as a principal, nor could a jury find Baugh guilty of first-degree murder as an aider or abettor as a backseat passenger with no intent to join the conspiracy to rob Land. *Brown v. Palmer*, 441 F.3d 347, 351 (6th Cir. 2006) (citing *People v. Wilson*, 493 N.W.2d 471, 476 (Mich. 1992)) ("[M]ere presence, or even knowledge, that a crime is about to be committed is insufficient to prove guilt under an aiding-and-abetting theory.").

Sailes's statement offers a third theory of the case. According to him, Kwasniewski stated that Baugh was the driver and Kwasniewski was the shooter. Under this theory, Baugh could be guilty of first-degree

felony murder as an aider and abettor for his involvement cutting off Land and helping Kwasniewski flee the scene. But of course, at Baugh's trial, only Baugh's statement and Kwasniewski's testimony offered explanations for Land's murder. The question before us now is how Sailes's statement affects the evidence.

As a threshold matter, Sailes's statement undeniably is hearsay. In Michigan, hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Sailes's statement contains an out-of-court statement from Kwasniewski to Sailes, so the statement is inadmissible to prove the truth of the matter asserted (i.e., that Baugh was the driver and Kwasniewski was the shooter). However, a statement is not considered inadmissible hearsay if the statement is inconsistent with the sworn testimony of the declarant. MRE 801(d)(1). Instead, "[w]hen a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement." *People v. Jenkins*, 537 N.W.2d 828 (Mich. 1995). But "[t]he purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement." *Id.*; *People v. Shaw*, 892 N.W.2d 15, 26 (Mich. Ct. App. 2016) ("Testimony of the impeaching witness presenting extrinsic proof should state the time, place, circumstances of the statement and the subject matter of the statement but not its content.").

Sailes's statement alleges that Kwasniewski told Sailes a materially different account of Land's murder than what he testified at Baugh's trial and second

preliminary hearing. Because his statement to Sailes is inconsistent with his in-court testimony, Baugh could introduce Sailes's statement for the limited purpose of impeaching Kwasniewski. At the same time, the prosecutor cannot rely on Sailes's statement to introduce a third theory of events because Sailes's statement is undeniably hearsay. Sailes's statement would be limited to impeaching Kwasniewski.

The district court held that Sailes's statement still inculpated Baugh in the murder, which would lead a factfinder to find Baugh guilty of first-degree felony murder anyway. This assumes that the jury would hear and rely on the content of Sailes's statement. However, Baugh's use of Sailes's statement would be limited to attacking Kwasniewski's credibility and proving that Kwasniewski's memory of the murder had changed. And even if the jury did hear the content of Sailes's statement, Baugh would be entitled to a limiting instruction providing that Sailes's statement should be considered only to assess Kwasniewski's credibility. *Shaw*, 892 N.W.2d at 27. "Jurors are presumed to follow their instructions," *People v. Mahone*, 816 N.W.2d 436, 439 (Mich. 2011), so we presume the jury would only consider Sailes's statement for it impeaching value.

The state had a threadbare case against Baugh with Kwasniewski's testimony being the only evidence that inculpated Baugh. Thus, we see no way a jury could find Baugh guilty beyond a reasonable doubt if Kwasniewski had been properly impeached.

Even if the content of Sailes's statement were admissible, we would still hold that no factfinder could find Baugh guilty. Of the three competing theories of

Land's murder, none is particularly reliable because Kwasniewski, Detective Miller, and Sailes each have serious credibility problems. Considering Kwasniewski first, his most obvious credibility problem is that his memory of the murder continues to change. He first told Detective Miller that Baugh fired the first shot from inside the stolen Jeep. Later he testified that Baugh exited the vehicle then fired the first shot. And of course, Sailes's contradicts the material allegations of Kwasniewski's testimony. Additionally, Kwasniewski entered a plea agreement with the government in which he agreed to testify against Baugh. Finally, Kwasniewski must overcome the suspicious fact that he was arrested with a .22 caliber shell casing in his pocket: the same caliber bullet that was used to kill Land. Kwasniewski's credibility problems are made all the worse given that at sentencing, the trial court acknowledged that "[t]he jury elected to give a lot of weight to the credibility of Mr. Kwasniewski's testimony[.]"

Next, Detective Miller also has credibility problems of her own. She took the statements from Baugh and Sailes on March 15 and 16, 2002, respectively. While she testified that it was her usual practice to turn over all her investigation notes to the prosecutor, there is no reason to believe that actually occurred when only one of two the statements made its way to the hands of defense counsel.

Finally, Sailes also has credibility problems. Sailes faces similar problems as Kwasniewski in that his prior testimony is largely inconsistent. For example, at times he suggested he mailed Baugh the withheld statement in 2004 and later he said he mailed the

statement in 2015. Moreover, Sailes faces the additional problem of previously lying under oath when he testified at Baugh's first preliminary hearing that he did not know Kwasniewski or Baugh.

In sum, considering Sailes's statement in light of the other evidence leaves a factfinder to choose among three competing theories of how Land was murdered offered by three witnesses who lack credibility. Because Baugh's statement that he was a backseat passenger cannot support a first-degree felony murder conviction, and his version of events is just as likely as Sailes's statement or Kwasniewski's testimony, we see no way that no reasonable factfinder could find beyond a reasonable doubt that Baugh is guilty of first-degree felony murder.

This conclusion is bolstered by the fact that during Baugh's first preliminary hearing, where only his statement to Detective Miller was read into evidence, the court dismissed the charges against him for lacking probable cause. It was only with the addition of Kwasniewski's testimony against Baugh that the prosecution demonstrated probable cause. Assuming Kwasniewski's testimony would be properly impeached, the case against Baugh again becomes seriously deficient, especially under the more demanding beyond a reasonable doubt standard.

In conclusion, Sailes's statement's significantly attacks Kwasniewski's credibility, with Kwasniewski being the state's only witness inculpating Baugh in Land's murder. Sailes's statement is not admissible for its substantive value, but even if it were, it offers a third competing theory of how Land was murdered. With the state's only witness lacking credibility and

so much uncertainty about Baugh's role, if any, in the murder of Land, no reasonable juror could find beyond a reasonable doubt that Baugh is guilty of first-degree felony murder.

II. *Brady* Violation

A. Standard of Review

In habeas appeals, we review the district court's legal conclusions de novo and its factual findings for clear error. *Fleming v. Metrish*, 556 F.3d 520, 524 (6th Cir. 2009). When a state court has adjudicated the merits of a petitioner's claims, federal courts must review those claims under AEDPA's highly deferential standard. *Hendrix v. Palmer*, 893 F.3d 906, 917 (6th Cir. 2018). When a state court does not adjudicate the petitioner's claims on the merits, AEDPA deference does not apply, and the claim is reviewed *de novo*. *Stermer v. Warren*, 959 F.3d 704, 721 (6th Cir. 2020).

Baugh argues the Michigan courts did not adjudicate his *Brady* claim on the merits. In denying his renewed motion for relief from judgment, the Michigan courts only considered whether withholding Sailes's statement was a violation of Michigan law. Specifically, the Michigan courts considered whether the failure to turn over Sailes's statement was contrary to *People v. Cress*, 664 N.W.2d 174 (Mich. 2003), and *People v. Grissom*, 821 N.W.2d 50 (Mich. 2012); it made no reference to federal law, much less *Brady v. Maryland*, 373 U.S. 83 (1963). Baugh argues that because the courts did not address his federal constitutional claim, AEDPA deference should not apply. The district court rejected this argument and held that

despite not mentioning *Brady*, the state courts sufficiently adjudicated Baugh's claim for AEDPA deference to apply.

Baugh relies on *Danner v. Motley*, 448 F.3d 372, 376 (6th Cir. 2006), to argue that his claim was not adjudicated on the merits. However, in *Jackson v. Smith*, 745 F.3d 206, 209 (6th Cir. 2014), we explicitly held that the Supreme Court in *Harrington v. Richter*, 562 U.S. 86 (2011), overruled *Danner*. Instead, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter*, 562 U.S. at 99. Accordingly, even though Michigan courts did not mention *Brady* or any federal law while dispensing of Baugh's claim, his claim was adjudicated on the merits and the state court decision is entitled to AEDPA deference.

Under AEDPA, habeas relief shall not be granted unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Miller v. Stovall*, 742 F.3d 642, 645 (6th Cir. 2014). A state-court decision is "contrary to" clearly established federal law if it (1) applies a rule that contradicts governing Supreme Court law; or (2) confronts a set of facts "materially indistinguishable" from a decision of the Supreme Court and yet arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405– 06 (2000). A state-court decision involves an "unreasonable application" of

clearly established federal law if it (1) correctly identifies the governing legal rule but unreasonably applies it to the facts of the instant case; or (2) either unreasonably extends an established legal principle to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Id.* at 407.

B. Analysis

"To establish that a *Brady* violation undermines a conviction, a convicted defendant must make each of three showings: (1) the evidence at issue is 'favorable to the accused, either because it is exculpatory, or because it is impeaching'; (2) the State suppressed the evidence, 'either willfully or inadvertently'; and (3) 'prejudice . . . ensued.'" *Skinner v. Switzer*, 562 U.S. 521, 536 (2011) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–282 (1999)). The state does not dispute that Sailes's statement was favorable to Baugh, and we agree. Accordingly, we focus our analysis on whether the state willfully or inadvertently suppressed Sailes's statement and whether Baugh was prejudiced.

1. State Suppression of Sailes's Statement

The petitioner bears the burden of proving that the state willfully or inadvertently suppressed exculpatory or impeaching evidence. *United States v. Dado*, 759 F.3d 550, 559 (6th Cir. 2014). Evidence is "suppressed" if it was in the "exclusive control of the government" and either (1) never disclosed to the defendant or (2) "disclosed during trial . . . [and] the defendant can specifically demonstrate prejudice resulting

from the delay[ed disclosure]." *McNeill v. Bagley*, 10 F.4th 588, 600 (6th Cir. 2021). Below, the district court found "[t]here is substantial reason to believe that the prosecutor withheld [Sailes's] statement." (Op., R. 43, PageID ##1895–98.)

On appeal, the state argues that it did not suppress Sailes's statement, but that Baugh made a strategic litigation decision not to mention it until 2015. Under the state's theory, Sailes's counsel opted not to mention the statement because it was additional evidence that implicated Baugh in Land's murder.

The state willfully, or at least inadvertently, suppressed Sailes's statement. As discussed above, Baugh likely did not have access to Sailes's statement before Sailes mailed the statement to Baugh in 2015. Because Sailes's statement was in the exclusive control of the government and never handed over to Baugh or his attorney, Baugh has satisfied his burden of proving that the prosecutor at least inadvertently withheld Sailes's statement.

The state's theory that Baugh made a strategic decision not to impeach Kwasniewski with Sailes's statement because the statement was so damaging to his defense makes little sense. On appeal, the state mentions several times that the prosecutor sought to convict Baugh as a principal or as an aider and abettor. But surely, if Sailes's statement that Baugh was the driver and Kwasniewski was the shooter was such strong evidence that Baugh was guilty of felony murder, the state would have called Sailes to testify and further implicate Baugh in the murder. Instead, the prosecutor made no mention of Sailes's statement. In fact, the state had an interest in shoring up the

credibility of Kwasniewski because at Baugh's first preliminary hearing—at which the state presented its case against Baugh without Kwasniewski's testimony—the court found the charges against Baugh lacked probable cause. It was only by including Kwasniewski's unimpeached testimony against Baugh that the state was able to bind over its charges against Baugh. It follows, then, that if Kwasniewski's testimony was essential to satisfy the probable cause standard, the state had an interest in suppressing impeachment evidence that would hamper its ability to meet the even more demanding beyond a reasonable doubt standard.

Furthermore, the prosecutor in this case had a proclivity to withhold information that would be helpful to Baugh's defense. Specifically, Baugh intended to question Crawford, the only eyewitness to the murder besides Kwasniewski, but the prosecution did not inform Baugh that Crawford had died until after the trial commenced. In a similar fashion, the prosecutor "forgot" to mention that he intended to introduce into evidence a statement from Kwasniewski's mother alleging Baugh bragged about killing someone.

For all these reasons, we find that the state willfully, or at least inadvertently, suppressed Sailes's statement in violation of *Brady*.

2. Prejudice

"The prejudice analysis under *Brady* evaluates the materiality of the evidence." *Jefferson v. United States*, 730 F.3d 537, 550 (6th Cir. 2013). "Evidence is material under *Brady* if a reasonable probability exists that, had the evidence been disclosed to the

defense, the result of the proceeding would have been different." *Jells v. Mitchell*, 538 F.3d 478, 501 (6th Cir. 2008). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

The requirement to prove prejudice under *Brady* is less demanding than the requirements of § 2244(b)(2)(B). In fact, we have held that satisfying the requirement of § 2244(b)(2)(B)(ii)— that no reasonable factfinder would find the petitioner guilty in light of the new evidence—is sufficient to prove the prejudice prong of *Brady*. *In re Jackson*, 12 F.4th 604, 610 (6th Cir. 2021) ("Jackson has also shown that 'but for the constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense,' which would suffice to demonstrate prejudice under *Brady*." (quoting 28 U.S.C. § 2244(b)(2)(B)(ii))). As mentioned above, when considering Sailes's statement in light of all the evidence, no reasonable factfinder could find beyond a reasonable doubt that Baugh is guilty of first-degree felony murder. Accordingly, because Baugh can satisfy the requirements of § 2244(b)(2)(B)(ii), he has satisfied the prejudice prong of *Brady*.

Accepting that the suppression of Sailes's statement constitutes a *Brady* violation, the final issue is whether the state court "unreasonable appli[ed] clearly established Federal law." 28 U.S.C. § 2254(d)(1). The crux of the state court's holding was that under Kwasniewski's account of the murder or

Sailes's account, Baugh could still be guilty of first-degree felony murder; and therefore, "the evidence supplied in this witness statement would not produce a different result on retrial." (Op. & Order Denying Second Mot. for Relied from J., R. 10-14, PageID ##1171–72.) The state court never mentioned that Kwasniewski and Sailes both had serious credibility problems, which could lead a jury to reject both of their theories. Worse still, the state court never considered Detective Miller's testimony that Baugh was a backseat passenger, which could not support a guilty verdict.

"The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received . . . a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. Without any consideration given to Sailes's statement at his trial, Baugh cannot be said to have received a fair trial. Without the ability to properly impeach the state's star witness, his current conviction is not worthy of confidence. Accordingly, because the state court held Baugh to a higher standard than what is required for relief under *Brady*, the state court unreasonably applied clearly established federal law.

CONCLUSION

For the reasons set forth above, we **REVERSE** the district court's dismissal of Baugh's petition and **GRANT** Baugh a conditional writ of habeas corpus that will result in the vacation of his conviction and sentence unless the state of Michigan commences a new trial against him within 90 days after this judgment becomes final.

RALPH B. GUY, JR., Circuit Judge, dissenting. I must dissent from the grant of a conditional writ vacating the conviction and sentence of Jimmy Baugh for first-degree felony murder of Craig Landyczkowski ("Land") in a December 2001 robbery gone bad. I would affirm the district court's dismissal of Baugh's second or successive petition because, at a minimum, the newly asserted *Brady* claim cannot satisfy the gatekeeping requirements of 28 U.S.C. § 2244(b)(2)(B)(ii). The district court was right to conclude that the facts, "if proven and viewed in light of the evidence *as a whole*," would not establish "*by clear and convincing evidence* that, but for the [alleged *Brady* violation], *no reasonable factfinder* would have found [Baugh] guilty of the underlying offense." *Id.* (emphasis added).[1]

For the sake of brevity and in the interest of ensuring that the heart of this matter does not get lost in the weeds, I skip over the Warden's not insubstantial argument that Baugh had or reasonably could have discovered Ricky Sailes's March 2002 statement well before December 2015. This argument presents a hurdle for Baugh as to the timeliness of his petition, *id.* at § 2244(d), as well as the requirement that "the factual predicate for the claim could not have been discovered previously through the exercise of due

[1] I agree that *Wogenstahl* dictates that Baugh's *Brady* claim is subject to § 2244(b)'s gatekeeping requirements. *In re Wogenstahl*, 902 F.3d 621, 627 (6th Cir. 2018); *see also In re Jackson*, 12 F.4th 604, 608 (6th Cir. 2021); *Brown v. Muniz*, 889 F.3d 661, 674 (9th Cir. 2018); *but see, e.g.*, *Storey v. Lumpkin*, 142 S. Ct. 2576, 2578 (2022) (Mem.) (Sotomayor, J., statement respecting the denial of certiorari).

diligence," *id.* at § 2244(b)(2)(B)(i).[2] But in my view, the heart of the matter is the majority opinion's conclusion that, but for the alleged suppression of Sailes's statement, no reasonable factfinder would have found Baugh guilty of first-degree felony murder. (Maj. Op. 18-23.) That conclusion rests heavily on the mistaken view that Sailes's statement may only be considered for the limited purpose of impeaching Kwasniewski's testimony. Nothing could be farther from the truth.

First, § 2244(b)(2)(B)(ii) directs that the assessment must be made "in light of the evidence as a whole," meaning all the evidence, "old and new, incriminating and exculpatory, *without regard to whether it would necessarily be admitted under* [*evidentiary rules*]." *United States v. MacDonald*, 641 F.3d 596, 612 (4th Cir. 2011) (emphasis added) (alteration in original) (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)). Thus our assessment of Sailes's statement cannot be limited to its value as impeachment of Kwasniewski's version of the shooting—*i.e.*, that

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[2] Sailes and Baugh had known each other and Kwasniewski for years and had committed armed robberies together. But when called as a witness at the first preliminary examination, Sailes denied knowing either of them— testimony that everyone knew to be false—and was excused without further questioning by anyone. (PageID 1563, 1577-78, 1686-87.) Sailes explained during the hearing before the district court that he refused to testify at the preliminary exam because the prosecutors were not offering him anything on the carjacking case for his help in the felony-murder case. (PageID 1590-91.) Also, although Sailes also testified that he mailed a copy of his statement to Baugh, Sailes was unable to say either *when* that occurred or *whose* idea it was to do so. (PageID 1587 ("You just asked me did I send it when I was in prison or did I send it when I was out of prison, and I just answered you and told you I can't remember.")).

Baugh was the shooter and he (Kwasniewski) was the driver (*i.e.*, the first theory of the case). (*But see* Maj. Op. 19-20.)

Second, and more importantly, regardless of whether *Kwasniewski's* out-of-court statements to Sailes would have been admissible, *Baugh's own inculpatory statement to Sailes* would be admissible because it is not hearsay. *People v. Lundy*, 650 N.W.2d 332, 333-34 (Mich. 2002) ("Admissions by a party are specifically excluded from hearsay and, thus, are admissible as both impeachment and substantive evidence under MRE 801(d)(2)."); *see also* Mich. R. Evid. 801(d)(2)(A).

Specifically, after Sailes described what Kwasniewski told him about the shooting the night before—in Baugh's presence no less—Sailes relayed Baugh's own admission:

> Q. Did Jimmie say anything while [Kwasniewski] was telling you this?
>
> A. ***Jimmie said [Kwasniewski] shot the guy and he [Baugh] drove off.***

(PageID 18-19 (emphasis added); *see also* Maj. Op. 8.) Make no mistake, this is *substantive* evidence of Sailes's third theory of the case—that *Baugh* was the driver and *Kwasniewski* was the shooter.

Why does this matter? It matters because the jury could have convicted Baugh either as a principal *or* as an aider and abettor. The Michigan Court of Appeals rejected Baugh's challenge to the aiding and abetting instruction, emphasizing that the prosecutor told the

jury in his opening statement that "it's the People's position in this case that both defendant and Kwasniewski are equally liable . . . equally guilty of what we call first-degree felony murder" because they "aided and abetted and helped one another out in this crime." *People v. Baugh*, No. 247548, 2004 WL 2412692, at *4 (Mich. Ct. App. Oct. 28, 2004) (cleaned up), *app. denied*, 705 N.W.2d 29 (Mich. 2005). So, for Baugh to win acquittal, the jury would have had to find that Baugh was *neither* the shooter *nor* the driver.

Third, that was precisely the defense theory at trial (*i.e.*, the second theory). (Maj. Op. 18.) Baugh did not testify; but Baugh's written statement was admitted into evidence through Detective Miller. (PageID 152-55.) According to that statement, Baugh, Kwasniewski, and Dearing were "out stealing cars" and were riding in a stolen Jeep when Kwasniewski and Dearing decided to rob Land. (PageID 152.) In Baugh's version of the shooting, Kwasniewski had the gun and was in the front passenger seat; Dearing was driving; and Baugh was merely "an unwitting backseat passenger" when Kwasniewski attempted to rob and then shot Land. (Maj. Op. 18.) This "backseat Baugh" story, if believed, would have allowed the jury to acquit Baugh.

Defense counsel also suggested in his opening statement that Baugh was not even there; but that Baugh had only heard about the shooting and was talked into the "backseat Baugh" story by Detective Miller. (PageID 609-10.) Miller specifically denied that scenario when pressed on cross-examination and testified that Baugh told her he was in the backseat.

(PageID 693-94.) In closing, the prosecutor argued that Baugh had given the statement to deflected blame and cleverly inject inconsistencies so he could later deny being there at all. (PageID 993-94.)

So, in my view, use of Sailes's statement introducing the "third theory of the case" (Maj. Op. 18) would have made it *easier*—not harder—for the jury to convict Baugh of first-degree felony murder. As the trial court explained, "MCL 767.39 allows a defendant who directly or indirectly commits an offense to be considered an aider and abettor." (PageID 30.) Under Kwasniewski's version of the events, where he was the driver and Baugh "fired the gun that killed the victim," "[t]hey worked as a team and [Baugh] would be guilty of first-degree felony murder." (PageID 30.) "Alternatively, if [as Sailes's statement described,] . . . [Baugh] drove the stolen Jeep and [Kwasniewski] fired the gun that killed the victim, again they worked as a team and [Baugh] would still be guilty of first-degree felony murder." (PageID 31.) That is, with the addition of Sailes's statement, a reasonable factfinder could convict Baugh even if they did not believe he was the shooter (as Kwasniewski testified), as long as they believed Baugh was the driver (as Sailes said both Kwasniewski *and Baugh* told him).

Instead of two theories—one of which would support an acquittal—Sailes's statement injected a third theory that contradicted Baugh's theory that he was not guilty because he was *neither* the driver *nor* the shooter. (PageID 970.) That was Baugh's best chance: defense counsel told the jury in closing, "the only story you have that implicates Mr. Baugh is Mr. Kwa[s]niewski's story." (PageID 966.) And, from the

get go, the defense attacked Kwasniewski's credibility. Defense counsel began opening statement with Kwasniewski's agreement to plead guilty to second-degree murder—thereby avoiding a "non-parolable life" sentence and getting three other felony charges dismissed—on the condition that he "testify against Jimmy Baugh." (PageID 601- 02.) The prosecutor tried to soften the blow by eliciting the details of that agreement from Kwasniewski even before asking Kwasniewski about Land's murder. (PageID 746-47, 752-62.)[3]

Kwasniewski also admitted "that he used three aliases to avoid criminal responsibility," that he had pleaded guilty to second-degree murder," and that he "had no qualms in 'riding out' to commit an armed robbery or 'stick up' with defendant." *Baugh*, 2004 WL 2412692, at *2. On cross-examination, Kwasniewski acknowledged being "an armed robber"; admitted that he was "willing to lie to the police to avoid criminal consequences"; and said that his lawyer told him that he "had to say" Baugh was the shooter to get the sentencing deal. (PageID 766-67, 769, 771.) That lawyer even testified regarding the details of Kwasniewski's sentencing agreement. (PageID 866-75.) The jury knew Kwasniewski was a liar and a robber who would benefit substantially by fingering Baugh as the shooter. Apart from Sailes's statement, there was already ample basis to disbelieve Kwasniewski's

[3] Despite Baugh's suggestion to the contrary, the trial court's only limitation on this impeachment was to with respect to Kwasniewski's separate plea agreement in the carjacking case. (PageID 387 ("You can refer to any agreement he has regarding this case.")).

testimony concerning which one of them was the shooter and which one of them was the driver.

In the end, it is clear to me that Sailes's statement would not only directly inculpate Baugh in the crime as an aider and abettor, but also substantially weaken Baugh's only viable defense that he was an "unwitting backseat passenger" (*i.e.*, *neither* the shooter *nor* the driver). Thus, the evidence as a whole is not sufficient to establish that, but for the alleged suppression of Sailes's statement, no reasonable factfinder would have found Baugh guilty of first-degree felony murder—and certainly not by clear and convincing evidence.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-1844

JIMMY BAUGH,
Petitioner - Appellant,

v.

NOAH NAGY, Warden,
Respondent - Appellee.

FILED
Sep 30, 2022
DEBORAH S. HUNT,
Clerk

Before: GUY, MOORE, and CLAY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Bay City.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's dismissal of Jimmy Baugh's petition is REVERSED. IT IS FURTHER ORDERED that a conditional writ of habeas corpus is GRANTED resulting in the vacation of his conviction and sentence unless the state of Michigan commences a new trial against him within 90 days of the filing date of this judgment.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JIMMY BAUGH,

Petitioner, Case No. 1:19-cr-10032

v. Honorable Thomas L. Ludington
United States District Judge

SHERMAN CAMPBELL,

Respondent.
_____/

OPINION AND ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND ISSUING CERTIFICATE OF APPEALABILITY

Petitioner Jimmy Baugh, confined at the G. Robert Cotton Correctional Facility in Jackson, Michigan, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See* Pet., ECF No. 1. In his pro se application, he challenges his state jury trial convictions for felony murder, MICH. COMP. LAWS § 750.316(1)(b); felon in possession of a firearm, *id.* § 750.224f; and possession of a firearm during the commission of a felony, *id.* § 750.227b. For the reasons stated hereafter, the Petition will be denied.

I.

On December 3, 2001, the victim in this case, Mr. Craig Land, was shot to death on the eastern sidewalk of Hayes Street, between Maddelein Street and East

Seven Mile Road in Detroit. The next day, the police arrested Robert Kwasniewski ("Lucky"), Jimmy Baugh ("Petitioner"), Ricky Sailes ("Slick"), and Lafayette Dearing ("Laf") for an unrelated carjacking.[1] In Lucky's pocket, however, was a .22 shell casing—the same type of bullet that killed Craig Land. *See* Jury Trial Tr. Vol. II, ECF No. 10-8 at PageID.763.

In March 2022, while detained, Petitioner, Lucky, and Slick gave statements to officers from the Detroit Police Department regarding the homicide. Slick and Laf pleaded guilty to the carjacking offenses. Petitioner and Lucky still faced the carjacking charges, in addition to charges for first-degree felony murder, felon in possession of a firearm, and possession of a firearm during the commission of a felony. *See* Register of Actions, ECF No. 10-1 at PageID.218; First Prelim. Hr'g Tr., ECF No. 10-2 at PageID.262.

A.

On April 24, 2002, Judge Norma Dotson from the Thirty-Sixth District Court of Michigan conducted the preliminary examination for Petitioner and Lucky. *See generally* First Prelim. Hr'g Tr., ECF No. 10-2. Wayne County Prosecutor Felepe Hall first called Slick as a witness, who testified that he did not know Petitioner or Lucky, which he has since acknowledged was false. *Id.* at PageID.226–28. Next, Prosecutor Hall called Officer Derryck Thomas, who testified about the details of his March 16, 2002 interview with

[1] The nicknames of the people involved in this case come from the proceedings in the trial court and the parties' filings and are used in this Order for consistency and clarity.

Lucky,[2] which Judge Dotson excluded against Petitioner as inadmissible hearsay. *Id.* at PageID.229–43. Finally, Hall called Detective JoAnn Miller of the Detroit Police as a witness, who testified about the details of her interview with Petitioner,[3] which Judge

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[2] Officer Thomas read Lucky's March 16, 2002 statement into the record, which stated in relevant part: Lucky stole a Jeep and picked up Petitioner, who "was a hundred dollars short on his rent and needed to hit a lick." First Prelim. Hr'g Tr., ECF No. 10-2 at PageID.237. After finding a target, Lucky stopped the Jeep and Petitioner jumped out the passenger seat, robbed someone with a handgun, and then "got into the Jeep," after which they both split an "Ecstasy pill." *Id.* at PageID.238. Next, Petitioner spotted Craig Land as a potential target and told Lucky to follow him to "see what [he] got." *Id.* at PageID.239. After following Craig Land for a bit, Petitioner told Lucky to hit Craig Land with the Jeep. *Id.* at PageID. 240. Instead, Lucky "pulled in front of him, sort of blocking him in." *Id.* Then Petitioner "rolled down the window," exclaimed, "Run your shit nigga!," and shot Craig Land in the leg, after which he "fell and threw his money." *Id.* Petitioner exited the Jeep "to get the money" and "let off another shot." *Id.* A white van appeared, so Petitioner "jumped in the Jeep and mashed off." *Id.* As they escaped, Petitioner fired two shots at the van, which peeled off, leaving Lucky and Petitioner undetected. *Id.*

[3] Detective Miller read Petitioner's March 15, 2002 statement into the record, which was in Miller's handwriting and stated in relevant part: Petitioner, Laf and Lucky "stole this Jeep," and "stopped at this gas station on Seven Mile and Hayes." First Prelim. Hr'g Tr., ECF No. 10-2 at PageID.255. Lucky went into the gas station and noticed that Craig Land "got some loot on him." *Id.* Against Petitioner's protest, Lucky and Laf agreed to rob Craig Land. *Id.* As Laf drove by Craig Land, Lucky rolled down the passenger window to initiate the robbery. *Id.* Next, Laf cut off Craig Land with the Jeep, then Lucky exited the vehicle and attacked him, so he "swung the bag he was carrying at Luck." *Id.* "That's when Luck shot him." *Id.* Craig land "fell, Luck got back in the truck[,] and Laf drove off." *Id.* Laf spotted a van or truck seemingly tailing them, but he evaded it. *Id.* at PageID.256. The

Dotson excluded against Lucky as inadmissible hearsay. *Id.* at PageID.243–59. Neither Lucky nor Petitioner testified at the probable-cause hearing. As indicated, even if they had sought to do so, their testimony was inadmissible hearsay against each other because they were codefendants. *See* Second Prelim. Hr'g Tr., ECF No. 10-3 at PageID.281–82. After considering the evidence presented, Judge Dotson found probable cause against Lucky for the homicide, and she dismissed the case against Petitioner for lack of probable cause under Michigan Court Rule 6.110(F).[4] First Prelim. Hr'g Tr., ECF No. 10-2 at PageID.263.[5]

What happened next to Petitioner, or why it occurred, is not altogether clear. On June 24, 2002, the homicide-related charges were once again brought against Petitioner, and his second preliminary

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firearm, which Lucky owned, "fell on the grass when [they] got caught for this carjacking stuff." *Id.*

[4] Michigan Court Rule 6.110(F) concerns discharge of defendants when the judge finds no probable cause and provides that:

> If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense or reduce the charge to an offense that is not a felony. *Except as provided in MCR 8.111(C), the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge.*

MCR 6.110(F) (emphasis added).

[5] Suspiciously, the first preliminary examination with Judge Dotson is absent from the state-level docket for Petitioner's case. *See generally* Register of Actions, ECF No. 10-1 at PageID.218–20.

examination was scheduled for July 18, 2002. *See* Register of Actions, ECF No. 10-1 at PageID.218. However, in the interim between the two preliminary examinations, Wayne County Prosecutor Augustus Hutting[6] made a plea offer to Lucky after Judge Dotson bound him over for trial on the homicide. In sum, Prosecutor Hutting agreed to dismiss Lucky's three carjacking charges and charge him with second-degree murder instead of first-degree murder, leaving him subject to 18 to 40 years' imprisonment instead of a life sentence and more, *but only if* he testified against Petitioner and implicated him as Craig Land's assailant. *See* Jury Trial Tr. Vol. I, ECF No. 10-7 at PageID.384; Second Prelim. Hr'g Tr., ECF No. 10-3 at PageID.267–68, 270, 285. As Prosecutor Hutting later admitted, he coordinated with Lucky to make all this happen. *See* Second Prelim. Hr'g Tr., ECF No. 10-3 at PageID.280–82. Indeed, on June 20, 2002, Lucky pleaded guilty to second-degree murder. *See id.* at PageID.285. Four days later, Prosecutor Hutting submitted a new warrant for Petitioner, who was arraigned before Judge Robert K. Costello on July 6, 2002. *See* Register of Actions, ECF No. 10-1 at PageID.218.

B.

On July 18, 2002, Judge Mark A. Randon conducted Petitioner's second preliminary examination despite objections. *See generally* Second Prelim. Hr'g Tr., ECF No. 10-3. First, Petitioner's trial counsel, Mr. James O'Donnell, objected that Judge Dotson should conduct the second preliminary examination, because

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[6] Augustus Hutting passed away October 10, 2011.

MCR 6.110(F) requires a refiled case to be "reheard by the same Magistrate or Judge who heard the first case." *Id.* at PageID.268. Referring to MCR 8.111(C),[7] Judge Randon responded by explaining that MCR 6.110(F) "allows an exception when there's a temporary absence of a Judge and the Chief Judge reassigns the case." *Id.* Judge Randon elaborated that he "had a conversation with the Chief Judge" who "indicated that she [would] reassign the case to [him] in the absence of Judge Dotson, who[] [was] out on vacation." *Id.* Attorney O'Donnell correctly replied that MCR 8.111(C) provides that when the chief judge designates a judge to act temporarily during the temporary absence of the assigned judge, the case returns to the assigned judge upon that judge's return. *See id.* at PageID.268–69. Relying on "the purpose of the exception," Judge Randon stated that "[i]f [Judge Dotson] was coming back tomorrow it might be a different matter" and proceeded to entertain evidence. *Id.* at PageID.270. As Prosecutor Hutting added, Judge Dotson was expected to return in 11 days. *See id.*

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[7] Michigan Court Rule 8.111(C) governs reassignment of cases and, as relevant, provides that:

> If a judge is disqualified or for other good cause cannot undertake an assigned case, *the chief judge may reassign it to another judge by a written order stating the reason*. To the extent feasible, *the alternate judge should be selected by lot*. The chief judge shall file the order with the trial court clerk and have the clerk notify the attorneys of record. *The chief judge may also designate a judge to act temporarily until a case is reassigned or during a temporary absence of a judge to whom a case has been assigned*.

MCR 8.111(C)(1) (emphases added).

Part and parcel to his plea bargain, Lucky testified at Petitioner's second preliminary examination, implicating Petitioner as Craig Land's shooter. *See generally id.* at PageID.284–329. First, Lucky testified as to the nature of his plea bargain to testify against Petitioner. *Id.* at PageID.285. Then, as relevant, Lucky gave testimony that is mostly consistent with the written statement he gave to Officer Thomas on March 16, 2002. *See* discussion *supra* note 2. His testimony is different in that he stated that Petitioner exited the Jeep *before* telling Craig Land to "run your shit." *Id.* at PageID.293. In addition, Lucky testified with much more detail than his written statement about the details of the actual shooting, adding that Petitioner first shot Craig Land in the leg, that Craig Land got up after the first shot, and that Petitioner shot Craig Land the second time "for bullshitting." *Id.* at PageID.294.

Based on Lucky's testimony, Judge Randon found probable cause against Petitioner for first-degree felony murder. *See id.* at PageID.338–39. Consequently, Petitioner was bound over to the Third Judicial Circuit Court of Michigan on the homicide-related charges, where Judge Gregory D. Bill conducted the remainder of Petitioner's trial-court proceedings. *See* Register of Actions, ECF No. 1 at PageID.218–19; *see also* Arraignment, ECF No. 10-4; Final Pretrial Conference Vol. I, ECF No. 10-5; Final Pretrial Conference Vol. II, ECF No. 10-6; Jury Trial Tr. Vol. I, ECF No. 10-7; Jury Trial Tr. Vol. II, ECF No. 10-8; Jury Trial Tr. Vol. III, ECF No. 10-9; Jury Trial Tr. Vol. IV, ECF No. 10-10; Sentencing Hr'g Tr., ECF No. 10-11.

C.

Petitioner's jury trial before Judge Bill began on January 13, 2003. *See* Jury Trial Tr. Vol. I, ECF No. 10-7 at PageID.371.

Just before the trial began, Prosecutor Hutting submitted a surprise written statement from Lucky's mother, the date of which is not in the record. *See id.* at PageID.376. Her statement said that, the day after Craig Land's homicide Petitioner "bragged" to her that he shot a person, and that she was not sure whether the victim was Craig Land. *See id.* at PageID.379–81. When Judge Bill asked why Prosecutor Hutting was submitting the statement "so late," he replied, "You know, Judge, because she didn't really say much at the investigator subpoena. And I guess I forgot about it." *Id.* at PageID.382. Attorney O'Donnell explained that the written statement was made "about a separate incident by the mother of [Lucky] who's accused of the crime who's now coming in and . . . testifying against [Petitioner]." *Id.* at 379. Indeed, her written statement describes an incident in which Petitioner allegedly stole a man's "chain," shot him, then told Lucky's mother, who later apparently located the victim. *See* Jury Trial Tr. Vol. II, ECF No. 10-8 at PageID.615–16.

That written statement conflicted with a separate statement she gave to the police, alleging that she saw Petitioner shoot Craig Land from the gas station where Petitioner and Lucky first spotted him. *See id.* at PageID.616. Yet Judge Bill admitted Lucky's mother's written statement over Petitioner's trial counsel's strong objection and gave trial counsel "the

lunch hour" to prepare for it. Jury Trial Tr. Vol. I, ECF No. 10-7 at PageID.375–82.

In addition, Judge Bill would not allow defense counsel to inform the jury of the substantial nature of Lucky's plea bargain, which supplanted a mandatory life sentence with a sentence of 18 to 40 years. *See id.* at PageID.390–92. As indicated, because Lucky had pled guilty, Prosecutor Hutting could use him to testify against Petitioner. *See* Second Prelim. Hr'g Tr., ECF No. 10-3 at PageID.282. Instead, Judge Bill limited Attorney O'Donnell "to make reference to the fact there's an agreement." Jury Trial Tr. Vol. I, ECF No. 10-7 at PageID.390.

Moreover, Attorney O'Donnell offered a statement that a lay witness, Mr. Gerves Crawford, made to the police at the scene seemingly implicating Lucky as Craig Land's triggerman. *See* ECF No. 10-12 at PageID.1070, 1094–95. But during a recess, Prosecutor Hutting asked Judge Bill to exclude Crawford's statement based on the State's confrontation right because the witness had passed away. *See id.* Judge Bill excluded Crawford's statement. *See id.*; *see also* Jury Trial Tr. Vol. II, ECF No. 10-8 at PageID.612–13.

During the trial, Prosecutor Hutting argued that Petitioner was guilty of first-degree murder as the shooter or alternatively as at least an aider and abettor. *See* Jury Trial Tr. Vol. II, ECF No. 10-8 at PageID.591–92, 598–99; Jury Trial Tr. Vol. IV, ECF No. 10-10 at PageID.945–47, 998. Similarly, Attorney O'Donnell argued against both theories and attempted to impeach Lucky's testimony. *See* Jury Trial Tr. Vol. IV, ECF No. 10-10 at PageID.970–72, 980–81. Judge Bill gave jury instructions for both theories. *See*

id. at PageID.1009–12, 1014–16. The jury later asked Judge Bill to re-read the jury instructions for aiding and abetting. *See id.* at PageID.1026–31. Petitioner neither testified nor called any witnesses. Ultimately, the jury found Petitioner "[g]uilty of first-degree murder, felony murder, larceny." *Id.* at PageID.1035.

Fifteen days later, Judge Bill sentenced Petitioner to two to five years' imprisonment for being a felon in possession of a firearm; life imprisonment without the possibility of parole for first-degree murder; and two years' imprisonment for the felony firearm conviction, to run consecutively to all counts. *See* Sentencing Hr'g Tr., ECF No. 10-11 at PageID.1054–55.

D.

In addition to the two statements discussed above, a third statement (the subject of this habeas proceeding) never made it to Petitioner or his trial counsel. *See* Pet., ECF No. 1 at PageID.18–19. According to its date, Slick made the statement to Detective Miller on March 16, 2002. *Id.* Slick's statement explains that the day after the shooting, Lucky admitted to Slick that he shot Craig Land and that Petitioner was his driver. *Id.*; *see also* Second Prelim. Hr'g Tr., ECF No. 10-3 at PageID.312, 328. Slick's statement also says that Petitioner "said [Lucky] shot the guy and he drove off." Pet., ECF No. 1 at PageID.19.

The relevant facts the Michigan Court of Appeals relied on are presumed correct in habeas proceedings brought under 28 U.S.C. § 2254, *see Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009) (citing 28 U.S.C. § 2254(e)(1)):

The victim in this case was a disabled forty-three-year-old man who lived with his father in Detroit. One evening, the victim rode his bicycle to a nearby convenience store to purchase beer. On his way home from the store, he was shot twice and died at the hospital. Near his bicycle, the police found $29 and a bag that contained a broken beer bottle.

Robert Kwanniewski, who is also known by several aliases [including "Lucky"], was with defendant on the day the victim was killed. Kwanniewski testified that he stole a Jeep Cherokee and returned to his home in Hamtramck, where defendant approached him with the idea to rob someone. Defendant, who was armed with a .22 pistol, needed $100 because he was short on rent. Kwanniewski claimed that he and defendant drove around, robbed one man, and spent the $50 proceeds on drinks, cigarettes, and drugs.

Kwanniewski claimed that defendant saw the victim in the instant case that evening, and they followed him away from a convenience store. Kwanniewski claimed that he cut the victim off with the Jeep and defendant approached the victim, demanding money. Because the victim did not cooperate, defendant shot him in the right hip, and the victim threw $29 at defendant. Kwanniewski became nervous because a vehicle was approaching, and he tried to hurry defendant. Defendant shot the victim again, this time in the left chest, and he returned to the Jeep without picking up the

money. While they were driving away, defendant fired two gunshots at the approaching vehicle, which then ceased to follow them.

While incarcerated on other charges, defendant approached the police and made a statement, in which he admitted that he, Kwanniewski, and two other friends had stolen a Jeep on the day in question. Defendant asserted that he was a backseat passenger in the Jeep when Kwanniewski spotted the victim and they stopped the Jeep. According to defendant, Kwanniewski shot the victim twice because he failed to cooperate with a robbery attempt. Defendant did not remember the victim riding a bicycle.

Defendant and Kwanniewski were arrested the following day for an unrelated carjacking. Kwanniewski spoke with the police several days after the arrest, but he did not implicate defendant and did not discuss the instant case. Several months later, defendant sent a letter to the police, requesting a meeting. Defendant discussed the instant case with an officer and made the above-mentioned statement, in which he implicated Kwanniewski. Both defendant and Kwanniewski were then charged with first-degree felony murder.

The trial court conducted a preliminary examination, but only bound Kwanniewski over for trial. Kwanniewski entered into a plea agreement with the prosecution, whereby he pleaded guilty to a reduced charge of second-degree murder in exchange for the

> dismissal of three unrelated stolen car cases. Kwanniewski also entered into a sentencing agreement, which provided that he serve 18-40 years instead of 270-450 months in prison.

People v. Baugh, No. 247548, 2004 WL 2412692, at *1–2 (Mich. Ct. App. Oct. 28, 2004) (per curiam), *appeal denied*, 705 N.W.2d 29 (Mich. 2005); ECF No. 1 at PageID.44–46.

On July 31, 2006, Petitioner filed a post-conviction motion for relief from the judgment, which was denied. *See People v. Baugh,* No. 02-8915 (Mich. 3d Cir. Ct. Wayne Cnty. Feb. 15, 2007), *appeal denied*, No. 280250 (Mich. Ct. App. Nov. 16, 2007), *appeal denied*, 750 N.W.2d 188 (Mich. 2008). Petitioner raised three claims: (1) that the prosecutor committed prosecutorial misconduct by requesting Judge Bill to exclude Crawford's statement; (2) that Judge Bill abused his discretion by excluding Crawford's statement; and (3) that decision of Petitioner's trial counsel "not to move the court to make the courts decision to exclude [Crawford's] statement a part of the record" was ineffective assistance of counsel. ECF No. 10-17 at PageID.1353–57. Judge Bill denied all three counts on their merits. *See id.*

On July 14, 2008, Petitioner filed a petition for writ of habeas corpus, which this Court denied on the merits on September 15, 2010. *See Baugh v. Palmer*, No. 208-CV-13033, 2010 WL 3623175 (E.D. Mich. Sept. 15, 2010).

On July 29, 2016, Petitioner filed a second post-conviction motion for relief from the judgment with the state trial court, which was denied on the merits.

See People v. Baugh, No. 02- 8915 (Mich. 3d Cir. Ct. Wayne Cnty. Jan. 27, 2017), *appeal dismissed*, No. 337811 (Mich. Ct. App. Sept. 15, 2017) (holding petition was procedurally barred and did not satisfy any of the exceptions in Michigan Court Rule 6.502(G)), *appeal denied*, 911 N.W.2d 703 (Mich. 2018) (holding Petitioner failed to establish that he was entitled to post-conviction relief under Michigan Court Rule 6.508(D)).

After Michigan denied him habeas relief, Petitioner filed a successful motion by which the Sixth Circuit Court of Appeals authorized this Court to consider a second or successive application for a writ of habeas corpus. *See In re Baugh*, No. 18-1848 (6th Cir. Dec. 17, 2018) (finding a prima facie violation of *Brady v. Maryland*, 373 U.S. 83 (1963)).

On January 3, 2019, Petitioner filed a second habeas petition. *See* ECF No. 1. Respondent filed a motion to dismiss the Petition, contending that Petitioner did not file within the statute of limitations, 28 U.S.C. § 2244(d)(1). *See* Mot. to Dismiss Pet., ECF No. 9. Petitioner responded. Resp. to Mot. to Dismiss Pet., ECF No. 11. On February 13, 2021, Respondent's motion to dismiss was denied, and counsel was appointed for Petitioner. Order Den. Mot. to Dismiss Pet., ECF No. 13; Order Appointing Federal Public Defender, ECF No. 14.

After two status conferences, this Court conducted an evidentiary hearing on Zoom videoconferencing on March 2, 2021 to gather testimony regarding the timeliness of Slick's statement. *See* Evidentiary Hr'g Tr., ECF No. 32. The Petition has since been fully briefed. *See* Resp. to Pet., ECF No. 39; Pet'r's Suppl. Br., ECF

No. 40; Resp't's Resp. to Pet'r's Suppl. Br., ECF No. 41; Pet'r's Reply to Resp't's Resp. to Pet'r's Suppl. Br., ECF No. 42.

Two issues remain at this juncture: (1) Whether Petitioner has satisfied the conditions of § 2244(b)(2)(B); then, if so, (2) Whether Petitioner has satisfied the conditions of § 2254(d). He has satisfied neither. The first issue is addressed *infra* Part II, the second *infra* Part III.

II.

This Court must dismiss a successive habeas petition unless:

> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B).

A.

Petitioner could not have discovered Slick's statement with due diligence.

i.

During the evidentiary hearing, this Court heard two competing explanations for how Petitioner obtained the statement Slick made to Detective Miller.

First, Slick testified that Detroit police officers told him not to assist the prosecutors unless they assisted him with the charges he was facing, which is why he testified that he did not know Lucky or Petitioner at Petitioner's first preliminary examination. *See* Evidentiary Hr'g Tr., ECF No. 32 at PageID.1576, 1588–89. Slick also testified that he does not confidently remember how he obtained a copy of the statement, when he informed Petitioner about it, or when he sent it to Petitioner. *See, e.g.*, *id.* at PageID.1571–77, 1579, 1585–88, 1596. In addition, Slick testified that he did not have an opportunity to give Petitioner the statement while in prison. *Id.* at PageID.1574.

Second, Petitioner testified that in 2013 Slick's then-wife sent a letter to Petitioner that Slick authored, which vaguely explained that Slick would help Petitioner's case. *See id.* at PageID.1661. Petitioner elaborated that Slick did not want to get involved in the murder case while in prison but would help after he got out; they were both worried about his safety in prison. *See id.* at PageID.1680, 1683, 1684, 1708. Petitioner also testified that Slick mailed the suppressed statement to him in December 2015. *See id.* at PageID.1663.

What happened next is not in dispute. On January 28, 2016, Petitioner sent a letter to his trial counsel, Attorney James O'Donnell, asking about Slick's statement and Petitioner's file. *See* ECF No. 10-18 at

PageID.1390–91. Attorney O'Donnell responded on February 2, 2016, upset that Prosecutor Hutting "purposely sandbagged [him] by withholding the news of Crawford's death and unavailability," and having "no memory of a statement by [Slick]." *See id.* at PageID.1392–93. Then an undated FOIA request was submitted to Wayne County by a third party, Monique Ingram, on Petitioner's behalf. *See id.* at PageID.1394. On March 23, 2016, the Wayne County Prosecutor's Office responded that it received the request and needed additional time to look. *See id.* at PageID.1395. On April 20, 2016, the Wayne County Prosecutor's Office denied the FOIA request, explaining that it did not have Petitioner's file. *See id.* at PageID.1396.

Attorney O'Donnell's testimony at the March 2, 2021 evidentiary hearing corroborates Petitioner's testimony. First, Attorney O'Donnell testified that he had limited independent memory of the case, but he refreshed his recollection by reviewing public case files (as he no longer has a copy of his personal file of the case). *See* Evidentiary Hr'g Tr., ECF No. 32 at PageID.1607. Then he testified that he had a usual practice of providing a complete copy of discovery and transcripts to defendants in all his cases. *See id.* at PageID.1606. He also explained that Lucky's trial testimony was "damaging" and that he was not aware of statements made by others implicating someone other than Petitioner as the shooter. *See id.* at PageID.1608. Further, he testified that his trial strategy was to seek to impeach Lucky and that he would have used Slick's statement to impeach Lucky at the second preliminary examination and at trial if he had had the statement. *See id.* at PageID.1609. In his view, Slick's

statement corroborates Petitioner's statement arguing he was not the shooter. *See id.* at PageID.1615. But he also testified that the statement was potentially damaging because it placed Petitioner behind the wheel, which would have supported the aidingand- abetting theory that Prosecutor Hutting pursued. *See id.* at PageID.1615, 1632.

Detective Miller, who took Slick's statement, had no memory of the case when she testified at the hearing. *See id.* at PageID.1642, 1645. Yet she testified that Slick's statement is recorded in her handwriting. *See id.* at PageID.1643. She also testified that her usual practice was to give a copy of the entire police file to the prosecutor's office, including all witness statements. *See id.* at PageID.1649. There is no reason to doubt that the statement is authentic.

ii.

Petitioner contends that he had no incentive to withhold Slick's statement until 2016 and then file his MCR 6.500 motion in state court. In addition, Slick's testimony is less than clear about when he sent his statement to Petitioner except to the extent that he did not send it until after he was released from prison. Indeed, Petitioner's testimony does not conflict with Slick's; both suggest that Slick did not want to disclose the details of the statement he made to Detective Miller until after he was released from prison for fear of potential harm for being a snitch. And the record indicates that after Slick shared the contents of his statement with Petitioner, Petitioner promptly investigated the origin of the statement and attempted to obtain copies of his file from both his defense counsel and the prosecutor's office, albeit unsuccessfully. For

these reasons, Petitioner has shown that he timely filed the new evidence with this Court. 28 U.S.C. § 2244(b)(2)(B)(i).

B.

Although Petitioner's claim is timely, it does not satisfy § 2244(b)(2)(B)(ii). Petitioner's trial counsel suggested that Slick's statement "would have shifted the blame for the shooting away from [Petitioner], and it would have left open the possibility that the shooting occurred incidental to or beyond the scope of the planned robbery or whatever else they were trying to plan with respect to [Craig Land]." Evidentiary Hr'g Tr., ECF No. 32 at PageID.1609. But he also admitted that Slick's statement could have reasonably implicated Petitioner as an aider and abettor. *See id.* at PageID.1615. So even faced with Slick's statement, a reasonable factfinder would likely have found Petitioner guilty of aiding and abetting the murder of Craig Land. 28 U.S.C. § 2244(b)(2)(B)(ii). That is the same determination the trial court made after reviewing the Petition on the merits. *See* Pet., ECF No. 1 at PageID.28–31. In this way, Petitioner has not met his burden by clear and convincing evidence. Consequently, Petitioner is not entitled to habeas relief.

III.

Even if Petitioner satisfied § 2244(b)(2)(B), he would not be able to satisfy § 2254(d).

A.

The following standard of review applies to § 2254 habeas petitions:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" clearly established Federal law if it either (1) applies a standard different than what Supreme Court precedent says to apply or (2) applies the correct precedent to materially indistinguishable facts but reaches a different result. *Williams v. Taylor*, 529 U.S. 362, 397, 405–06, 413 (2000). But a state decision that applies a state-law standard is not "contrary to" clearly established Federal law if the state standard is practically similar to the Supreme Court's. *See Robertson v. Morgan*, No. 20-3254, 2020 WL 8766399, at *4 (6th Cir. Dec. 28, 2020) (holding state decision was not "contrary to" because it applied a statelaw standard bearing "some similarity" to the *Brady* standard).

AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal citations omitted). If the state decision was not "contrary to" clearly established Federal law, then it "precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). In this way, to obtain habeas relief in federal court, a state prisoner must show that the state court's denial "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. A "readiness to attribute error [to a state court] is inconsistent with the presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

Thus, the Petition should be denied if it is within the "realm of possibility" that fairminded jurists could find the state-court decision to be reasonable. *See Woods v. Etherton,* 587 U.S. 113, 113 (2016) (per curiam).

B.

The Third Circuit Court of Michigan rejected Petitioner's claim as follows:

> In this case, whether defendant is entitled to a new trial on the basis of his proffered evidence is governed by [*People v. Cress*, 664 N.W.2d 174 (Mich. 2002)], and specifically his case is resolved by applying the interrelated

first and third parts of the *Cress* test, which require that defendant demonstrate that the evidence is "newly discovered" and that he could not, using reasonable diligence, have discovered and produced the evidence at trial.

Defendant has produced a Detroit police department witness statement made by Ricky Sailes on March 16, 2022. Sailes stated that he was told by Robert Kwanniewski (aka Scotti Trent) that he and the defendant were driving in a jeep together and that the defendant was driving and that while the defendant was driving, Scotti shot a white guy. Sailes further states that the defendant stated to him that "Scottie shot the guy and that he drove off."

After a review of the submitted evidence and applying the *Cress* test, this Court finds that this witness statement will not satisfy the four part test for newly discovered evidence as set forth above and defendant has not carried his burden of satisfying this test and thus is not entitled to a new trial. The presented witness statement is not of such a nature as to render a different result on re-trial, as there was other significant testimony proffered against the defendant, as well as other independent indicia and material evidence that was sufficient to prove the guilt of the defendant.

Specifically, defendant was convicted of first-degree felony murder under a theory of aiding and abetting, which means that both

the defendant and Kwanniewski are equally liable for the crime of first-degree murder. They each aided and abetted and helped each other commit the crime.

. . . .

The plain language of MCL 767.39 allows a defendant who directly or indirectly commits an offense to be considered as an aider and abettor. Here, if based on Kwanniewski's version of events, Kwanniewski drove the stolen Jeep and defendant fired the gun that killed the victim. They worked as a team and defendant would be guilty of first-degree felony murder. Alternatively, if based on this newly available witness affidavit provided by Ricky Sailes, the version of events is that defendant drove the stolen Jeep and Kwanniewski fired the gun that killed the victim, again they worked as a team and the defendant would still be guilty of first-degree felony murder. As such, the evidence supplied in this witness statement would not produce a different result on re-trial.

This Court finds that the allegations and evidence presented in this motion are insufficient to warrant an evidentiary hearing, new trial or relief from judgment. Defendant has not shown "good cause" under MCR 6.508(D)(3), nor has he proven actual prejudice. Therefore, for all the aforementioned reasons stated, defendant's second motion for relief from judgment is hereby DENIED.

People v. Baugh, No. 02-8915 (Mich. 3d Cir. Ct. Wayne Cnty. Jan. 27, 2017) (emphases and footnotes omitted), *appeal dismissed*, No. 337811 (Mich. Ct. App. Sept. 15, 2017), *appeal denied*, 911 N.W.2d 703 (Mich. 2018).

C.

The state decision was not "contrary to" clearly established Supreme Court precedent. Granted, the state court applied *Cress* and *Grissom*, not *Brady*. *See* Pet., ECF No. 1 at PageID.28– 31. And it is "clearly established" that courts should apply *Brady v. Maryland* and its progeny when reviewing habeas claims alleging state suppression of exculpatory evidence. *Ricks v. Pauch*, No. 20-1778, 2021 WL 4775145, at *7 (6th Cir. Oct. 13, 2021). But the *Cress–Grissom* standard is substantially similar to the *Brady* standard.

Together, *Cress* and *Grissom* require the petitioner to show that the new evidence would produce a different result probable on retrial and requires the evidence to have an exculpatory effect. *See People v. Grissom*, 821 N.W.2d 50, 52 (Mich. 2012); *People v. Cress*, 664 N.W.2d 174, 182 (Mich. 2003). Those two elements are akin to the first and third elements of a *Brady* violation: the evidence must be exculpatory or impeaching and prejudicial. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

Although neither *Cress* nor *Grissom* requires an independent determination of whether the evidence was willfully or inadvertently withheld (which *Brady* requires), the absence of that element could only make the State's standard more lenient to petitioners than *Brady*. Comity advises deference in that regard, as the

State's standard does not narrow or conflict with the federal standard. *See Buck v. MacLaren*, No. 2:14-CV-93, 2016 WL 4471719, at *7 (W.D. Mich. Aug. 2, 2016) ("[T]he four-part test enunciated in *People v. Cress* . . . . is the same test used in *Grissom*, and is based on Michigan and federal precedent."), *report and recommendation adopted*, No. 2:14-CV-93, 2016 WL 4466556 (W.D. Mich. Aug. 24, 2016). For that reason, the state decision was not "contrary to" clearly established Supreme Court precedent.

D.

The state decision did not unreasonably apply Michigan's *Brady*-esque standard.

i.

Petitioner alleges that the State suppressed Slick's statement. A *Brady* claim of suppression has three elements:

> (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;
>
> (2) That evidence must have been suppressed by the State, either willfully or inadvertently; and
>
> (3) Prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

Evidence is "favorable" if it is "exculpatory or impeaching." *McNeill v. Bagley*, 10 F.4th 588, 598 (6th Cir. 2021) (citing *Strickler*, 527 U.S. at 281). Evidence

is exculpatory if it "is material to either guilt or punishment." *Gregory v. City of Louisville*, 444 F.3d 725, 743–44 (6th Cir. 2006) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

Evidence is "suppressed" if it was in the "exclusive control of the government" and not "disclosed during trial." *Id.* at 600. The Government has a duty to disclose, triggered by the potential impact of the favorable but undisclosed evidence. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *United States v. Bagley*, 473 U.S. 667 (1985).

Evidence creates "prejudice" if it is "also material." *McNeill*, 10 F.4th at 601 (citing *Strickler*, 527 U.S. at 289). Evidence is "material" if there is a "reasonable probability" that the outcome of the trial would have been different had the prosecutor disclosed the evidence. *See Kyles*, 514 U.S. at 433. But the "reasonable probability" of a different result is not a question of whether the petitioner would more likely than not have received a different *verdict*; it is a question of whether the Government's suppression of evidence *undermines the confidence in the outcome* of the trial. *See id.* at 433–38. Indeed, materiality is not determined by applying a sufficiency of evidence test. *See id.* Instead, the petitioner must show only that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict. *See id.* Further, there is no harmless error review because, by definition, a *Brady* violation cannot be harmless error. *See id.*

ii.

Slick's statement impeached Lucky, but it did not exculpate Petitioner.

Slick's statement contradicted Lucky's testimony because it provides that Petitioner was the driver of the Jeep and not the shooter. For that reason, the evidence impeached Lucky's testimony.

The evidence is not exculpatory, however, because it is material to neither guilt nor punishment. *Gregory v. City of Louisville*, 444 F.3d 725, 743–44 (6th Cir. 2006). The prosecution argued that Petitioner was guilty of first-degree murder as either the shooter (principal) or the driver (aider and abettor), and the trial court gave jury instructions to the same effect. Granted, Petitioner's trial counsel explicitly argued that the jury should ignore the aiding and abetting theory, and the jury convicted Petitioner of "first-degree murder, felony murder," not aiding and abetting first-degree murder.[8] But in Michigan, there is no distinction between those two crimes. *People v. Smielewski*, 596 N.W.2d 636, 643 n.4 (Mich. Ct. App. 1999). And Slick's statement was that Petitioner admitted to being the driver. In this way, Slick's statement supports the jury finding Petitioner guilty of the same crime they found him guilty of at trial. And whether convicted under Michigan Compiled Laws §

[8] Notably for habeas purposes, it is unclear whether juries must clarify whether they find a defendant guilty of aiding and abetting independent of the underlying offense. And for that matter, this Court does not have a copy of the jury's verdict form to know whether the jury had the option.

750.316(1)(b) or 757.39, the penalty was life without parole and was therefore not material to guilt.

Because the evidence is not exculpatory, the Petition will be denied.

iii.

There is substantial reason to believe that the prosecutor withheld Slick's statement. As she testified, Detective Miller took Slick's statement and gave it to the prosecutor's office, as was her practice. And Prosecutor Hutting did not disclose Slick's statement to Petitioner or his trial counsel, despite a duty to do so.

But the suppression of Slick's statement caused no prejudice to Petitioner. Indeed, resolving Petitioner's second MCR 6.500 motion for relief from judgment, the trial court concluded that the suppressed statement "would not produce a different result on retrial," because it implicated Petitioner as the driver of the vehicle. *See* Pet., ECF No. 1 at PageID.29–31. With Petitioner as the driver, a reasonable jury could—and indeed might—have found him guilty beyond a reasonable doubt as an aider and abettor of first-degree murder. *See id.* As indicated, "[u]nder Michigan law, there is no distinction" between whether the "defendant acted as principal" or "aided and abetted the killing." *Smielewski*, 596 N.W.2d at 643 n.4. In this way, whether evaluated under *Cress–Grissom* or *Brady*, the suppressed evidence did not prejudice Petitioner.

Slick's statement in part undermines the prosecution's theory that Petitioner was the shooter. And

based on this Court's review of the record, it is unlikely that Petitioner was Craig Land's shooter; everything—from his eidetic recall of the shooting to the shell casing found in his pocket—suggests Lucky was the shooter.

Even so, Slick's statement supports the prosecution's theory that Petitioner aided and abetted the murder and, therefore, does not undermine confidence in the jury's verdict. *Hughbanks v. Hudson*, 2 F.4th 527, 541 (6th Cir. 2021), *reh'g denied* (Aug. 13, 2021). Indeed, the Sixth Circuit has held that evidence is not prejudicial if it would have impeached a witness who not only admitted to a willingness to lie to prevent incarceration but also was cross-examined regarding his plea agreement with the Government that resulted in a favorable sentence. *Jefferson v. United States*, 730 F.3d 537, 551 (6th Cir. 2013). Those elements were present at Petitioner's trial. In addition, though Judge Bill conceded at sentencing that "[t]he jury elected to give a lot of weight to the credibility of [Lucky's] testimony," the jury relied on much more than Lucky's testimony to convict Petitioner, including testimony from nine other witnesses. *See Harris v. Lafler*, 553 F.3d 1028, 1034 (6th Cir. 2009); Jury Trial Tr. Vol. II, ECF No. 10-8 at PageID.583; Jury Trial Tr. Vol. III, ECF No. 10-9 at PageID.816; Sentencing Hr'g Tr., ECF No. 10-11 at PageID.1054.

Notably, the record reveals several incidents of potentially egregious prosecutorial misconduct. To wit, the prosecutor made a plea offer and sentence agreement with Lucky, a less-than-reliable witness who was important to the jury's verdict, and then suppressed evidence that would have impeached him.

However, under the standard established by the Supreme Court, which the state court reasonably applied, the suppression of Slick's statement was not prejudicial to Petitioner. For that reason, there was no question of confidence in the jury's verdict and no *Brady* violation. *United States v. Busch*, No. 20-4065, 2021 WL 5133178, at *5 (6th Cir. Nov. 4, 2021).

This Court's "role is limited to applying the law's demands as faithfully as we can in the cases that come before us." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020). In the United States, "the Law is the publique Conscience, by which [people have] already undertaken to be guided." THOMAS HOBBES, LEVIATHAN 210 (Barnes & Noble 2004) (1651). And by "ground[ing] our laws in popular consent, and by working toward a regime in which all citizens have equal input into the content of those laws, we increase the extent to which any given individual judged under those laws may be said to have judged himself or herself." Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2404 (1999). To that end, "we strive to couch our laws in general terms—applicable equally to all citizens—with the aim being that the law itself, rather than individual men and women, will sit in judgment." *Id.* In this way, what may seem an injustice to some is not necessarily a threat to justice.

Because the suppression was not prejudicial, the Petition will be denied.

IV.

Before Petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c)(1)(a); FED. R. APP. P. 22(b).

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Skaggs v. Parker*, 235 F.3d 261, 266 (6th Cir. 2000). When a court rejects a habeas claim on the merits, the substantial-showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) ("A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.").

In applying that standard, a district court may not conduct a full merits review and must "limit its examination to a threshold inquiry into the underlying merit of [the petitioner's] claims." *Miller-El,* 537 U.S. at 323. "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254.

Although this Court believes its ruling is sound, reasonable jurists could find it debatable that no reasonable juror would have found Petitioner guilty of first-degree murder if faced with Slick's statement. *See Phillips v. Pollard*, No. 1:20-CV-13326, 2021 WL 5234507, at *5 (E.D. Mich. Nov. 10, 2021). This

reasonable disagreement exists because the *Kyles* Court emphatically stated that the question of materiality "is *not* whether the defendant would more likely than not have received *a different verdict* with the evidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Rather, the crux of materiality is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

In this way, suppressing Slick's statement might have been a material omission, as other jurists might reasonably believe the suppression or Slick's statement undermines confidence in the jury's verdict. Indeed, it is less than clear whether a reasonable juror would have found Petitioner guilty as an aider and abettor of Craig Land's murder for simply driving Lucky to a robbery knowing he was armed; Petitioner did not necessarily know Lucky intended to kill Craig Land. *People v. Buck*, 496 N.W.2d 321, 327 (Mich. Ct. App. 1992) (per curiam) ("To be convicted of aiding and abetting first-degree murder, the defendant must have had the intent to kill or have given the aid knowing the principal possessed the intent to kill."), *rev'd in part on other grounds sub nom. People v. Holcomb*, 508 N.W.2d 502 (Mich. 1993).

Surely, there is less confidence in jury verdicts arising from courts that excuse prosecutorial finagling. *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 548 (6th Cir. 2021) (Bush, J., concurring) (noting that the Supreme Court has found "preserving confidence in judicial integrity" to be a compelling interest (citing *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015))). Indeed, "'[t]he price of [such] dishonesty is

self-destruction.'" CAROLYN PRICE, THE WORDS OF EXTRAORDINARY WOMEN 22 (2010) (quoting Rita Mae Brown). For these reasons, a certificate of appealability will issue. And, as indicated, Petitioner's claims are not frivolous. For this reason, he will be permitted to appeal in forma pauperis. *Hill v. Lappin*, 630 F.3d 468, 476 (6th Cir. 2010).

V.

Accordingly, it is **ORDERED** that the Petition for a Writ of Habeas Corpus, ECF No. 1, is **DISMISSED WITH PREJUDICE**.

Further, it is **ORDERED** that a Certificate of Appealability is **GRANTED**.

Further, it is **ORDERED** that Petitioner is **PERMITTED** to appeal this Opinion and Order in forma pauperis.

Dated: December 17, 2021

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JIMMY BAUGH,

Petitioner,

Case No. 19-10032
Honorable Thomas L. Ludington

v.

CONNIE HORTON,

Respondent.
_____/

ORDER DENYING WITHOUT PREJUDICE RESPONDENT'S MOTION TO DISMISS, AUTHORIZING SCHEDULING OF AN EVIDENTIARY HEARING, AND SEEKING COUNSEL

Petitioner, Jimmy Baugh, confined at the Gus Harrison Correctional Facility in Adrian, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his *pro se* application, Petitioner challenges his conviction for first-degree murder, M.C.L. § 750.316, felon in possession of a firearm, M.C.L.§ 750.224f, and felony-firearm, M.C.L. § 750.227b.

Petitioner moved for an order of the United States Court of Appeals for the Sixth Circuit authorizing the district court to consider a second or successive application for a writ of habeas corpus. The Defendant did not respond to the motion. The motion was granted on

December 17, 2018. Respondent then filed a motion to dismiss the petition before this Court contending that it was not timely filed in accordance with the statute of limitations. 28 U.S.C. § 2244(d)(1). ECF No. 9. Petitioner filed a response to the motion. ECF No. 11.

I.

Petitioner was found guilty by a jury of multiple charges related to the shooting death of Craig Land in the Wayne County Circuit Court on January 16, 2003. He was sentenced on January 31, 2003 to life imprisonment without parole on the first-degree murder conviction, two to five years on the felon in possession of a firearm conviction, and two years on the felony-firearm conviction.

The Michigan Court of Appeals summarized the facts of the case as follows.[1]

> The victim in this case was a disabled forty-three-year-old man who lived with his father in Detroit. One evening, the victim rode his bicycle to a nearby convenience store to purchase beer. On his way home from the store, he was shot twice and died at the hospital. Near his bicycle, the police found $29 and a bag that contained a broken beer bottle.
>
> Robert Kwanniewski, who is also known by several aliases, was with defendant on the day the victim was killed. Kwanniewski testified that he stole a Jeep Cherokee and

[1] *People v. Baugh*, 2004 WL 2412692 (Mich. Ct. App. Oct. 28, 2004).

returned to his home in Hamtramck, where defendant approached him with the idea to rob someone. Defendant, who was armed with a .22 pistol, needed $100 because he was short on rent.

Kwanniewski claimed that he and defendant drove around, robbed one man, and spent the $50 proceeds on drinks, cigarettes, and drugs. Kwanniewski claimed that defendant saw the victim in the instant case that evening, and they followed him away from a convenience store. Kwanniewski claimed that he cut the victim off with the Jeep and defendant approached the victim, demanding money. Because the victim did not cooperate, defendant shot him in the right hip, and the victim threw $29 at defendant. Kwanniewski became nervous because a vehicle was approaching, and he tried to hurry defendant. Defendant shot the victim again, this time in the left chest, and he returned to the Jeep without picking up the money. While they were driving away, defendant fired two gunshots at the approaching vehicle, which then ceased to follow them.

While incarcerated on other charges, defendant approached the police and made a statement, in which he admitted that he, Kwanniewski, and two other friends had stolen a Jeep on the day in question. Defendant asserted that he was a backseat passenger in the Jeep when Kwanniewski spotted the victim and they stopped the Jeep. According to defendant, Kwanniewski shot the victim twice

> because he failed to cooperate with a robbery attempt. Defendant did not remember the victim riding a bicycle.
>
> Defendant and Kwanniewski were arrested the following day for an unrelated carjacking. Kwanniewski spoke with the police several days after the arrest, but he did not implicate defendant and did not discuss the instant case. Several months later, defendant sent a letter to the police, requesting a meeting. Defendant discussed the instant case with an officer and made the abovementioned statement, in which he implicated Kwanniewski. Both defendant and Kwanniewski were then charged with first-degree felony murder.
>
> The trial court conducted a preliminary examination, but only bound Kwanniewski over for trial.[2] Kwanniewski entered into a plea agreement with the prosecution, whereby he pleaded guilty to a reduced charge of second-degree murder in exchange for the dismissal of three unrelated stolen car cases. Kwanniewski also entered into a sentencing agreement, which provided that he serve 18-40 years instead of 270-450 months in prison. ECF No. 1 at PageID.44- 46.

Direct review of Petitioner's conviction concluded on October 19, 2005 when the Michigan Supreme Court denied Petitioner's application for leave to

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[2] The Court of Appeals did not explain when Petitioner was later bound over for trial.

appeal. The Michigan Court of Appeals affirmed his conviction. *People v. Baugh*, 705 N.W.2d 29 (2005).

On July 31, 2006, Petitioner filed a post-conviction motion for relief from judgment. The motion was denied by the trial court. *People v. Baugh,* No. 02-8915 (Third Cir. Ct. Crim. Div. Feb. 15, 2007). After the Michigan Court of Appeals denied Petitioner's leave to appeal, *see People v. Baugh,* No. 280250 (Mich. Ct. App. Nov. 16, 2007), collateral review of Petitioner's conviction concluded on June 23, 2008 when the Michigan Supreme Court denied Petitioner's application for leave to appeal the denial of his post-conviction motion. *People v. Baugh*, 481 Mich. 912, 750 N.W.2d 188 (2008).

On July 14, 2008, Petitioner filed a petition for writ of habeas corpus, which was denied on the merits on September 15, 2010. *Baugh v. Palmer*, No. 2:08-cv-13033, 2010 WL 3623175 (E.D. Mich. Sept. 15, 2010).

On July 29, 2016, Petitioner filed a second post-conviction motion for relief from judgment with the state trial court. The trial judge denied the motion. *People v. Baugh,* No. 02-8915 (Third Cir. Ct. Crim. Div. Jan. 27, 2017). Petitioner appealed the denial of the successive motion to the Michigan Court of Appeals. On September 15, 2017 the Michigan Court of Appeals dismissed the appeal on the ground that Petitioner was not entitled to appeal the denial of his successive motion for relief from judgment because the claims contained within his motion did not fall within one of the exceptions under M.C.R. 6.502(G) that would permit an appeal from the denial of a successive motion for relief from judgment. *People v. Baugh,* No. 337811 (Mich. Ct. App. Sept. 15, 2017).

Petitioner filed an application for leave to appeal with the Michigan Supreme Court, which was denied on May 29, 2018, on the ground that Petitioner failed to establish that he was entitled to post-conviction relief under M.C.R. 6.508(D). *People v. Baugh*, 911 N.W.2d 703 (2018).

Petitioner's motion to file a successive petition for writ of habeas corpus with the United States Court of Appeals for the Sixth Circuit was filed on July 26, 2018.[3] The Sixth Circuit granted the motion on December 17, 2018. *In re: Jimmy Baugh*, No. 18-1848 (6th Cir. Dec. 17, 2018). The petition was filed with this Court on January 3, 2019. ECF No. 1.

II.

Petitioner contends that he is in possession of newly discovered evidence that potentially demonstrates a Brady violation. The new evidence Petitioner relies on is a witness statement allegedly furnished by Ricky Sailes to Officer JoAnn Miller on March 16, 2002. The following statement refers to "Scotti Trent" and "Scottie Trent." The Michigan Department of Corrections lists Mr. Trent's known aliases, including Robert Kwasniewski. *See* ECF No. 9 at PageID.204. Respondent's motion and state court opinions spell his name as Robert Kwanniewski. ECF No. 9. The Sixth Circuit spells his name as Robert Kwasniewski. ECF No. 1-1 at PageID.164-167. Accordingly, this Court presumes the names Scotti Trent, Scottie Trent,

[3] Under the prison mailbox rule, this Court will assume that Petitioner actually filed his motion for authorization with the Sixth Circuit on July 26, 2018, the date that it was signed and dated. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).

Robert Kwasniewski, and Robert Kwanniewski refer to the same person. Additionally, the Court will use the Sixth Circuit's spelling in this opinion, Robert Kwasniewski.

It provides as follows:

> Q. What can you tell me about the shooting on Navara and Hayes?
>
> A. Scotti Trent told me when I went over his house in the jeep he had bring me the night of the shooting. The 3rd. He told me we were going to put the jeep up because it was "hot" after we put the jeep up I got in another jeep with him. He told me he had shot a white guy on Navara and Hayes. He told me Jimmy was driving and they pulled up on the white guy. He said he ask him for his money he said the white guy didn't give him all of his money. The white guy started to run and Scottie shot him. After he fell to the ground the white guy gave him all the money. Then Jimmie Baugh drove off.
>
> Q. What kind of gun did Scottie have?
>
> A. A .22 he called Peggy Sue.
>
> Q. What kind of jeep was it Scottie gave you?
>
> A. 96 Cherokee. The box kind. Black.
>
> Q. Did Scottie say how many times he shot the man?
>
> A. No.

Q. Who was with you when Scottie told you this?

A. It was me, Jimmie Baugh and Lafayette Dearing.

Q. Where is the gun now?

A. I don't know. The last time I saw it was the night of the carjacking.

Q. Did Scottie say why he shot the man?

A. No.

Q. Did Jimmie say anything while Scottie was telling you this?

A. Jimmie said Scottie shot the guy and he drove off.

ECF No. 1 at PageID.18-19.

To succeed on a habeas petition under this theory, Petitioner must demonstrate he could not have discovered the facts earlier with due diligence and show the newly discovered facts, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(i)-(ii), (b)(3)(C). The Sixth Circuit found that Petitioner had made a prima facie showing on both prongs, so that the petition warranted "a fuller exploration in the district court." *In re McDonald*, 514 F.3d 539, 546 (6th Cir. 2008).

III.

"After an appellate court authorizes filing, § 2244(b)(4) empowers the district court to dismiss any claim that does not 'satisf[y] the requirements of this section.'" *Clark v. Warden*, 934 F.3d 483, 490–91 (6th Cir. 2019). Afterward, "the district court may [ ] determine that 'an evidentiary hearing is warranted,' or (more rarely) grant the petition without a hearing." *Id.*; Rule 8(a), Rules Governing § 2254 Cases. Accordingly, this Court must make its own determination of whether there is a potential Brady violation and whether Petitioner meets the AEDPA requirements for a successive petition. Only then, after the procedural requirements are met, may the Court decide the merits of the petition.

A.

Respondent filed a motion to dismiss Petitioner's petition based on untimeliness. ECF No. 9. As discussed below, Petitioner has filed a facially timely petition for habeas relief on the potential Brady violation. Therefore, Respondent's motion to dismiss will be denied without prejudice and an evidentiary hearing will be conducted.

B.

The test for a Brady claim requires, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Stricker v. Greene*, 527 U.S. 263, 281–82 (1999). In this case, the alleged statement Mr.

Sailes provided to the police is favorable to the accused because this testimony, if true, could have impeached Mr. Kwasniewski's testimony that Petitioner was the shooter. The first prong is met. Second, Petitioner's trial attorney explained in his February 2016 letter that while Petitioner's file no longer exists, he does not remember a statement by Mr. Sailes and he cannot imagine not using it during trial if he had access to it. Also, the prosecutor's office does not have Petitioner's file. Therefore, an evidentiary hearing is needed to determine the circumstances surrounding (i) the statement by Mr. Sailes to Officer Miller recounting a conversation in Petitioner and Lafayette Dearing's presence, (ii) how Mr. Sailes' came into possession of a copy of the statement, and (iii) the accuracy and truthfulness of Mr. Sailes statement. Third, Petitioner likely was prejudiced by the alleged suppression of the alleged statement due to Petitioner's inability to cross-examine Mr. Kwasniewski with Mr. Sailes' statements. The available evidence shows the possibility of a Brady violation, but more information is needed. Therefore, Petitioner meets the standard for an evidentiary hearing on the potential Brady violation.

C.

Second, before ordering an evidentiary hearing, this Court is required to make an independent determination if Petitioner has met the qualifications for an AEDPA hearing on the basis of the petition itself. 28 U.S.C. § 2244(b)(4). The two requirements from AEDPA are whether Petitioner exercised "due diligence" in his attempt to find the new information and second, the new information "if proven and viewed in

light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Clark*, 934 F.3d at 495 (quoting 28 USC § 2244(b)(2)(B)(ii)).

In this case, Mr. Sailes' wife sent Petitioner a letter from Ricky Sailes in October 2013, explaining Mr. Sailes "promised to help [Petitioner] with [his] case." ECF No. 1-1 at PageID.126. Then, in December 2015 Ricky Sailes sent Petitioner an alleged copy of Sailes March 16, 2002 statement to the police. *Id.* Petitioner promptly contacted his attorney in January 2016 who told Petitioner he had no memory of Mr. Sailes statement. In February 2016, Petitioner's friend submitted a Freedom of Information Act request to the Wayne County Prosecutor's office seeking Sailes' witness statement to police. ECF No. 1 at PageID.99. The Wayne County Prosecutor's office responded on April 20, 2016 and explained that they could not locate Petitioner's file. ECF No. 1-1 at PageID.101. Then, on July 29, 2016, Petitioner filed a second post-conviction motion for relief from judgment with the state trial court. The trial judge denied the motion. *People v. Baugh,* No. 02-8915 (Third Cir. Ct. Crim. Div. Jan. 27, 2017). Petitioner appealed the denial of the successive motion to the Michigan Court of Appeals. On September 15, 2017, the Michigan Court of Appeals dismissed the appeal on the ground that Petitioner was not entitled to appeal the denial of his successive motion for relief from judgment because the claims contained within his motion did not fall within one of the exceptions under M.C.R. 6.502(G) that would permit an appeal from the denial of a successive motion for relief

from judgment. *People v. Baugh,* No. 337811 (Mich. Ct. App. Sept. 15, 2017). Petitioner filed an application for leave to appeal with the Michigan Supreme Court, which was denied on May 29, 2018, on the ground that Petitioner failed to establish under M.C.R. 6.508(D) that he was entitled to post-conviction relief. *People v. Baugh*, 911 N.W.2d 703 (2018). Then, on July 26, 2018, he filed a motion for leave to file a successive habeas petition with the Sixth Circuit. Petitioner has demonstrated that he has diligently sought habeas relief after learning about Mr. Sailes' alleged statement.

The second requirement is to determine whether the available evidence presented by Petitioner establishes whether it is clear and convincing that "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). In this case, Mr. Sailes' statement could have impeached the state's main witness' account of the events in question. At this stage, this Court lacks sufficient information to determine what potential effect, if any, Mr. Sailes' statement regarding Mr. Kwasniewski would have had on Petitioner's trial. Accordingly, an evidentiary hearing is required.

Respondent argues even if Mr. Sailes statement is true, Petitioner may still be correctly convicted under an aiding and abetting theory. ECF No. 9 at PageID.208. However, in Michigan, "to convict a defendant of aiding and abetting a crime, a prosecutor must establish that '(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime; and (3) the

defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.'" *People v. Moore*, 679 N.W.2d 41, 49 (Mich. 2004) (quoting *People v. Carines*, 597 N.W.2d 130, 135 (Mich. 1999)). However, "[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abetter or a principal in the second degree nor is mere mental approval, sufficient, nor passive acquiescence or consent." *People v. Burrel*, 235 N.W. 170, 171 (Mich. 1931) (quoted in *People v. Worth-McBridge*, 929 N.W.2d 285, 286 (Mich. 2019)). Further discussion on whether Petitioner would have been found guilty or acquitted based on the additional testimony is not possible without an evidentiary hearing to determine the credibility of witnesses and the authenticity of the statement itself. The Sixth Circuit has provided that when the district court has insufficient information to decide the second prong of the AEDPA test, "it is [ ] well within the district court's discretion to hold an evidentiary hearing and seek that answer." *Clark*, 934 F.3d at 497.

D.

28 U.S.C. § 2254, the statute under which Petitioner brings his petition, also requires Petitioner's state remedies to be exhausted for his claim to be brought in federal court. 28 U.S.C. § 2254(b)(1)(A). As discussed earlier, after Petitioner learned about Mr. Sailes statement to police, he filed a successive motion to amend judgment in state court and was denied. As such, Petitioner has exhausted his state remedies.

E.

Petitioner has established that there is a question of fact regarding a potential Brady violation that can only be resolved after an evidentiary hearing. He has also shown he exercised due diligence and the potential for clear and convincing evidence that a different result would have occurred if Mr. Sailes alleged statement was not allegedly withheld by the prosecution. Finally, Petitioner has exhausted his state remedies. As a result, an evidentiary hearing will be ordered to address Mr. Sailes' statement and his credibility.

IV.

Rule 8 of the Rules governing § 2254 motions provides that "[i]f an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A." Petitioner paid the $5 filing fee for his successive habeas petition and did not submit a copy of his prison finances. However, Petitioner explains in his letter to his trial counsel that "you were appointed counsel, to represent me in multiples cases." ECF No. 1 at PageID.93. Additionally, the letter from his trial counsel was on letterhead from the Legal Aid and Defender Association in Southeast Michigan. 18 U.S.C. § 3006A(1)(H) provides that "[r]epresentation shall be provided for any financially eligible person who–is entitled to appointment of counsel under the sixth amendment to the Constitution." Petitioner was eligible for appointed counsel at the time of his trial. Accordingly, the Court will begin the process to locate representation for Petitioner.

V.

Accordingly, it is **ORDERED** that Respondent's motion to dismiss, ECF No. 9, is **DENIED WITHOUT PREJUDICE**.

It is further **ORDERED** that Petitioner must appear and conduct an evidentiary hearing on his Brady violation claims. Separate orders will issue appointing an attorney and setting a date for the evidentiary hearing.

Dated: February 4, 2020

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney of record herein by electronic means and to **Jimmy Baugh** #183590, G. ROBERT COTTON CORRECTIONAL FACILITY, 3500 N. ELM ROAD, JACKSON, MI 49201 by first class U.S. mail on February 4, 2020.

s/Kelly Winslow
KELLY WINSLOW, Case Manager

No. 18-1848

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 17, 2018
DEBORAH S. HUNT, Clerk

In re: JIMMY BAUGH,)
)
Movant.) O R D E R
)

Before: SILER, ROGERS, and COOK, Circuit Judges.

Jimmy Baugh, a Michigan prisoner proceeding pro se, moves for an order authorizing the district court to consider a second or successive application for a writ of habeas corpus under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b)(3)(A).

In 2003, a jury convicted Baugh of first-degree felony murder, being a felon in possession of a firearm, and possessing a firearm during the commission of a felony. The trial court sentenced him to life imprisonment for the murder conviction, two to five years of imprisonment for the felon-in-possession conviction, and two years of imprisonment for the felony-firearm conviction. The Michigan Court of Appeals affirmed, and the Michigan Supreme Court denied leave to appeal. *People v. Baugh*, No. 247548, 2004 WL 2412692, at *1 (Mich. Ct. App. Oct. 28, 2004) (per curiam), *appeal denied*, 705 N.W.2d 29 (Mich. 2005) (table). Baugh unsuccessfully sought post-conviction relief in state court.

In 2008, Baugh filed a federal habeas petition raising due process, Confrontation Clause, prosecutorial misconduct, evidentiary, and ineffective-assistance-of-counsel claims. The district court denied the petition, finding that Baugh's claims were either meritless or procedurally defaulted. Baugh did not appeal. Baugh now seeks leave to file a second or successive § 2254 habeas petition in which he would argue that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by suppressing a 2002 police statement made by Ricky Bernard Sailes, which impeached the testimony of the State's star witness, Robert Kwasniewski.

The filing of a second or successive habeas petition raising a new ground for relief is authorized only if the petition "makes a prima facie showing" that it contains a claim premised on: (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; or (2) newly discovered facts, which "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(A)-(B), (b)(3)(C). A prima facie showing requires only "sufficient allegations of fact together with some documentation that would warrant a fuller exploration in the district court." *In re McDonald*, 514 F.3d 539, 546 (6th Cir. 2008) (quoting *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004)); *see also Keith v. Bobby*, 551 F.3d 555, 557 (6th Cir. 2009).

Baugh acknowledges that his claim does not rely on a new rule of constitutional law, but he claims that

it is supported by newly discovered evidence—Sailes's statement. According to Baugh, the State did not disclose Sailes's statement to defense counsel during discovery, in violation of *Brady*, and he learned of the statement only after Sailes was released from prison and sent the statement to him. Baugh submits an affidavit in which he states that Sailes sent him a copy of his statement in mid-December 2015—well after the district court denied Baugh's initial habeas petition in September 2010. He also attached a letter that he sent to his attorney on January 28, 2016, in which he asked his attorney whether he had been aware of Sailes's statement. On February 2, 2016, counsel responded to Baugh, stating that, although Baugh's file had been destroyed, he "had no memory of a statement by a Mr. Sailes" and he "cannot imagine having such a statement and not trying to use it." Furthermore, at Baugh's first preliminary hearing, Sailes denied even knowing either Baugh or Kwasniewski, and there is nothing in the pre-trial or trial record to suggest that Sailes gave a statement to police. In light of this evidence, Baugh has made a prima facie showing that Sailes's statement "could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i).

Next, Baugh must show that the facts alleged, "if found to be true, would indeed constitute a constitutional violation." *In re McDonald*, 514 F.3d at 545. To succeed on a *Brady* claim, a petitioner must make the following showings: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or

inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

With respect to the first *Brady* component, Sailes's statement could have been used to impeach Kwasniewski's testimony that it was Baugh's idea to rob and shoot the victim, that Baugh in fact shot the victim, and that Kwasniewski simply drove the getaway car. According to Sailes's statement, Kwasniewski (aka "Scotti Trent") told Sailes that he shot the victim and Baugh drove the car. Sailes stated that Baugh and Lafayette Dearing—a man whom Baugh placed in the vehicle at the time of the shooting but Kwasniewski did not—were with him when Kwasniewski made these statements shortly after the crime. Sailes stated that Baugh also told him that Kwasniewski "shot the guy and [Baugh] drove off." With respect to the second *Brady* component, Baugh's affidavit and counsel's letter are sufficient to make a prima facie showing that the statement was suppressed. With respect to the third *Brady* component, because Kwasniewski was the only witness who identified Baugh as the shooter, and because Sailes's statement could have impeached that testimony, Baugh has made a prima facie showing of prejudice.

Finally, to warrant authorization, we "must determine whether there are 'sufficient allegations' together with 'some documentation' so as to require a district court to engage in additional analysis in order to ascertain whether but for the constitutional error, no reasonable factfinder would have found [Baugh] guilty of the underlying offense." *In re McDonald*, 514 F.3d at 547. Baugh has made such a showing. There was no physical evidence pointing to Baugh as the

shooter. The outcome of the trial turned on whether the jury believed Baugh's statement to police or Kwasniewski's testimony. Because Kwasniewski and Baugh were both present at the shooting and both had a motive for identifying the other as the shooter, Sailes's statement could have tipped the balance in Baugh's favor. In sum, this is a rare case in which additional analysis by the district court is warranted. *See id.*

Accordingly, Baugh's motion for an order authorizing the district court to consider a second or successive § 2254 petition is **GRANTED** as to his *Brady* claim.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt
Deborah S. Hunt, Clerk

Order

Michigan Supreme Court
Lansing, Michigan

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

May 29, 2018

156664 & (19)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v SC: 156664
COA: 337811
Wayne CC: 02-008915-FC

JIMMY BAUGH,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the September 15, 2017 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). The motion to remand is DENIED.

I, Larry S. Royster, 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.

May 29, 2018 *Larry S. Royster*
Clerk

Court of Appeals, State of Michigan

ORDER

People of MI v Jimmy Baugh	Michael J. Talbot Presiding Judge
Docket No. 337811	Kirsten Frank Kelly
LC No. 02-008915-01-FC	Michael J. Riordan Judges

The Court orders that the motion to waive fees is GRANTED and fees are WAIVED for this case only.

The Court further orders that the delayed application for leave to appeal is DISMISSED. Appellant has failed to demonstrate his entitlement to an application of any of the exceptions to the general rule that a movant may not appeal the denial of a successive motion for relief from judgment. MCR 6.502(0).

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

SEP 15 2017	*Jerome W. Zimmer Jr.*
Date	Chief Clerk

STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
v Case No. 02-008915-01
Hon. Gregory D. Bill

JIMMY BAUGH,
Defendant.
_____/

OPINION AND ORDER

AT A SESSION OF SAID COURT HELD IN
THE FRANK MURPHY HALL OF JUSTICE
ON ***January 27, 2017***

PRESENT:
HONORABLE HON. GREGORY D. BILL
Circuit Court Judge

For reasons more fully explained below the Court will deny defendant's second motion for relief from judgment.

Following a jury trial defendant was convicted of first-degree felony murder, **MCL 750.316(1)(b),** felon in possession of a firearm, **MCL 750.224f,** and possession of a firearm during the commission of a felony, **MCL 750.227b.** Defendant was sentenced to life imprisonment for the first-degree murder conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction.

The Michigan Court of Appeals affirmed defendant's conviction and sentence on October 28, 2004. Defendant's motion for relief from judgment was denied on July 31, 2006. Defendant now files a second motion for relief from judgment pursuant to **MCR 6.500 et seq.** The Prosecution has not filed a response.

MCR 6.502(G) states in pertinent part: " ... that regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The only exception to this rule is under subrule (G)(2), which states that 'a defendant may file a second or subsequent motion based on a retroactive change in the law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first motion.' **"MCR 6.502(G)(2).** The court shall return without filing any successive motions for relief from judgment. *A defendant may not appeal the denial or rejection of a successive motion.* **MCR 6.502(G).**

In this motion defendant alleges the existence of newly discovered evidence in the form of a recently received Detroit police department witness statement made by witness, Ricky Sailes. Defendant proffers that this evidence serves as a basis for an evidentiary hearing, evidence of defendant's actual innocence and constitutes grounds for reversal and new trial.

Michigan's Supreme Court has determined for a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered;" (2) "the newly discovered evidence was

not cumulative;" (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial;" and (4) the new evidence makes a different result probable on retrial. *People v Cress,* 468 Mich 678, 692 (2003). Moreover, *People v Grissom,* 492 Mich 296, (2012) held there must be an exculpatory connection between newly discovered evidence and significantly important trial evidence to satisfy the *Cress* test.[1]

It is equally well established that "motions for a new trial on the ground of newly-discovered evidence are looked upon with disfavor, and the cases where this court has held that there was an abuse of discretion in denying a motion based on such grounds are few and far between."[2] The rationales underlying such disfavor are premised on both "the principle of finality" and "the policy of the law ... to require of parties care, diligence, and vigilance in securing and presenting evidence."[3] Specifically: in fairness to both parties and the overall justice system, the law requires that parties secure evidence and prepare for trial with the full understanding that, absent unusual circumstances, the trial will be the one and only opportunity to present their case. It is the obligation of the parties to undertake all reasonable efforts to marshal all the relevant evidence for that trial. Evidence will not ordinarily be allowed in installments.[4]

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[1] *People v Grissom,* supra at 312-13.

[2] *People v Rao,* 491 Mich 271 (2012).

[3] *Id.*

[4] *Id.*

People v Cress sets forth the showing a defendant must make in order to satisfy the exception to this rule and struck a balance between upholding the finality of judgments and unsettling judgments in the unusual case in which justice under the law requires a new trial.[5]

In this case, whether defendant is entitled to a new trial on the basis of his proffered evidence is governed by *Cress,* and specifically his case is resolved by applying the interrelated first and third parts of the *Cress* test, which require that defendant demonstrate that the evidence is "newly discovered" and that he could not, using reasonable diligence, have discovered and produced the evidence at trial.[6]

Defendant has produced a Detroit police department witness statement made by Ricky Sailes on March 16, 2002. Sailes stated that he was told by Robert Kwanniewski (aka Scotti Trent) that he and the defendant were driving in a jeep together and that the defendant was driving and that while the defendant was driving, Scotti shot a white guy. Sailes further states that the defendant stated to him that "Scottie shot the guy and that he drove off".

After a review of the submitted evidence and applying the *Cress* test, this Court finds that this witness statement will not satisfy the four part test for newly discovered evidence as set forth above and defendant has not carried his burden of satisfying this test and thus is not entitled to a new trial. The

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[5] *Id*.

[6] *Cress*, supra at 692

presented witness statement is not of such a nature as to render a different result on re-trial, as there was other significant testimony proffered against the defendant, as well as other independent indicia and material evidence that was sufficient to prove the guilt of the defendant.

Specifically, defendant was convicted of first-degree felony murder under a theory of aiding and abetting, which means that both the defendant and Kwanniewski are equally liable for the crime of first-degree felony murder. They each aided and abetted and helped each other commit the crime.

Aiding and abetting describes all forms of assistance made available to the perpetrator of a crime and includes all words or deeds that might support, encourage, or incite the commission of a crime.[7] "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime."[8] A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense.[9] A defendant may be convicted as an aider and abettor for an offense that he had the required intent to commit as well as the natural and probable consequences of that offense.[10]

The plain language of **MCL 767.39** allows a defendant who directly or indirectly commits an offense to be considered as an aider and abettor. Here, if

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[7] *Carines,* supra at 757.

[8] *People v Lawton,* 196 Mich App 341, 352; 492 NW2d 810 (1992).

[9] *People v Mass,* 464 Mich 615 (2001)

[10] *People v Robinson,* 475 Mich 1, 1 (2006)

based on Kwanniewski's version of events, Kwanniewski drove the stolen Jeep and defendant fired the gun that killed the victim. They worked as a team and defendant would be guilty of first-degree felony murder. Alternatively, if based on this newly available witness affidavit provided by Ricky Sailes, the version of events is that defendant drove the stolen Jeep and Kwanniewski fired the gun that killed the victim, again they worked as a team and the defendant would still be guilty of first-degree felony murder. As such, the evidence supplied in this witness statement would not produce a different result on re-trial.

This Court finds that the allegations and evidence presented in this motion are insufficient to warrant an evidentiary hearing, new trial or relief from judgment. Defendant has not shown "good cause" under **MCR 6.508(D)(3),** nor has he proven actual prejudice. Therefore, for all the aforementioned reasons stated, defendant's second motion for relief from judgment is hereby **DENIED.**

Dated: 1-27-17 *Gregory D. Bill*
CIRCUIT COURT JUDGE

PROOF OF SERVICE

I certify that a copy of the above instrument was served upon the attorneys of record and/or self-represented parties in the above case by mailing it to the attorneys and/or parties at the business address as disclosed by the pleadings of record, with prepaid postage on ____ _____.

Laurie Bathiust Zeliff
Name

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JIMMY BAUGH, #183590
Plaintiff,) Bay City, Michigan
vs.) March 2, 2021
) 9:34 a.m.
CONNIE HORTON, WARDEN)
Defendant.) Case No. 19-10032
_____)

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE THOMAS L. LUDINGTON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
CHRISTOPHER J. MCGRATH
Attorney at Law
503 South Saginaw; Suite 939
Flint, MI 48502
(810) 238-8540

For the Defendant:
JARED D. SCHULTZ
Michigan Department of Attorney General
525 W Ottawa
Lansing, MI 48933

Court Reporter:
Carol M. Harrison, RMR, FCRR
1000 Washington Avenue
Bay City, MI 48708

Proceedings reported by stenotype reporter. Transcript produced by Computer-Aided Transcription.

[Page 2]

I N D E X

[Page 3]

P R O C E E D I N G S

(At 9:34 a.m., proceedings commenced.)

(Defendant present.)

THE CLERK: Jimmy Baugh versus Connie Horton, Case No. 19-10032.

THE COURT: Good morning, counsel. If we could have your introductions, please.

MR. MCGRATH: Good morning, Your Honor. Christopher McGrath appearing with Mr. Baugh.

MR. SCHULTZ: Good morning, Your Honor. Jared Schultz, Michigan Assistant Attorney General, on behalf of the respondent.

THE COURT: We are assembled today essentially under the direction of the Sixth Circuit Court of Appeals in an opinion and order that they would have handed down in December 17 of 2018 responding to a supplementary petition for habeas corpus pursuant to 28 United States Code Section 2254.

Their direction was for us to conduct an evidentiary hearing. We have worked fairly extensively. Mr. McGrath from the Federal Defendant's Office has represented Mr. Baugh, and we have had a number of conferences in preparation for the beginning of today's hearing. We actually last spoke yesterday, briefly surveyed the witnesses that Mr. McGrath anticipated calling beginning this morning with Mr. Sailes.

Are you ready to proceed, Mr. McGrath?

[Page 4]

MR. MCGRATH: We are, Your Honor.

THE COURT: Mr. Schultz?

MR. SCHULTZ: Yes, Your Honor.

THE COURT: Ms. Winslow, if we could bring the first witness in and, Mr. McGrath, if you could identify him just for our record, please.

MR. MCGRATH: Yes, Your Honor. We would call Ricky Sailes.

THE COURT: And while Mr. Sailes is coming in, there's a couple of things that we should follow up on, the first of which is the fact we're conducting the hearing using video technology.

Mr. Baugh, are you satisfied that we should be proceeding using this as opposed to waiting for an in-person or in-courtroom hearing?

THE DEFENDANT: Yes, sir, Your Honor.

THE COURT: And you've talked with Mr. Baugh concerning that subject, Mr. McGrath?

MR. MCGRATH: Yes, Your Honor.

THE COURT: And, Mr. Baugh, for your background, the other folks that are with us this morning are our case manager who called the case, Ms. Kelly Winslow. Ms. Carol Harrison is the woman who is maintaining a record of the case, our stenographer, and Ms. Maria Critchlow is the law clerk who is assigned particularly to your case and of assistance to me.

[Page 5]

We are ready for Mr. Sailes, Ms. Winslow.

MR. MCGRATH: Judge, I have one preliminary question if I may.

THE COURT: Yes, sir.

MR. MCGRATH: Mr. Kendall from our office, I believe he has signed on, and he'll be helping me just in terms of being able to project documents that we're talking about. I don't know if he needs to be brought onto this screen, or if he stays on as an audience member, but I just wanted to make sure that we have that straight before we get going with the testimony.

THE COURT: Audience member is fine with us.

Good morning, Mr. Sailes.

MR. SAILES: Good morning.

THE COURT: Where are you located?

MR. SAILES: I'm in my living room.

THE COURT: In Detroit?

MR. SAILES: Yes, sir.

THE COURT: We appreciate you being with us today.

Could you raise your right hand, please, sir.

(At 9:38 a.m., sworn by the Court.)

THE COURT: Thank you.

Mr. McGrath, your witness.

MR. MCGRATH: Thank you, Your Honor.

[Page 6] Sailes – Direct

RICKY SAILES,

PLAINTIFF'S WITNESS, SWORN AT 9:38 a.m.

DIRECT EXAMINATION

BY MR. MCGRATH:

Q. Good morning, Mr. Sailes. My name's Chris McGrath. I work with the Federal Defender's Office, and I represent Jimmy Baugh. You can see his picture here on the screen.

Now, let me start with a conversation from this past spring. Do you remember having a telephone conversation with me?

A. Yeah.

Q. Okay. And during that conversation we talked about a statement that you previously made to the Detroit police department a long time ago. Do you remember that?

A. Yes, I do.

Q. Okay. So with that in mind, let's move backwards a little bit now just to kind of lay a foundation for everything here. Specifically I want to take you back to 2002. At that time, did you know a gentleman named Jimmy Baugh?

A. Yes.

Q. Okay. What about a gentleman named Robert Kwasniewski?

A. Yes.

Q. Okay. Does Mr. Kwasniewski have a street name?

A. Luck.

Q. Luck?

[Page 7] Sailes – Direct

A. Yeah.

Q. Okay. Does he sometimes also go by the name Scottie Trent?

A. Yeah, that was his alias.

Q. Okay. And do you know a gentleman named Lafayette Dearing?

A. We were all codefendants.

Q. You were all codefendants? Okay. And that's exactly what I was getting at. Codefendants in what kind of case, Mr. Sailes?

A. Carjacking, armed robbery.

Q. Okay. And was Mr. Baugh involved in that case, too?

A. Yeah. I believe they charged him with receiving and concealing. I'm not sure to be exact.

Q. Okay. And, now, you went to court on that case I assume, right?

A. Yeah. I end up doing almost 13 years.

Q. Okay. And was that the Wayne County Circuit Court? Is that where that case was pending?

A. Yes.

Q. Okay. Did you take a guilty plea, or did you end up going to trial?

A. I took a guilty plea.

Q. Okay. And you said you wound up doing about 13 years. Do you remember what year you were sentenced?

[Page 8] Sailes – Direct

A. I was sentenced in -- I believe it was July, 2020 -- 2002, I mean.

Q. All right. And you are out now --

A. Yes.

Q. -- so it's safe to assume that at some point you were paroled in that case?

A. Yes.

Q. Do you remember what year you were paroled?

A. I was paroled December 2013.

Q. December of 2013? Okay. And are you still on parole or have you been discharged?

A. No, sir. I've been discharged.

Q. Good. Now, let's move back to 2002. Does the name JoAnn Miller ring a bell at all?

A. Homicide detective.

Q. Homicide detective, that's right. Do you know what department she was with?

A. Homicide.

Q. Detroit Police Department homicide, does that sound right?

A. Yes.

Q. Okay. And at some point in 2002, did you have a conversation with Detective Miller?

A. Yeah, they came and got us several times.

Q. I'm sorry. I didn't quite hear you. Can you repeat --

A. Yes, they came and got us several times.

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Q. All right. So is it fair to say that this conversation that you had with Detective Miller was while you were in custody?

A. Yes.

Q. Okay. And do you remember Detective Miller asking you about a conversation that you had with Mr. Kwasniewski and Mr. Baugh?

A. Yes, I do.

Q. Okay. And is it fair to say it was a conversation about a shooting that took place on Navara and Hayes?

A. Yeah, I believe it was supposed to happen December 3rd.

Q. Okay. Fair to say you weren't involved in the shooting, right?

A. No.

Q. Okay. But you heard about the shooting?

A. Yeah.

Q. Okay. Now, so you have this conversation with Detective Miller, and do you remember what she was asking you about?

A. Not offhand. I know it was -- it was stated that -- they was just trying to get information on what really happened. That's all I really know.

Q. All right. I'd like to show you a written statement and see that helps refresh your recollection a little bit, okay Mr. Sailes?

A. Okay.

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MR. MCGRATH: Mr. Kendall, if we could pull up the Ricky Sailes statement.

MR. KENDALL: Okay. Just a second.

THE COURT: Good morning, Cedric.

MR. KENDALL: Good morning, Judge.

BY MR. MCGRATH:

Q. Okay. Can you see that document that's on the screen, Mr. Sailes?

A. Yeah.

Q. All right. If you would just take a minute and review the whole document. It's about two pages long. It shouldn't take you very long, and when you're ready for Mr. Kendall to scroll down so that you can see more, would you just let him know.

A. Yeah.

Yep.

Uh-huh.

Uh-huh.

MR. MCGRATH: Okay. If we could remove that from the screen so that I can see Mr. Sailes, please.

Thank you, Mr. Kendall.

BY MR. MCGRATH:

Q. Okay. Mr. Sailes, I know it's been a long time since that -- since the date of that statement. That's dated March 16th of 2002, but after reviewing that, does that kind of jog your memory a little bit about your conversation with

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Detective Miller?

A. Uh-huh.

Q. Okay. If you would, please do us a favor and try to stick with "yes" or "no" in lieu of "uh-huh" or "huh-uh," because Ms. Harrison, our court reporter, is recording all of this, and it's difficult to transcribe.

So is your answer then, yes, it does jog your memory, sir?

A. Yes.

Q. Okay. And if you would, then, just outline for us the conversation that you're having with Detective Miller in this statement.

A. She was asking me questions about the shooting and what I knew or what I heard -- or what I heard.

Q. Okay. And is it fair to say, then, that you told her about a conversation that you had like the next day with Lucky, Mr. Kwasniewski, and my client, Mr. Baugh?

A. Yeah.

Q. Okay. And did you tell Detective Miller that Kwasniewski told you that he shot the gentleman in that case, the white guy?

A. Yeah.

Q. Okay. And did you tell Detective Miller that Jimmy said that he was driving and that he drove away, right?

A. Yeah. Yes.

[Page 12] Sailes – Direct

Q. And you told Detective Miller that Jimmy said that Scottie shot the guy, right?

A. Yes.

Q. Okay. And, again, Scottie Trent refers back to Mr. Kwasniewski, Lucky; is that correct?

A. Yes.

Q. Okay. All right. Now, let's go back to the conversation that you and I had this spring, all right. I had asked you whether or not you provided a copy of this statement to Mr. Baugh. Do you remember that?

A. Yes.

Q. Okay. And you said that you did. Do you remember that?

A. Yep.

Q. Okay.

MR. SCHULTZ: Well, Your Honor, I would object at this time. I think we should just ask him whether he -- what his memory of, not what his memory of the conversation with Mr. McGrath was.

THE COURT: I agree.

Mr. McGrath, if we could get just the witness's recollection of the events, please.

MR. MCGRATH: I don't see Mr. Sailes. There we go, we have him back.

BY MR. MCGRATH:

Q. Okay. Mr. Sailes, so is it your testimony today that you

[Page 13] Sailes – Direct

provided a copy of the statement that you just read to Mr. Baugh?

A. Yeah. At a point in time during our prison sentence, I reached out to Jimmy.

Q. Okay. Do you remember what year this was?

A. Oh, man, I believe -- if I could recollect, I was at Carson City I want to say -- not Carson City, I mean, Kinross, so I would said between 2004 -- between 2004 and 2000 -- shoot -- it was right when I first got -- I'm going to say between 2004 and 2006 I want to say. That's -- excuse me -- sorry about that.

Q. Oh, that's okay. So you're in the UP at some point during your prison sentence, but you can't remember the exact year, is that what you're saying?

A. Yeah. I know I went up there it was 2004, and it was early on. I spent a few years up there. It was early on.

Q. And you say you reached out to Jimmy?

A. Yeah.

Q. How is it that you reached out to him? How did you accomplish that?

A. Through mail.

Q. Okay. You couldn't just call him because you were each prisoners, right?

A. Yes.

Q. Okay. And when you were in prison, was there -- were you

[Page 14] Sailes – Direct

able to just send him directly a piece of mail with you each being prisoners, or did you have to use an indirect route?

A. No, we couldn't -- we couldn't send that type of mail, so I sent it to my mother, and I had my mother send it to him, if I can remember correctly.

Q. Okay. And what was it that you sent to him?

A. Statements.

Q. Okay. Let me ask you this: Before you sent him the statements, did you -- do you remember sending him a letter?

A. Yeah, I wrote him a letter.

Q. Okay. Do you remember what you said in the letter, Mr. Sailes?

A. Not offhand, no, I don't.

Q. Okay. In any event, you said that you sent Mr. Baugh statements and you used that in plural. Can you tell us what statements you sent to him.

A. Yeah, we was -- we was going back and forth about the whole situation. The situation we was on, you know what I'm saying, all collectively together, and the situation -- his -- what he doing right now, his -- his -- the murder bit.

Q. Okay. You were going back and forth, you know, talking about the sentences that you were serving and what have you, and at some point that caused you to send him some statements?

A. Yeah.

Q. All right. Now, do you remember who made the statements

[Page 15] Sailes – Direct

that you sent him?

A. I want to say the statement I wrote, the statement I signed. Man, it's been so long, bro. I can't remember every exact detail.

Q. That's okay. You do remember sending him the statement that you say you signed?

A. Yes.

Q. Okay. Now, the statement that you're referring to, the one that you signed, is that the statement that we just had up on the screen?

A. Yes.

Q. Okay. So your testimony is that at some point during your prison term, you send a copy of that statement to Mr. Baugh?

A. Yes.

Q. Okay. Do you remember how you got a copy of that statement, meaning when you got a copy of it and how you got a copy of it?

A. Let me see, it was -- we was at 1300 Beaubien. I remember sitting down and talking to JoAnn Miller. It was several statements that were on her desk, and I don't know if it was in my paperwork, but I know I had possession of it.

Q. Okay. Is it possible that Detective Miller gave you a copy of the statement when you made it?

A. It's possible, but I don't know if -- it's possible, yeah, I guess.

[Page 16] Sailes – Direct

Q. Okay. But your testimony is you don't have a specific recollection of how you obtained a copy of that statement?

A. No.

Q. Okay. But the statements that Detective Miller attributes to you, okay, your oral assertions, what came out of your mouth, she attributes that to you in this written statement that we just went through, that you just took a look at. Does that fairly depict what you said to her?

A. Yeah.

Q. Okay.

A. Yep.

Q. So that was the truth?

A. Yes.

Q. Okay. And you made the statement in 2002. The statement suggests that Mr. Kwasniewski was the shooter in this homicide case that Mr. Baugh was dealing with. That's potentially very helpful evidence to Mr. Baugh, would you agree?

A. Yes.

Q. Okay. Why not give it to him back in 2002? Why did you wait a long time to give it to him?

A. If you knew our case, it was so crazy and so much stuff and manipulating was going on in our case, that we was not able to even talk to each other while going to trial because so much stuff was going on. We had escape attempts. We had people calling down there saying we was going to try to harm each

[Page 17] Sailes – Direct

other, so we was separated. We was going to court separate basically. Jim did not go to court with us. We didn't see Jim.

Q. So is it your testimony that you didn't have an opportunity to give it to him before then?

A. No.

Q. No you didn't have an opportunity, or no that's not your testimony?

A. No, I didn't have an opportunity to give it to him.

MR. MCGRATH: Your Honor, at this point -- and I'll try not to do this with every witness, but, you know, if we were in the courtroom right now, this is the point where I would lean over to Mr. Baugh and I'd say, hey, boss, are there any other questions that you want me to ask Mr. Sailes.

Given that we're in this format, this obviously is the best that we can do under the circumstances with the pandemic, but -- and given the importance of Mr. Sailes and the fact that we have him here, I would like to respectfully ask for a brief moment to call Mr. Baugh off the record and pose that very question to

him, are there any additional questions that you would like me to ask.

THE COURT: I have no objection.

Mr. Schultz, are you agreeable?

MR. SCHULTZ: Yes, that's fine. I don't have an objection to that.

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MR. MCGRATH: Okay. Thank you, Your Honor. So I'm going to go ahead and mute myself, and take myself off video, and I'm going to call Mr. Baugh right now.

THE COURT: And then you'll be back shortly.

MR. MCGRATH: Yes. Thank you, Your Honor.

(At 9:58 a.m., break taken.)

(At 10:01 a.m., break concluded.)

MR. MCGRATH: Just a few more follow-up questions if I may, Your Honor?

THE COURT: Yes, sir.

MR. MCGRATH: But we're almost done.

BY MR. MCGRATH:

Q. Mr. Sailes, do you remember communicating at all with Mr. Baugh after you got out of prison?

A. I don't know if we had a conversation or he wrote, but I do remember.

Q. Okay. And, you know, we were talking about the timeline of when you sent that statement to Mr. Baugh. Is it possible that you could have sent it to him actually when you were corresponding after you got out?

MR. SCHULTZ: Well, I would object. That's leading. He testified he sent it in 2004 I believe it was, so I don't think that's an appropriate question.

MR. MCGRATH: Well, the state may not like his answer, but it's an appropriate question. He didn't testify

[Page 19] Sailes – Direct

that he sent it in 2004. He was completely unsure about the year that he sent it.

THE COURT: Sure. And the -- without suggesting a particular date, Mr. McGrath, I don't have problems traveling back to the subject, but let's not suggest dates, please.

MR. MCGRATH: I will not suggest any dates, Your Honor, yes.

BY MR. MCGRATH:

Q. Okay. So, Mr. Sailes, you indicated that you -- after you got out of prison, you had been corresponding, sending letters, if you will, to Mr. Baugh; is that right?

A. Yes, we did.

Q. Okay. And is it possible that it was that period when you're out of prison that you sent the statement to Mr. Baugh?

A. It's possible. Now, it's -- the -- JoAnn Miller -- all these people knew this a long time ago. They even tried to put me on the stand when these boys was fittin' to go to -- I think it was a preliminary hearing.

I was told, if they don't do shit for you, don't do shit for them. Flat out, period, in my case on my carjacking armed robbery. But they knew exactly what happened with that murder case on December 3rd, so --

Q. And the "they" that you're talking about, are you talking about the Detroit Police Department?

A. Yeah.

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MR. MCGRATH: Okay. Thanks, Mr. Sailes. I have no further questions at this point.

THE COURT: Thank you.

Mr. Schultz, cross-examination.

MR. SCHULTZ: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SCHULTZ:

Q. Good morning, Mr. Sailes.

A. Good morning.

Q. My name is Jared Schultz. I'm an Assistant Attorney General with the state of Michigan. I'll ask you a few questions. If you don't understand, for whatever reason, just let me know, and I'll rephrase the question, okay?

A. Okay.

Q. All right. Mr. Sailes, how long have you known Jimmy Baugh?

A. I been knowing Jimmy Baugh since I was about 17, 16.

Q. Okay. And approximately what year --

A. Approximately that was about '96, '97.

Q. Okay. So approximately five, six years before this incident we're talking about took place?

A. Yes.

Q. Okay. What about Scottie Trent or Robert Kwasniewski, how long have you known him?

A. We all met around the same time.

[Page 21] Sailes – Cross

Q. Okay. Does that include Lafayette Dearing?

A. No, Lafayette was my childhood friend.

Q. Okay. So you've known him even longer?

A. Yeah.

Q. Okay. You mentioned that you had -- were all on a case together, an armed robbery case?

A. Yes, carjacking/armed robbery.

Q. Would you -- all four of you would commit armed robberies together; is that correct?

A. Jim would never commit an armed robbery. Jim never really did anything but drive.

Q. Okay. What about the other three, you and Mr. Kwasniewski and Mr. Dearing?

A. Yeah, that's what we -- we committed that armed robbery, yes, we did.

Q. Okay. Any other armed robberies?

A. No.

Q. Okay. So for the one we're talking about, you were arrested for armed robbery and carjacking in 2001, does that sound correct?

A. Yes, sir.

Q. Okay. And, again, Mr. Baugh and Mr. Kwasniewski and Mr. Dearing, they were all arrested for that as well?

A. Yes.

Q. Okay. And you pleaded guilty, correct?

[Page 22] Sailes – Cross

A. Yes.

Q. Do you remember what you pleaded guilty to, what crime or crimes?

A. I believe it was carjacking, armed robbery, felony firearm -- yeah and felony firearm.

Q. Okay. And did you go to prison?

A. Yes.

Q. I believe you already said that you went to prison, correct?

A. Yes.

Q. Okay. When were you released?

A. December 13th, 2000 -- I mean, December -- December 4th, 3rd, 2013.

Q. Okay. And were you placed on parole at that time?

A. Yes.

Q. When did you get off parole?

A. I got off parole in like November of 2015, December, 2015.

Q. Okay. So going back to this statement that you made, do you recall when you spoke to Detective Miller?

A. They came and got us so many times during the time we was in the county jail, I can't recall the exact date, but I remember making the statement. And if you all can go back, you all can clearly see that they even tried to put me on the stand.

Q. Well -- and we'll get to that, but I guess what I'm asking

[Page 23] Sailes – Cross

is do you remember a specific time when you spoke to Detective Miller? You mentioned "they" kept getting you, but I'm asking specifically about Detective Miller. Do you remember speaking with her?

A. Yeah, Miller, yeah. I don't remember the exact date, no, I don't.

Q. Okay. That's fair. And you said "they" came and got you, so is it fair to say that she approached you or did you approach her?

A. We all -- yeah, they approached me.

Q. Okay. And if you don't remember, that's fine, you can say so. But do you remember, was the conversation about your armed robbery case with every -- with Mr. Baugh and Mr. Kwasniewski, or was it about this specific murder case?

A. It was about homicide.

Q. Okay. Do you remember what she asked?

A. She asked me what I knew.

Q. Okay. And do you remember what you said, other than just referring to your statement?

A. I told her what I knew.

Q. Okay. So then what you knew, you said that a conversation occurred. Mr. Kwasniewski told you something. When did that conversation with Mr. Kwasniewski happen?

A. December 4th. I remember that so good because it was the day we got locked up.

[Page 24] Sailes – Cross

Q. December 4th, 2002?

A. 2001.

Q. 2001, okay. And was that the day after the murder --

A. Yes.

Q. -- or the day after the shooting?

How did that conversation come up?

A. I was in a stolen Jeep, a Grand Cherokee. Jeeps used to get left around the neighborhood or cars used to get left around the neighborhood and we used to get in them, and I drove it over them to where Mr. Baugh and Kwasniewski was at, and I was told, get up out that jeep.

Q. Who told you that?

A. Mr. Trent.

Q. Okay. And then what did he say?

A. He said it was hot.

Q. Okay. And then what happened?

A. We -- I proceeded to get out the Jeep. And he said something happened in that Jeep yesterday, said you got to get rid of that Jeep, a guy got shot.

Q. Okay. And was Mr. Baugh present when he told you that?

A. Yes.

Q. And I guess I'll back up a little bit. Mr. Kwasniewski said somebody got shot, and he said that he did the shooting; is that correct?

A. Yes.

[Page 25] Sailes – Cross

Q. Okay. And he also said that Mr. Baugh was the driver; is that correct?

A. Yes.

Q. Okay. And while he's saying this, is -- Mr. Baugh is present, correct?

A. Yes.

Q. So he's hearing this conversation, too?

A. Yes.

Q. Okay. What did Mr. Baugh do at that time?

A. We -- I think we proceeded to -- we was smoking some weed, end up getting up out the truck. Not sure exactly what he did per se, but we continued to smoke weed, talk like -- just have regular conversation, and we took off, we just drove around.

Q. Well, let me ask you this: What did Mr. Baugh say about Mr. Kwasniewski's statement or what -- Mr. Kwasniewski's given this play-by-play of what happened. What did Mr. Baugh say?

A. I don't remember exactly what he said. I can't give you verbatim what he said. Alls I know is that's what Mr. Trent told me that what happened. I don't remember what Mr. Baugh said.

Q. Well, do you remember him being upset or angry in anyway?

A. I'm quite sure he probably would have been because the understanding that we had, he -- Mr. Baugh never did anything. Mr. Baugh wasn't -- he wasn't -- honestly he wasn't a part of this, you know what I'm saying, this thing that we had going

[Page 26] Sailes – Cross

on, so I'm quite sure he was upset that it even took place.

Q. Okay. Do you -- did he deny that he was the driver?

A. Like I said, I can't particularly say that, you know what I'm saying, I remember hearing him say that,

you feel me? I don't -- you got me trying to go back almost 20 years, over 20 years.

THE COURT: I think you have your response, Mr. Schultz.

MR. SCHULTZ: I apologize, Your Honor. I'll ask my next question.

BY MR. SCHULTZ:

Q. Did he -- if you can remember, Mr. Sailes, did he deny that he knew that they were going to rob somebody?

A. Like I said -- like Jim --

MR. MCGRATH: I'm going to object to that question. I want to object to that question, because I don't believe that there's any suggestion in the record that he did say that he -- that anybody said that he knew that the gentleman was going to get shot. There's no suggestion, so to ask him whether or not he denied, I object on grounds of relevancy.

THE COURT: Overruled. The gentleman can respond.

THE WITNESS: Like I said before, Jim never agreed to do any of the stuff that we were doing, period.

BY MR. SCHULTZ:

Q. But he was the driver --

[Page 27] Sailes – Cross

A. Jim --

Q. -- in this case?

MR. MCGRATH: That's been asked and answered.

THE WITNESS: A lot of the times, Jim had no knowledge of it.

BY MR. SCHULTZ:

Q. Okay. All right. I want to go back to the statement. When you gave the statement to Detective Miller, do you remember if there was anybody else in the room with you?

A. No. We was sitting at a desk, I believe, because that -- I very -- after they interrogated me, and they came and got me a few times, I was never back in the interrogation room. We was sitting at a desk.

Q. Okay. Who wrote out the statement?

A. Ms. Miller.

Q. And you signed it, correct?

A. Yes.

Q. Do you know what happened to the statement after that?

A. Like I said, like I just told his lawyer, I do not recall how I got the statement or -- no, I don't know what

happened to the statement, but I don't know -- I don't know how I got the statement.

Q. Well, let me ask you this: When is the first time you remember being aware of the statement?

A. It took me a while to even read through my paperwork

[Page 28] Sailes – Cross

because I don't -- I can't give you an exact date of when I remember that I had the statement because once I -- I took a plea, it wasn't no -- you know what I'm saying, wasn't no more further fighting for me or nothing like that. I accepted my end of what I did and it was over with, so I can't exactly give you around -- almost around about time when I got the statement or realized I had the statement.

Q. Well, and I think you said in that that -- something about your paperwork. Are you saying that you found the statement in -- while you're going through your paperwork?

A. I -- like I just told you, I don't know exact -- I don't know how I got the statement. I don't remember all that. I remember what was told to me that what happened.

Q. Okay. Then when did you decide that you would send the statement to Mr. Baugh?

A. Same questions over again. Like I said, I don't remember exactly when. I can't tell you if it was when I

was in the joint. I can't tell you if it was when I was out here. I know I did send him the statement, though.

Q. Well, earlier you mentioned that you were communicating with Mr. Baugh, and you couldn't exactly pin down the dates, but you said it was early on in your stay, and I think you said maybe 2004 it could have been. Is that correct, were you -- I mean, did you testify --

MR. MCGRATH: I'm going to object on two grounds.

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No. 1, it's been asked and answered and, No. 2, that mischaracterizes his testimony on direct.

THE COURT: Overruled. You can answer, Mr. Sailes.

THE WITNESS: Okay. Yes, I said that it possibly could have been then, but when he refreshed my memory, I don't -- you know what I'm saying, we did speak once I got out, and I did send him stuff -- some stuff, but I -- it was like honestly I was trying to forget about all this stuff and move on with my life.

Now you all trying to get me to remember questions or things that happened that like didn't directly impact my life and I'm not -- you know what I'm saying, I can't get down to dates and specifics. I know what I told -- I know what I told Ms. JoAnn Miller. I remember that. I remember them trying to put me on the stand. I remember what she told me. I remember what Mr. Trent told me.

BY MR. SCHULTZ:

Q. Mr. Sailes, if you don't remember, that's absolutely fine. You can say you don't remember. We're trying to make a record here, though, and I'd like to ask some more questions, and if you can't remember, you can say you can't remember, but to the best of your memory, I'd like some answers to a couple more questions.

Do you remember when you decided to send the statement, or the statement first came up, whose idea was it?

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A. Like I said, I -- you know, I'm not absolutely sure whose idea it was. I'm not -- I'm not -- I'm trying to figure out like -- because I'm pretty familiar with the law and the courts and all that, too. I've been through it. I understand the relevance, but me knowing what I knowing and she knowing what she said, and you all -- the stuff you all can prove, come on man. It's -- getting down to the who sent it and who asked and why this, the truth is the truth, man.

Q. Well, that's fine, Mr. Sailes. I still -- I'd just like you to answer the questions. If you don't remember, you don't remember, that's fine .

Did you have -- do you know if you had the statement when you got out of prison?

A. I had a bunch of paperwork when I got out of prison. I had a bunch of paperwork.

Q. And do you believe the statement was in that paperwork?

A. You just asked me that, bro.

Q. Well, I asked you if you had paperwork when you got out of prison. Now I'm asking if that -- if you had the statement.

A. You just asked me did I send it when I was in prison or did I send it when I was out of prison, and I just answered you and told you I can't remember.

Q. Okay. Fair enough. Do you remember how you sent the statement? By letter?

A. Obviously it was mailed.

[Page 31] Sailes – Cross

Q. Okay. Was it you personally who sent the statement?

A. Yes, it was.

Q. And was your wife at the time ever involved?

A. No.

Q. Did Mr. Baugh ever ask you to execute an affidavit?

A. I don't recall.

Q. Okay. I'd just like to go over one more thing, and you mentioned it earlier. You were called to testify at one point in this case; is that correct?

A. Uh-huh.

MR. MCGRATH: Is that a yes?

THE WITNESS: Yes.

BY MR. SCHULTZ:

Q. Thank you, Mr. Sailes.

Do you remember when that was?

A. No, I don't. I know I was still in the county jail, so it was before, I believe, I got sentenced in July of 2002. So it was before then.

Q. Okay. Could it have been at a preliminary examination?

A. That's what I said.

Q. Okay. I apologize if I missed that. Do you remember what you said?

A. Yeah, I said I ain't know him.

Q. And why did you say that?

A. Because I was informed that if they didn't help me on my

[Page 32] Sailes – Redirect

case, don't help them, meaning about my armed robbery. They wasn't trying to compensate me in, you know what I'm saying, any form or fashion.

Q. So you were under the impression that you were there to testify in Mr. Baugh's favor?

A. I -- I believe that's what it was going to be. I don't know.

MR. SCHULTZ: Okay. At this time I don't think I have any further questions. Thank you, Mr. Sailes.

MR. MCGRATH: Judge, you're on mute.

THE COURT: You're correct.

Any redirect, sir? Thank you.

MR. MCGRATH: Just a little bit, Judge.

REDIRECT EXAMINATION

BY MR. MCGRATH:

Q. Mr. Sailes, I promise I'm not going to ask you many questions here, but you were just talking about testifying at that preliminary examination, and it was your impression that if they don't help you, you don't help them. Who is the "they" that we're talking about there? Is it the Detroit Police Department, the prosecutors, or is it Mr. Baugh?

A. I believe it was prosecutors. That's what -- that's what she told me.

Q. Okay. So if we were going to rephrase that, it would be like if the prosecutor doesn't help you, you don't help the

[Page 33] Sailes – Redirect

prosecutor, right?

A. Yes.

Q. Okay. Now, just a couple more quick questions. Mr. Schultz was asking you about --

THE COURT: Mr. McGrath --

MR. MCGRATH: Yes, Your Honor?

THE COURT: If we could identify who specifically told Mr. Sailes if they're not helping you, you shouldn't be helping him.

BY MR. MCGRATH:

Q. Mr. Sailes, do you remember who it was that told you that?

A. Ms. Miller.

Q. Ms. Miller told you that? If we don't help you, you don't help us?

A. She said that if they not trying to compensate you , I wouldn't say shit.

Q. Okay. And who is she referring to?

A. She had to be referring to the prosecutors.

Q. Okay. All right. Interesting.

You also testified that Mr. Schultz was asking you about whether, you know, your wife was involved in

any of this, in any of the letter writing, that kind of thing. And, you know, you had testified earlier that when you were in prison, since you couldn't have direct contact with Mr. Baugh, that you asked your -- I think you said it was your mother to send

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something to him; is that right? Do you remember that?

A. Yeah.

Q. Okay. And is it basically a letter that you provided to, in your recollection, your mom, and then your mom would forward it to Mr. Baugh?

A. Yeah.

Q. Okay. Now, is it possible that it could have been your then wife who forwarded the letter to Mr. Baugh? Is it possible that she could have ever done that?

MR. SCHULTZ: Your Honor, that's been asked and answered. I asked him if his wife was involved and he clearly said no.

THE COURT: Sustained.

MR. MCGRATH: Then I have no further questions.

THE COURT: Mr. Schultz?

MR. SCHULTZ: No, nothing further, Your Honor. Thank you.

THE COURT: All right. Mr. Sailes, a few questions that I have. Is your mom living?

THE WITNESS: No, my mom is deceased now.

THE COURT: Do you know when she passed, sir?

THE WITNESS: My mom passed almost two years ago.

THE COURT: All right. You indicated at one point that once you and the other gentleman that got arrested for the carjacking and robbery were arrested, that there were lots of

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times when the police officers pulled you out of detention and asked to talk with you; is that correct?

THE WITNESS: Yes.

THE COURT: You also referenced the fact that there was an escape attempt and they were trying to keep you separate.

THE WITNESS: Correct.

THE COURT: Can you explain to us what you understood to be occurring then.

THE WITNESS: From my understanding, and this was what I kind of figured out on my own like later on, Mr. Trent was manipulating the situation very well because he had talked about a whole bunch of stuff that was like irrelevant and was putting a lot of people in it, trying to get himself out of trouble.

He had wrote a bunch of statements on even guys that didn't have nothing to do with our case, and he was just being very manipulative, you know what I'm saying? It was -- it was like he was -- he was trying anything to get himself out of the situation that we were in.

Now, I didn't know too much for like how they -- how that murder case was going, but as far as the armed robbery case, he was just throwing a bunch of people under the bus that didn't have nothing to do with nothing.

THE COURT: Okay. You've indicated that there was an

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escape. Do you recall who that was?

THE WITNESS: Yeah, one of my codefendants tried to escape. Lafayette, he tried to escape at one point in time.

THE COURT: And they were trying to keep all of you separate, is that accurate?

THE WITNESS: Yes. They -- it was like me, Lafayette and Mr. Trent. On most occasions going to court, we would go to court together, but Jim would never be in court with us because -- I don't know the exact reason, but they had him -- he was in a yellow jumpsuit. I think that was PC.

THE COURT: Okay. You referenced the fact that you were at 1300 Beaubien. What -- what is 1300 Beaubien?

THE WITNESS: 1300 -- that was -- what is the -- the first precinct, headquarters, homicide, I guess.

THE COURT: Okay. So at some point you met Detective Miller at that location and there was -- you saw paperwork related to a number of things there, is that accurate?

THE WITNESS: Yes.

THE COURT: Would that have been after you were released from custody or would this have been before you were arrested?

THE WITNESS: No, this was when I was in custody.

THE COURT: So the -- they would actually take you out of lockup and then over to Beaubien to talk with Miller?

THE WITNESS: Yes.

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THE COURT: Okay. Do you recall if this was before you entered your guilty plea or afterwards?

THE WITNESS: This was before.

THE COURT: Do you remember who your lawyer was at the time, Mr. Sailes?

THE WITNESS: At the time on my case?

THE COURT: Yes, sir.

THE WITNESS: What was his name? Oh, man, Christian Berry, Jr. (ph).

THE COURT: All right.

THE WITNESS: Christian Berry.

THE COURT: When do you think you got out of Kinross?

THE WITNESS: I left Kinross it was – Jesus -- maybe -- I think I did almost three to four years up there, so maybe 2000 -- 2007 or '08. They sent me to what is known as URF East now I believe, basically across the street.

THE COURT: You indicated earlier that there was a time when you talked with Detective Miller about the testimony that you were to give in the preliminary -- in Mr. Baugh's preliminary examination --

THE WITNESS: Uh-huh.

THE COURT: -- and your recollection is that she had said, I wouldn't provide any assistance to Mr. Baugh and the prosecutor if the prosecutor's not doing anything for you. Is that accurate?

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THE WITNESS: She didn't specifically say Mr. Baugh. She didn't specifically say -- she didn't

specifically say anybody. She just said, if they ain't trying to help you, I wouldn't help them. If they ain't trying to do nothing for you, I wouldn't -- because if you all can look at the -- I'm quite sure it's documented, I said I didn't know them.

THE COURT: Yes. Now, were you at that stage still negotiating the carjacking plea arrangement?

THE WITNESS: Yeah, I don't think -- I wasn't sentenced at the time.

THE COURT: Okay. But you also hadn't probably entered your guilty plea, am I correct or incorrect?

THE WITNESS: You -- you -- that's -- that's fair to say, yeah. I hadn't entered the guilty plea.

THE COURT: So it's fair to say you were sort of in play at that point negotiating?

THE WITNESS: Yes.

THE COURT: All right. What -- how did you come to the conclusion that this statement might be helpful to Mr. Baugh?

THE WITNESS: If he didn't -- if he didn't have the statement of what I was saying to say that he didn't shoot the guy, that's -- not to sound like snobby or anything like that, that's like -- I'm trying to word it the best I can, but maybe I'm just gonna -- it was plain to see. Like, if he didn't have

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that information, it was clear that it could help him.

THE COURT: Sure. But how do you know that he didn't have the information?

THE WITNESS: It could have came up in conversation. Like I say, some things I'm not so clear on about how it transpired or, like, how it came up in conversation, but if we ever talked about it, or if I ever said something to him of the fact that I got something that may can help you, yes, I probably would have did that, yes, sir.

THE COURT: But at this point you would have both been under sentence and in different -- in different jails, so you wouldn't have been easy -- it wouldn't -- you wouldn't have had a conversation.

THE WITNESS: No.

THE COURT: Did it occur through the mail?

THE WITNESS: Yes, it could have because at that time we were able to still write each other. You know, you was able to still write from prison to prison to prisoner. As of right now I think that's like over with. You can't do that no more.

So at that time we was still able to do that, and I had reached out to him. I know I did that when I was at Kinross, just wanted to see how he was doing, what everything -- how everything was going on, but that's how the conversate -- how we start communicating. Other than that, it wasn't a -- I don't know if it would have ever happened.

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THE COURT: And your recollection is that you would send the letter that you wanted to go to Jimmy to your mother who, in turn, would get it mailed to him?

THE WITNESS: No, that -- that was only if we were sending like if it was, like, legal mail. That was only like -- we could write back and forth just regular chitchat stuff like that, but we couldn't send each other legal mail, like statements or I couldn't send him a motion from -- that was in my paperwork and things like that, no, we couldn't do that.

THE COURT: Okay. And you could have an informal conversation in the -- in the letter, but you'd use the mail service, not a kite?

THE WITNESS: No, it wasn't no kite. It was mail.

THE COURT: Okay. Mr. McGrath, any additional questions for the gentleman?

MR. MCGRATH: No, Your Honor. Thank you.

THE COURT: Mr. Schultz?

MR. SCHULTZ: Just a couple, Your Honor.

RECROSS-EXAMINATION

BY MR. SCHULTZ:

Q. Mr. Sailes, you said that you were having conversations with Mr. Baugh, and perhaps that was by

letter, and that's where this idea of the statement came up; is that correct?

A. Like I said, I'm not sure if that's where that came from.

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I didn't say that. I said that it possibly, but I'm not sure when exactly the idea of the statement came up. I'm saying that's how we were communicating.

Q. Well, is it fair to say that you didn't just reach out to Baugh and say, hey, I can help you, here's a statement?

A. If we talked about -- if we talked about that case, and we, you know what I'm saying, went back and forth and talked and, you know what I'm saying, if I told him I got something that can help him, I would have did that, because I knew it wasn't -- he was jammed up basically. It wasn't, you know -- this wasn't on him.

Q. But you don't --

A. That was the understanding that me and him had. It was -- you know, he was -- basically Scottie Trent shitted on him, and they knew that.

Q. But you don't remember specifically reaching out to him for the purpose of saying "I have a statement;" is that correct?

A. No, I could have did that. Yes, that's a possibility. Because like I just told you, they knew, I knew, that he -- it wasn't -- it didn't go down the way Mr. Trent

portrayed it to them, from my understanding what Mr. Trent told me, so --

MR. SCHULTZ: Okay. That's it, Your Honor. Thank you.

THE COURT: Where's Lafayette these days, Mr. Sailes?

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THE WITNESS: I have no idea.

THE COURT: Do you know what -- did he end up with a plea arrangement, or did he try his case?

THE WITNESS: He took a plea agreement, too, eight to two, eight plus two years.

THE COURT: And he was a childhood friend of yours?

THE WITNESS: Yes.

THE COURT: He would also have been present when Mr. Trent told you that he was the shooter?

THE WITNESS: Yeah. I don't know if he was in the car per se. I know me and him were together that day, and we all were together that day. I can't place his body in the car when Mr. Trent said that to me.

THE COURT: You knew that you were all at the same residence, but you can't recall if he was present during --

THE WITNESS: No, we -- we wasn't even in a house. We were outside, you know. We wasn't in a dwelling, a building. We were outside.

THE COURT: And where did you ditch the Jeep?

THE WITNESS: I didn't ditch the Jeep.

THE COURT: Did it just get parked on the street?

THE WITNESS: I think Mr. Trent got rid of the Jeep.

THE COURT: All right.

THE WITNESS: I didn't -- you know, I had nothing to do with that.

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THE COURT: All right. I don't have any additional questions. Are you all set, Mr. McGrath?

MR. MCGRATH: Yes, and we'd like to thank Mr. Sailes for his time.

THE COURT: Mr. Schultz, any additional questions for Mr. Sailes?

MR. SCHULTZ: No, Your Honor. Thank you.

THE COURT: Mr. Sailes, we very much appreciate your attendance today. We are concluded. Thank you very much.

(At 10:44 a.m., witness excused.)

THE COURT: Mr. McGrath, are you prepared with your next witness?

MR. MCGRATH: I believed that Mr. O'Donnell is still in the audience, and if he is, then we would call James O'Donnell.

THE COURT: Good morning, Mr. O'Donnell.

MR. O'DONNELL: Good morning, Your Honor.

THE COURT: Where do you hail from this morning?

THE WITNESS: I hail from my house, in Grosse Pointe Park, Michigan.

THE COURT: It's sunny.

THE WITNESS: It is. I can see it out the window.

THE COURT: And that's progress, don't you think?

THE WITNESS: Yes, it is, Judge.

Mr. McGrath, may I swear your witness?

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MR. MCGRATH: Please do, Your Honor.

THE COURT: Sir, if you could raise your right hand.

(At 10:45 a.m., sworn by the Court.)

THE COURT: Mr. McGrath, if you'd like to proceed to direct examination.

MR. MCGRATH: Thank you, Your Honor.

JAMES O'DONNELL,

PLAINTIFF'S WITNESS, SWORN AT 10:45 a.m.

DIRECT EXAMINATION

BY MR. MCGRATH:

Q. Sir, if you would state your name for the record and spell your last name.

A. James O'Donnell, and that's o apostrophe capital D-O-N-N-E-L-L.

Q. Thank you. Where do you work Mr. O'Donnell?

A. I work now for the Neighborhood Defender Service of Detroit, which is responsible for representing approximately 25 percent of all of the indigent felony defendants in Detroit.

At the time I represented Mr. Baugh, I was working for the defender's office, the predecessor to the current neighborhood defender's office.

Q. Okay. So fair to say you're a member of the State Bar of Michigan?

A. Yes, 42585.

Q. How long have you been a lawyer for, Mr. O'Donnell?

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A. Since about 1988.

Q. Okay. Now, you indicated that you previously represented my client, Mr. Baugh; is that correct?

A. Yes.

Q. All right. And around what time was that? Do you remember the year or years?

A. Well, I've had to work at that, and I'll begin by apologizing. I have almost no memory of these cases, and I apologize for that. I've had many cases since, but my understanding is I received a verdict in a carjacking/robbery armed case in approximately October of 2002. And that I began this case also in 2002 and it completed with a verdict in January of '03.

Q. Okay. Now, when you say "this case," what case are you referring to, sir?

A. There was a predecessor case involving the same defendant involving carjacking and robbery, but the homicide case is the one I'm talking about that ended with a verdict in 2003.

Q. Okay. So is it your testimony that you represented Mr. Baugh in two separate cases?

A. Yes.

Q. Okay. And each of these were Wayne County Circuit Court cases?

A. Yes.

Q. And is it fair to say that both of them went to trial?

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A. Yes.

Q. Okay. And the first one that went to trial, if I'm hearing you correctly, was the armed robbery/carjacking case; is that right?

A. Yes.

Q. Okay. And do you remember the result of that trial?

A. Only by conferring with you and also with the registry of actions. As I understand it, it was a not guilty on the main counts and a finding of guilt for the count of receiving concealing stolen property.

Q. Okay. Good result, fair to say?

A. I don't even remember the facts to even be able to tell you whether that was a good result, I'm sorry.

Q. That's okay. All right. And I think you indicated that the verdict in that case was October, 2002?

A. That's what I understand.

Q. Okay. And then you also went to trial in the homicide case; is that correct?

A. Yes, but in looking the case up and studying it, there were two preliminary exams, and it's my understanding that I did not represent him in the first preliminary exam, but I did in the second. And, yes, I represented him at a trial.

Q. Okay. And these preliminary exams that we're talking about, we're talking about in connection with the murder case or the armed robbery case?

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A. Yes, the murder case.

Q. The murder case, okay.

And do you remember when you received the verdict in -- the jury verdict, okay, when did you receive the verdict in the homicide case?

A. I believe it was January of 2003.

Q. Okay. And is it fair to say that these cases take a little while to get to trial?

A. They do. For a while, and actually for an extended period of time, Wayne County was trying to get cases tried in 90 days. However, when they were serious capital cases that might have had more than one defendant, they frequently took longer.

Q. Okay. And let's focus on these two cases, the armed robbery case and the homicide case. Were they -- were they going on at the same time, or did they -- you know, did you work on the armed robbery and finish that up and then start with the homicide, or were they simultaneous, if you remember?

A. I believe I began the carjacking case first, but the verdict in that occurred in October of '02. The first preliminary exam happened in April of 2002 and the second occurred in July of 2002, so they were occurring simultaneously but on different tracks.

Q. Okay. Now, let's talk about, you know, your practices in the typical case down there. First of all, how would you get discovery in a case?

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A. So you'd receive an assignment, and I would walk that over to the tenth floor of Frank Murphy Hall of Justice and I would make contact with the secretary for that unit, in this case the homicide unit, and I would present the assignment and they would give me discovery, sometimes the same day, I'd sometimes come back another day and pick it up.

Q. Okay. And is that what you did in this homicide case?

A. Yes.

Q. All right. And what would you do once you get the discovery?

A. I'd prepare for the preliminary exam by going to the jail and meeting the client, and I would organize the file by sections. And as it moved toward trial, I'd outline each section.

Q. Okay. And your outlines, how would you describe them, if -- on -- let's say on a scale of 1 to 10, 1 is kind of cursory, just a few notes, 10 is as meticulous as you can get, where would you put your -- your outlines on that continuum?

A. So if it was a document that just listed pieces of evidence, I might just make a cursory note. When it was a statement, a police report, preliminary

complaint reports, PCR's, officer in charge statements, witness statements, I would take extensive notes. And sometimes I'd take a second set of notes because the case would develop as I'm reading through it, and it would develop through the exam, and I'd see

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that something that I had just sort of passed over had more significance as I put all the pieces, statements, reports together.

Q. Okay. So if I'm hearing you correctly, your testimony is that if, in your view, a particular documents was an important document, you'd take pretty extensive notes, but if it was a document that, in your view, wasn't so important, you might just jot down a few notes; is that right?

A. That'd be correct.

Q. Okay. When you would get this discovery, would you ever skip over documents in your review?

A. No, no. I believe, up until recently, I made notes on every single document. Recently, within the digital age, I've gotten vast amounts of documents, sometimes more than I can even count of pages of Facebook or something. But back then, every single document would have a note regarding that document that I'd make.

Q. Okay. And would you give documents to your clients?

A. Yes. I made a complete copy of all discovery and give it to every client and a copy of the transcript --

Q. Okay.

A. -- when that became available.

Q. Okay. And would that include Mr. Baugh?

A. Yes, that would include Mr. Baugh.

Q. Okay. Now, let's focus on the specifics of this homicide

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case, all right.

A. To the best ability -- to the best of my ability and memory, I will.

Q. Sure. Obviously you represented Mr. Baugh. Do you -- well let me ask you: Do you remember the name Robert Kwasniewski or the nickname Lucky or the name Scottie Trent?

A. I recognize them now, but when this first case -- when this case first came to my attention as an appellate matter recently, I did not remember. I remembered the name Jimmy Baugh because he communicated with me once via letter, but the name Kwasniewski, Scottie Trent, Lucky I did not remember until I came back to this case.

Q. Okay. But when you came back to the case, did you review some documents in an effort to refresh your recollection?

A. I did.

Q. Okay. And having reviewed those documents, now does the name Robert Kwasniewski or Lucky or Scottie Trent ring a bell?

A. Yes.

Q. Okay. And do you remember his role in the homicide as far as the testimony at trial goes?

A. So what I reviewed was opening statements and closing statements. I know he had -- he was a witness at the preliminary -- second preliminary exam where he implicated my client, and that's what I remember.

Q. Okay. When you say "implicated" your client, Mr. Baugh,

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do you remember how it was that he implicated him, what it was he accused Mr. Baugh of?

A. I think said my client was the shooter.

Q. Okay. And in your view, Scottie Trent -- or Mr. Kwasniewski, Lucky, him pointing the finger at Mr. Baugh and telling the jurors that Mr. Baugh was the shooter, was that fairly benign evidence or would you characterize it as pretty darn damaging evidence?

A. It was damaging evidence.

Q. Okay. And as you were trying this case, were you aware of --

THE COURT: Mr. McGrath?

MR. MCGRATH: Yes, Your Honor?

THE COURT: Are you referring to the preliminary examination or the trial, if we could --

MR. MCGRATH: I'm referring to the trial, Your Honor, the homicide trial.

THE COURT: Okay.

MR. MCGRATH: Yes.

BY MR. MCGRATH:

Q. As you're trying this case, were you aware of any other individuals that may have pointed the finger elsewhere in terms of who shot the decedent?

A. No, I wasn't aware of any other statements regarding statements made by people that implicated other individuals. I

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was not aware of that.

Q. Okay. And if you had been in possession at this trial of statements like that, statements where someone else is pointing the finger not at Mr. Baugh, but pointing the finger at Mr. Kwasniewski in terms of who the shooter was, would you have utilized it or would you have not utilized it? What would you have done with it?

A. So as I reviewed this, and I realized that Mr. Kwasniewski had identified my client as the shooter in the second preliminary exam, if I had a statement, the statement that I now know exists, I would have used it to impeach him to the best of my ability. I certainly could have refreshed his recollection and asked him if that was true, and I would have used it, and I would have done that, and I certainly would have used it in the trial.

Q. Okay. And what would you -- at risk of asking you the obvious but, I mean, how would that have been helpful?

A. Well, it would have shifted the blame for the shooting away from my client, and it would have left open the possibility that the shooting occurred incidental to or beyond the scope of the planned robbery or whatever else they were trying to plan with respect to that person.

Q. Okay. Now, at some point did you learn that there apparently was a statement out there where another individual suqqested that Mr. Kwasniewski shot the decedent in the

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homicide case?

A. When I was contacted by your office and you.

Q. Okay. Do you -- did you at any point receive a letter from Mr. Baugh asking you about that?

A. I did receive a letter from Mr. Baugh, and I responded to that letter, and I forget what I said, but I -- I do remember receiving a letter from Mr. Baugh.

MR. MCGRATH: Okay. At this point, Your Honor, I'd like to -- Mr. O'Donnell just testified that he doesn't remember what he said. I'd like to show him his letter that he wrote back to Mr. Baugh and see if we can refresh his recollection a little bit.

THE COURT: Certainly.

MR. MCGRATH: Mr. Kendall, if we could pull up the O'Donnell letter to Baugh.

MR. KENDALL: Okay.

BY MR. MCGRATH:

Q. Okay. Mr. O'Donnell, if you could review it and just -- if you would be kind enough to let Mr. Kendall know when you're ready for him to scroll down, please.

A. Okay.

Okay.

Okay.

That's good.

All right.

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MR. MCGRATH: Okay. Thank you, Mr. Kendall. If we could remove that from the screen, please.

MR. KENDALL: Okay.

BY MR. MCGRATH:

Q. All right. Mr. O'Donnell, now does that refresh your recollection about your written conversation, if you will, about, you know, the existence of this statement and whether or not you would have used it and whether you had it?

A. Yes. Yeah, that -- I wrote that, and apparently I was writing in response to Mr. Baugh saying there was a statement or asking me about a statement, and I'm responding by saying I didn't have such statement, and if I would have had it, I certainly would have used it.

Q. Okay. And is it fair to say that if you had such a statement, you would have given it to Mr. Baugh?

A. Of course. No, that's -- that's my habit in every case. I make a copy of the file, and then I walk it over to the jail and I give it to them.

Q. Okay. Now, let me ask you this: Have you seen -- have you -- since this transpired, so after you wrote this letter, have you seen the statement that Mr. Sailes has purported to have made to Detective Miller?

A. Yes, I've seen it.

Q. Okay. Do you remember any portion of that statement quoting not Mr. Kwasniewski -- Kwasniewski, but instead quoting

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my client Mr. Baugh?

A. I believe he was -- Mr. Baugh was referenced at the end of that statement, but it was mostly Ricky Bailes relating a conversation he had with Mr. Kwasniewski also known as Scottie Trent or Lucky. That's what I remember about it.

Q. Okay. And that -- I want to focus on that part at the very end that you're referring to. Is it fair to say that without looking at it you didn't remember exactly what it was that Mr. Bailes said?

A. No, I don't.

MR. MCGRATH: Okay. Your Honor, I'd like to just give him a quick chance to take a look at that statement, if I may, see if it refreshes his recollection.

Thank you. Mr. Kendall, if we could pull up the Bailes witness statement, please, Ricky Bailes' witness statement.

MR. KENDALL: Okay.

THE COURT: And, Mr. McGrath, while he's doing that, if you could see if you could determine from the witness when he first saw that and whether or not it was included with the correspondence that he received from Mr. Baugh.

MR. MCGRATH: Certainly, Your Honor.

BY MR. MCGRATH:

Q. And Mr. O'Donnell, while Mr. Kendall's pulling that up, I'm going to try to address those in reverse order.

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When you received the letter from Mr. Baugh that caused you to write him back, write him the letter that we just looked at, okay, when you received that letter from Mr. Baugh, was there any type of witness statement included with that or was it just the letter from Mr. Baugh?

A. I don't remember. In rereading my letter, the thought that came to my mind as I was rereading it was that if there had been a witness statement that I had seen, I might have reacted even more strongly in my letter to what I -- to the witness statement and the significance that that might have had, but at this time, I can't remember whether I saw --

Q. Okay.

A. -- in the letter itself.

Q. Do you remember when the first time it was that you saw the Ricky Sailes witness statement?

A. The memory that I have now is that when you forwarded it to me attached to an email.

Q. Okay. And about when would that have been?

A. In the last month, month and a half.

MR. MCGRATH: Okay. All right. Mr. Kendall, I believe we're ready to pull up the Sailes statement.

BY MR. MCGRATH:

Q. All right. And what I really want to focus on for now is the very end of it, the second page.

A. All right. We can continue.

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It was me, Jimmy Baugh and Lafayette Dearing.

Q. If you could just -- yeah, from that point on if you could just read down to the bottom, and then let us know when you're done, please.

A. Yes.

Okay.

MR. MCGRATH: Okay. Mr. Kendall, I believe we're done with that one. Thank you very much.

MR. KENDALL: Okay.

BY MR. MCGRATH:

Q. Okay. So, Mr. O'Donnell, that very last portion of that statement does, in fact, contain what purports to be a quote that Mr. Sailes overheard Mr. Baugh saying. Is that a fair statement?

A. Yes.

Q. Okay. And the quote is that Jimmy said that Scottie Trent, Kwasniewski, Lucky, shot the guy, Jimmy drove off, right?

A. Yes.

Q. Okay. So per that statement, that puts Mr. Baugh behind the wheel of the car, right?

A. Yes.

Q. Okay. And if you remember, during the course of the trial, did you make any meaningful attempt to argue that Mr. Baugh wasn't even there at the time of the shooting?

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A. I don't believe I did, but, again, you're stretching my memory at this point. There's been a lot of cases that have occurred between then and now.

Q. Okay. Well, this is what I'm getting at: So you have this statement from Sailes which says that -- or suggests, if you will, that Mr. Kwasniewski is the shooter and that Jimmy drove off, okay.

A. Uh-huh.

Q. So it contains some pretty good information, but potentially, you know, a little bit of damaging information --

A. Yes.

Q. -- insofar as it puts Mr. Baugh behind the wheel. Potentially damaging, would you agree with that?

A. Yes.

Q. Was it so damaging that it would have caused you to not use that statement at trial?

A. No, not at all. Again, I don't remember my trial strategy at this point, but I could see how you'd make -- while Jimmy Baugh could be an aider and abettor, but you could also argue that he was not there for the shooting. He was there for the robbery. He did not have any intent to participate in a shooting and he didn't plan on that.

But, again, my memory of what I did then and what I would have done with this had I had it, I'm weak on the memory, and I would be speculating about what I'd do with this had I

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had it, but I certainly would have confronted Mr. Kwasniewski about his claims.

Q. Okay. So your testimony was that even though it -- and correct me if I'm wrong, even though it wasn't perfect, you would have used it?

A. Yes.

Q. Okay. And is it your testimony that if you had that statement, you would have given it to Mr. Baugh, given him a copy?

A. Oh, yes. And I -- again, I can only go by hundreds and hundreds of cases I've conducted. I'm just certain Mr. Baugh would have put this in my face if he had it.

Q. Okay. Do you believe you had that statement at the time of the homicide trial?

A. No, I did not have the statement at the time. That was my reaction to Jimmy Baugh's letter and that's my reaction today.

MR. MCGRATH: Okay. Your Honor, I believe that I'm done with my direct but, again -- Mr. O'Donnell's a pretty important witness, if I could have just a brief moment to make a quick phone call to Mr. Baugh.

THE COURT: Yes. Actually my suggestion at this stage would be to leave the webinar up, Ms. Winslow, but to takes about a five-minute break so folks can use the facilities, and then we'll return.

We'll return at, let's say, 11:18. We'll see you

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then, and the record's closed for a short period of time and, Mr. McGrath, you can consult with your client.

MR. MCGRATH: Thank you, Your Honor.

THE COURT: All right. Record's closed.

(At 11:12 a.m., break taken.)

(At 11:19 a.m., break concluded.)

THE COURT: Mr. McGrath, did you have a chance to finish up your conversation with Mr. Baugh?

MR. MCGRATH: I did, Your Honor. Thank you.

THE COURT: Do you have remaining questions for Mr. O'Donnell?

MR. MCGRATH: I've just got a couple of quick follow-up questions, Judge, if I may.

THE COURT: Thank you.

BY MR. MCGRATH:

Q. Mr. O'Donnell, can you hear me?

A. I'm not hearing you, sir.

Q. And it looks like his video is a little bit -- there we go. You were frozen for a minute, but can you hear me well, now?

A. Yes.

Q. Okay. Here we go.

All right. Mr. O'Donnell, so just a couple of quick questions: Now, you talked about how you -- in addition to this homicide case we've been talking about, you represented

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Mr. Baugh in connection with this other armed robbery/carjacking case that went to trial, right?

A. Yes.

Q. Okay. And correct me if I'm wrong, but the gist of your testimony was that the cases were going on almost simultaneously?

A. Yes.

Q. Okay. Now, this statement that we've been talking about, the Ricky Sailes statement, if that would have been given to you in connection with the armed robbery case, instead of the homicide case, okay, would you have had the wherewithal to be able to spot that, well, maybe this is not helpful in connection with the armed robbery, but it is helpful in connection with the homicide?

A. Yes, of course. I would have had two separate accordion files -- one for the first case, another for the second -- and they would have been in my office at the same time, and I would have been working on both cases at the same time, and I would have seen the relevance of that document even had it been in the wrong file or been given to me or been misfiled with the carjacking case. I would have seen that it would have applied to the homicide case.

And that, as I said a moment ago, I'm certain that Mr. Baugh would have brought it to my attention. That's just what clients do. They throw it at me and say what do we do

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with this, so, no, I didn't have it, and it wasn't in either file.

Q. Okay. Now, relatedly you talk about these accordion files that you get, are these prepared by someone in your office?

A. No. I do it all myself.

Q. Okay. But you testified that you inherited the homicide case from another attorney, Rene Cooper; is that correct?

A. He conducted the preliminary exam, and I'm not sure why that happened, because I was already engaged in a trial with Mr. Baugh on the carjacking robbery; but, yes, I did get that from another attorney Ray Cooper, Rene Cooper.

Q. Rene Cooper, okay. And did you create a new file when you got that or did you essentially get Mr. Cooper's -- the physical file I'm talking about. Did you get Mr. Cooper's physical file or did you create a new one?

A. I would have gotten the discovery he had gotten at that point from him. I would have been on -- it would have been on me to complete the file if there was other documents and then to collect the preliminary exam and make that part of the file and then to make certain that Mr. Baugh had all of that file.

Q. Okay. So is it fair to say that after you inherited that file from Mr. Cooper, that you -- you still went through and you made sure that Mr. Baugh had every document that was in, there, even though it was initially Mr. Cooper's case?

A. Yes. Yes. We would have sat down in the jail lockup area

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together and gone over the documents he had and the documents I had, and I'm -- I'm just as certain as I can

be, that if it existed, and he had it, he would have brought it to my attention if I didn't bring it to his attention.

MR. MCGRATH: Thank you, Mr. O'Donnell. I have nothing further at this point.

THE COURT: Cross-examination.

MR. SCHULTZ: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SCHULTZ:

Q. Good morning, Mr. O'Donnell. How are you?

A. Fine. Thank you.

Q. I'm going to ask you a couple questions. If you don't understand, please let me know and I'll rephrase the question, okay?

A. All right. Yes.

Q. So kind of going back to what you just talked about, you were not the first attorney on Mr. Baugh's murder case, correct?

A. Correct.

Q. Do you remember when -- I know you didn't -- you said you didn't conduct the first preliminary examination. Do you remember when you became his attorney?

A. No, I don't.

Q. Okay. Do you remember speaking with his first attorney?

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A. No, I don't. I can only say that our offices have always been close together, so it's very likely we talked, but I can't tell you that I remember speaking with Rene Cooper. I still see Rene Cooper to this day, although we haven't had any conversations about the Jimmy Baugh case.

Q. Very well. Were you aware -- to your knowledge, were you aware at that time that there had already been a preliminary examination?

A. If you're asking me -- I only became aware of the first examination now in reviewing the registry of actions with Mr. McGrath. So I can only assume I was aware of it, sir, but I can't tell you that.

Q. Okay. Well, I guess assuming you were aware of it, were you aware of what happened at the first preliminary examination?

A. No. Again, in prepare -- in preparing for today, I was informed that the case against Mr. Baugh was dismissed because a witness either didn't have memory or refused to testify.

Q. And do you remember who that witness was?

A. No, I don't.

Q. Okay. Well, I guess I'll start out by asking this: But why should we trust your memory today that you would not have had this statement, if you can't even

remember what happened in the preliminary examination?

MR. MCGRATH: Judge, I'm going to object. That's

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argumentative.

THE COURT: Yes, I would agree it is, but I need a proffer to the extent that it is an un -- there are some undisputed factual background.

Mr. Schultz, Mr. McGrath, the fact that there were two preliminary examinations is news to me today. Do either of you have independent knowledge of the dates of those examinations before we go forward with additional testimony?

MR. MCGRATH: I can have you an answer in about 30 seconds if you let me go off screen real quick, Judge.

THE COURT: Will do.

MR. MCGRATH: Thank you.

MR. SCHULTZ: And while he's doing that, Your Honor, I could do that, too, but -- I don't remember the exact dates, but I do know that it was in April. I believe April was the first preliminary examination and the second one was in July of 2002.

THE COURT: And do you have transcripts of those hearings and the ability to identify who the witnesses were?

MR. SCHULTZ: Your Honor, both of those transcripts were filed with the Rule 5 material.

THE COURT: Okay.

MR. MCGRATH: Your Honor, hopefully I made it back in my 30 second window of time.

THE COURT: You did.

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MR. MCGRATH: So preliminary exam No. 1, the transcript of that is dated April 24th, 2002, and that's -- the first page of that transcript is page ID 221 of our record in this case.

The second preliminary examination, this is the one that Judge Randon presided over, was July 18th, 2002, and that starts at page ID 265.

THE COURT: And do you recall who was presiding on the April prelim?

MR. MCGRATH: That was Judge Norma Dotson, Your Honor.

THE COURT: And if -- could you identify the witnesses at the April 24, 2002 prelim.

MR. MCGRATH: The first witness was Ricky Bernard Sailes, the second witness was Derryck Thomas, T-H-O-M-A-S, and his first name is spelled D-E-R-R-Y-C-K according to the transcript, and the third witness was JoAnn Miller.

THE COURT: And the witnesses in July?

MR. MCGRATH: Witness No. 1 was -- I am going to have a really hard time with last name, but Cornelius Landyczkowski, who was related to the decedent. And throughout the trial they called the decedent Craig Land, and when I spell this last name you'll understand why, L-A-N-D-Y-C-Z-K-O-W-S-K-I. That's witness No. 1.

Witness No. 2 was Robert Kwasniewski,

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K-W-A-S-N-I-E-W-S-K-I, although I've also seen his name spelled without the N I believe.

THE COURT: Also known as Lucky.

MR. MCGRATH: Yes, and also nobody as Scottie Trent.

THE COURT: Indeed.

Any other witnesses in July?

MR. MCGRATH: No, Judge.

THE COURT: That was helpful to me.

Mr. Schultz, if you'd like to continue with cross-examination.

MR. SCHULTZ: Thank you, Your Honor.

BY MR. SCHULTZ:

Q. So, Mr. O'Donnell, did you hear what was just said, that Mr. Sailes, Ricky Sailes, who authored the

statement that we're here for today -- did you hear that he was called to testify at the first preliminary examination?

A. I did.

Q. Do you have any memory of that?

A. No, I don't. Remember I wasn't the attorney at that one.

Q. Okay. But when you got on the case, would you have reviewed what had happened in the case prior to your involvement?

A. Yes.

Q. So if you -- if there was a preliminary examination, would you have reviewed it?

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A. Yes.

Q. Okay. Where is your file now?

A. It's destroyed.

Q. Okay. And why is it destroyed?

A. At that time the defender's office kept files for 7 or 10 years and then destroyed them. Subsequently they began scanning them, but this file could not be located.

Q. So how is it that you're so sure that Mr. Sailes' statement was not in your file?

A. Because it makes my client not the shooter, and if my client wants to say that he was there for one purpose and something else happened, and that someone else did the murder, that would have been a significant piece of evidence that I would have used. And when he's -- as I understanded it, Mr. Kwasniewski put the -- pointed the finger at him, I would have used it to turn the finger around.

Q. Well, do you remember what your strategy at trial was?

A. I think I was just attacking the credibility of Mr. Kwasniewski.

Q. Well --

MR. SCHULTZ: Give me one section, Your Honor. I apologize.

BY MR. SCHULTZ:

Q. Mr. O'Donnell, do you remember your client, Mr. Baugh, making a statement in this case?

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A. I don't remember.

Q. Okay. Would it jog your memory if I said he said he was in the backseat of the car when this shooting occurred?

MR. MCGRATH: Judge, that's just another way of asking the same question. I object on the grounds that it's been asked and answered.

THE WITNESS: I can't -- oh, I'm sorry.

THE COURT: Overruled.

THE WITNESS: I can't remember.

MR. SCHULTZ: Okay. Your Honor, if I could share a document. If you would just give me a moment, I can share a document on the screen.

THE COURT: Please.

MR. SCHULTZ: Okay. Thank you.

BY MR. SCHULTZ:

Q. Mr. O'Donnell, can you see that statement?

A. No.

Q. No? I apologize.

MR. SCHULTZ: I apologize, everyone. I'm not so familiar with screen sharing.

THE COURT: Give it another year.

MR. MCGRATH: I think it's starting to pop up.

THE WITNESS: Yes.

MR. MCGRATH: There we go.

BY MR. SCHULTZ:

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Q. All right. Mr. O'Donnell, can you see that statement now?

A. Yes, I'm reading it.

Q. Okay.

A. Yes, I've read that portion.

Yes.

Yes.

MR. SCHULTZ: Okay. And I believe we've gotten past the point that I wanted to point out, so I'll stop my screen share at this point, if I can figure out how to do that.

BY MR. SCHULTZ:

Q. All right. Mr. O'Donnell, did you see in that statement where Mr. Baugh said that he was in the backseat?

A. Yes.

Q. Okay. And do you recall in closing argument arguing that your -- Mr. Baugh was not in the backseat -- well, he only gave that statement because he wanted to receive favor from the police, from the prosecution?

A. I believe so, yes.

Q. Okay. And would you say that's -- that's a reasonable strategy to put forth at trial?

MR. MCGRATH: I'm going to object. That calls for a legal conclusion, Your Honor.

THE COURT: Overruled.

THE WITNESS: All right. Ask the question again, sir.

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BY MR. SCHULTZ:

Q. Would you say that that is a reasonable strategy that you put forth at trial?

A. The only strategy I can remember was trying to make Kwasniewski out to be an unreliable witness, and that's what I recall from my legal -- from reviewing the portions of my final argument.

Q. You testified that you recalled saying that Mr. Baugh was pressured into -- or he wanted to seek favor and to -- by the prosecution and the police by saying he was in the backseat. Do you remember that?

A. No, I don't, but I'll take your word that if that's so -- that that is so.

Q. Okay. And would that -- fair to say that that would be a reasonable argument to put forth at trial?

A. Yes.

MR. MCGRATH: Objection. That's been asked and answered.

MR. SCHULTZ: Well -- okay, Your Honor --

THE COURT: Overruled.

MR. SCHULTZ: Thank you.

THE WITNESS: That is a strategy. I'm not sure if that was my strategy because, as I recall from reading the transcripts, I was attacking Mr. Kwasniewski's reliability as a witness, and that's also a strategy.

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BY MR. SCHULTZ:

Q. Correct. Now, if -- if you had put forth that strategy, which the transcript can speak for themselves, that Mr. Baugh was just pressured into giving that -- or was seeking favor by giving that statement and he -- implying that he wasn't even there, wouldn't that contradict that theory if you put forth this statement?

A. Wait. You just said putting forth a theory that he wasn't even there?

Q. Implying that he wasn't even there by saying the prosecutor and the police -- he wanted to seek favor from the police by saying he was -- he was in the backseat.

A. Oh, okay. Not that he wasn't there, but that he was in the backseat. Yeah, that would be -- that -- without -- without my remembering whether or not that was my strategy, I could say that that is a strategy.

Q. And Mr. Sailes' statement that Mr. Baugh was driving the car would contradict that strategy, would it not?

A. It could.

Q. So would it be a reasonable strategy to decide not to use that statement in trial?

A. Not if -- not if Kwasniewski is putting everything on my client, and if -- and if all parties were attempting to minimize their involvement such that it was common that all defendants were trying to make themselves less liable, and I

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had an opportunity to make the person pointing the finger at my client to be the person who did the shooting, and we had a statement from a witness, I would have used it.

Q. Well, is that true even though that -- even that statement could have potentially implicated your client as guilty of first degree felony murder?

A. It would have been an argument having to do with whether or not he was involved in or had planned in or anticipated the shooting of the white boy coming out of the gas station.

Q. And knowing that -- well, I guess I'll strike that, Your Honor.

I guess what I'm getting at is why is it not just as reasonable or perhaps even a better strategy to argue that my client was not even there versus putting out

a statement that would -- could potentially make the jury even more convinced that your client is guilty?

A. Because the main evidence against my client appeared to be, at least from the exam on, that my client was the shooter and Kwasniewski was pointing the finger at him. And here we had a witness statement saying that Kwasniewski was the person that initiated the attack on the decedent, the victim, and appeared to be the sole planner of that attack and the one who carried out the shooting on the -- of the individual. So I would have had to use it to attack his credibility if that was my game plan, to attack the credibility of a person who needed

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a way to dodge his own bullet.

MR. SCHULTZ: Well, Your Honor, if I could share screen again, and I apologize if this takes a little bit, but I would like to put Mr. Sailes' statement back on the screen.

THE COURT: Certainly.

MR. SCHULTZ: Thank you.

BY MR. SCHULTZ:

Q. Mr. O'Donnell, can you see that statement?

A. Yes, I can.

Q. Could you read the -- a little -- what's on the screen and then ask me to go down when you're ready.

A. Do you want me to read it out loud or just read it to myself.

Q. Just to yourself, I'm sorry.

A. Thank you.

Okay.

Okay.

Q. Okay. And that's the portion I wanted you to see so I'm going to stop the screen share now.

Okay. Mr. O'Donnell, that statement didn't necessarily put Mr. Kwasniewski as a sole planner of this crime as you say, did it?

A. I think you could argue that it did.

Q. Well, what in there said that he was the sole planner?

A. Well, they were on one mission. He went inside. I

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thought I read that to say that it's Kwasniewski who goes inside and he sees that person, and he's the one telling the driver what to do.

Q. Well --

A. He's got an idea what he wants from that person who he saw in the gas station.

Q. Well, if he's telling the driver, Mr. Baugh, what to do, and Mr. Baugh is doing that, isn't that pretty damaging evidence that Mr. Baugh was an aider and abettor?

MR. MCGRATH: Judge, I'm going to object to the argumentative nature of the question.

THE COURT: Overruled.

THE WITNESS: It could show him as aider and abettor, but it might make his posture at sentencing different and it, again, would allow me to attack Kwasniewski as a person who could not be trusted, if he's the person giving much of the damaging evidence.

MR. SCHULTZ: Your Honor, I don't have any more questions at this time.

THE COURT: Mr. McGrath?

MR. MCGRATH: I don't have any follow-up questions, Your Honor. I'd like to thank Mr. O'Donnell, and wish him luck with his booster this afternoon.

THE WITNESS: Yes, sir.

THE COURT: I have just a couple questions, sir. I

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was thumbing my way through the initial preliminary examination conducted in front of Judge Dotson in April of 2002. She concluded -- and apparently the preliminary examination was both of Mr. Kwasniewski and Mr. Baugh, and it was done in a joint session.

She concludes, quote, this Court does find that the defendant driving the vehicle and blocking the defendant off is sufficient to aid and abet in the commission of the felony. Therefore, as to Mr. Kwasniewski the Court is finding that there is probable cause that the offense of homicide, felony homicide, occurred in the city of Detroit.

She goes on to bind him over on the homicide, the aiding abetting theory, and then proceeds to address Mr. Baugh. She makes these following statements:

"As to Mr. Baugh, it's tougher. I can't find probable cause for Mr. Baugh. Case dismissed." That was the end.

What happened after the initial preliminary examination in your involvement?

THE WITNESS: Okay. That's a good question, and I can't be totally certain. It appears that I would have already been appointed to represent Mr. Baugh on the carjacking case. Our policy was generally that you stayed with the same individual because you had an attorney/client relationship.

So what I can't explain is why another attorney was

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the attorney at that initial preliminary exam because I believe you to be saying that that was the first preliminary exam, the one conducted in April of 2002.

THE COURT: Yes, sir.

THE WITNESS: So with that as background, ask me your question again.

THE COURT: Case was dismissed. Must have been --

THE WITNESS: Right.

THE COURT: Must have been recharged?

THE WITNESS: Yes. I'm sure there was a -- they needed a -- they needed a witness who could tie Mr. Baugh to the case. Apparently they used Mr. Kwasniewski, and apparently they made a deal with Mr. Kwasniewski, and Mr. Kwasniewski was given some sort of benefit for his willingness to get on the stand and name my client.

I guess in July of 2002 they reissued and a second exam was held, and at that exam, my understanding is that I was the attorney representing Mr. Baugh.

THE COURT: Do you recall your client telling you that Sailes lied in the first preliminary examination?

THE WITNESS: No, I don't.

THE COURT: No recollection?

THE WITNESS: No, I don't, sir. No.

THE COURT: Any recollection of what your client told you about his participation in the homicide?

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THE WITNESS: No, I don't, sir. I apologize.

THE COURT: You nevertheless did know that Sailes was going to have no memory of any relationship with either your client or Mr. -- let's just say Trent.

THE WITNESS: The preface of your question is that I would have no knowledge that --

THE COURT: Yes.

THE WITNESS: -- that Sailes would have no memory?

THE COURT: Yes.

THE WITNESS: Based on what, sir? I apologize for my lack of memory.

THE COURT: The fact that during the first preliminary examination he testified that he knew neither of those gentlemen.

THE WITNESS: I can't say at this time, Judge, what I knew about Mr. Sailes as I began working on the second case, the homicide case. Although they were connected with each other in the carjacking case, were they not?

THE COURT: Indeed.

THE WITNESS: So, I mean, that had to be -- my understanding, I can only guess, was that Mr. Sailes was saving himself or tried to save Kwasniewski and Jimmy Baugh.

THE COURT: So at the time of the initial preliminary examination, the best the prosecution can do is

to put Mr. Baugh in the backseat. By the time you get to the second

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preliminary examination, and you're retained once the case is retried, you now know that the codefendant, Mr. Kwasniewski, has cut a deal and placed your client with the weapon?

THE WITNESS: Yes.

THE COURT: When you got to trial, did you argue that he was in the backseat, the driver, the shooter, or not present?

THE WITNESS: I don't remember what I did during that entire trial. I do recall my -- the -- in the final argument I was trying to make Kwasniewski out to be an unreliable witness

THE COURT: Certainly.

THE WITNESS: -- and one that you couldn't base a verdict on. And I'm not sure, sir, where I put Jimmy, whether I allowed that he might -- Jimmy might have said various things at various times to try to save himself from being there at all, but as I recall, a lot of my argument had to do with Mr. Kwasniewski.

THE COURT: Any additional questions, Mr. McGrath?

MR. MCGRATH: No, Your Honor. Thank you.

THE COURT: Mr. Schultz.

MR. SCHULTZ: Just one, Your Honor, and it'll be a lengthy question, but I want to read from closing argument starting on -- it's page ID 959, and this is Mr. O'Donnell.

THE COURT: I'm sorry, the page ID citation?

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MR. SCHULTZ: 969 -- just give me one second, Your Honor.

THE COURT: No problem. The only thing we need to do is get Mr. O'Donnell to get inoculated today.

MR. SCHULTZ: Your Honor, I'm going to strike that actually. I think I'm -- too much is up on my screen right now, and I'm getting myself confused, so I don't have any further questions at this time. I apologize.

THE COURT: All right. Any additional questions, Mr. McGrath?

MR. MCGRATH: No, Your Honor. Thank you.

THE COURT: Thank you, Mr. O'Donnell, and best of luck this afternoon.

THE WITNESS: Thank you, sir. I understand you had both shots?

THE COURT: Yes, and I would highly recommend that you keep your -- you keep your docket light tomorrow.

THE WITNESS: All right. I think I know what that means. Thank you, Judge.

THE COURT: It is worth it for sure, but be prepared to be a little lethargic and a little fuzzy-headed.

THE WITNESS: More than usual, thank you, Judge.

THE COURT: At least that was my wife's description, which was fuzzier than normal.

MR. MCGRATH: Judge, you forgot the part about

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grumpy.

THE COURT: Yep, that was in there, too.

THE WITNESS: Thank you, Judge. Thank you, counselors.

THE COURT: And best of luck.

THE WITNESS: Thank you, sir.

(At 11:54 a.m., witness excused.)

THE COURT: Mr. McGrath, I'm looking over our schedule here. You were anticipating Detective Miller at approximately 11:00 our time, which would have been about an hour ago.

MR. MCGRATH: That's correct. And it's my hope that she is on, and is being patient with us. I'm looking

on here and I'm seeing a JoAnn Miller popping up it looks like.

THE COURT: Ms. Winslow is doing that, and I guess the question that I would have at this stage is, is every -- should we proceed with Ms. Miller? Should we take a 45-minute break? Do we know what Ms. Miller's schedule is. We just found her.

MR. MCGRATH: I would defer to her, Your Honor. If she wants to get it over with right now, I'm good with that, or if she wants to take a break, that's fine, too.

THE COURT: Ma'am, where are you located?

MS. MILLER: Good morning, Your Honor. I'm in Henderson, Nevada.

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THE COURT: I'm sorry?

MS. MILLER: Henderson, Nevada.

THE COURT: Okay. I suspect it's warmer than here?

MS. MILLER: Absolutely. It'll be sunny and 70 degrees today.

THE COURT: You're making us hurt.

The question that we've been talking about is the fact that it is noon here. We've been in session for about three hours, with the exception of a five-minute break -- well, two and a half, and the question that we

have is whether we take a half an hour break for lunch, or whether we proceed.

What's your schedule look like today?

MS. MILLER: I am retired, and I am doing the same thing I did yesterday, nothing.

THE COURT: And are you doing it well?

MS. MILLER: Absolutely. Loving every minute of it. So whatever you decide is fine with me.

THE COURT: How long would you anticipate her testimony being, sir? Probably at least 45 minutes?

MR. MCGRATH: Yeah, I think that she might be a little bit shorter than our first two witnesses, Your Honor, but somewhere in the 30- to 45-minute range sounds pretty accurate to me without binding myself, of course.

THE COURT: So I guess the question is, if we went to, say, 1:15 are we going to have anybody that is going to

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be -- that's going to be difficult doing that because of a lack of food?

All right. Then let's proceed.

I will be fine, so as long as no one else is concerned about that, we'll complete that testimony.

If you could raise your right hand.

(At 11:58 a.m., sworn by the Court.)

Mr. McGrath, your witness.

JOANN MILLER,

PLAINTIFF'S WITNESS, SWORN AT 11:58 a.m.

DIRECT EXAMINATION

BY MR. MCGRATH:

Q. Good morning, ma'am.

A. Good morning.

Q. Could you please state your name and spell your last name for the record.

A. JoAnn Miller, M-I-L-L-E-R.

Q. Okay. Thank you for being with us today, Ms. Miller. You indicated a minute ago that you are currently retired?

A. Yes.

Q. Can you tell us where you're retired from?

A. I retired from the Detroit Police Department in 2014.

Q. Okay. And were you with DPD your entire career as a law enforcement officer?

A. Yes.

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Q. Okay. So when did you start at DPD? What year?

A. It was May 18th, 1987.

Q. 1987, okay.

A. Yes.

Q. And what was -- I mean, when you first started there, you were, I assume, a law enforcement officer, right?

A. Yes.

Q. You didn't start out as a homicide detective?

A. Oh, no.

Q. Had to work your way there, so what did you do, you know, the first few years before you became a homicide detective?

A. I worked patrol, and -- for a few years, and then I was -- then I changed to the plainclothes, the 30 series, the plainclothes unit, and that involved like vice and narcotics and things like that, and then eventually I ended up at homicide.

Q. Okay. And do you remember what year it was that you went over to homicide?

A. April 1st of 1999.

Q. April 1st of 1999, okay.

A. April Fool's Day.

Q. And then did you remain with homicide the remainder of your career with DPD?

A. I did.

Q. Now, I'd like to take you to 2002, so this was just not

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too long after you went over to homicide. Do you have any recollection of prosecuting, working on a case involving a gentleman named Jimmy Baugh?

A. You know, I am terribly sorry, but I really don't remember. I wish I could. I just don't.

Q. Okay. Well, that's okay. What I would like to do, Ms. Miller, is show you a witness statement, and let's see if that jogs your memory at all, okay?

A. Okay.

MR. MCGRATH: All right. Mr. Kendall, if we could please pull up the Baugh witness statement.

MR. KENDALL: Okay.

BY MR. MCGRATH:

Q. Okay. Now, if we could start -- and you can still hear me; is that right, Ms. Miller?

A. Yes.

Q. Okay. So if we could start right at the very top up there.

MR. MCGRATH: And, Mr. Kendall, is it possible to scroll it a little bit higher, it looks -- a little bit higher the other direction? Perfect. Thank you very much.

BY MR. MCGRATH:

Q. That form, it says right there in the upper left-hand corner, Detroit Department Police; is that correct?

A. Yes.

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Q. Okay. And in the middle there right at the top it says Witness Statement, Case Progress. Do you agree?

A. It says W-I-S-E-S-S statement, some of the letters are missing but, yes, it's supposed to be a witness statement.

Q. Right. And if that little white area weren't blotted out, is it safe to say that, you know, at one time that probably did say "witness?"

A. Yes.

Q. Okay. Now, does this -- not what's in the form, but the form itself, does that look familiar?

A. Yes.

Q. Okay. And can you describe it for us, please.

A. It is the standard witness statement that was used by homicide while talking to witnesses.

Q. Okay.

A. It's a standard form.

Q. Okay. And there's some very nice neat handwriting on there. Does that handwriting on that form, without regard to substance, just the handwriting itself, does that look familiar?

A. Yes.

Q. Okay. And do you know whose handwriting that is?

A. Mine.

Q. Okay. Now, and this is going to take a few minutes, but -- because this is a four-page document, but if we could

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just slowly scroll down, and if you could look that over, Ms. Miller, and then as soon as you're ready for Mr. Kendall to scroll down further just let him know, okay.

A. Okay. He can scroll.

Okay.

Okay.

Okay.

All right.

Q. All right. Before I dive back into the substance, I had a couple of quick mechanical questions for you, if I may.

MR. MCGRATH: Mr. Kendall, can we please scroll back to the very last page of this. If we could go down a little bit further, please.

Perfect.

BY MR. MCGRATH:

Q. All right. I see on this statement, Ms. Miller, there's some areas that are scratched out with initials above those. Can you explain to the Court why it looks like that?

A. Once I've written a statement, I give it to whoever I'm speaking with to go over and make sure it's correct, and at that time, if there's corrections to make, I'll make it, draw a line through it, scratch it out, but I'll also have them put their initials above it to show that, yes, they agreed with it.

Q. Okay. And there's also a signature at the bottom -- actually on this one there's two signatures if we scroll down a

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little bit further.

MR. MCGRATH: There we go. Thank you, Mr. Kendall.

BY MR. MCGRATH:

Q. Is it fair to say that when you take a statement from a witness, you actually have them sign the statement at the bottom?

A. Yes.

Q. Okay. Now, back to the substance, you've had a chance to read this particular statement. Did anything in there jog your memory about Mr. Baugh's case?

A. I can't say that it did, no, I'm sorry.

Q. Okay. Well, as you sit here today, other than the fact that you received a court order to come testify here, does the name Jimmy Baugh ring any bells?

A. No, I'm sorry.

Q. Okay. What about the name Robert Kwasniewski or Robert Kwasniewski?

A. No.

Q. Okay. What about the name Scottie Trent?

A. No.

Q. What about the street name "Lucky"?

A. I've heard that name many times over my career. I can't put a face with it or when I heard it though, no.

Q. Okay. What about the name Lafayette Dearing?

A. No.

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Q. No? or --

A. No.

Q. -- the name "Laf"? The nickname "Laf"?

A. No.

Q. Okay. What about the name Ricky Sailes, does that ring any bells?

A. No.

Q. What about the street name "Slick"?

A. No. Nope.

Q. Okay.

A. Sorry.

Q. No. I just want you to tell the truth.

Now --

A. You got it.

MR. MCGRATH: Mr. Kendall, if we could take that witness statement down, and if we could put the witness statement -- the Ricky Sailes witness statement up, please.

MR. KENDALL: Okay.

MR. MCGRATH: All right. Thank you, Mr. Kendall.

BY MR. MCGRATH:

Q. Ms. Miller, can you see this second witness statement that is up on the screen?

A. Yes.

Q. Okay. And I'd like to give you a chance -- this one's not as long. It's about only half as long. I'd like to give you a

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chance to take a look at this one and see if there's anything in there that might jog your memory about Mr. Baugh's case, okay.

A. Okay.

Q. So same deal as before, just please let Mr. Kendall know when you're ready to scroll down a little bit.

A. Okay.

Okay. That's too much. Go back up a little bit. Okay. Stop.

Okay.

Okay.

MR. MCGRATH: All right. Mr. Kendall, if we could just please put it right back at the very beginning, please.

Thank you, sir.

BY MR. MCGRATH:

Q. Okay. Detective -- or, Ms. Miller, did anything in the statement that you just read refresh your recollection in anyway about Mr. Baugh's case?

A. No.

Q. No?

A. Not really, not -- no.

Q. All right. Well, that's okay. I'd like -- I'd like to direct your attention right to the very top. This form, too, appears to say Detroit Department Police, Witness Statement, Case Progress. Do you agree?

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A. Yes.

Q. Okay. And would you agree that this, too, is the standard form that the Detroit Police Department uses when interviewing witnesses in homicide cases?

A. Yes.

Q. Yes, okay.

A. Yes. Yes.

Q. What about the handwriting on that? Does that look familiar?

A. Yes.

Q. Whose handwriting is that?

A. That's mine.

MR. MCGRATH: Okay. If we could scroll back down to the bottom now, please, Mr. Kendall. Oh, there we go. Thank you.

BY MR. MCGRATH:

Q. Now, that signature at the bottom, that's not your signature, right?

A. No.

Q. Okay. Would that have been the witness that you were interviewing?

A. Yes.

Q. Okay. Now, what would you do with these forms after you prepared them and after you've gone through them with the witness and, you know, verified that everything in there is an

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accurate rendition of what they said and then had them sign it? What would you do after all of that?

A. After -- after the case is put into a folder, it's taken over in its entirety it's taken over to the prosecutor's office, along with a copy of everything in the file, and then the copies at that time were given to the prosecutor.

Q. Okay. So that was your usual practice. You don't --

A. Yes.

Q. You don't remember much about this case in terms of substance; "this case" being Mr. Baugh's case, right?

A. I'm sorry, no, I don't.

Q. Okay. That's okay. And so, as you sit here and you try and picture it in your head, you -- is it fair to say you can't picture yourself physically handing this to the prosecutor, can you?

A. No.

Q. Okay.

A. No.

Q. Now, and we're almost done here, but let's pretend for a minute that you take a statement from me, and we go through, we -- you know, I tell you what I know, you put it down on this form, we go through it, we verify the accuracy, and I sign it at the bottom.

And let's say at that point I say to you, hey, Detective Miller, can I get a copy of this, please, would you

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have given me a copy?

A. Absolutely.

Q. Absolutely. Okay.

A. It's your statement.

Q. Okay. Great.

MR. MCGRATH: Your Honor, if I -- I believe I'm done, but I'd like to, if I may, just very quickly confer with Mr. Baugh and make sure that there's any questions or anything I haven't missed.

THE COURT: Yes, certainly, take a couple minutes.

MR. MCGRATH: Thank you, Your Honor.

(Brief pause.)

MR. MCGRATH: Judge, we have nothing further at this point.

THE COURT: Mr. Schultz, your witness.

MR. SCHULTZ: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SCHULTZ:

Q. And good -- well, actually good afternoon, Ms. Miller -- well, good morning in your time. My name is Jared Schultz. We spoke over the phone a couple times. I'm going to ask you a couple questions, and if you don't understand anything, just please let me know, okay?

A. Okay.

Q. Great. So I'll just pick up kind of where Mr. McGrath

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left off. You -- you saw the statements just now. You don't deny that you took those statements, correct?

A. Correct.

Q. But you just don't have any --

A. I don't deny -- I just don't remember taking them.

Q. Correct. That was going to be my next question. You don't have any memory of taking those statements or the aftermath; is that correct?

A. Correct.

Q. Okay. So exactly how long were you a police officer again?

A. Twenty-seven years.

Q. Okay. And you said you became a detective in 1999; is that correct?

A. Correct.

Q. So how long were you --

A. I was at homicide for 15 years. I was at homicide for 15 years, sorry.

Q. Okay. Thank you. Thank you. And how many cases did you investigate during that time, approximately?

A. That's going to be impossible to say. It would -- it would be in the hundreds.

Q. Hundreds, okay. And how many of those were you the officer in charge?

A. Over 100.

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Q. Okay. And is it fair to say, then, in many, or maybe even all of those cases, you took witness statements?

A. Yes.

Q. Okay. What -- what would you generally do after taking a witness statement? What would you do with the statement?

A. The statement -- if it's going to be my case, or someone else's case, the statement is taken and put into a file, and then that file is marked "witness statements." And then it goes into the larger file that the officer in charge has with all of the documents in it, the evidence, things -- pictures, things like that.

Q. Okay. And as officer in charge, what would you then do with those witness statements?

A. Like I said, it would go into a folder for witness statements and then to the file, the large file.

Q. Right. And then what would you do with the file? When the --

A. The file - -

Q. I'm sorry, go ahead.

A. The file would go with me over to the prosecutor's office for the prosecutor to review.

Q. Okay. And, generally, you would physically take the file over to the prosecutor's office?

A. Yes.

Q. Okay. Any reason to think that that wasn't done in this

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case?

A. No.

MR. SCHULTZ: Okay. I think that's it, Your Honor. I don't have any further questions.

THE COURT: Mr. McGrath?

MR. MCGRATH: Nothing, Your Honor. Thank you.

THE COURT: Ms. Miller, do you recall being a witness at a preliminary examination in April of 2002? Probably not?

THE WITNESS: I'm sorry, Your Honor, I don't.

THE COURT: I have no additional questions for the witness. Are we concluded, Mr. McGrath?

MR. MCGRATH: Yes, Your Honor.

THE COURT: Mr. Schultz?

MR. SCHULTZ: Yes, Your Honor. Thank you.

THE COURT: And, Ms. Miller, thank you very much for your time. Thank you.

THE WITNESS: Thank you. Stay safe.

THE COURT: Yes. And enjoy the heat.

THE WITNESS: Absolutely.

THE COURT: All right.

(At 12:23 p.m., witness excused.)

THE COURT: Scheduling, Mr. McGrath, your suggestion?

MR. MCGRATH: I would propose, Your Honor, taking this opportunity to have a little bit of lunch, and then reconvening after a moderately short break, and we would be

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presenting Mr. Baugh as a witness.

THE COURT: And I'm just checking my calendar, double check if we've got anything later in the day, and we don't have anything that can't be modified. Would you like to pick up here about 1:15 our time?

MR. MCGRATH: That'd be great, Your Honor. Thank you.

THE COURT: Does that create a problem for anyone? I anticipate we will be done by 3:15, would be my guess, approximately.

All right. 1:15 it will be. The record's closed.

(At 12:25 p.m., break taken.)

(At 1:15 p.m., break concluded.)

THE COURT: We had one additional witness, Mr. Baugh?

Mr. McGrath, are you ready to proceed?

MR. MCGRATH: We are, Your Honor.

THE COURT: If you'd like to call -- identify the gentleman.

MR. MCGRATH: The defense calls Jimmy Baugh.

THE COURT: Mr. Baugh, if you could raise your right hand.

(At 1:16 p.m., sworn by the Court.)

THE COURT: Thank you. Mr. McGrath, your witness.

MR. MCGRATH: Thank you, Your Honor.

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JIMMY BAUGH,

PLAINTIFF'S WITNESS, SWORN AT 1:16 p.m.

DIRECT EXAMINATION

BY MR. MCGRATH:

Q. Please state your name, sir, and spell your last name for the record.

A. Jimmy Baugh, B-A-U-G-H.

Q. And, Mr. Baugh, is it fair to say that you are a prisoner in the Michigan Department of Corrections?

A. Yes, I am.

Q. What facility are you at?

A. G. Robert Cotton Correctional Facility.

Q. And what are you doing time for?

A. Felony murder, felony firearm, felon in possession of a firearm and receiving and concealing stolen property over $20,000.

Q. Okay. Let's break that down a little bit more. The felony murder case, did that result in a life sentence?

A. Yes, sir, it did.

Q. Okay. You indicated that you also had some other charges that went along with that conviction; is that right?

A. Yes, sir.

Q. Okay. And I say that because you also included the receiving and concealing, but that was a different case, right?

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A. Right.

Q. So the gun charges, you said felony firearm and felon in possession; is that correct, sir?

A. Yes, sir.

Q. Okay. So the felon in possession, fair to say that that's just running concurrently with your life sentence but not the felony firearm?

A. Yes.

Q. Okay. Did you get an extra two for the felony firearm?

A. Yes, I did.

Q. Consecutive, right?

A. Yes.

Q. Okay. So those were all in one case; is that correct, sir?

A. Yes, sir.

Q. And that conviction arose out of Wayne County Circuit Court?

A. Yes.

Q. Did you go to trial in that case?

A. Yes, I did.

Q. Okay. Now, you made reference to a receiving and concealing case as well. Was that receiving and concealing 20,000 or more?

A. Yes, sir.

Q. Okay. And did you enter a guilty plea in that case, or

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did you go to trial on that one as well?

A. I went to trial on that case, too.

Q. Okay. Fair to say you had a bunch of other charges, too, carjacking, armed robbery, felon in possession, felony firearm, right?

A. Yes, sir.

Q. Okay. Did the jury find you guilty of those additional charges?

A. No.

Q. They acquitted you on those?

A. Yes, they did, sir.

Q. Okay. What was your sentence on the receiving and concealing charge, Mr. Baugh?

A. Ten years to 50 years.

Q. Okay. And you're still serving that sentence concurrently with your life plus two sentence in the felony murder case, right?

A. Yes, sir.

Q. All right. And the receiving and concealing case, did that also arise out of the Wayne County Circuit Court?

A. Yes, it did.

Q. Did you have the same lawyer for both cases?

A. Yes, I did.

Q. Who was that?

A. James H. O'Donnell.

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Q. Okay. Now, for a little while I want to focus just on your felony murder case, and I don't want to belabor this point too bad, but can you just give us kind of a procedural breakdown of what happened in that case, and I'll help you a little bit.

Did you appeal to the Michigan Court of Appeals after you were convicted of felony murder?

A. Yes, I did.

Q. Okay. And fair to say that your conviction and sentence were affirmed by the Court of Appeals?

A. Yes, sir.

Q. Okay. And then did you seek leave to appeal in the Michigan Supreme Court after that?

A. Yes, I did.

Q. Okay. Was leave denied?

A. Yes, it was.

Q. All right. What happened after that? Did you do a motion for relief from judgment? Did you go straight into federal court? What happened?

A. I did an MCI 6.500 motion.

Q. Okay. A motion for relief from judgment or some people call that a 6500 motion, right?

A. Right, correct.

Q. Three different ways of saying the same thing.

Okay. And did you file that in Wayne County Circuit

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Court?

A. Yes, I did.

Q. Okay. Was that motion granted or denied?

A. It was denied.

Q. Okay. And did you appeal the denial of that motion to the Michigan Court of Appeals and the Michigan Supreme Court?

A. Yes, I did.

Q. Okay. And did you have any luck?

A. No.

Q. Okay. So after you're done with your second attempt at getting the Michigan Supreme Court to grant leave to hear your case, what happens after that procedurally? Do you go into federal court?

A. Yes, I did.

Q. Okay. Was that through a 2254 motion, a habeas petition?

A. Yes, it was.

Q. Okay. Do you remember your judge in that case?

A. Let me see I had -- R. Steven Whalen was the magistrate. I think his name is Caram Steeh, S-T-E-E-H, something like that, yep.

Q. Okay. And was your habeas petition granted?

A. No.

Q. No. Okay.

A. No.

Q. Did you -- were you able to obtain a certificate of

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appealability and appeal to the US Court of Appeals for the Sixth Circuit?

A. No.

Q. No? Okay. So by the time Judge Steeh denies your habeas petition, if you know, what year are we at at this point?

A. 2010.

Q. About 2010, all right.

A. Yes.

Q. And what do you do next in your case? What's the next step in terms of going to court?

A. It wasn't nothing left for me to do. I mean, I was basically kind of stuck.

Q. Okay. So you were kind of between a rock and a hard place, not a whole lot to do, but then does something happen that changes that?

A. Yep.

Q. What?

A. I was reached out to by one of my codefendants on the other case that I had.

Q. Okay. Now, first of all, the other case we're talking about, the armed robbery/carjacking that resulted in your R & C conviction?

A. Yes, sir.

Q. Which codefendant are we talking about?

A. Ricky Sailes.

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Q. Okay. What year is this that Mr. Sailes reaches out to you?

A. Well, we had been back and forth over the years, but then the Department of Corrections stopped prisoners from communicating with each other, and we just weren't talking to each other for a long period of time. And then around 2013 he sent me a letter through his then wife to Macomb Correctional Facility.

Q. Okay. So this letter that you're talking about through his then wife, is this a letter that's authored by her and she's speaking for Mr. Sailes, or is it a letter that's authored by Mr. Sailes that she sends to you or what?

A. No, he wrote the letter, but he had to send it to her to send it to me because he couldn't send it to me directly at that time. He used to could, but then they stopped doing that, so he had to send it to her to send it to me.

Q. Okay. Can you tell us about that letter.

A. Yeah. It was just he was like, you know, hey, I'm getting ready to get out and, you know, I'm gonna holler at you when I get out basically.

Q. Okay. What did you take that to mean?

A. That he was going to help me out some kind of way. I didn't know how he was going to be able to do it, but that's what I took it as.

Q. Okay. And you said this was 2013?

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A. Yep.

Q. All right. Well, what happens next?

A. Well, I don't hear from him for a long time, and then in 2015, in December of 2015, I get a letter, an envelope, it's got his -- you know, it's got his name on it and my name on it I open it up, and it's a police statement in there.

Q. Okay. Can you tell the Court about the police statement.

A. Yeah. It was a statement that he supposed to made to -- where that he did make to Homicide Investigator JoAnn Miller.

Q. Okay. And what did -- if you recall, you know, what was the statement about? Did it relate to you somehow?

A. Yes. Yes.

Q. Okay. Tell us about that, please.

A. He was -- he was telling JoAnn Miller that Robert Kwasniewski, you know, Scottie Trent, Lucky, you know, that he told him that he the one did the shooting, and I was driving.

Q. Okay. Now, this gentleman, Robert Kwasniewski, Scottie Trent, Lucky, did he testify at your trial?

A. Yes, he did.

Q. Okay. And when Mr. Kwasniewski testified, did he testify that he shot the decedent in your murder case or that you shot the decedent?

A. He testified that I was the shooter.

Q. Okay. And if I'm hearing your testimony right, you're telling us that this statement that you received from

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Mr. Sailes pointed in the other direction; that Mr. Kwasniewski was the shooter; is that correct?

A. Yes, sir. Yes, sir.

Q. Okay. Okay. And why was that important in the context of your trial?

A. Because the only thing that the Wayne County Prosecutor's Office had against me was his testimony. They had nothing else. They had no gun, no fingerprints, no DNA, no regular ordinary citizen witnesses. They had nothing but what he was saying that I did. So with this statement, I could have been able to say, look, he done told somebody else that he the one did the shooting, that it wasn't me, you see what I'm saying?

And so -- and that came out of his mouth, not mines, so, you know, I think that it would have helped

me greatly because of the fact that what the jury had to go on -- only thing they had to go on was what he was saying at that time.

Q. Okay. What year is it that you received this statement from Mr. Sailes?

A. 2015.

Q. Okay. Where are you at this point in 2015? Do you remember where you were housed?

A. Yeah, I was at the Richard A. Handlon Correctional Facility in Ionia, Michigan.

Q. Okay. And, if you know, was Mr. Sailes still behind bars at that point or was he out?

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A. No, he was out.

Q. Okay. So you received this statement, and what does that cause you to do?

A. First I don't know what to say about because I'm like where did this come from, because I had never seen it before, you know, so what I did was -- the first thing I did -- it was during the holiday time, so I waited until after the holidays, and I put together a letter and I sent it to my trial attorney.

Q. Okay. And when you say "my trial attorney", you're talking about Mr. O'Donnell; is that correct?

A. Yes. Yes, sir.

Q. Okay. All right. And tell us about the letter. What did you say?

A. Well, I asked him in the letter -- first I tried to refresh his memory to the case, because it had been a long time. It had been like, I don't know, 13, 14 years, something like that, and so I tried to refresh his memory. Then I asked him, did he ever recall ever seeing a statement or having a statement during the trial?

Q. All right. And, let's see, so you received the Sailes statement around the holidays in 2015, and then you waited until after the holidays in 2016 to send it so -- is that correct?

A. Yes, sir.

Q. Okay. So what are we talking, like January, the next

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month, January 2016?

A. Yes, sir.

Q. All right.

A. It was toward the end of January, sir.

Q. All right. And did you get a response?

A. Yeah, surprisingly he wrote me right back. You know, I mean, like as soon as he got it, he put a letter together and sent it back to me.

Q. Okay.

A. Yep.

Q. And tell us about the response, please.

A. Well, he told me in the letter that he no longer had my file but he remembered the case because of -- we had a deceased witness statement. That deceased witness had made a statement where they had gave a description of the person who they thought was driving, that we had got into -- that we had wanted to get into trial, but the trial judge denied it because the guy was deceased, so -- and he was like, you know, that he was -- thought that the prosecutor at the time, Augie Hutting, was -- whether he sandbagged him or not, because this guy had been on so many witnesses' lists that we had that they was going to call him for trial that they never told us that he was deceased already until trial.

After he went on to tell me -- he went on to tell me that he didn't recall no statement by Ricky Sailes, and if he

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had had it, that he would have used it, and then he turned -- and then he told me if a statement exists where I could look for it at.

Q. Okay. And did you follow his advice and look for the statement?

A. Yes, I did.

Q. Okay. But correct me if I'm wrong, you already had the statement because you had gotten it from Mr. Sailes back in December of the previous year?

A. Yes.

Q. Okay. So why go look for it when you already have it? Explain that to us, please.

A. Because -- excuse me, but I did it because I felt that if this statement already exist in the files, whether we had it or not, I remembered or not, or Mr. O'Donnell remembered or not, if it's in a file, then there's no need to be filing this in the court, because the first thing that the state is going to say, the prosecutor's office, attorney general, is going to say is that, hey, we gave you the statement, you didn't use it, so it's not new evidence.

You know, so it would have been a waste of time, you know, for me to file something in court that's already in the files and they going to say, well, no, that ain't new. You already had it, so --

Q. So whether it was in actuality a helpful step or not, you

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felt like you were doing that to try to build your case, right?

A. Right.

Q. Okay. That's fair. Now, do you get a response back in terms of trying to get it from the police department? Do you have any luck?

A. No, I didn't have any luck with that.

Q. Okay. And at some point do you eventually wind up filing a second 6500 motion?

A. Yes, I did.

Q. Okay. And you filed that in the Wayne County Circuit Court?

A. Yes, I did.

Q. Okay. And how many issues did you raise in your second 6500 motion?

A. I believe just one.

Q. Just one? Okay. And what was the -- what was the substance of that issue?

A. That this new statement that I had got, this statement I had got from Ricky Bailes, was newly discovered evidence.

Q. Okay. And did you allege that there was some kind of constitutional violation?

A. Yes. I alleged it was a Brady violation.

Q. A Brady violation. Are you talking about Brady versus Maryland?

A. Yes, sir.

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Q. The famous US Supreme Court case?

A. Yes, sir.

Q. Okay. And if you would, just outline, you know, in a few sentences or so how you felt the state violated your rights under Brady versus Maryland.

MR. SCHULTZ: Well, Your Honor, I think that's a legal conclusion. We're just -- this is an evidentiary hearing. We're here for the facts.

MR. MCGRATH: It's not that important of a question.

BY MR. MCGRATH:

Q. All right. Now, did you attach anything to your -- your second 6500 motion? Were there exhibits?

A. Yes.

Q. Okay. And did those exhibits include an affidavit?

A. Yes.

Q. Okay. Your affidavit?

A. Yes, sir.

Q. Okay. And you don't have to pull it out. If we need to refer to it, we can project it on the screen. Don't worry about that, Mr. Baugh.

Okay. So you file this motion, and do you have any success in the Wayne County Circuit Court?

A. No.

Q. So, in other words, motion was denied?

A. Yes, sir.

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Q. All right. And did you appeal it?

A. Yes, I did.

Q. Okay. So is it fair to say you sought leave to appeal in the Michigan Court of Appeals?

A. Yes, sir.

Q. Did they grant your appeal?

A. No.

Q. Did you try the Michigan Supreme Court?

A. Yes, I did.

Q. Okay. And did you have any luck there?

A. No.

Q. Okay. So what was your next step legally? What's the next thing you did court wise?

A. Well, I had been doing a lot of studying, a lot of research in the law library, and I found out that you could ask for permission to file a second writ of habeas corpus.

And so what I did was, after I kind of learned a little bit about it, you know, I wrote to the Sixth Circuit Court in Cincinnati and asked for an application,

and they sent me an application to file -- application to -- for permission to file a second or successive writ of habeas corpus, and they sent me the application to file a 2254 writ of habeas corpus with it.

Q. Okay. And did you go ahead and fill out the application and file it with the Court?

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A. Yes, I did.

Q. All right. And eventually did you receive a decision from the US Court of Appeals?

A. Yes, I did.

Q. All right. And what did the Sixth Circuit do? What was the result?

A. Amazingly to me they granted it, you know. They gave me permission to file the second writ of habeas corpus.

Q. Okay. Amazingly to you why?

A. Because most of the guys you talk to around here in prison that do legal stuff, or have any knowledge of this stuff, they said, man, the Sixth Circuit don't grant those, you see what I'm saying, so to me it was like I was throwing up a Hail Mary pass. If they catch it, they catch it, because if they grant it, I'm good, I can file another one; but if they deny it, I can't appeal it, so I'm still locked in with a life prison sentence.

Q. Okay. And fair to say -- I mean, up to that point, every other appeal that you had filed you got thumbs down on, correct?

A. Absolutely.

Q. Okay. So you were probably pretty ecstatic, I'm guessing, when you got this order from the US Court of Appeals?

A. Yeah, I couldn't believe it. I'm telling you, I was shocked.

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Q. Okay. So here we are today, the case has been transferred back down to the US District Court for the Eastern District of Michigan, and then you were appointed counsel and that's how you and I met, correct?

A. Yes, sir.

Q. Okay. Now, let's go back to that affidavit for a minute that we were talking about, the affidavit that you filed in your second 6500 motion in the Wayne County Circuit Court, okay?

A. Yes.

MR. MCGRATH: And, Mr. Kendall, might we be able to pull that up really quick, affidavit of Jimmy Baugh?

MR. KENDALL: Yes, I'll pull it up now.

BY MR. MCGRATH:

Q. All right. Can you still hear me, Mr. Baugh?

A. Yes, sir.

Q. All right. Does this look like the affidavit that you filed, sir?

A. Yes, it does.

MR. MCGRATH: Okay. If we could scroll down to the very bottom of that first page, please. There we go.

BY MR. MCGRATH:

Q. Do you see paragraph five there, Mr. Baugh?

A. Yes, I do.

Q. Okay. In that paragraph you indicate that you were

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completely unaware that Ricky Bernard Sailes had made statements in relation to my case to Detroit Police Officer JoAnn Miller.

A. Yes.

Q. Let's talk about that paragraph for a minute. First of all, JoAnn Miller, who is she? How did she factor into all of this?

A. Well, she was the -- I guess the lead investigator on the homicide case.

Q. Okay. And your statement is I was completely aware that -- or completely unaware, rather, that Mr.

Sailes had made statements in relation to my case. Here's my question for you: What's our time frame there? So up to what point were you when did you become aware that he had made a statement in your case? When did you become aware?

A. When he actually sent me the statement.

Q. And what year was that?

A. 2015.

Q. 2015.

MR. MCGRATH: Okay. If we could take that off the screen, Mr. Kendall.

BY MR. MCGRATH:

Q. And as you sit here under oath, realizing that you could be subject to prosecution if you were to lie under oath, is it still your contention that you were unaware that Mr. Sailes

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made any kind of statement to JoAnn Miller prior to 2015?

A. Yes, sir.

Q. Okay. What was your primary trial strategy in your homicide case?

A. Well, Mr. O'Donnell, his whole thing was trying to show that Scottie Trent, Lucky, was lying about this, you know, because they actually had nothing to back

up what he was saying, you know. And so it was so much stuff going on, guys making statements and doing this and doing that, that, you know, it was just incredible down there at that time with this case. There was so much -- there was so much garbage going on and stuff that he was trying pull, you see what I'm saying, so --

Q. He being whom? Mr. O'Donnell or Mr. Kwasniewski?

A. Mr. Kwasniewski.

Q. Okay. All right. So if I'm hearing you correctly, you're saying that your primary trial strategy was to discredit Mr. Kwasniewski; is that right?

A. Yes.

Q. Okay. Now, let's go back a little bit. As you're preparing for trial, did you have a lot of opportunities to confer with Mr. O'Donnell?

A. Yes, I did.

Q. In fact, you guys got to know each other reasonably well because he represented you in not just one trial but two

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trials; is that correct?

A. Yes, sir.

Q. Over the course of his representation in both of those cases, how many times would you say that you and he met?

A. I don't know, maybe about five or six times each case.

Q. Okay. So around 10 or 12 times altogether?

A. Right.

Q. Okay. And when you two would meet, would you discuss strategy with him?

A. Yes.

Q. Okay. If you had had this statement that we're talking about, this statement from Mr. Sailes that pointed the finger right back at Mr. Kwasniewski as the shooter and away from you, would you have used that at trial?

A. Absolutely. Absolutely.

Q. Okay. You do realize that the statement from Mr. Sailes also puts you behind the driver's wheel, okay, of the car that Mr. Kwasniewski says you were in at the time of the shooting, right? Do you acknowledge that --

A. Yes.

Q. Is that a yes?

A. Yes, sir. Yes, sir, I acknowledge that.

Q. Okay. So in a sense it's damaging, I guess, or potentially gives the state an argument, okay, as to why you were an aider and abettor. Would that have made you take pause

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in terms of presenting that statement if you had had it at the time of trial?

A. No.

Q. And why not?

A. Because, you know, I'm -- with all due respect, I am not no legal mind or no legal nothing, but I do know how to read and write the English language, and when I read up on the aiding and abetting in the State of Michigan, the prosecutor's whole case was that I was the shooter. They never offered an aiding and betting. They said I was shooting.

They gave Mr. Kwasniewski, Mr. Trent, the second degree murder as an aider and abettor. In our first preliminary examination he got bound over as the aider and abettor. Nobody never said I was an aider and abettor, so my whole thing is, if I'm the shooter, prove I'm the shooter. Don't try to set me up and say that we both aided and abetted one another in the commission of this crime. How do we do that, when the Michigan law don't go along with that. Michigan law says that you have to be --

MR. SCHULTZ: Your Honor, I think we're getting way too into the Michigan law at this point. Again, this is an evidentiary hearing.

THE COURT: Overruled. I'm -- I find that the witness's response is responsive to the inquiry.

You can continue, sir.

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THE WITNESS: Thank you, Judge.

The thing is, like I said, they never said -- they never presented no evidence of nobody else being involved in this crime but Scottie Trent and myself. And, like I said, with my understanding, and I ain't no legal genius, but with my understanding, in order to be an aider and abettor, somebody got to be a principal, so who the principal? If he's the aider and abettor, and you're saying I'm doing the shooting, you're saying I'm the principal.

Now, you ain't going to get to trial and then try to flip it around and say, well, they aided and abetted each other. How do we do that? Somebody had to be shooting, and somebody had to be doing the assisting, you see what I'm saying? So which one you want me to be? You want me to be the driver? I prefer to be the driver. Or do you want me to be the shooter? You see what I'm saying? No. You wanted me to be the shooter, because you gave him the deal as the aider and abettor, as the driver to testify against me. Other than that, you had no case. That's why they dropped it at the first preliminary examination.

I told them the truth when I made my statement. I never said I wasn't there. I said I was in the backseat. I'm not doing nothing. I'm not -- how is I'm

assisting him? He doing what he doing on his own. I'm not doing anything.

BY MR. MCGRATH:

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Q. All right. Let me ask you this, Mr. Baugh. In terms of documentation, was Mr. O'Donnell good about sharing documents with you and making copies for you?

A. Yes, sir.

Q. Okay. And you heard him testify earlier that he gave you copies of everything that he had; is that right?

A. Yes, he did.

Q. Okay. And was that the case in both your homicide case and in the armed robbery case?

A. Well, yes, but in the armed robbery case, Mr. O'Donnell got that case kind of late, because my first attorney on that case was a lady by the name of Charlotte Steffen, but when they charged me, or they began looking at me on this murder case, she was like, oh, no, you got too much stuff going on, so she backed off the case, and that's when Mr. O'Donnell -- Mr. O'Donnell came into the case on that case.

And when he came into the case, he gave me copies of everything all over again that she had already gave me. He gave me copies of everything again, and he was like, look, okay, this is what's going on. I said, okay, and so we got to strategizing from what the paperwork that we had.

Q. All right. Now, when you would receive these documents from your attorneys, whether it's Mr. O'Donnell or someone else, how detailed were you in your review of them? So, in other words, would you just kind of cursorily go through them,

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or would you examine them page by page like Mr. O'Donnell testified he did? Tell us about that.

A. Well, I went through them page by page.

Q. You had a lot of time on your hands, right?

A. I wasn't doing nothing else.

Q. Okay. So you weren't a bonder in either the armed robbery case or the homicide case, right?

A. No, I was not on bond.

Q. Okay. And suppose just for the sake of argument that Mr. Sailes' statement had been in, you know, those document productions, right, when your attorneys gave you the paperwork and, you know, let's say that you found it, what would you have done at that point?

A. I'd have asked Mr. O'Donnell about it.

Q. Okay. At any time did Mr. O'Donnell say anything to you about Mr. Sailes having potential as a witness in your case?

A. No.

Q. Did you ever consider -- you, yourself, ever consider using Mr. Sailes as a witness?

A. No.

Q. Okay. If Mr. O'Donnell had come to you -- let's flip the hypothetical around a little bit, Mr. O'Donnell has the statement, okay, from Mr. Sailes, and if he comes to you and he says, I've got this statement here, you know, from Mr. Sailes, pointing the finger at Mr. Kwasniewski rather than you in terms

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of who the shooter is, how would that have affected your view of what the proper strategy should be?

A. I'd have asked him to call him as a witness.

Q. Okay. And to try to use that statement, right?

A. Yes, sir.

Q. Okay. Did you shoot Craig Land?

A. No, sir.

Q. Let me ask you this: Your testimony is that the first time you ever saw this statement from Ricky Sailes was 2015, right?

A. Yes, sir.

Q. Okay. And your testimony is that Mr. Sailes mailed you that statement, right?

A. Yes, it is.

Q. Okay. And is it your testimony that that's the first time your eyes ever saw a statement by Ricky Sailes in connection with --

A. Yes, it is. Yes, it is.

Q. Okay. Have you ever told anyone that you don't know where you got Mr. Sailes' statement?

A. Yes, I did.

Q. Who did you tell that to?

A. I told it to my nephew, Cardell Baugh, and to my brother, Max Williams.

Q. Okay. What year did you tell these guys I don't know

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where I got the statement?

A. That was 2016.

Q. 2016? Okay.

A. Yes.

Q. All right. So you just got done testifying that you got the statement in the mail from Mr. Sailes. You tell these guys, Max and Cardell something different. Why?

A. Because over the years, when Slick first reached out to me, he wanted to know did Scottie Trent make a statement against him on some separate shootings.

And so I asked him, you know, where do you want me to send the statement to, and so I sent it to his mother. And I asked him, I said, hey, man, why did you come to the first preliminary examination, then get up there and say that you didn't know us? He said because I don't want to be involved in no murder case.

I was like, okay, you see what I'm saying, so it wasn't no need for me to keep asking him about it, you see what I'm saying? So then as years went on, you know, he just -- I don't know. I don't know what was in his mind, or how he was feeling or whatever, but he just wrote me again. Like I said, it was years later, 2013, and he was like, look, man, I don't want to get involved in this murder case, man, but I'm going to -- I'm going to help you out, man. I'm getting ready to go home. I'm gonna help you out.

But I had no idea what he could have had that could

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have helped me out because, like I said, Mr. O'Donnell, at least I'm thinking, he got me everything that he could possibly -- that -- all the paperwork that was generated in both cases, I got everything. The trial transcripts, the sentencing transcripts, the discovery packages, the motion hearing transcripts, the motions. I got everything. I had all the paperwork I but I never had this statement.

So when I asked my brother and them about it, I'm still under the impression -- when Slick sent me the statement, Ricky Sailes, when he sent me the statement, he didn't send no letter in there or nothing

saying that, hey, man, look, you can use this statement, man, I don't care, nothing like this, this, that or the other.

So when I asked my nephew and my brother about going to see if the statement existed, I told them that I found it somewhere, simply because I wasn't trying to pull him into the case. Like I said, I know that -- like I say, I'm not no legal mind. I'm not no -- but I didn't know that it was going to come a point in time where it wasn't no matter he was -- no way of avoiding him coming into the case because he was going to have to testify to the statement. I didn't know that at that time.

I thought that the only thing I had to show was that the state suppressed the statement, that it was impeaching or exculpatory and that it was material. I didn't know that I was

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going to have to have people making statements and coming to evidentiary hearings and doing all that other stuff, because I'd have asked him flat out. I'd a just went on and asked him, hey, man, look, you know that sooner or later you're going to have to get involved in this and just knew where he was at.

So when I told them that, hey, man, look, I found it, that's because I just didn't really want it to get out that he was actually helping me. They knew I had the statement. They -- because I done told them I got the statement, but I didn't want them to know that he was actively in it trying to help me out.

Q. Why would it be bad for people to know that he was actively in it helping you out?

A. Because in my mind, you see what I'm saying, I'm looking at it like he's still out there in the street, meaning he's still out there doing criminal activity, so it wouldn't be necessarily good for people to know that he involved in a murder case, or that he done made a statement in a murder case, or he willing to testify on a murder case and all that other stuff.

So that's why I didn't tell them that he was just actively helping me out. It was easier for me to say that I found it somewhere than for them to just say that, hey, man, look, you know, Slick done wrote me, man. He done sent me a statement, man. He said he gonna help me out. He gonna do

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this. Because people get all on Facebook, man, and they get to talking about stuff and the next thing you know it's all out everywhere.

And this what I'm thinking, I'm in prison. I done been in prison 13, 14 years, so I'm thinking that from what I'm hearing, that how people be all on social media, I just didn't want it out there like that that he was helping me with the case.

Q. Okay. Were you under oath when you told Max and Cardell that you didn't know where you got the statement from?

A. No, I was talking to them on the phone in the prison.

Q. Okay. Are you under oath today?

A. Yeah, I'm under oath now.

Q. Okay. Are you telling the truth today?

A. Yes, sir.

Q. Were you telling them the truth when you told them that you didn't know where you got the statement?

A. No, I wasn't telling them the truth.

Q. Okay. One more thing, earlier today you heard Mr. Sailes testify -- or he didn't know exactly when he reached out to you and sent you this statement. Do you remember that?

A. Yes.

Q. Okay. And your testimony is, though, that Mr. Sailes sent it to you in what year?

A. 2015.

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Q. 2015? Okay.

A. Yep.

Q. And how is it that you know that it was 2015 and not sometime before then?

A. If I'd have got it before 2015, I'd have been into court before then. I wouldn't have waited until 2016

to go into court, you know, so I'd have went on and used it. If I'd have got it earlier, I'd have used it earlier, but I didn't have it earlier, you know.

And then he didn't -- by him constantly telling me that he didn't want to be involved in this case that -- I figure that he just waited until he got off parole before he sent it to me, because then, you know, the Department of Corrections can't violate him and send him back or, you know, none of that other stuff, so he just waited until he was free.

MR. MCGRATH: Okay. Thank you, Mr. Baugh. I have no further questions at this point, Your Honor.

THE COURT: Thank you.

Mr. Schultz, your witness.

MR. SCHULTZ: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SCHULTZ:

Q. Mr. Baugh, my name is Jared Schultz. I'm a Michigan assistant attorney general. I'm going to ask you a few questions. If for whatever reason you don't understand me,

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just please let me know, okay?

A. Okay.

Q. Thank you. All right. So you went through this already. We know you're serving a life sentence for felony murder in this case, correct?

A. Yes, sir.

Q. Okay. And you mentioned that you're also serving time for receiving and concealing on another case, correct?

A. Yes, sir.

Q. Okay. What was that case about?

A. Armed robbery/carjacking.

Q. Okay. Who else was involved?

A. Ricky Sailes, Lafayette Dearing, Scottie Trent and myself.

Q. Okay. Well, how long have you known those players? Scottie Trent -- we'll start with Scottie Trent, how long have you known him?

A. Probably about five or six years.

Q. Okay. And what about Ricky Sailes?

A. I be knowing Ricky Sailes -- I don't know because I kind of met them through Scottie Trent, you know. All them was much younger than me, so they used to stop by my house all the time so I knew them for sometime, but I really didn't start dealing with them until later on.

Q. Okay. And I'll back up. For Scottie Trent you said five to six years, do you mean five to six years before this --

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these cases came up?

A. Oh, yeah, yeah, five or six years before these cases came up.

Q. Okay. And within that time is when you met Ricky Sailes?

A. Yes, sir.

Q. What about Lafayette Dearing?

A. Same time, I met them all about the same time, Ricky Sailes and Lafayette Dearing.

Q. Okay. And is it true that all four of you would participate in armed robberies together?

A. Yep.

Q. Okay. How many armed robberies?

A. I don't know. I don't -- never really participated per se me sticking nobody up, but I used to always get the cars and stuff, so I don't know, it's -- I don't know. I can't say no number. It wasn't no 20 or 30, no, but, you know, it was a few.

Q. Okay. Do -- does Mr. Trent have a nickname?

A. Yeah.

Q. What's that?

A. Lucky.

Q. And what about Mr. Sailes?

A. Yep.

Q. What's his nickname?

A. Slick.

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Q. Okay. Does Mr. Dearing have a nickname?

A. Yes.

Q. What's that?

A. Laf.

Q. And what about you? Do you have a nickname?

A. Everybody just know me by Jim.

Q. Okay. So the underlying case, this murder case that you're doing time for, what happened?

A. Well, we was out stealing some cars and, you know, we stopped by a store, you know, to pick some blunt wraps up, you know, we riding, we smoking weed, drinking and stuff. And Luck went in the store and came out and said, you know, man, I fittin' to get this white boy. You know, I'm like, what you talking about? And then Lafayette was like, ah, man, just go on lay on back, you see what I'm saying. There ain't

gonna be nothing, you know, and they went on and did what they did.

Q. So are you saying you -- what was your role? Were you the driver?

A. No, I was in the backseat.

MR. MCGRATH: Judge, I'd like to object. I mean, do we really need to retry the murder case here? I didn't think that that was the inquiry. I thought that we were dealing with the Brady issue and, you know, whether he exercised reasonable diligence in uncovering this evidence, whether it's newly discovered. Those are the legal issues, not what happened in

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the murder case.

MR. SCHULTZ: Well, I'm --

THE COURT: Respectfully, it's relevant to our inquiry. Overruled.

BY MR. SCHULTZ:

Q. So I'm sorry, Mr. Baugh, did you say you were in the backseat?

A. Yes, I was.

Q. Okay. So I guess I'll kind of jump around here. Are you saying that Mr. Sailes' statement was not true, then?

A. No, I'm not saying his statement wasn't true, but I'm saying at this time, when the murder happened, I was in the backseat of that Jeep.

Q. So Mr. Sailes' statement that you were the driver is not true?

A. I'm not saying his statement not true. What I'm saying is, when we get together, we be talking about different stuff. Now, none of you all know Lucky, or what type of cat this guy is. He's one of these guys that like to brag a lot about stuff that he do, so just not to get into it with him, or argue with him, or get into all that goofy stuff with him, yeah, man whatever, you see what I'm saying? That's how we would talk about it.

So while Lucky sitting up there talking about this stuff to him, the next day after it happened, yeah, man I did

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this, I did that, man. Jimbo was driving. You know, so Slick -- if he -- if Slick asked me – I don't even recall him asking me was I driving. If he asked me that I was driving, I probably did tell him, yeah, just to shut him up.

You know, because one thing he didn't say that neither one of us said -- we never -- neither one of us said that Lafayette was with us, because usually when we have Lafayette with us, Slick is with us also, but Slick wasn't with us that night. So nobody never said Lafayette was there, but he was there. He was the one that was actually driving.

Q. Okay. So it's your testimony that you were present when -- later, after the fact, when Mr. Kwasniewski talked about the shooting?

A. Yeah, I was present.

Q. And you heard him say that he was the shooter?

A. Yeah.

Q. And you heard him say that you were the driver?

A. Yeah.

Q. And you just said yes?

A. I don't even -- I don't even recall Slick asking me that. But if he did, I probably did just to tell him -- just so he would shut up. Yeah, I was driving.

Q. I'm saying, according to Mr. Sailes, Mr. Kwasniewski made that statement that you were the driver?

A. Right.

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Q. So you just said, yes, yeah, I was the driver?

A. I'm trying to explain this as clearly as I can explain it. Mr. Trent is a guy that like to brag about what he do. He told Slick them that he did the shooting. If he said I was driving, then I probably didn't say nothing just to shut him up, so he can go on tell your story and let's get on with it, man.

If Slick had asked me, which I don't recall Slick asking me, did I -- was I the driver, but if he had asked me -- Ricky Sailes, if he had asked me was I the driver, I probably told him, yeah -- yeah, I was driving, man -- just so he gone and shut up. You done shot somebody, man, and now you want to tell everybody about it? You don't believe the Michigan Department of Corrections is real, huh? You see what I'm saying? So, no, shut up, man. Go on ahead, whatever you say, yeah, go on ahead, tell me what you gonna say, shut up.

Q. Okay. So then just briefly going back to the facts, you were there when Mr. -- according to you, you were there when Mr. Kwasniewski shot Craig Land?

A. Yeah, I was in the backseat.

Q. Okay. Did you know he was gonna rob him?

A. No I ain't even know he had a gun on him.

Q. Well, you participated in armed robberies before with Mr. Kwasniewski, correct?

A. Right.

Q. So would he typically carry a gun when -- when

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participate -- when doing these armed robberies?

A. Yeah, when he doing armed robberies, but we not always doing armed robberies.

Q. Okay. What was your reaction after the shooting?

A. Man, what the hell you do that for. I said, man, drop me off, man. Let me go, man. Drop me off.

Q. Did you tell the police?

A. No, I didn't tell the police.

Q. Well, if you didn't know about it, why not? Or if you didn't know he was going to rob him, why not?

A. I did, I told police the truth on this case right here that got me life without the possibility of parole, so it would have still probably got me life without the possibility of parole by telling the truth then, so I didn't want to be involved in it either.

Q. All right. So I'll get off of the facts of the underlying case now, but I want to go back to the statement, Mr. Ricky Sailes' statement. When did you -- when did you say you actually learned about it for the first time?

A. In December of 2015.

Q. Okay. And how?

A. It was sent to me in the mail.

Q. By who?

A. By Slick.

Q. Okay. And do you remember -- I believe Mr. McGrath showed

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you your affidavit earlier, and do you remember stating in that affidavit that it was actually Mr. Sailes' wife that sent you -- or, I'm sorry, that -- that first told you that they -- she would help you out?

A. Right.

Q. Is that correct?

A. Right.

Q. Okay. So that did happen?

A. Right. He sent a letter through his wife to me while he was still in prison, though. He was still in prison then. He sent a letter through his wife to me telling me that he was going to help me out when he got out.

Q. Okay. Where is that letter?

A. It was a part of the exhibits for the 6.502(G)(2) motion. I have a copy of it right here, but I -- I -- it was a part of the exhibits for the 6502(G)(2) motion.

Q. Well, I guess that -- we can discuss that later. I don't recall that, but you can -- Mr. McGrath can correct me if I'm wrong. I don't recall that letter.

Okay. So according to you, Mr. Sailes' wife sent you that letter, but it didn't -- it just said that he's going to help you out?

A. Right.

Q. When did you learn the actual contents of the statement?

A. In 2015.

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Q. That -- when he sent you the statement?

A. Right.

Q. Okay. How did he send it to you?

A. Through the mail.

Q. What kind of envelope was it in?

A. A regular envelope.

Q. So, you know, a paper letter envelope, so it would have been folded up inside?

A. Yep.

Q. What did you do after you received that statement?

A. Well, like I said, at first I couldn't believe it that he had actually made a statement, because all those years nobody never knew nothing about Slick making no statement. So then once I -- like I said, once the holidays was over with, I contacted my trial attorney, Mr. O'Donnell.

Q. Okay. And what did you tell your attorney?

A. Did he ever recall a statement by Mr. Sailes. I got the letter right here that I wrote him if you want me to read the letter verbatim what I wrote him.

Q. No, that -- I do have that letter. Is there a reason why you did not mention that the statement puts you as the driver?

A. No, not particularly.

Q. Well, wouldn't you think that's important for your attorney to know if he's evaluating whether he has an exculpatory statement?

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A. No.

Q. Okay. Did you keep documents from your murder case? Did you keep all the files?

A. Yes, I did.

Q. What about in your receiving and concealing case, did you keep all those files?

A. Yes, I did.

Q. And did you look through those files before you filed your 6500 motion?

MR. MCGRATH: I would just like to clarify for the record if we may, because he's testified that he filed two separate 6500 motions, so if we could clarify which one we're talking about, please.

MR. SCHULTZ: Yeah, absolutely. I apologize.

BY MR. SCHULTZ:

Q. So your second 6500 motion was pertaining to this evidence, Ricky Sailes' statement; is that correct?

A. Right.

Q. So before you filed that second 6500 motion, did you look through your files?

A. I looked through the murder files, yes.

Q. Okay. What about your receiving and concealing file?

A. I sent those home years before because I was -- already reached the out date on -- well, the minimum on the sentence, on that sentence, so I wasn't appealing that or nothing, so

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there wasn't no need to be keep dragging that stuff along around with me. I sent that stuff home.

Q. Okay. Are you sure that Mr. Sailes' statement was not in one of those files?

A. If I'd have had his statement at any point in time during this trial, during when I was down in the county jail or in prison or whatever, I'd have been used that. It's not like -- you know, I'm not trying to be funny or nothing, Mr. Schultz. I'm not in Cancun nowhere. I'm not having no hell of a nice time in the Michigan Department of Corrections where I decide I don't want to go home.

I'd have been trying to get out of here. You know, I got life without the possibility of parole. If I'd have had, at any point in time, had have had that statement prior to 2015, I'd have been in court a long time ago or it would have been part of my first round of appeals.

It was easier then. This stuff so hard. This second 6500 stuff, this second habeas petition, this stuff so hard, man, it's incredible. I'd have rather did it on my first one, you see what I'm saying, but I didn't have it then. If I'd have had it then, it'd have been in that stuff, but I didn't have it.

And so by me being exhausted all that stuff in 2010, when they denied my writ of habeas corpus, my certificate of appealability and my writ of certiorari, when they denied all

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that, I had to come back around on the second stuff, you see what I'm saying, and so that's why I had to use it now, because I didn't have it then.

Q. Okay. So it's your testimony that it was not in the files, correct?

A. That's right.

MR. SCHULTZ: Okay. Your Honor, I'd like to play a couple recordings now if I may.

THE COURT: Yes.

MR. SCHULTZ: And I believe -- consulting with Ms. Winslow last night, I believe I have to share my screen to do that, so just bear with me for a second.

(Brief pause.)

MR. SCHULTZ: I do want to point out that the first 30 seconds, 45 seconds or so are a bit hard to hear, especially on the first one, but it does clear up, the recording does, so I just want to point that out.

THE COURT: And we'll let Ms. Harrison know that she only needs to begin maintaining the record at a point in time which the -- it is discernible to her what is being said on the tape.

MR. SCHULTZ: Yes. And I -- am I sharing the screen at this point or no?

THE COURT: Yes.

MR. SCHULTZ: Okay. And for reference, this is a

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call made from Mr. Baugh in prison on February 3rd, 2016. I am going to start at approximately 1 minute and 27 seconds, and I will end at approximately 3 minutes and 24 seconds, I believe it is.

(Following is transcription of the audio of the jail call to the best of my ability.)

JIMMY BAUGH: Hello (indiscernible) --

CARDELL BAUGH: Hey, Uncle Jim.

JIMMY BAUGH: Hey, what's up?

CARDELL BAUGH: Hey (indiscernible) hey, be quiet -- (indiscernible) --

JIMMY BAUGH: Oh, okay.

CARDELL BAUGH: I got that mail, too.

JIMMY BAUGH: Oh, okay. Okay. All right.

CARDELL BAUGH: (Indiscernible.)

JIMMY BAUGH: Oh, okay.

CARDELL BAUGH: You say just go up there, show them the paper and they know exactly what to give?

JIMMY BAUGH: Yep. They gonna tell you that you might have to pay for it.

CARDELL BAUGH: (Indiscernible) how much you think it gonna be? I probably could pay for it (indiscernible) --

JIMMY BAUGH: Well, if it's anything, it ain't gonna be no more than about $10.

CARDELL BAUGH: All right. Well, I got -- I got

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that.

JIMMY BAUGH: Because see -- because see the actual statement itself -- see, the thing is here, Cardell --

CARDELL BAUGH: Yes.

JIMMY BAUGH: -- I got the statement already.

CARDELL BAUGH: All right.

JIMMY BAUGH: I already got it. But the thing is I don't know where I got it from. So what I got to do is -- see, Slick is on parole now. I found out that he on parole, the guy who made the statement.

CARDELL BAUGH: Yeah.

JIMMY BAUGH: So the thing is is that I can't go into the Court unless I can prove where I got the statement from, do you see what I'm saying? That's why I'm going -- that's why I'm going this route, to get you to go up to the police department and ask them if they got the statement. Now, you ain't got no warrants or no -- nothing like that, do you?

(Audio concluded.)

MR. SCHULTZ: All right. And that's all for that one, and I'd like to, if I may, play one more, Your Honor.

THE COURT: Yes.

MR. SCHULTZ: And for reference, this call is made from Mr. Baugh on February 4th, 2016. And I will start the call at approximately 1 minute, 40

seconds into the recording, and this one will be a bit lengthier. It's going to go until 8

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minutes and 58 seconds.

(Second prison phone call played; transcribed to the best of my ability.)

JIMMY BAUGH: What's up, bro?

MAX WILLIAMS: What's up -- (indiscernible) --

JIMMY BAUGH: What's happening with you?

MAX WILLIAMS: Same shit.

Man, going up there -- (indiscernible) --

JIMMY BAUGH: Say what?

MAX WILLIAMS: (indiscernible) for you.

JIMMY BAUGH: Do what?

MAX WILLIAMS: Hum?

JIMMY BAUGH: Say what? I didn't hear you.

MAX WILLIAMS: (Indiscernible).

JIMMY BAUGH: Hum? What you say? I couldn't hear you. They talking all this shit in the background (indiscernible) school and all this other stuff. Now, what were you saying?

MAX WILLIAMS: Can you hear me now?

JIMMY BAUGH: Yeah, I hear you now.

MAX WILLIAMS: I say the order you gave me.

JIMMY BAUGH: Oh, the order I gave you, oh, okay --

MAX WILLIAMS: Yeah.

JIMMY BAUGH: -- all right, all right, all right, yeah. Yeah, I was just calling to remind you, man. Don't send

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it to the wrong Jimmy, man. Man, don't send it to the wrong guy, man. Make sure they -- make sure that they got the right guy, man. When you talk to them --

MAX WILLIAMS: Yeah.

JIMMY BAUGH: -- however is you do it, however you gonna do it, just make sure they got the right guy.

MAX WILLIAMS: Sure, yeah, sure.

JIMMY BAUGH: All right. Other than that, everything straight -- man, just gotta keep waiting on Cardell to go up to that place and grab that paperwork for me.

MAX WILLIAMS: Oh, he did?

JIMMY BAUGH: No, he said he ain't gone -- he ain't get it yet. He said he gonna try to do it sometime this week because he said he going to Kansas.

MAX WILLIAMS: See, I told him when he want to go up there, I should take him up there to get it.

JIMMY BAUGH: Oh, okay. Well, I'll be -- I guess he was waiting on you, you see what I'm saying?

MAX WILLIAMS: I told him whenever he ready to let me know, I'll take him up there.

JIMMY BAUGH: Oh.

MAX WILLIAMS: That's what I told him.

JIMMY BAUGH: Oh, oh, okay.

MAX WILLIAMS: Unless he got another way up there or something.

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JIMMY BAUGH: Hey, man is the police -- is the police department still at the same place?

MAX WILLIAMS: Which one?

JIMMY BAUGH: The Detroit police headquarters.

MAX WILLIAMS: They moved it.

JIMMY BAUGH: Where they move that motherfucker to?

MAX WILLIAMS: I think that's it right there on the corner of Woodward and the boulevard now.

JIMMY BAUGH: Okay. Because, see, that's where he got to go. He got to go to the Detroit police headquarters.

MAX WILLIAMS: Yeah, that's -- well, that's on the corner of the Boulevard and Warren -- or not -- Boulevard and Woodward.

JIMMY BAUGH: Boulevard and Woodward?

MAX WILLIAMS: Yeah.

JIMMY BAUGH: Okay. He got to go there and then just go to they records -- to they records section, have him tell them they he want some information out of the Freedom of Information Act and just hand them that paper that I sent you.

MAX WILLIAMS: Hey, don't you remember where the Secretary of State used to be right there on the corner of Woodward Boulevard.

JIMMY BAUGH: Yeah, yeah, yep, yep.

MAX WILLIAMS: That's that same building.

JIMMY BAUGH: Oh, okay.

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MAX WILLIAMS: Yeah, that's exactly right there.

JIMMY BAUGH: But I knew I had heard they moved it, but I didn't know where they moved it to, you know what I'm saying, yep. So that's where he got to go to, because last night, man, I think he was a little bit tipsy when I was talking to him.

MAX WILLIAMS: Probably was.

JIMMY BAUGH: So if you talk to him, tell him, man, make sure that's where he go because he still talking about 1300 Beaubien. And I said, no, the police department -- I said, no, the police department ain't down there no more. I know that and I ain't even out there, you see what I'm saying? Yeah, I know they closed that down, but that's where they got to go. And I found out that Slick on parole now.

MAX WILLIAMS: Yeah.

JIMMY BAUGH: Yeah, I said Slick on parole now, so now, you know, you know, I ain't got to worry about them trying to press him or squeeze him or try to violate his parole for using -- you know, for wanting him to testify for me in my behalf, you see what I'm saying?

MAX WILLIAMS: All right.

JIMMY BAUGH: The only thing -- the only thing that I got to try to -- the only thing that I got to do is make sure that because he -- the paperwork that I'm looking for, I already got. I already got it.

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MAX WILLIAMS: Why you trying to get this then?

JIMMY BAUGH: Because I don't know where I got it from, you see what I'm saying?

MAX WILLIAMS: Uh-huh.

JIMMY BAUGH: And so --

MAX WILLIAMS: So you don't -- you don't know what type of agency gave it to you or whatever?

JIMMY BAUGH: Right. I don't know who gave it to me. I don't know if it was in my armed robbery/car-jacking case or if it was in the murder case. But I don't believe it was in the murder case, you see what I'm saying?

MAX WILLIAMS: Yeah.

JIMMY BAUGH: Because see -- because see on the murder case I had two preliminary examinations. I had -- the first preliminary examination they brought Slick to testify, but he refused, but they never said nothing about he made a statement or nothing, you see what I'm saying?

MAX WILLIAMS: Right.

JIMMY BAUGH: So he just said they asked him did he know me, he said, no. They asked him did he know Lucky, he said, no. But we was all on the -- on the armed robbery case together so you know he know us all, but he was just like, no, so they told him, okay, well, you can leave, and they never said nothing.

So, you know, before I sent Ali my -- before Ali came

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up to Macomb and got my other legal footlocker, I was going through some of my paperwork, and I found a statement that Slick made to homicide where he told

homicide that Luck told him that he did the shooting, that Luck did the shooting --

MAX WILLIAMS: Right.

JIMMY BAUGH: -- you see what I'm saying? So I wasn't -- you know, I was going to use that with the polygraph stuff. That was gonna be secondary to the polygraph stuff. Now, since I didn't pass all the questions on the polygraph, I'm gonna make Slick's statement the primary thing and use the fact that I passed three of the four questions on the polygraph that I didn't do the shooting, that I didn't have a gun, and that dude lied on me when he testified. I'm gonna use them three statements as the secondary thing in my -- in my -- in this paperwork I'm fittin' to put -- I'm fittin' to put another 6.500 motion in because newly discovered evidence. But I have to be able to show the Court, when I put this motion in, where I got Slick's statement from, you see what I'm saying?

So, now, really, to tell you the truth, I want them to say that they don't have it.

MAX WILLIAMS: That'd be a good thing?

JIMMY BAUGH: Hell, yeah. I want them to say -- because then where did I get it from --

MAX WILLIAMS: Right.

JIMMY BAUGH: -- you see what I'm saying? If you all

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don't have it, and he made it to a police homicide detective, then where the hell I get it from --

MAX WILLIAMS: Right.

JIMMY BAUGH: -- you see what I'm saying? Where did I get Detroit Police Department stationary at, you see what I'm saying? So, you know, but as soon as he get a chance, you go down there and do that for me, and I'll be, you know -- because I wrote my --

MAX WILLIAMS: What, you gonna talk to him today?

JIMMY BAUGH: Who? Cardell?

MAX WILLIAMS: Oh, yeah.

JIMMY BAUGH: No, I talked to him last night.

MAX WILLIAMS: Oh. Well, (indiscernible) he talking about.

JIMMY BAUGH: Because, I wrote my attorney that was my attorney on my case, and I asked him do he remember the statement or him ever having the statement, do you see what I'm saying? And so, you know, because, see, they got a thing in the legal thing that they call due diligence. Once you find some information out, then you have a due diligence to act on it, you see what I'm saying? If you -- if you don't act on it and you wait, then you violate the due diligence clause, you see what I'm saying?

MAX WILLIAMS: Right.

JIMMY BAUGH: So that's why I'm doing all these

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things because I'm saying that I heard through a third party that Slick was talking and he was telling somebody, I don't know why Jim mad at me because I made a statement. I told him that he didn't do the shooting, you see what I'm saying, I just didn't testify. So then that's why I'm going through things trying to find the statement now, even though I got it. I'm trying to find out who else got it.

MAX WILLIAMS: Where it came from.

JIMMY BAUGH: Where it came from, right, exactly, you see what I'm saying. So --

MAX WILLIAMS: Yeah.

JIMMY BAUGH: Well, all right, dog --

(Audio concluded.)

MR. SCHULTZ: All right. And that's the end of that call, and if you'll bear with me while I stop my screen share.

(Court reporter asked for clarification.)

THE COURT: Mr. Schultz, if you could inquire of the witness.

MR. SCHULTZ: Yes, I will.

BY MR. SCHULTZ:

Q. Mr. Baugh, I believe you actually already acknowledged that was yourself in those recordings, correct?

A. Yes.

Q. And the first call, who were you speaking to?

A. I was talking to my nephew Cardell Baugh.

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Q. Okay. And the second call?

A. I'm talking to my brother, Max Williams.

Q. Okay. Thank you.

So I guess I have one final question, Mr. Baugh. You didn't really get that statement from Mr. Sailes, did you?

A. Yes, I did.

MR. SCHULTZ: Okay. That's all the questions I have, Your Honor.

THE COURT: Redirect, Mr. McGrath?

MR. MCGRATH: None, Your Honor. Thank you.

THE COURT: Mr. Baugh, Mr. Sailes contacted you shortly before he was going to be released from prison, if I recall correctly?

THE WITNESS: Yes, sir.

THE COURT: Were you surprised when he indicated that he thought he could help you out?

THE WITNESS: Yes, I was. I was very surprised.

THE COURT: And the way he was going to help you out was to get you a copy of his earlier statement, correct?

THE WITNESS: I didn't know what he had at that point, Your Honor, because he didn't say.

THE COURT: He ultimately sent the statement, correct?

THE WITNESS: He didn't never say what he had until I actually received it, Your Honor.

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THE COURT: What would have led him to believe that that would have been help to you?

THE WITNESS: I have no idea, I guess -- I guess because he knew I didn't have it during the trial. I don't know. I have no idea.

THE COURT: How would he have known that you didn't have it during the trial?

THE WITNESS: Well, because I had asked him once before why did he get on the stand, you know, for what purpose. Why was he on the stand at the first preliminary examination, and he was like, man, I'm not getting into that, man, because I don't want to be involved in that murder case.

That's all he kept telling me over the years. He never said nothing, you know, all while we was in prison. When he did the 12 years, 13 years that he did in prison, all while we was in prison he never said he

made a statement. He never stated that he made a statement.

THE COURT: But for it to be valuable to you, he would have to know that you didn't have it?

THE WITNESS: I think so. I guess, yeah.

THE COURT: All right. Any additional questions, counsel?

MR. SCHULTZ: I have none, Your Honor.

THE COURT: Mr. McGrath?

MR. MCGRATH: I might have a follow-up or two, Your

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Honor, just based on a couple of the questions that you asked.

THE COURT: Sir.

REDIRECT EXAMINATION

BY MR. MCGRATH:

Q. Mr. Baugh, if you know, was Mr. Sailes aware of any of the testimony at your trial? In other words --

A. Not that I knew of.

Q. Okay. You said that you and he had gone back and forth about your situations, right, over the years --

A. Right.

Q. -- I think you said?

A. Right.

Q. Okay. And if you recall, did you ever tell him at any point, yeah, Lucky said that I shot Craig Land?

A. I didn't have to tell him that. He knew that already.

Q. How?

A. Because Lucky wrote it all over the walls in the county jail in the bullpen.

Q. What did Lucky write --

A. That's how goofy this guy is.

Q. What did he write all over the walls?

A. He was like Jim thought he was slick, he was gonna get away with murder, yeah, I know I told that he shot that guy. He put it on the walls with his goofy --

Q. How do you know that Slick saw that?

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A. Because they was all going to trial at the same time. They was all going to courts at the same time. Everybody in the county jail seen it.

Q. Okay. And did Mr. Sailes ever say anything to you about, yeah, I saw what Lucky wrote on the wall at the county jail?

A. No, when me and Slick talked -- when me and Ricky Sailes talked about that stuff, he like, yeah, man, I heard dude said you did the shooting. And I was like, yeah. And he was like, man, he said I did some stuff, too, and I was like, yeah, you know.

The first statement that Mr. Trent made to JoAnn Miller at the ninth precinct, right after we got arrested for the armed robbery/carjacking stuff, he was saying that a guy named Martin, JJ and Slick shot a guy on a bike. The same set of circumstances that was involved in this crime right here, he said Slick pulled him off the bike and shot him, you see what I'm saying.

So when I sent Slick that statement he was like, man, that guy he just trying to do whatever he can do. That's what he did. He tried to do whatever he could do to get the attention taken off of him and put it on anybody else. He didn't care who it fell on, just long as it wasn't on him. That was his whole thing. That's why you got so many statements.

You got statements under Scottie Trent. You got

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statements under Robert Kwasniewski, you see what I'm saying. That's because he call himself playing this game that I'm gonna make statements under this, then I'm gonna make statements under this, and ain't nobody gonna know who I am, you know, until a circulation where we all was in prison, a circulation of his face sheet, MDOC face sheet got out, that got his name Scottie Trent on it, but got his alias, Robert Kwasniewski on it.

Now he can't lie about all the stuff that he been doing, because people know that he using two different names. He testifying under one. He try to make himself seem like he some guerrilla, killer, carjacker and all this other stuff under Scottie Trent, but he don't want nobody to know that he done testified on me under Robert Kwasniewski.

MR. MCGRATH: Okay. Thank you, Mr. Baugh.

THE WITNESS: Yes, sir.

THE COURT: I think we're done.

Any additional witness, Mr. McGrath.

MR. MCGRATH: No additional witnesses, Your Honor, but what I would like to request is the opportunity to obtain the letter from Deborah Sailes that -- Deborah Sailes, of course, is Mr. Sailes' former wife and it is referenced in the affidavit. Mr. Schultz asked Mr. Baugh about it, and if you read the affidavit, it very much does make it sound like the letter was an attachment in the 6500 motion. In fact, at the

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end of the -- and this affidavit was filed in connection with the 6500 motion, but then also attached in our case.

In any event, it says see Exhibit Bl after he's talking about the letter. That leads me to believe that the letter is, in fact, out there, but I'm with Mr. Schultz in the sense that it doesn't appear as an attachment to our habeas petition. I've read all 172 pages of it

numerous times, and it's just not in there. So I would like the opportunity, if possible, to get a copy of that letter from Mr. Baugh and provide it to the Court as part of this record, since it came up today at the evidentiary hearing.

THE COURT: Mr. Schultz.

MR. SCHULTZ: Your Honor, I guess I don't necessarily have an objection, although we've -- I believe we've filed the 6500 motion that was filed in the state court. I believe we filed that with our Rule 5 material, and if that's -- if it's not in there, I'm -- I mean, that means he's -- he didn't -- he didn't file it with the 6500 motion, so I'm not sure it would be appropriate for this Court to consider it.

That being said, I guess I'm not opposed to him filing it as long as you consider that it was not filed with the 6500 motion.

THE COURT: Ms. Critchlow just did a quick beeline from her location and dropped off a document that I would suggest to you was from the Rule 5 materials, and it's page ID

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1152, appears to be Exhibit B1 to some other document.

MR. MCGRATH: Judge, I don't have the ability to pull that up without, you know, minimizing us and then logging onto Pacer and cause a little bit of a disruption here, but I'd like the opportunity to look at the letter myself.

THE COURT: Wouldn't be the first disruption that you caused, Mr. McGrath.

MR. MCGRATH: Oh, I've done a few over the years probably. I always apologize.

THE COURT: I'm waiting to see if Mr. Schultz is able to corroborate our belief.

MR. SCHULTZ: Yes, Your Honor. I'm trying to look it up right now. Again, if you could just bear with me for a couple minutes.

THE COURT: We're bearing with you.

(Brief pause.)

THE COURT: How's everybody doing with the COVID, Mr. Baugh.?

THE WITNESS: Well, it's better now. It's better.

THE COURT: Getting vaccines out in the Department of Corrections?

THE WITNESS: Yes, sir. I've been -- I took both doses myself.

THE COURT: Good for you. I'm sure it was a concern.

THE WITNESS: Yes, it was, sir.

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MR. SCHULTZ: Your Honor, I do see a letter. I'm briefly going through it. I cannot quite tell what is in

-- contained in the letter or who it's from, but I do see a letter, so if that's the letter he's talking about, then, I mean, the record speaks for itself.

MR. MCGRATH: Judge, if possible I'd like the opportunity to read it with my own eyes. I don't know what the quality of it is. If it is of poor quality and it's hard to read, then perhaps Mr. Baugh can provide us with a better copy of it. I'd just like to -- it was a letter that was mentioned several times today, and it makes sense to -- if we can put our hands on it to get a good copy of it and have as complete of a record as we can.

THE COURT: I don't dispute that, and I'm just trying to think of in terms of process and procedure the best way of accommodating your request, without anyone authenticating the document or its date.

MR. MCGRATH: Here's what I would propose, Judge.

THE COURT: Yes, sir.

MR. MCGRATH: First of all, Mr. Schultz and I have a good line of communication, so if -- if I were to receive a letter from Mr. Baugh that, you know, looks, at least in terms of quality, different from the one that's already been filed her, the first thing I would do is reach out to Mr. Schultz and see if we can agree that it's authentic, that it is what it

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purports to be.

And if we can, then I would ask the opportunity -- because I was also going to propose filing supplemental briefs in this case. We haven't done supplemental briefing and that would be something which would be beneficial, not only to Your Honor, but potentially to the Court of Appeals, and so I was going to propose that anyways.

And if Mr. Schultz and I can agree that it's authentic, then I would just attach it to my supplemental brief. If not, you know, we're not going to have any trouble finding Mr. Baugh. We know exactly where he is, and it's easy enough to produce him for questioning if there does need to be any questioning in an attempt to authenticate the letter.

THE COURT: What if we start with Ms. Harrison. You're going to need transcripts. What kind of timetable would you anticipate on transcript preparation, ma'am, and we're not -- our effort here is not to put you under pressure, because we have sometime.

(Off-the-record discussion.)

THE COURT: What if we were to set a status conference that would also include a briefing schedule about a month out. That way hopefully someone will have made the request for the transcripts. We will have some idea of what those look like. We can have addressed the question on the authenticity of the correspondence at that point. Is that

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process agreeable?

MR. MCGRATH: Yes, Your Honor.

MR. SCHULTZ: Yes, Your Honor.

THE COURT: Ms. Winslow, we're looking at probably half an hour conference about 35 days out.

THE CLERK: April 7th at 11:30.

MR. MCGRATH: Judge, would it be possible, by any chance, to maybe do it like the following week? The only reason I propose that, my wife and kids are both going to be on Easter break, and we'll all be fully vaccinated. I don't know if we're going to go on vacation or not, but if we did, that would be the one time of year that we would probably try to do it.

THE CLERK: How about April 14th at 11:30?

MR. MCGRATH: That would be perfect.

MR. SCHULTZ: I think that works for me, too, as well.

THE COURT: And I have one additional question for you gentlemen. I have taken a look at the Rule 4 materials. One item is not contained there. It's not necessary for it to be there, but I was unaware of whether you might have it, and that is Mr. Trent's guilty plea in the second degree homicide.

MR. SCHULTZ: If we don't -- I don't know if we have it, if we don't, I can attempt to get it. Wayne County, sometimes their records with cases going back that far are a

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bit iffy, so I can't guarantee I can get it, but I can certainly try.

THE COURT: I think I know another place that you might locate it. Mr. Baugh may have it.

THE DEFENDANT: I got it. I got it.

THE COURT: How do we get a copy of that, Mr. McGrath?

MR. MCGRATH: Mr. Baugh, can you please send me, along with that letter, a copy of the transcript from Lucky's guilty plea.

THE DEFENDANT: Yeah, I can do that.

THE COURT: Okay. Very good.

THE DEFENDANT: You got to give me a couple days. I got to get a copy first. This is the only copy of it I got.

MR. SCHULTZ: Mr. Baugh, is that the pre --

THE DEFENDANT: Pretrial settlement notice and offer of acceptance.

MR. SCHULTZ: Is that what you were looking for, Your Honor?

THE COURT: I was actually interested in the transcript where he outlined his factual basis for the plea.

MR. MCGRATH: Right. Jimmy, do you -- I haven't seen that in my review of the case, but, Jimmy, do you know if you have the actual transcript, you know, where it sets forth what Mr. Kwasniewski said during his guilty plea proceeding?

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THE DEFENDANT: No, I don't have any transcript. He wouldn't have gave me his transcript, no, not unless I requested it. I never requested it before --

MR. MCGRATH: Okay.

THE DEFENDANT: -- on this thing --

THE COURT: Mr. Schultz, you'll make the effort to see if that can be secured from Third Circuit?

MR. SCHULTZ: Yes, Your Honor, absolutely. And one other thing I will point out, though, is I don't know if Mr. Kwasniewski appealed or not, but if he did not appeal, there might not be a transcript. We'd have to order it ourselves, and I've run into the problem before where the court reporters no longer have their recordings or their notes to go off of, so I'll try. I just want to make you aware.

THE COURT: Yep, I'm aware of the problem.

MR. SCHULTZ: Thank you.

THE COURT: All right. I think we have covered everything we need to today, would you agree?

MR. MCGRATH: Yes, Your Honor. And we very much appreciate the Court's time.

THE COURT: And we appreciate yours. Mr. Baugh, the best and we will close our hearing for today.

MR. SCHULTZ: Thanks everyone.

THE DEFENDANT: Thank you, Your Honor.

(At 2:47 p.m., court recessed.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the proceedings in the above-entitled matter.

Date: 4-7-2021

Carol M. Harrison, RMR, FCRR
Official Court Reporter
United States District Court
Eastern District of Michigan
1000 Washington Avenue
Bay City, MI 48708