

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

FERONDA MONTRE SMITH

Defendant-Appellant.

GENESEE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

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

Supreme Court No. _____

Court of Appeals No. 304935

Lower Court No. 08-23581FC

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W-29-13

Genesee

J. Farah

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NOTICE OF HEARING
APPLICATION FOR LEAVE TO APPEAL
DEFENDANT-APPELLANTS PRO PER SUPPLEMENTAL BRIEF
PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

JUDGMENT APPEALED FROM AND RELIEF SOUGHT iii

STATEMENT OF QUESTIONS PRESENTED vi

STATEMENT OF FACTS.....1

I. MR. SMITH WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WHERE HE WAS ARRESTED ON OR ABOUT DECEMBER 13, 2007 AND TRIAL BEGAN ON MAY 10, 2011 LARGELY DUE TO DELAYS ATTRIBUTABLE TO THE PROSECUTION.6

II. WHERE THERE WERE ONLY TWO WITNESSES WHO PROVIDED TESTIMONY AGAINST MR. SMITH AND ONE OF THOSE WITNESSES, MARK YANCY, COMMITTED PERJURY THAT WENT UNCORRECTED BY THE PROSECUTION, AND DIRECTLY IMPACTED THE WITNESS' CREDIBILITY, MR. SMITH WAS DENIED HIS DUE PROCESS RIGHTS TO A FAIR TRIAL.13

III. THE PROSECUTION'S ELICITATION, OVER DEFENSE OBJECTION, FROM THE OFFICER IN CHARGE OF HIS PERSONAL BELIEF IN MR. SMITH'S GUILT AND THE PROSECUTION'S REPEATED EMPHASIS ON THAT TESTIMONY IN CLOSING ARGUMENT ALONG WITH A DEMONSTRATION OF THE INCIDENT RESULTED IN A DUE PROCESS VIOLATION OF MR. SMITH'S RIGHTS TO A FAIR TRIAL16

TABLE OF AUTHORITIES

CASES

<i>Barker v Wingo</i> , 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972).....	passim
<i>Berger v United States</i> , 295 US 78; 79 L Ed 1314 (1935).....	20
<i>Klopfers v North Carolina</i> , 386 US 213; 87 S Ct 988; 18 L Ed 2d 1 (1967).....	7
<i>Moore v Arizona</i> , 414 US 25; 94 S Ct 188; 38 L Ed 2d 183 (1973).....	11
<i>Moore v Casperson</i> , 345 F3d 474 (CA 7, 2003).....	14
<i>Napue v Illinois</i> , 360 US 264; 79 S Ct 1173, 3 L Ed 2d 1217 (1959).....	13; 15
<i>People v Ackerman</i> , 257 Mich App 434; 669 NW2d 818 (2003).....	13; 16; 20
<i>People v Barbara</i> , 400 Mich 352; 255 NW2d 171 (1977).....	14
<i>People v Boske</i> , 221 Mich 129; 190 NW 656 (1922).....	19; 20
<i>People v Buckey</i> , 424 Mich 1, 378 NW2d 432 (1985).....	19
<i>People v Cassell</i> , 63 Mich App 226; 234 NW2d 460 (1975).....	14
<i>People v Grimmett</i> , 388 Mich 590; 202 NW2d 278 (1972).....	10
<i>People v Humphreys</i> , 24 Mich App 411; 180 NW2d 328 (1970).....	19; 20
<i>People v Katt</i> , 468 Mich 272; 662 NW2d 12 (2003).....	16
<i>People v Lemmon</i> , 456 Mich 625; 576 NW2d 129 (1998).....	18
<i>People v Lukity</i> , 460 Mich 484; 596 NW2d 607 (1999).....	16
<i>People v McLaughlin</i> , 258 Mich App 635; 672 NW2d 860 (2003).....	6
<i>People v Moreno</i> , 112 Mich App 631; 317 NW2d 201 (1981).....	18
<i>People v Washington</i> , 468 Mich 667; 664 NW2d 203 (2003).....	16
<i>People v Wilder</i> , 485 Mich 35; 780 NW 2d 265 (2010).....	13; 16
<i>Strunk v US</i> , 412 US 434; 93 S Ct 2260; 37 L Ed 2d 56 (1973).....	9

<i>US v MacDonald</i> , 456 US 1, 102 S Ct 1497; 71 L Ed 2d 696 (1982).....	11
<i>US v Marion</i> , 404 US 307; 92 S Ct 455; 30 L Ed 2d 468 (1971).....	8
<i>US v Scheffer</i> , 523 US 303; 118 S Ct 1261; 140 L Ed 413 (1998).....	18

CONSTITUTIONS, STATUTES, COURT RULES

US Const, Amend. V, XIV	19
US Const amend VI	7
US Const, amend XIV	13; 14
Mich Const 1963 art I § 20	7

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Feronda Smith was convicted in the Genesee County Circuit Court and the Court of Appeals affirmed his convictions for armed robbery and first-degree murder in an unpublished opinion issued October 29, 2013. (Opinion attached as Appendix A)

On appeal Mr. Smith, through Counsel, presented three issues and in pro per presented additional issues. On application to this Court Mr. Smith, through Counsel, posits that the Court of Appeals erred in finding no prejudice in the 41-month delay in prosecuting this matter, (Opinion at 3-4), erred in finding that despite the falsity of testimony by the key witness that the fairness of the trial was not undermined (opinion at 5) and erred in holding that prosecutorial misconduct in the form of eliciting testimony from the officer-in-charge of his belief in Mr. Smith's guilt was harmless, (opinion at 6-7)..

It is critical to understanding this case that the only issue was the identity of the person or persons who shot Larry Pass. The entire sum and substance of the prosecution's incriminating evidence was the testimony of two men, Mark Yancy and Terrence Lard, both of whom admitted to being at Mr. Pass's home at the time of the shooting and both of whom could have been the shooter or involved. Mr. Lard was charged and accepted a plea to testify against Mr. Smith and Mr. Yancy was paid \$4000 or more for his cooperation but was not truthful about that fact at trial and the prosecution failed to correct the false testimony.

While the Court of Appeals correctly found that each issue presented had merit, it found each issue was harmless or the equivalent of harmless. The errors in this case were not only not harmless they were an affront to the integrity of the trial process.

There are multiple components to the speedy trial issue but perhaps most pivotal to the analysis is the fact that Mr. Smith and his counsel were ready and wanted to proceed to trial yet the judge refused to allow the trial to move forward because of unspecified errors in the preliminary examination transcript. Making matters worse, defense counsel was leaving his position and therefore not able to try the case if there was a delay. So the judge's actions over defense objection not only resulted in some delay but substantial delay as new counsel had to come in on this very complicated case. The delay was unsupportable by any reasoned analysis. The prejudice was borne about by the fact that the agent who had previously testified about the payments to Mark Yancy was unavailable to testify at trial and the excessive incarceration of Mr. Lard, which arguably impacted his willingness to cooperate.

The other two issues, the falsity of Mr. Yancy's testimony and the prosecution's failure to correct it as well as the prosecutorial misconduct in asking the officer-in charge about his personal belief in Mr. Smith's guilt and arguing that as a reason to convict are significant issues that this Court should address. There was a pervasive pattern of misconduct in this case that the Court of Appeals acknowledged in part but failed to find harmful. Such a finding ignores the constitutional protections afforded to all criminal defendants and in this particular case to Mr. Smith. A key prosecution witness testified falsely. The prosecution failed to correct that falsity. Yet the Court of Appeals found that because the witness was otherwise adequately impeached that the error was

harmless. The Court engaged in essentially the same analysis on the prosecutor's misconduct in eliciting improper opinion testimony and arguing that improper evidence as a reason to find Mr. Smith guilty. The Court of Appeals found that because the jury acquitted Mr. Smith of the three gun charges that the misconduct had no impact. Such reasoning ignores the reality of the situation. There would be no issue if Mr. Smith was acquitted of all charges, only then could one reach the conclusion that the misconduct had no impact.

Mr. Smith, like all criminal defendants, was entitled to a fair trial. His trial was not fair and the pervasiveness of the unfairness undermined the integrity of this particular trial to such a degree that the convictions should not stand.

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court either peremptorily reverse the Court of Appeals by either vacating his convictions finding a speedy trial violation or reversing his convictions and granting a new trial or grant leave to hear the case.

Respectfully submitted,

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Dated: December 12, 2013

STATEMENT OF QUESTIONS PRESENTED

- I. WAS MR. SMITH DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WHERE HE WAS ARRESTED ON OR ABOUT DECEMBER 13, 2007 AND TRIAL BEGAN ON MAY 10, 2011 LARGELY DUE TO DELAYS ATTRIBUTABLE TO THE PROSECUTION?

Trial Court answers, "No".

Court of Appeals answers, "No."

Defendant-Appellant answers, "Yes".

- II. WHERE THERE WERE ONLY TWO WITNESSES WHO PROVIDED TESTIMONY AGAINST MR. SMITH AND ONE OF THOSE WITNESSES, MARK YANCY, COMMITTED PERJURY THAT WENT UNCORRECTED BY THE PROSECUTION, AND DIRECTLY IMPACTED THE WITNESS' CREDIBILITY, WAS MR. SMITH DENIED HIS DUE PROCESS RIGHTS TO A FAIR TRIAL?

Trial Court made no answer.

Court of Appeals answers, "No."

Defendant-Appellant answers, "Yes".

- III. DID THE PROSECUTION'S ELICITATION, OVER DEFENSE OBJECTION, FROM THE OFFICER IN CHARGE OF HIS PERSONAL BELIEF IN MR. SMITH'S GUILT AND THE PROSECUTION'S REPEATED EMPHASIS ON THAT TESTIMONY IN CLOSING ARGUMENT ALONG WITH A DEMONSTRATION OF THE INCIDENT RESULT IN A DUE PROCESS VIOLATION OF MR. SMITH'S RIGHTS TO A FAIR TRIAL?

Trial Court answers, "No".

Court of Appeals answers, "No."

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Following a nine (9) day jury trial in the Genesee County Circuit Court, Mr. Smith was acquitted of three charges: felon in possession of a firearm¹, carrying a concealed weapon² and felony firearm³. Trial Transcript Volume 9 (T 9), 8-9. He was convicted as charged of armed robbery⁴ and first-degree felony murder⁵ and sentenced to the mandatory term of life imprisonment for the murder conviction and 250 months to 35 years for the armed robbery conviction. Sentencing Transcript (ST), 10-11.

This case involved the murder of Larry Pass Jr., a drug dealer who died in his home in November 2005 as a result of being shot 8 times with a 9 millimeter weapon. T 4, 7, 11. Of note, is that although Mr. Pass was murdered in November 2005 the trial in this matter did not begin until May 2011, despite Mr. Smith being bound over on September 17, 2008.

The only evidence implicating Mr. Smith came from two witnesses. Mark Yancy testified he was present in the home when the incident took place and Terrance Lard, originally charged as a co-defendant, testified in exchange for a plea to unarmed robbery and manslaughter.

The prosecution's theory was that Mr. Smith shot Mr. Pass and that Mr. Lard and Mr. Yancy were in another room at the time of the shooting. T 1, 11-13; T2, 11-13. The defense theory was that Mr. Lard or Yancy shot Mr. Pass and Mr. Smith was not present or involved. T 1, 18; T 2 16-19.

Two motions to dismiss were brought and denied during the pendency of the case. (12/7/09, 1/11/10, 2/25/10 pre trial hearing transcripts and 3/7/11 and 4/8/11 hearing transcripts.)

¹ MCL 750.224

² MCL 750.227

³ MCL 750.227b

⁴ MCL 750.529

⁵ MCL 750.316

The Court denied Mr. Smith's request for the appointment of appellate counsel to pursue an interlocutory appeal on the speedy trial motion. (4/8/11 hearing transcript)

On November 4, 2005 *Marquis Sanders* bought cocaine from Larry Pass a/k/a Country. T 2, 81-82. Mr. Sanders called Country later on to purchase more cocaine. Although Country did not answer his phone call, Mr. Sanders went to Country's home with Tywone Bonner and another individual. T 2, 82-83, 114-115. He entered after receiving no response to his knock on the door and saw the Complainant lying on the floor. T 2, 83-84. He did not call the police because he was high on cocaine (T 2, 94) and was in violation of his probation. T 2, 91. Instead he called the friend who had introduced him to the Complainant. T 2, 84-85. Mr. Sanders denied killing the Complainant. T 2, 89.

Tywone Bonner went with Marquis Sanders to Country's home on 11/5/05. After going to the door, Mr. Sanders returned to the car and said there was a dead guy in the house. T 2, 114-115.

At trial, Mr. Bonner testified that Mr. Sanders was in the home a very short time and he heard no gun shots. T 2, 116-117. However, he told the police that he had heard 3-4 shots when Mr. Sanders went to the house. At trial he stated that those shots were not from the house. T 2, 124-125.

Sergeant Nelson interviewed Mr. Bonner. Mr. Bonner told Sgt Nelson that he heard three shots when he was outside Country's home. T 3, 134-135.

Many people responded to the scene including EMS⁶, police⁷ and evidence technicians⁸.

⁶ EMS is used broadly to encompass firefighters, paramedics and anyone who rendered aid. Eric Imeron, firefighter/paramedic, T 2, 7-10.

⁷ Officer Petrich, T 3, 47-57; Officer Tolbert, T 3, 60, Sergeant Coon, T 3, 67; Sergeant Collins T 5, 72; Sergeant Larrison, T 5, 81-83.

Shaquana Kidd and **Tracy Woodson** were friends: T 6, 63 (Kidd); T 4, 33-34 (Woodson). Ms. Kidd knew Mr. Bonner and purchased dope from Country. T 6, 64. On Friday night 11/4/05 she and Tracy went out and returned home around 6:00 am. T 6, 65; T 4, 36-38.

When they returned there was a message on the answering machine from Mr. Bonner. T 6, 65-66. After hearing the message she went to Country's home and found him dead. T 6, 66. Ms. Kidd told the police that the last people around Country were Mr. Bonner and Quis. T 6, 73-74.

Mark Yancy, who claimed to be at Country's home at the time of the incident, received, according to his testimony, \$4500.00 from the federal government. He testified that the payout had nothing to do with the current case. T 4, 74-75, 99.

However, Agent Harris testified at a pretrial hearing that Mark Yancy was paid \$4000 for information about Pierson-Hood⁹ and the Larry Pass homicide, which specifically included information against Mr. Lard and Mr. Smith (10/6/10 at 14).

Mr. Yancy knew Country as the neighborhood drug dealer and frequented his house to buy drugs. T 4, 56-57. Mr. Yancy had known Mr. Smith and Mr. Lard for many years and testified that they were often together. T 4, 57-58.

On November 5, 2005 Mr. Yancy claimed he went to Country's home twice. The first time he purchased cocaine. T4, 59-60. The second time he played video games with Country. T4, 60-61.

⁸ Linda Anthony, evidence technician T 2, 31-59; T3, 16-30; Tonya Griffin, police terminal operator T 2, 69-71; Alona Smallwood, Crime scene technician, T 3, 39-41; Elaine Dougherty, T 5, 43-46.

⁹ Mr. Smith and many others were originally charged with conducting a continuing criminal enterprise allegedly connected to a gang referenced as Pierson-Hood. That charge was dismissed.

According to Yancy, while playing video games there was a knock on the door and Country let into the house Mr. Smith and Mr. Lard. T4, 62. Country went into the bathroom to get cocaine for Mr. Smith and Mr. Lard and when he returned Mr. Yancy heard multiple gunshots. T 4, 66-67. Mr. Lard pulled a gun on him and asked him if he knew where the dope was. T 4, 68. He saw Mr. Smith with a gun and believes that Mr. Smith killed Country. T 4, 104-105, 108.

Mr. Yancy got the dope (an ounce of crack and an ounce of cocaine) and they all left the house together. T 4, 68-71. Mr. Yancy and Mr. Smith used the cocaine. T 4, 73.

Mr. Yancy admitted that shortly before the shooting he had a dispute with Mr. Smith over money. T 4, 79-80. Also, while at Country's home he snorted cocaine and smoked marijuana. T 4, 83.

According to *Detective Sergeant Ainslie*, who analyzed the firearms evidence, all the bullets were fired from one gun as were the casings. However, he was unable to determine if the bullets and casings came from the same weapon because he did not have a firearm. T 5, 35, 41. The weapon was a 9mm Luger caliber firearm. T 5, 42.

Dishonder Williams, who had children with Country, made the identification. T 5, 103. Country sold drugs and normally kept the door locked as he had a lot of enemies. T 5, 104-105, 107-108. He also carried a gun. T 5, 109.

Kathleen Boyer of the Michigan State Police tested for fingerprints at Country's home and found nothing to indicate Mr. Smith had been at the home. T 6, 53.

Co-Defendant *Tarence Lard* testified in exchange for a plea deal to manslaughter and unarmed robbery. T 6, 102, 126, 129. According to Mr. Lard he and Mr. Smith went to

Country's home on 11/4/05-11/5/05 (witness not sure on time T 6, 87) to buy drugs. T 6, 86-87. When they arrived Mr. Yancy was in the home sitting on the couch. T 6, 88.

Mr. Lard went into the living room with Mr. Yancy while Mr. Smith bought the cocaine from Country. T 6, 90-91. Mr. Lard testified that Country went into the bathroom twice and he then heard about 5-6 fast, repetitive shots. T 6, 92. 93.

According to Lard he did not have a gun and Country did not have a gun. T 6, 95. Mr. Lard told Mr. Yancy to get the dope, turned it over to Mr. Smith and they all left. T 6, 96. Mr. Lard knew Mr. Smith to carry a 9 mm handgun. T 6, 98

Sergeant Ellis, the Officer-in-Charge, received information that Mr. Yancy was in Country's home at the time of the shooting in July 2006. T 7, 25. At the same time he received information that Mr. Smith and Mr. Lard killed Country. T 7, 26.

Over defense counsel's objection, Sergeant Ellis responded to the prosecutor's question "is there any question in your mind that Feronda Smith killed Larry Pass", by saying "No." T 7, 42.

During closing arguments the prosecutor argued things like Sergeant Ellis had no doubt that Mr. Smith killed Country and "we are confident that it was the Defendant that killed Larry Pass." T 8, 27, 84, 88. Also during closing argument, over defense counsel's objection T 8, 127-129, the prosecutor engaged in a demonstration of the shooting. T 8, 88-91. This is Mr. Smith's appeal of right.

I. MR. SMITH WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WHERE HE WAS ARRESTED ON OR ABOUT DECEMBER 13, 2007 AND TRIAL BEGAN ON MAY 10, 2011 LARGELY DUE TO DELAYS ATTRIBUTABLE TO THE PROSECUTION.

Issue Preservation and Standard of Review:

Whether a defendant has been denied his right to a speedy trial presents a constitutional question this court reviews *de novo*. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860, 867 (2003). Mr. Smith preserved this issue by filing/making multiple speedy trial demands and filing two written motions to dismiss. *See Appendix A, Court's Opinions on Speedy Trial Motions (April 22, 2010 and April 25, 2011)*.

Argument:

There can be no dispute in this case that there was a significant delay from arrest to trial. Mr. Smith was arrested in December 2007 and trial began in May 2011. Trial counsel filed two motions to dismiss on speedy trial grounds and Judge Farah issued a written opinion each time. The Court's opinions are attached as Appendix A.

In the Court's decision on the first speedy trial motion, the Court found 16 months of delay attributable to the prosecution. (Opinion at pages 6-7) The Court denied the motion finding no prejudice.

In the second decision, the Court found that the delay attributable to the appointment of new counsel, as counsel obtained new employment precluding him from continuing on the case, was attributable to the defense. (Opinion at page 1). The Court went on to state "While the Court recognizes that some delay was caused by correction of some of the preliminary examination transcripts, the delay is of neutral tint because it was not caused by the People and

the corrected transcript could be used to Defendant's advantage." (Opinion at page 2). The Court's analysis of this issue misses the mark.

On June 22, 2010 it was the trial court that called the parties into court. The Court indicated that it had been informed the day prior of problems with the district court transcripts (Mr. Smith had earlier brought it to the Court's attention that the transcripts were inaccurate). *Despite both sides being ready for trial*, and wishing to proceed to trial, the trial judge unilaterally adjourned until the parties had time to review the corrected transcripts.

On June 28, 2010 trial counsel had to remove himself from the case due to a new job, thus necessitating the appointment of new counsel.

Yet, in denying the motion to dismiss on speedy trial grounds the trial court treats as insignificant the delay caused by the transcript issues. When, in fact, it was the Court's decision to delay the trial due to the errors in transcription with the preliminary examination transcripts and the trial court knew that Attorney Vance would no longer be able to represent Mr. Smith with this delay. The entire delay from June 22, 2010 to May 10, 2011, over 10 months, should be counted against the prosecution as Mr. Smith and his counsel were prepared to go to trial, wanted to proceed to trial and the only reason that the trial failed to occur was the judge's sua sponte decision to delay it. With this additional 10 month delay added to the already determined 16 month delay, the delay in bringing this case to trial was, at a minimum, 26 months.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." US Const Am VI. Michigan offers a virtually identical protection in its constitution. See Mich Const 1963 art I § 20.1 This right is fundamental to our system of justice and "one of the most basic rights preserved by our Constitution." *Klopper v North Carolina*, 386 US 213, 226; 87 S Ct 988, 995; 18 L Ed 2d 1

(1967). The provision prevents persons accused of crimes from “undue and oppressive incarceration prior to trial ... anxiety and concern accompanying public accusation and ... impair[ed] ... ability ... to defend himself.” *US v Marion*, 404 US 307, 320; 92 S Ct 455, 463; 30 L Ed 2d 468 (1971). As the *Marion* court observed, serious policy considerations drive the rule:

Inordinate delay between arrest, indictment and trial may impair a defendant’s ability to present an effective defense. **But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused’s defense.** To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. **Arrest is a public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and his friends.**

Id at 320; 92 S Ct at 463; 30 L Ed 2d 468 (emphasis supplied).

In *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182, 2192; 33 L Ed 2d 101 (1972) the Supreme Court identified four factors for lower courts to consider in evaluating whether an accused has been denied a speedy trial. They include “[l]ength of delay, the reasons for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Id*. While a court must consider each *Barker* factor individually, no factor alone is dispositive:

We regard none of the four factors identified ... as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must engage in a difficult and sensitive balancing process. **But because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused’s interest in a speedy trial is specifically affirmed in the Constitution.**

Id at 533; 92 S Ct at 2193; 33 L Ed 2d 101 (emphasis supplied). Analyzing Mr. Smith's case according to the *Barker* factors reveals Mr. Smith was denied his right to a speedy trial.

As discussed in more detail above, Mr. Smith was jailed for 3-1/2 years awaiting trial. He personally asserted his speedy trial rights on numerous occasions and his defense attorneys filed motions to dismiss on speedy trial grounds.

The US Supreme Court identified three kinds of delay in *Barker*: (1) deliberate delays, for example, where a prosecutor attempts to hamper a defense; (2) neutral delays, caused by things like prosecutorial negligence or overcrowded dockets; and (3) valid delays, as might occur when something like a necessary witness is missing. *Barker, supra* at 527. The ultimate responsibility for "neutral" delays still rests with the government. *Id* at 529 (noting that the primary burden to assure cases are brought to trial rests with prosecutors, not defendants). Here, the trial court initially found 16 months of chargeable delay to the prosecution. Following the denial of the first motion to dismiss on speedy trial grounds, Mr. Smith suffered continued incarceration for an additional year before the second motion to dismiss was denied and another several weeks before his trial began.

Under *Barker*, standard pre-trial delays are the responsibility of the prosecutor. It is well settled that delays caused by docket congestion cannot be weighed against the defendant. Unintentional or otherwise, they are more properly charged to the prosecution, since the State – not the accused – bears the duty of bringing a defendant to trial. *Strunk v US*, 412 US 434, 436-37; 93 S Ct 2260, 2262; 37 L Ed 2d 56 (1973). Moreover, focusing on whether the prosecutor caused a delay for a "legitimate" reason or because of bad faith is somewhat misplaced. Indisputably, the fact remains that Mr. Smith had **no hand whatsoever** in the delay.

Accordingly, the only reasonable conclusion is that this factor ultimately weighs against the prosecution.

Here, Mr. Smith asserted his right to a speedy trial in a proper and timely fashion.

The *Barker* court passed on the importance of a defendant asserting his right to a speedy trial:

The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to **strong evidentiary weight in determining whether the defendant is being deprived of the right.**

407 US at 531-32; 92 S Ct at 2192-93; 33 L Ed 2d 101 (1972) (emphasis added). Since Mr. Smith took every reasonable step in preserving his right to a speedy trial, *Barker* dictates that this factor weighs heavily in Mr. Smith's favor.

Under Michigan law, if eighteen months pass between arrest and the start of trial, courts will **presume** prejudice to the defendant. *People v Grimmett*, 388 Mich 590, 606; 202 NW2d 278, (1972) (overruled on other grounds, 390 Mich 245; 212 NW2d 222 (1972)). Here, since the delay exceeded eighteen months, prejudice to Mr. Smith is presumed. The People now bear the heavy burden of justifying the delay and showing that no prejudice accrued to Mr. Smith's defense or his person. *See Barker, supra* at 533; 92 S Ct at 2193; 33 L Ed 2d 101. *See also, Doggett, supra* at 659; 112 S Ct at 2695; 120 L Ed 2d 520 (THOMAS J., dissenting) (identifying 'the major evils' against which the Speedy Trial Clause is directed as 'undue and oppressive incarceration' and the 'anxiety and concern accompanying public accusation,' and emphasizing that these two concerns "lie at the heart of the Clause.") (internal citations and quotations omitted).

Moreover, while acknowledging the importance of considering prejudice in weighing the *Barker* factors, the Supreme Court has cautioned against placing undue emphasis on the need to show actual prejudice to one's defense:

“The Sixth Amendment right to a speedy trial is ... not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is primarily protected by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.”

US v MacDonald, 456 US 1, 8; 102 S Ct 1497, 1502; 71 L Ed 2d 696 (1982) (emphasis added).

And even though *Barker* provides the analytical framework for evaluating speedy trial claims, later decisions interpreting that case challenge the notion that lack of prejudice, alone, should be fatal. *See generally, Moore v Arizona*, 414 US 25, 26; 94 S Ct 188, 189-90; 38 L Ed 2d 183 (1973) (observing that *Barker* “expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial,” and focusing on the need to keep in mind whether in light of a defendant’s demands, the State discharged its duty under the constitution to make a “diligent, good-faith effort to bring him to trial.”).

The factors identified above weigh heavily in Mr. Smith’s favor. He timely asserted his rights, and notwithstanding the diligence on his part, the trial did not begin until he had been continually incarcerated for over three years. While justifiable reasons may have existed for some delay in bringing Mr. Smith to trial, one must not lose focus in analyzing these claims; it is **Mr. Smith** – not the prosecution – who the Sixth Amendment exists to protect. As the *Barker* court cautioned, the State must resist the temptation to diminish the significance of the speedy trial right, which the framers enshrined in the very text of our Constitution. 407 US at 533; 92 S Ct at 2193; 33 L Ed 2d 101 (reminding courts that because the inquiry involves a fundamental

right, the process must take place with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.).

The Sixth Amendment dictates dismissal of the charges where there was inordinate delay directly attributable to the prosecution and the court, where the delay was far greater than 18 months thus engendering the presumption of prejudice and where there was actual prejudice in the form of an additional witness, Mr. Lard, who agreed to testify only after extreme incarceration (T 8, 85) and coercive tactics and the personal cost to Mr. Smith¹⁰. This court must vacate Mr. Smith's convictions.

¹⁰ Mr. Smith was treated for an adjustment order while in jail, he had been enrolled and attending Baker College but lost his financial aid eligibility, and he suffered many other losses during his extensive pretrial incarceration.

II. WHERE THERE WERE ONLY TWO WITNESSES WHO PROVIDED TESTIMONY AGAINST MR. SMITH AND ONE OF THOSE WITNESSES, MARK YANCY, COMMITTED PERJURY THAT WENT UNCORRECTED BY THE PROSECUTION, AND DIRECTLY IMPACTED THE WITNESS' CREDIBILITY, MR. SMITH WAS DENIED HIS DUE PROCESS RIGHTS TO A FAIR TRIAL.

Issue Preservation

This issue was not preserved but it was the prosecution that had the duty to correct the perjured testimony.

Standard of Review

Prosecutor misconduct is reviewed de novo to determine whether Mr. Smith was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448-49; 669 NW2d 818 (2003).

A due process violation presents a constitutional question, which this Court reviews de novo. *People v Wilder*, 485 Mich 35, 40, 780 NW 2d 265 (2010).

Argument

The government's use of perjured testimony to obtain a criminal conviction violates the Due Process Clause of US Const, amend XIV. *Napue v Illinois*, 360 US 264, 79 S Ct 1173, 3 L Ed 2d 1217 (1959).

In this case, despite a 9 day trial, only two witnesses were the key to the prosecution's entire case. One witness was Terance Lard who agreed to testify against Mr. Smith only after being in jail for two years and who received a plea deal in exchange for his testimony. T 6, 102, 126, 129. The other was Mark Yancy who claimed to not be involved despite his admission that he handed over cocaine to Mr. Lard and his admission that he not only left with Mr. Lard and Mr. Smith (T 4, 68-71) after the shooting but also used cocaine with Mr. Smith T 4, 73.

The defense theory was that Mr. Lard or Yancy shot Mr. Pass and Mr. Smith was not present or involved. T 1, 18; T 2 16-19. The defense also argued that Mr. Yancy had a motive to frame Mr. Smith based on a prior altercation. T 4, 79-80. Also, while at Country's home Yancy snorted cocaine and smoked marijuana. T 4, 83.

Mark Yancy, who claimed to be at Country's home at the time of the incident, received, according to his testimony, \$4500.00 from the federal government. He testified that the payout had nothing to do with the current case. T 4, 74-75, 99.

However, Agent Harris testified at a pretrial hearing that Mark Yancy was paid \$4000 for information about Pierson-Hood¹¹ and the Larry Pass homicide, which specifically included information against Mr. Lard and Mr. Smith (10/6/10 at 14).

The prosecutor has a duty to correct perjured testimony not only going to the elements of the charged offense, but anything that affects the credibility of a witness. *Id* at 269. As a corollary, a defendant is entitled to a new trial based on newly discovered evidence that a material witness committed perjury. *People v Barbara*, 400 Mich 352, 255 NW2d 171 (1977); *People v Cassell*, 63 Mich App 226, 234 NW2d 460 (1975).

Furthermore, the refusal to grant a new trial based on newly discovered evidence may violate the Due Process Clause of US Const, amend XIV, where the evidence is "so compelling that it would be a violation of ... fundamental fairness ... not to afford a defendant a new trial...." *Moore v Casperson*, 345 F3d 474, 491 (CA 7, 2003).

In the present case, the prosecutor knew that several witnesses had received money from agents of the federal government. There were at least two hearings regarding the various payouts. *See generally*, Transcripts of 9/3/10 and 10/6/10. The prosecution, as discussed in Issue

¹¹ Mr. Smith and many others were originally charged with conducting a continuing criminal enterprise allegedly connected to a gang referenced as Pierson Hood. That charge was dismissed.

III, *Infra*, put great emphasis on vouching for the credibility of both testifying and non-testifying parties to convince the jury that the police and prosecutor knew they had the guilty party. It was the prosecution's duty to correct the perjured testimony and the prosecution failed to do so.

Agent Harris was unequivocal in his sworn testimony that the large sum of money to Mr. Yancy was for the receipt of information regarding both another case AND the Larry Pass homicide. (10/6/10 at 14).

The government's use of perjured testimony to obtain a criminal conviction violates the Due Process Clause of US Const, amend XIV. *Napue v Illinois*, 360 US 264, 79 S Ct 1173, 3 L Ed 2d 1217 (1959). In this case the prosecution used perjured testimony to bolster the credibility of a witness who had every reason to frame Mr. Smith for this homicide. Mr. Yancy never disputed that (1) he was smoking cocaine and using marijuana that night, (2) he had an altercation with Mr. Smith just prior to this shooting, or that (3) he left with the alleged perpetrators of the shooting and used cocaine with Mr. Smith following the shooting. Nothing about Mr. Yancy's story makes him a credible character and the fact the he accepted a very large sum of money to implicate Mr. Smith directly would have impacted his credibility even further. Given that the jury acquitted Mr. Smith of all the gun charges despite the prosecution theory that he was the shooter arguably says something about Mr. Yancy's credibility in this matter.

Mr. Smith is entitled to a new trial free from the taint of perjured testimony.

III. THE PROSECUTION'S ELICITATION, OVER DEFENSE OBJECTION, FROM THE OFFICER IN CHARGE OF HIS PERSONAL BELIEF IN MR. SMITH'S GUILT AND THE PROSECUTION'S REPEATED EMPHASIS ON THAT TESTIMONY IN CLOSING ARGUMENT ALONG WITH A DEMONSTRATION OF THE INCIDENT RESULTED IN A DUE PROCESS VIOLATION OF MR. SMITH'S RIGHTS TO A FAIR TRIAL

Issue Preservation

Defense counsel preserved this issue at trial by objecting to the prosecution's question to Sergeant Ellis (T 7, 42,), by moving for a mistrial based on the elicitation of this testimony that Sergeant Ellis believed Mr. Smith was guilty (T 7, 44-47) and by objecting to the prosecution's demonstration during rebuttal closing argument (T 8, 88-91).

Standard of Review¹²

This Court reviews for abuse of discretion a trial court's decision to admit or to exclude evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670—71; 664 NW2d 203 (2003). Consequently, there is an "abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Prosecutor misconduct is reviewed de novo to determine whether Mr. Smith was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448-49; 669 NW2d 818 (2003).

A due process violation presents a constitutional question, which this Court reviews de novo. *People v Wilder*, 485 Mich 35, 40, 780 NW 2d 265 (2010).

¹² This issue involves both the admission of evidence in the form of Sergeant Ellis's testimony on the ultimate question of Mr. Smith's guilt or innocence and a challenge to the prosecution's closing argument, which while clearly not evidence, is similar in nature given what was done.

Argument

There are multiple problems that occurred during this trial relating to the prosecution's questioning of the Officer-in-Charge and her argument about that testimony. The following exchange occurred when the prosecution questioned Sergeant Ellis:

Q. Okay. Sergeant, are you confident that you have the right person seated in this defendant's seat?

Mr. Whitesman (Defense Counsel): I want to object. That's the ultimate issue for the jury. I object to that.

The Court: The ultimate issue for the jury is to evaluate his testimony on whether he believes that they have the right person.

Mr. Whitesman: It calls for an improper opinion also.

The Court: So, I'll overrule the objection. The jury can either accept his conclusion or reject it. That's what the jury is there for."

By Ms. Hanson:

Q. **Sergeant, is there any question in your mind that Feronda Smith killed Larry Pass?**

A. **No.**

T 7, 42 (emphasis added).

Following this exchange, defense counsel moved for a mistrial stating:

Mr. Whitesman: First of all, you know, when I do this, I'm not in any way trying to be disrespectful, but I think that the officer being allowed to tell the jury that he has no doubt that my client is the killer was an impermissible inquiry that was so egregious that it should be a basis for a mistrial."

T 7, 44

The Court not only rejected the argument but chastised counsel for making it. T 7, 44-45.

In closing argument, the prosecutor relied heavily on Sergeant Ellis and took the jury extensively through his testimony, including testimony on why certain witnesses had not come forward. T 8, 24-27. She reminded the jury *that Sergeant Ellis "indicated to you he had no doubt in his mind that the defendant is the one who killed Larry Pass."* T 8, 27 (emphasis added).

The prosecutor also argued Segeant Ellis's testimony that Lewis Nelson and Tyquan Avery told him that Mr. Smith was the one who killed Larry Pass. Neither of those people testified.

The prosecutor began her rebuttal closing argument by telling the jury that "***we are confident that it was the defendant Feronda Smith that killed Larry Pass.***" T 8, 84 emphasis added. She went on to argue that "***we believe that Larry Pass was killed by the defendant, and we believe Mark Yancy and Tarence Lard's statements.*** Of course, some of the things they say might be confused, they might be mixed up. It was five years ago, but the important things they remembered," T 8, 88 emphasis added.

Following these arguments the Judge instructed the jury that there was going to be a demonstration and that it was not evidence. T 8, 88.

Defense Counsel objected stating: "I just want to supplement my objection. I can't cross-examine this. Okay? There is what we believe. What the prosecution believes is improper closing argument. Okay? This should have been done during the evidence". T 8, 89. The demonstration then took place. T 8, 89-91. And, defense counsel continued to object on the basis that the demonstration did not conform to the evidence. T 8, 90, 127-129.

A key function of the jury is to evaluate the reliability of each witness. *See US v Scheffer*, 523 US 303, 312-13, 118 S Ct 1261, 140 L Ed 413 (1998); *People v Lemmon*, 456 Mich 625, 637, 576 NW2d 129 (1998). When the prosecutor steps in and begins making statements pertaining to the witnesses' reliability, she usurps this important function. A witness opinion concerning the guilt or innocence of a criminal defendant is not admissible. *People v Moreno*, 112 Mich App 631, 635; 317 NW2d 201 (1981).

Improper questions warrant reversal when "the defendant might have been prejudiced by improper bolstering of the credibility of prosecution witnesses or by allowing an opinion on his guilt or credibility to be expressed." *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

The prosecution asserted that it was a *fact* Mr. Lard and Mr. Yancy were credible and believable witnesses. Credibility determinations should be made by the jury, not the prosecutor. Portraying the prosecution's mere opinion as fact was improper because "[i]t was the duty of the jury to pass upon the facts and decide the question of guilt or innocence uninfluenced by the opinions of others." *People v Boske*, 221 Mich 129, 134; 190 NW 656 (1922); *People v Humphreys*, 24 Mich App 411, 419-20; 180 NW2d 328 (1970) (quoting *Boske*, 221 Mich at 134) (holding that improper prosecutor remarks during closing were reversible error and granting a new trial).

The application of the *Humphreys* doctrine in this case is especially appropriate because of the key similarities between Mr. Smith's and Mr. Humphreys's trials. Both cases called for the jury to weigh conflicting testimony regarding the key issue. *Id.* Just like in *Humphreys*, where credibility determinations were dispositive to the outcome as they were here, this Court should find that the prosecution engaged in misconduct and grant a new trial. *Id.* at 420.

The prosecutor argued, repeatedly, what she believed in terms of who committed the murder and who was a credible witness. Such arguments, as pointed out by defense counsel, were improper because the prosecutor portrayed her own opinion, and the opinion of the Officer-in-Charge as fact. *Boske*, 221 Mich at 134; *Humphreys*, 24 Mich App at 419-20.

The prosecutorial misconduct denied Mr. Smith his right to a fair trial, guaranteed by the due process clauses of the federal and state constitutions. US Const, Amend. V, XIV; Const 1963, art 1, sec 17. Mr. Smith is entitled to a new trial because the prosecutor's misconduct

“seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *People v Ackerman*, 257 Mich App 434, 448-49; 669 NW2d 818 (2003). The fairness of Mr. Smith’s trial was seriously affected by the prosecution’s misconduct that succeeded in characterizing the only relevant prosecution witnesses, both of whom could have been the actual shooter, as credible and believable. Given that the jury acquitted Mr. Smith of all the gun charges despite the prosecution theory that he was the shooter arguably says something about Mr. Yancy’s and Mr. Lard’s credibility in this matter.

The prosecution's duty, first and foremost, is to ensure that justice is done, and it did not do so in this case.

In addition, the prosecutor's actions showed disrespect for the criminal justice system and should be punished by this Court. Prosecutors have a duty “to see that the person charged with crime receives a fair trial, so far as it is in his power to afford him one . . . [and] . . . his methods to procure conviction must be such as accord with the fair and impartial administration of justice.” *Bahoda*, 448 Mich 261, 267, n.6; 531 NW2d 659 (1995); see *Berger v United States*, 295 US 78, 88-9; 79 L Ed 1314 (1935). The prosecution resorted to improper tactics in conducting a display, during closing argument, of what she thought happened in the house and repeatedly telling the jury that “we” believe in the guilt of the defendant. Additionally, when the “closeness of the ultimate factual question” is clear and this Court is unable to say that an instruction “ would have eliminated the prejudice inhering in [the] unfortunate remark[s]” of the prosecutor, it is reversible error and a new trial is appropriate. *Humphreys*, 24 Mich App at 420.