Approved, Michigan Court of Appeals

LOWER COURT	Electronically Filed	CASE NO.
		Lower Court 10-232149FC
Oakland County Circuit Court	BRIEF COVER PAGE	Court of Appeals 304610

(Short title of case)

Case Name: **People v. Wilbern Woodrow Cooper**

1. Brief Type (select one):
   - ☒ APPELLANT(S)
   - ☐ APPELLEE(S)
   - ☐ REPLY
   - ☐ CROSS-APPELLANT(S)
   - ☐ CROSS-APPELLEE(S)
   - ☐ AMICUS
   - ☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **Wilbern Woodrow Cooper**

3. ☐ This brief is in response to a brief filed on by .

4. ORAL ARGUMENT: ☒ REQUESTED ☐ NOT REQUESTED

5. ☐ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
   [See MCR 7.212(C)(12) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]
   - ☒ Table of Contents [MCR 7.212(C)(2)]
   - ☒ Index of Authorities [MCR 7.212(C)(3)]
   - ☒ Jurisdictional Statement [MCR 7.212(C)(4)]
   - ☒ Statement of Questions [MCR 7.212(C)(5)]
   - ☒ Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
   - ☒ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
   - ☒ Relief Requested [MCR 7.212(C)(9)]
   - ☒ Signature [MCR 7.212(C)(9)]

7. This brief is signed by [type name]: **Marla R. McCowan**
   Signing Attorney's Bar No. [if any]: **P57218**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Oakland County Circuit Court by jury trial and a Judgment of Sentence was entered on June 1, 2011. A Claim of Appeal was filed on June 16, 2011 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated June 1, 2011, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

STATEMENT OF QUESTIONS PRESENTED

WHETHER THE TRIAL COURT VIOLATED MR. COOPER'S CONSTITUTIONAL RIGHTS BY ADMITTING INTO EVIDENCE STATEMENTS OBTAINED WHERE THE POLICE QUESTIONED APPELLANT AFTER HE UNAMBIGUOUSLY INVOKED HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT; WHETHER ANY STATEMENTS MADE THEREAFTER WERE INVOLUNTARY AND SHOULD HAVE BEEN SUPPRESSED?

Trial Court answered, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

OVERVIEW: Defendant-Appellant Wilbern Cooper was convicted of one count of first degree felony murder and one count of second degree murder after a jury trial in the Oakland County Circuit Court, Judge Wendy Potts presiding.

This case involves the September 29-30, 1978 killing of David McKillop in Farmington Hills, Michigan. Defendant Cooper was charged with "Open Murder" after a witness, Billy Joe Lolley became terminally ill in 2006 and provided information implicating Mr. Cooper as the perpetrator of the crime. *See generally*, Lower Court Records; Information; Preliminary Examination Vol I, page 66. Mr. Cooper made a series of statements during the investigation and was ultimately arrested in 2010. The trial court declined to suppress his statements. *See generally* Docket Entries and Lower Court Records; "*Ruling*" transcript dated November 24, 2010 (Attached as **Appendix H**). Mr. Cooper's trial occurred over the course of six days in May of 2011 (hereafter abbreviated by volume number)[1].

PRE-TRIAL PROCEEDINGS: A Preliminary Examination was conducted in the 47th District (Farmington Hills) on May 21 and May 27, 2010, resulting in Mr. Cooper being bound over as charged on the Information alleging Open Murder, contrary to M.C.L. §750.316-C. Prior to trial, the defense sought to suppress statements that the Defendant made during the investigation on the theory that the statements were made after he invoked his right to remain silent and that continued questioning rendered any subsequent statements involuntarily made. *See generally* Motions and Responses by the parties, attached as **Appendices D, E, F, G**. On November 24, 2010, the trial

[1] "T I" = Trial Transcript of May 2, 2011; "T II" = Trial Transcript of May 3, 2011"T III" = Trial Transcript of May 5, 2011"T IV" = Trial Transcript of May 6, 2011"T V" = Trial Transcript of May 9, 2011"T VI" = Trial Transcript of May 10, 2011.

court denied the defense's Motion to Suppress. *See "Ruling"* and Order attached as **Appendix H**; *See also* Issue I, *Infra.*

FACTS ESTABLISHED AT TRIAL:

In September of 1978, Paul Robert Jenkins was 32 years old. (T II, 66). He was dating a woman named Judy Frazer, and had been in a long term relationship with her, and was planning to move to Arizona. (T II, 49-50, 58, 60, 72). Mr. Jenkins owned a real estate business, "Landmark Realty", and several rental properties in the "Brightmoor" area of Northwest Detroit. (T II, 51, 59). Mr. Jenkins lived in a home on Middlebelt just south of Ten Mile Road in Farmington Hills with then 22-year old David McKillop. (T II, 50, 66-67). Mr. McKillop worked for Mr. Jenkins as a real estate agent. (T II, 50). Other people who worked for Mr. Jenkins were Ed Daniels, Dave Northrop, Marge Phillips and Terry Beck. (T II, 51). Mr. Beck and Mr. Jenkins became good friends during earlier real estate work in Garden City, Michigan. (T II, 52, 88). Mr. Beck was involved in selling drugs such as cocaine and possibly marijuana. (T II, 52-53, 56). Mr. Jenkins and Mr. Beck both used marijuana and on occasion Mr. Jenkins would sell marijuana as well. (T II, 53, 85). Mr. McKillop smoked marijuana with them. (T II, 85). Mr. Beck traveled out of state to Florida to obtain cocaine for drug sales in Michigan. (T II, 56).

John Anderson was an acquaintance who came to Mr. Jenkins' home with Mr. Beck and others.[2] (T II, 53-54, 83). Mr. Jenkins denied dealing drugs through Mr. Anderson and denied owing Mr. Anderson – or anyone – money in 1978. (T II, 54-55). However, Mr. Jenkins once arranged for Mr. Anderson to assist with the fraudulent disposal of a car leased to Mr. Jenkins' business. (T II, 67-70). Mr. Jenkins explained that as an owner of rental properties, there were

[2] It was stipulated at trial that Mr. Jenkins told one of the investigators that he did not know John Anderson. T II, 177.

people who owed him money, but he did not owe anyone anything. (T II, 55, 84-85). On occasion, Mr. Jenkins enlisted the help of a larger person (Ron Moody) to implicitly threaten people when trying to collect debts owed to him. (T II, 72-74, 84). The threats were not actually physical.[3] (T II, 74). Mr. Jenkins owned guns which he described as "some .22's a shotgun and a hunting rifle and a few pistols." (T II, 76-77). His home had been broken into previously[4] and in the week before his death Mr. Jenkins provided Mr. McKillop with a .22 caliber weapon for his safety. (T II, 77, 79). In 1978 Mr. Jenkins reported being threatened, though he did not recall that at the time of trial. (T II, 78-79).

Mr. Jenkins described his home on Middlebelt as a large ranch-style home, set back off from the street and situated on approximately an acre of land. (T II, 57). On September 29, 1978, Mr. Jenkins was at home with Mr. McKillop. (T II, 60). Ms. Frazer came over later in the day; she and Mr. Jenkins went to her cousin's wedding that evening in Westland and Garden City. (T II, 60, 61). Mr. McKillop was going to the office for business purposes. (T II, 63).

After the wedding celebration, Mr. Jenkins and Ms. Frazer returned to the home on Middlebelt between 4:00 and 4:30 a.m. on September 30, 1978. (T II, 62-63). Mr. Jenkins recalled walking in the home with Ms. Frazer, but that she separately went to the area near the bedrooms after seeing Mr. McKillop's body on the floor. (T II, 63-66). Mr. McKillop's hands were tied up and there was blood all over the floor. (T II, 66). They called police. (T II, 66, 71).

In his testimony, Mr. Jenkins acknowledged that he and Mr. McKillop looked similar and were approximately the same size and stature. (T II, 67). Mr. Jenkins initially believed that Mr.

[3] Mr. Jenkins denied enforcing debts by putting people in the trunk of a car, or directing anyone to do so. (T II, 74). Ms. Frazer testified that reports of Mr. Jenkins having anyone put in the trunk of a car were "a big joke." (T II, 135).

[4] There was a complaint of a breaking and entering at that address on May 2 or 3, 1978. (T II, 148-149).

McKillop was killed because of "drugs or a girl". (T II, 87). It was stipulated at trial that Mr. Jenkins told one of the early detectives that Mr. McKillop was "sleeping around with married women" and was possibly killed when a husband discovered him; alternatively, "cult activity" was suspected by Mr. Jenkins due to items found among McKillop's personal belongings. (T II, 177). In his testimony, Mr. Jenkins denied any plan to use Mr. McKillop's name or credit for fraudulent housing applications. (T II, 88). After the incident in the home on Middlebelt, Mr. Jenkins was scared for his safety (not before). (T II, 55, 64). Mr. Jenkins had no idea why anyone would want to kill him, and denied that he owed any type of debt to anyone at all. (T II, 71).

Judith Ann Rainville (so called at the time of trial, previously Judy "Frazer", and referred to as such herein) testified that in 1978 Mr. Jenkins and Mr. Beck were involved in selling drugs, and that there was a large amount of marijuana in the Middlebelt home. (T II, 93). Mr. Jenkins also distributed "diet pills" around that time, before September of 1978. (T II, 94). John Anderson visited Mr. Jenkins in early September 1978 and had young teenage boys with him, which caused Mr. Jenkins to send Ms. Frazer and their children out of sight. (T II, 95, 124). One teenager with Mr. Anderson was tall with long blonde hair, looked "uncomfortable or shy" and did not say anything. (T II, 96). Mr. Anderson would do things that Mr. Jenkins would ask him to do, as would Ron Moody. (T II, 134). Ms. Frazer did not know Bill Lolley, but his name was familiar to her. (T II, 124-125).

Ms. Frazer recalled that Mr. Jenkins was acting strangely in September of 1978, prior to Mr. McKillop being killed, evidenced by activity such as parking his car in the back of the house. (T II, 101). A few weeks or one month prior to Mr. McKillop's death, the Middlebelt home was broken into. (T II, 102). During the early morning hours of September 30, 1978, as they returned to the Middlebelt home from the wedding festivities, all of the lights in the home were on and the door was open, which was unusual. (T II, 104-105). According to Ms. Frazer, Mr. Jenkins dropped her

off at the door while he parked in the back of the house. (T II, 105). As she entered the home, she called for Mr. McKillop and walked toward his bedroom. (T II, 107-108). She saw him on the floor, saw blood, then backed out of the room and told Mr. Jenkins that Mr. McKillop was on the floor. (T II, 109-110). Ms. Frazer called the police. (T II, 110). The 911 call was played for the jury during trial. (T II, 151-156).

Ms. Frazer testified that Mr. Jenkins' business was not doing well, and Mr. Jenkins and Mr. Beck were involved in a series of transactions to "flip" houses for profit. (T II, 114). Contrary to Mr. Jenkins' testimony[5], Ms. Frazer recalled that in early September (before Mr. McKillop was killed) Mr. Jenkins complained regularly about being in debt, and eventually explained that he owed money to a "loan shark" in the amount of $15,000. (T II, 115-116, 129). After Mr. McKillop's death, she was "terrified" and a few years later moved away from Michigan to Arizona. (T II, 117). Ms. Frazer brought with her to trial files from the Landmark Realty Company given to her for safekeeping by Mr. Jenkins. (T II, 117-118, 122). In the file was a deed to a house with David McKillop's name on it. (T II, 118). During the investigation in 2006, Ms. Frazer advised the detectives that there were other names, besides Mr. McKillop's, used by Mr. Jenkins and Mr. Beck to obtain a house from the government illegally in order to acquire money to pay off their drug debt. (T II, 119-120). According to her statement in 2006, Ms. Frazer did not know if Mr. McKillop was aware of his name being used for this purpose. (T II, 121, 122).

Farmington Hills Police Officer Robert Burkhart was dispatched to the Middlebelt home at 4:29 a.m. on September 30, 1978. (T II, 28, 30). Mr. Jenkins and Ms. Frazer met Officer Burkhart at the door. (T II, 30-31). They explained that when they arrived home the front door was open

[5] The jury was instructed that this information was not substantive evidence, it was only to be considered for impeachment purposes. (T II, 115).

and the lights were on. (T II, 31, 46-47). There was no evidence of forced entry in to the home, and the house did not appear to be ransacked. (T II, 38, 41, 46). Officer Burkhart observed the body on the floor with hands tied behind his back with an electrical cord and blood was on the floor. (T II, 33, 37; *see also* testimony of Detective John Kohls at T II, 140). A bullet wound to the back of the head was observed. (T II, 34; *see also* testimony of Detective John Kohls at T II, 140). The person was obviously dead. (T II, 33, 34). A pillow was next to the body, containing a bullet hole, some gun powder residue and blood. (T II, 35-36; *see also* testimony of Detective John Kohls at T II, 140). The pillow and electrical cord were taken from the scene for evidentiary purposes. (T II, 45, 141, 165).

The Medical Examiner who performed David McKillop's autopsy on October 2, 1978 was Dr. Silery, who had died several years prior to the 2010 trial. (T II, 187-188). Dr. Kanu Virani testified at trial that he reviewed the autopsy protocol that was prepared by Dr. Silery and all relevant documents. (T II, 184-185, 188). It was noted that his hands were tied with a brown electric cord behind his neck and was found face down. (T II, 189). Mr. McKillop sustained seven (7) gunshot wounds; four on the right side of the head, two on the back of the neck just below the hairline and one on the left side of his neck just below the jaw bone. (T II, 191, 197). There was also an injury to his groin area. (T II, 205). Six bullets were recovered from his head during the autopsy and given to the investigating officers. (T II, 193). They were described as small, from a .22 caliber weapon (or weapons). (T II, 212-213, 218). It was believed that the gunshot wounds came through an object like a pillow. (T II, 197). The pillow collected for evidentiary purposes had 6 holes corresponding to the bullet holes described in the autopsy protocol. (T II, 198. 220). The cause of death was homicide. (T II, 202). Though Dr. Silery made some conclusions about how Mr. McKillop was standing or positioned at the time he was shot, Dr. Virani was not prepared to make any such determination. (T II, 210-211, 215-216, 218).

The bullets taken from Mr. McKillop's head were not fired by the .22 caliber weapon found in the Middlebelt home. (T III, 64-66). It was not known whether the bullets were all fired from the same weapon. (T III, 82). Cartridges were not found at the scene. (T III, 90-91). A fingerprint belonging to Mr. McKillop was on a mirror in the bathroom. (T III, 67). The pillow had evidence of close range firing and multiple gunshot entrance holes. (T III, 68).

The evidence collected in 1978 was re-analyzed in 2007. (T III, 70; *see also* testimony of Det. Wehby at T III, 116-126). Fingerprint comparisons on evidence were negative for suspects identified in 2007 (and 1978) including Mr. Cooper, Ronald McKitty, William Watson, Donald McKitty, Terry Beck and Otto McKitty. (T III, 81-82, 87). One hair found on Mr. McKillop's body was analyzed but had an insufficient DNA profile; Mr. McKillop could not be excluded as a source of the limited sample. (T III, 71-73). No testing on the hair was done after 2007, nor was any hair analysis or comparison requested after that time. (T III, 84-85). Testing for DNA evidence did not exist in 1978 and some evidence can deteriorate over time. (T III, 86). No DNA evidence belonging to Mr. Cooper was analyzed. (T III, 91). No gun was found and it was unknown whether a revolver was used to kill Mr. McKillop or an automatic weapon. (T III, 91, 93).

Detective John Kohls was assigned as the lead detective in the investigation of the death of David McKillop. (T II, 143). Det. Kohls testified that he would not have given details to the media regarding circumstances of the crime, such as the victim being tied up, particularly during the early stages of the investigation, in an effort to verify the credibility of information. (T II, 143-145, 150). Det. Kohls described this as an "execution type slaying" that was "very difficult to investigate." (T II, 145; *see also* T II, 166). Det. Kohls interviewed people who were with Mr. McKillop on the day he died and followed up on leads provided by people including Mr. Jenkins and Ms. Frazer. (T II, 145, 149). Mr. McKillop had an appointment and stopped by to see a girlfriend, and she was believed to be the last person to see him alive. (T II, 145-146). Mr. McKillop spoke to a woman on

the telephone named Terry Lee Joint at approximately 9:30 or 10:30 p.m., which was his last conversation as far as the Detective knew. (T II, 147-148, 162).

One of the people that Detective Kohls interviewed was Bill Lolley; he and his wife were with Mr. McKillop during the evening of September 29, 1978 to see a house. (T II, 166- 170). Though information about the crime itself was not released by Det. Kohls, there were facts in the officer's narrative which is part of a public record. (T II, 174, 176). The electrical cord information was not released to the public. (T II, 175).

In 1978, Billy Joe Lolley lived next door to Mr. Cooper's family home; however, Mr. Cooper lived in John Anderson's basement. (T III, 6, 7, 21, 42-43). Mr. Cooper was known as "Boo Boo", and Mr. Lolley identified him in court during trial. (T III, 8). Mr. Lolley contacted the police in 2006 to provide information about the 1978 murder.[6] Mr. Lolley's testimony at trial (in 2010) was that in 1978 Mr. Cooper told him that someone had paid him $3,000 to kill somebody, a fee he would share with Mr. Lolley if he could provide transportation for the murder because Mr. Cooper did not have a car.[7] (T III, 9). No one else was present during the conversation. (T III, 22, 36). Mr. Lolley declined, and believed that Mr. Cooper was joking. (T III, 9, 40). Later, when Mr. Lolley was contacted by police because he was with Mr. McKillop to view a real estate property the day he was killed.[8] (T III, 9). According to Mr. Lolley, he did not realize that it was "the same deal" when he first spoke with police. (T III, 9). After he spoke with the police, Mr. Lolley again talked to Mr. Cooper who advised that he had killed a person, and that Mr. Anderson was threatening that

[6] After Mr. Lolley contacted the police in 2006, he acquired a drunk driving charge in Washtenaw County; the Oakland County Assistant Prosecutor offered to share information with Washtenaw County about Mr. Lolley's cooperation in the instant case. (T II, 7).

[7] During the interview with the detective on October 3, 1978, Mr. Lolley made no mention of anyone such as Defendant Cooper asking him for a ride "to do a hit." (T II, 170, 172-173).

[8] Mr. Lolley jokingly told his wife, before speaking with the police, that they probably contacted them because the real estate agent had been killed. (T III, 25).

someone would kill Mr. Lolley and his kids if he spoke to the police again. (T III, 10, 43). According to Mr. Lolley, Mr. Cooper described killing Mr. McKillop by having him lay down on the floor, whereupon he put a pillow to his head and shot him six or nine times. (T III, 10, 20). Mr. Cooper explained that he tied him up, held him and shot and killed him. (T III, 11). According to Mr. Lolley, Mr. Cooper killed the wrong person; Mr. Jenkins was supposed to have been killed. (T III, 18).

Cross-examination established that Mr. Cooper was not a close friend of Mr. Lolley's, and they did not "hang out" regularly in 1978. (T III, 21, 41). Mr. Cooper had never asked for a specific ride before. (T III, 36-37). During the 1978 initial interview with police, Mr. Lolley did not mention the proposition from Mr. Cooper, and he maintained that he did not consider a connection between the conversation with Mr. Cooper and the fact that his real estate agent was killed. (T III, 27-28). After speaking with police, Mr. Lolley told Mr. Cooper that they were asking about someone being killed – which prompted the relayed threat from Mr. Anderson, directly and through Mr. Cooper, and other people in the neighborhood, to keep his mouth shut. (T III, 28-33). Other people present when Mr. Lolley described his initial conversation with police, such as Mr. Anderson's wife Sandy, Otto and Donny McKitty (John Anderson's brothers-in-law), and Mr. Cooper. (T III, 32-34). Mr. Lolley may have been drinking during the conversation. (T III, 44-45).

Dawn Smith testified[9] that she met Mr. Cooper in 1981, when she was 16 years old and married to someone else, and she and Mr. Cooper had a relationship thereafter for 13 years. (T III, 54, 60). John and Sandy Anderson were friends of Mr. Cooper's, and Ms. Smith socialized with

[9] The prosecutor's Notice of Intent to Introduce Other Acts Evidence pursuant to MRE 404(b), filed on January 5, 2011, was withdrawn. *See e.g.* T I, 9-10, 125-126. Over defense objection, the prosecution intended to introduce statements Mr. Cooper made to Dawn Smith regarding other acts subsequent to the crime charged. *Id.* The Court precluded the prosecution from eliciting any testimony from Ms. Smith concerning statements Mr. Cooper made about other shootings or break-ins he committed until after Mr. Cooper testified. (T III, 46-52).

them as well. (T III, 55). Ms. Smith described Mr. Anderson as a "father figure" to Mr. Cooper, and Mr. Cooper would do things for Mr. Anderson if he asked. (T III, 56). Mr. Cooper was concerned about something he had done for Mr. Anderson, which they concealed from the women when it was discussed. (T III, 57-59). Mr. Cooper told her that it was none of her concern, and would become angry and red faced. (T III, 59). She agreed that Mr. Cooper had a bad temper or a quick temper. (T III, 59). There were guns in the house "periodically." (T III, 59, 61).

In 2006, Mr. Lolley became very ill, believed he was dying, and "wanted to clear this case up" at that point in his life. (T III, 11, 19; *see also* T III, 101). He was interviewed by police and though he mentioned a "lie detector test" in his testimony it was stipulated by the parties that he did not take a polygraph examination.[10] (T III, 12-17). Neither Det. Wehby nor Det. Rzeppa provided Mr. Lolley with information about the case. (*See e.g.* T III, 38).

Detective Richard Wehby and his partner, Detective Scott Rzeppa, were working in the "cold case team" (among other responsibilities) of the Farmington Hills Police Department in 2006 when they received the call from Bill Lolley regarding information on a murder 28 years earlier. (T III, 98-100). Mr. Lolley explained that a victim had been shot in the back of the head approximately six to nine times through a pillow at a residence in Farmington Hills, and that "it had something to do with real estate." (T III, 101-102). Mr. Lolley said the perpetrator was "Woodrow Wilbur Wiley Cooper, III", with some physical description. (T III, 102). Mr. Lolley was interested in protection as a witness. (T III, 103). Detectives Wehby and Rzeppa searched older files with the names and information provided by Mr. Lolley, and arrived at the McKillop homicide file and Mr. Cooper's whereabouts. (T III, 105-107). The physical file was retrieved from the courthouse and documents and items were reviewed by the detectives. (T III, 107-108).

[10] The defense declined any cautionary instruction regarding the polygraph reference. (T III, 95-97).

Mr. Lolley provided additional details and information during a subsequent interview with the detectives that warranted further investigation including a coordinated effort to interview people, some of whom were out of state. (T III, 108-115). Mr. Cooper was living in Bay City, Michigan, and in December 2006 he was interviewed by Det. Wehby and Detective Haro. (T III, 114, 129). In his first interview, Mr. Cooper was at work at an automobile dealership and agreed to speak with the detectives at that time at the Bay City Police Department. (T III, 130-131). That interview was not recorded. (T III, 131-132; T IV, 25). Mr. Cooper was not under arrest. (T III, 132). Mr. Cooper was advised that the discussion concerned people he knew in the 1970's from the Brightmoor area of Detroit – an area known for motorcycle gangs and criminal activity and violence. (T III, 133-136, 147). Mr. Cooper confirmed that his nick-name was "Boo Boo". (T III, 109). Mr. Cooper was friendly and straightforward in the conversation, as he described his relationship with John Anderson – a drug dealer who let then-17 year old Cooper live in his basement and offered him as a "fall guy" when police were investigating Anderson's criminal activities. (T III, 137-139, 142, 148; T IV, 30). Mr. Anderson was a father figure, and Mr. Cooper was a wild teenager[11] and would do anything to prove himself to Anderson and his confederates. (T III, 140, 143, 148). John Anderson's wife, Sandy McKitty Anderson, had many siblings – including Ronnie, Donny and Otto – who were often around at that time. (T III, 141). Mr. Cooper explained that he had an eye-opening event and realized he needed to remove himself from the criminal activities. (T III, 142-143). Mr. Cooper wanted to join the military or National Guard and become an assassin. (T III, 143; T IV, 31). Mr. Cooper described himself as quick tempered. (T III, 143). Mr. Cooper denied that Lolley was involved in any illegal activities. (T III, 145; *but see* T IV, 28-29, concerning the fact that this information is not in the detective's report).

[11] The detective's testimony was that Mr. Cooper described himself as a "wild ass", but it says "wild teenager" in the report. *See e.g.* T IV, 26-28.

When the detectives inquired about Robert Jenkins in this 2006 interview, Mr. Cooper's demeanor changed to nervousness. (T III, 144). The mention of David McKillop caused Mr. Cooper to sit straight up and become very "flush"; he crossed his arms and became nervous with an "obvious physical change at the mention of that name." (T III, 146). Mr. Cooper was advised that the detectives had information that Mr. Cooper was paid a sum of money to kill someone and that he killed the wrong person, which Mr. Cooper "deflected" but never denied. (T III, 149). Mr. Cooper changed the subject to other criminal activities he was involved in, such as breaking and entering, but did not recall a homicide. (T III, 149). Mr. Cooper was initially agreeable to providing a DNA sample, but ultimately refused during the interview, and took evasive measures such as retaining his cigarette butts, coffee cup, gum, and hand towels. (T III, 150-154). Det. Wehby concealed some details of the homicide, such as the victim being tied up. (T III, 154). When asked about his involvement, Mr. Cooper said he never killed anyone for money and never held anyone down to be beaten up or killed, but, according to the detective, Mr. Cooper "would not come out and say directly that he had never killed anyone before." (T III, 156; T IV, 32). Mr. Cooper insinuated that Anderson and the McKittys planned to implicate him in the homicide. (T III, 157). Mr. Cooper became emotional and ended the interview. (T III, 157-158). He said that if the wrong person was killed he felt bad for the family, "but if it was the right guy then he got what he deserved." (T III, 158; T IV, 36).

On January 26, 2010[12], Det. Wehby returned to the dealership where Mr. Cooper was still working and asked to speak with him again. (T III, 159; *see also* T IV, 14, 33-34). This time they spoke in the manager's office. (T III, 159-160). Det. Wehby told Mr. Cooper "flat out" that he believed he was the shooter and involved and responsible for David McKillop's murder, and that

[12] The jury asked why three years elapsed between interviews. Det. Wehby explained that the delay was due to administrative changes in the prosecutor's office, among other issues. (T V, 12).

other people were involved too. (T III, 161). Mr. Cooper had several questions, including asking about witness protection and sentencing guidelines. (T III, 161-162). Mr. Cooper declined to answer questions and expressed concern about making arrangements for his wife in the event that he was arrested. (T III, 162-163). When presented with "hypotheticals" about the crime, Mr. Cooper did not make specific denials and sometimes smiled and agreed non-verbally with the theories offered by the detectives. (T III, 164-166). Mr. Cooper again retained items he physically touched during the interview. (T III, 166). Mr. Cooper inquired if the murder weapon had been found, which Det. Wehby denied, thereby leading Mr. Cooper to conclude that the case was circumstantial. (T III, 167). As Mr. Cooper ended the interview, he was provided a warrant for his DNA; though he questioned the validity of the warrant but submitted to the test for the officers. (T III, 167-169; T IV, 14). Mr. Cooper was advised by the detectives that they were not going to drop the investigation and they next time they met with him it would be for purposes of arresting him. (T III, 169; T IV, 35).

On March 2, 2010, Mr. Cooper was arrested in Bay City pursuant to a warrant issued by the Oakland County Prosecutor's Office charging Mr. Cooper with open murder. (T III, 169). At the Bay City Police Department Mr. Cooper was advised of his right to remain silent, which he waived, and he spoke with investigators in a recorded interview that was played for the jury at trial. *See* **Appendix A** (DVD and transcript of DVD, admitted as People's Exhibits 13 and 16, respectively, at trial). (T III, 169-172; T IV, 3-7). In the interview at Bay City, Mr. Cooper discussed three occasions he was at the Jenkins home on Middlebelt and the other people who were present. (T III, 177-178). *See also* **Appendix A**. During this portion of the interview, Mr. Cooper described some of the events as follows: A few days before the shooting, Mr. Cooper was sent to Jenkins' Middlebelt home with Donnie McKitty and Mark Bolis to tie up and beat up Mr. Jenkins, and coerce him to repay a debt. They broke into the Middlebelt home and waited for Jenkins; while they

waited, Mr. Cooper had an extension cord from a lamp, but nothing happened during this event. In the next incident, Anderson sent them again to collect the debt and this time an unknown black man was with Mr. Cooper, Donnie McKitty and Mark Bolis. Mr. Cooper insisted throughout the interview that he waited outside, heard fighting and gunshots fired, then walked home. Later, Mr. Cooper learned that the wrong person had been shot. He maintained during the Bay City portion of the interview on March 2, 2010 that he had nothing to do with the shooting, that he did not know anyone even had a gun with them, that the effort was to obtain money, and that there would be no reason that his DNA would be found on the victim's body. *See generally* **Appendix A**.

Cross-examination of Det. Wehby established that the DNA collected from Mr. Cooper in January of 2010 was never sent to the Michigan State Police laboratory for comparison or analysis, despite representations otherwise to Mr. Cooper during the March 2, 2010 discussion. (T IV, 15-18). There was no scientific evidence from the 1978 collection linking the crime to any particular suspect. (T IV, 19). Mr. Cooper was a suspect beginning in 2006 with the information obtained from Bill Lolley. (T IV, 23). Though they spoke twice before, the first interview that was actually recorded with Mr. Cooper and the detectives was on March 2, 2010. (T IV, 38-40). Mr. Cooper was told that there would be "wiggle room" with the prosecutor if he provided truthful information to the detectives. (T IV, 40). Detective Wehby acknowledged that he misrepresented to Mr. Cooper the fact that they might have DNA evidence. (T IV, 41). Det. Wehby said that he was "trying to get him to open up further about his involvement in the incident" but Mr. Cooper did not admit to being inside the Middlebelt home during the murder in the first recording (at Bay City). (T IV, 41-42). Though Mr. Cooper informed the detective that he met up with a woman named Ferris after the shooting, she was never found or interviewed. (T IV, 42).

In re-directed testimony by the prosecutor, the detective confirmed that he did not submit DNA evidence for testing because it was not necessary. (T IV, 43; *see also* T V, 13). On March 3,

2010 Mr. Cooper initially said he was on the porch of Jenkins' home, then he advised that he did go in the house, then later he said he was on the couch while Mr. McKillop struggled with Mark Bolis and an unknown black male, then later he admitted that he provided an extension cord to help tie up Mr. McKillop, that he assisted in subduing Mr. McKillop with Mark Bolis and the unknown black male and taking McKillop to the ground. Thereafter, Donnie McKitty shot Mr. McKillop multiple times; after the third shot was fired Mr. Cooper fled the home. (T IV, 44). Det. Wehby read the final portion of the March 3, 2010 interview concerning Mr. Cooper's ultimate confession during his testimony at trial. (T IV, 45-48). The defense asked that the entire interview be played; specifically the March 2, 2010 evening conversation at the Farmington Hills Police Department and the entire recorded conversation that occurred on March 3, 2010 at the Farmington Hills Police Department. (T IV, 51-52). The jury heard these played in their entirety and they were admitted as exhibits at trial. *See e.g.* T IV, 62-63. The March 2, 2010 evening conversation was admitted as Defense Exhibit B and is attached hereto as **Appendix B**.[13] (T IV, 64-65). The March 3, 2010 recorded conversation was admitted as Defense Exhibit C and the transcript of that recording was admitted as Defense Exhibit D, and they are attached hereto as **Appendix C**. (T V, 4-5).

In the conversation transcribed in **Appendix B**, Mr. Cooper essentially maintained the version of events he described earlier in the recorded portion of the interview in Bay City. Specifically, he denied actually being inside of the Jenkins home during the shooting. *See generally* **Appendix B**. The interview ended at approximately 11:53 p.m. on March 2, 2010, roughly 15 minutes after Mr. Cooper informed the detectives that he was done speaking with them. *Id*; *See also* Transcript of **Appendix B** at pages 16-21.

[13] This interview was not transcribed, but as a courtesy to this Court Defendant-Appellant has prepared a transcript for purposes of appellate review. The DVD recording itself was the only item that the jury had at trial, and the recording itself is the only proper exhibit before this Court.

At approximately 9 a.m. the following morning, the detectives retrieved Mr. Cooper from his cell to continue questioning him; that interview is attached as **Appendix C**. Mr. Cooper denied his involvement in the shooting itself until near the end of the interview, when he admitted he was inside of the home when the shooting occurred. *See* Transcript of **Appendix C** beginning at page 61 (of 71).

The defense's motion for directed verdict was denied. (T V, 18-19). Mr. Cooper declined to testify in his own behalf[14] and the defense rested without calling any witnesses. (T V, 16-17, 20).

In closing arguments, the prosecutor acknowledged that Mr. Jenkins was not entirely truthful, but that Ms. Frazer filled in the gaps and that Mr. Lolley was a credible witness with nothing to gain by testifying. According to the prosecutor, Mr. Cooper's statements constituted guilt on the count of first degree murder. *See generally* Prosecutor's closing argument at T VI, 5-36. The defense's theory was that Mr. Cooper made a statement after prolonged and intimidating questioning, and that his confession did not match the physical evidence of the crime. *See generally* Defense Counsel's closing argument at T VI, 36-56.

The jury instructions were modified by the parties to reflect the law on felony murder in 1978. (T III, 3-4). At the conclusion of trial, the jury found Mr. Cooper guilty as charged of first degree felony murder, and of the lesser offense of second degree murder. (T VI, 99). On June 1, 2011, Mr. Cooper was sentenced to life in prison without the possibility of parole for the first degree felony murder conviction. (ST, 11).

This is Mr. Cooper's appeal of right. Further facts may be added, *Infra*.

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[14] In opening statements and during trial, defense counsel indicated that Mr. Cooper was going to testify in his own behalf. *See e.g.* T II, 22, 26. In closing arguments, defense counsel advised the jury that the taped statements replaced the testimony. (T VI, 48).

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. COOPER'S CONSTITUTIONAL RIGHTS BY ADMITTING INTO EVIDENCE STATEMENTS OBTAINED WHERE THE POLICE QUESTIONED APPELLANT AFTER HE UNAMBIGUOUSLY INVOKED HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT; ANY STATEMENTS MADE THEREAFTER WERE INVOLUNTARY AND SHOULD HAVE BEEN SUPPRESSED.

ISSUE PRESERVATION: This issue was preserved by Mr. Cooper's pretrial Motion to Suppress Statements. The original Motion is attached as **Appendix D**; the prosecutor's response in support of admissibility of the statements is attached as **Appendix E**. Substitute counsel filed a "Supplemental Memorandum in Support of Defendant's Motion to Suppress His Statements", which is attached as **Appendix F**. The prosecutor's Supplemental Response is attached as **Appendix G**. The trial court denied the Defense's Motion to Suppress on November 24, 2010, attached as **Appendix H** along with the Order Regarding Motion filed on November 29, 2010.

During trial, the prosecutor questioned the interrogating officer in direct examination about the first portion of the statements taken on March 2, 2010 in Bay City (essentially, **Appendix A**). While the defense cross-examined the officer about facts in the first part of the interview (and the officer gratuitously offered details of the third portion of the interview, essentially **Appendix C**) the defense kept the inquiry narrow (T IV, 41-42) but the prosecutor in redirected testimony expanded the inquiry and had the officer read Mr. Cooper's ultimate confession (the final portion of **Appendix C**). (T IV, 43-48). The defense then asked that the entire set of interviews be played for the jury for context or completeness (essentially **Appendices B** and **C**; the jury had already heard **Appendix A**). (T IV, 51-52). Out of the presence of the jury, the prosecutor asserted that he only intended to introduce the first interview and it was the *defense* who wanted to introduce the second

and third; however, after the prosecutor's redirected testimony, the defense maintained that all three portions were part of a continuous or complete interview, which the court already ruled was admissible. (T IV, 52-55). The issue is preserved for appeal. *See generally* MRE 103(a).

STANDARD OF REVIEW: Concerning Mr. Cooper's invocation of the right to remain silent, this Court reviews the record *de novo*, while the trial court's factual findings are reviewed under the clearly erroneous standard. *See People v Adams,* 245 Mich App 226, 231 (2001).

Whether a confession was voluntarily given is a question of fact. *People v Robinson,* 386 Mich 551, 557 (1972). Unlike most questions of fact, however, the voluntariness of a confession is a question the judge must decide on a separate record away from the jury. *See People v Walker (On Rehearing),* 374 Mich 331, 338 (1965). The burden is on the prosecutor to prove voluntariness by a preponderance of the evidence. *People v DeLisle,* 183 Mich App 713, 719 (1990). When evaluating a trial court's determination after a *Walker* hearing[15], appellate courts must examine the entire record and make an independent determination regarding whether the confession was voluntarily given. *Id.* (quoting *People v Summers,* 15 Mich App 346, 348 (1968)). The trial court's decision will not be overturned unless the reviewing court has a firm conviction that a mistake has been made. *People v Conte,* 421 Mich 704, 744 (1985); *People v McGillen #1,* 392 Mich 251, 257 (1974).

Because these issues concern preserved constitutional error, this Court must consider whether the error was harmless beyond a reasonable doubt. *Chapman v California,* 386 US 18, 24 (1967); *People v Anderson (After remand),* 446 Mich 392, 404-05 (1994). "This requires the [prosecution] to prove, and the court to determine, beyond a reasonable doubt that there is no

[15] Here, the parties agreed to the Court conducting a *Walker* hearing by review of the videotaped statements obtained from Mr. Cooper. *See* **Appendix F** at p. 1.

reasonable possibility that the evidence complained of might have contributed to the conviction." *Anderson, supra* at 405-06 (citing *Chapman, supra at 23*) (footnote and internal quotations omitted).

BASIS FOR ARGUMENT: It remains the defense's position that Mr. Cooper invoked his right to remain silent with the following statements nearly three hours into the March 2, 2010 interview at Bay City:

> "See, that's why I don't want to talk to you guys about this because who do I have to collaborate anything I have to say?"

(*See* Transcript of **Appendix A** at p. 75).

Detectives Wehby and Rzeppa continued to interrogate Mr. Cooper for a short period of time in Bay City, conversations continued in the car ride[16] to Farmington Hills and the interrogation itself continued in Farmington Hills later that night, beginning at approximately 10:45 p.m. In Farmington Hills, Mr. Cooper was advised that he was still "under" the previously administered *Miranda* rights. *See* Transcript of **Appendix B** at p. 1. Mr. Cooper continued participating in the interrogation, confirming essentially the same details that he provided earlier at Bay City. *See generally* **Appendix B**. Specifically, Mr. Cooper maintained that he did not enter the house on the night of the shooting; he acknowledged he was there with others for the purpose of getting money from Jenkins, but Mr. Cooper waited outside of the home and fled on foot when he heard shots fired. *Id.* During the Farmington Hills portion of the interrogation, Detective Wehby explained to Mr. Cooper that multiple people identified him as the shooter; that, coupled with the pending DNA analysis pointed to his involvement. As Detective Wehby offered potential scenarios where Mr. Cooper was less involved, and urged Mr. Cooper (as he did repeatedly throughout the interviews) to provide more explanation, Mr. Cooper informed the detectives that he was done speaking with them

[16] The conversation recorded in the car was not admitted at trial.

at approximately 11:35 p.m., though the officers alternately continued to question him for at least 15 more minutes:

> **Wehby:** It's not going to say anything about the condition and what the cord and everything like that. It's not gonna say that. And these people say yeah this is what he told me. This is how he did it. And you're being honest with us all the way up to the point that uh yeah but I didn't do the deed or I had no contact with the victim when we got people saying that you did. And you're granted your right that is circumstantial evidence but what I keep getting back to is that DNA and those hair samples. That's gonna make you look like a bold face liar and it's gonna make it look like what these people said was true that you did it by yourself. When we know it wasn't but if I don't have anything to prove otherwise that's how it's gonna come down. So if we can explain away your hair samples, your hair follicles, your DNA on that extension cord, or on the victim, now is the time to tell us. Cuz there's not gonna be any more time. Now's the time to tell us, ok, this is what happened. I told you everything was true up to the time the guy went in the house [indesc] we're gonna jack around this guy a little bit next thing I know this black guy Mark Bollis, Donnie, John Anderson some Dawn somebody pulled out a gun and started shooting. I was like holy fuck let me get the fuck out of here. Cuz I was not signed up for this shit. I signed up to be a tough guy, muscle somebody around and get some money and earn some respect, I didn't sign up to kill nobody.
>
> **Cooper:** (Shaking head)
>
> **Wehby:** Is that what happened? <23:35:01>
>
> **Cooper:** **No, we're done** (stands up) <23:35:04>
>
> **Rzeppa:** Sit back.
>
> **Wehby:** Wilbern
>
> **Cooper:** **Take me back to my cell.**
>
> **Wehby:** Wilbern, have a seat
>
> **Cooper:** I just [indesc] gotta take a piss
>
> **Wehby:** Ok, well, we'll take a piss in a minute, ok. I hate to break the news to you but we're not at Baylin and we're not at City… places
>
> **Cooper:** **Then take me back to my cell.**
>
> **Wehby:** If you don't wanna talk to us fine, we're gonna stare at you all night.
>
> **Cooper:** Ok. Since the whole thing first got out, this whole thing

Wehby: No I asked you what you did. I didn't say what, you, I didn't say if you did anything.

Cooper: I know but I'm

Wehby: Cuz you wanna

Cooper: (indesc)

Wehby: You wanna know another thing?

Cooper: Who'd Who'd say this? Who? Who'd put this out. And now your're telling me that you have a whole bunch of collaboration on it.

Wehby: Ok, Well I'll say a whole bunch of collaboration. We have corroborating stories of people that haven't seen each other in over 20 years that were interviewed at the exact same time that gave accounts of what you told them. Information that was not made known to the public at the time of this incident and was not made known since then. These are people that were not even interviewed because of this you weren't even interviewed because of this incident back then, were you?

Cooper: (shakes head negatively)

Wehby: None of these people were interviewed back then cuz they didn't have any of this information until this person came forward on their own.

Cooper: And this person that came forward he had all the so-called players that were in were part of this and they knew that I had did this.

Wehby: If somebody was coming forward, lets just say 28 years they somebody goes by and they're like you know what I've been thinking and I need to get this off my chest you know what I'm gonna give the information I know. Do think that they might have gave up everybody? They might have said yeah, Wilbern Cooper, Donnie McKiddie, Mark Bollis, and then this black guy who worked for John Anderson went and did this and they killed the wrong guy. They didn't say that. They came forward and said you did this. And that you lived with John Anderson and you knew all these other people. Which led us to the other people who said at the same time their butts were being interviewed. They didn't say you and a black guy and Mark Bollis, and Donnie McKiddie did this. They said you did.

Wehby: I know there was more than one person there. But it it strikes me as odd as how these people know or ...know to say the exact same thing that you told them.

Cooper: (nodding)

Wehby: Is what and why they wouldn't implicate anyone else, is what I'm trying to get at.

Cooper: So..

Wehby: If you're gonna clear your conscience, why clear your conscience, who could you have possibly pissed off 28 years ago that decides they want to come forward and put this on you? If they're gonna clear their conscience, don't you think they're gonna want everybody that they knew that was involved in this and name them? But they didn't they just named you. And why would they name you? Because they said that you told them this. And that you didn't mention anybody else which might have been a mistake on your part who knows they might have misunderstood you. But that's what it boils down to is and you're right I don't have the smoking gun. I don't have your big palm print on a window or big palm print in blood or something like that. Alls I got is a guy that's shot and you being put there by several different people including yourself at the time that this incident occurred. I want to know or get an explanation as to why none of these other people who are trying to clear their consciences and live all of the information they know, that why didn't they mention these other names? Now, I told you from the get go I will go after who ever I gotta go after to get to the bottom of this and get to everybody that's responsible for this and have them pay and sent away. But if I don't have any proof or any evidence only thing I'm gonna be able to do is talk to them and put your story against there's and try and get them tricked up and try and get them to confess to something to being there or admit to knowing more than they told from the beginning. Can't talk to Mark Bollis, he's dead. Can't talk to unknown black guy cuz we don't know who he is. We got Donnie McKiddie, John Anderson, and Terry Beck. Terry Beck, by your own admission wasn't there. John Anderson wasn't there, he just sent you over there. I could put John Anderson at that house. I know that John Anderson and Jenkins had a relationship, I know that. But I can't understand or get around why nobody else puts anybody else in that house when they haven't talked to these people in 28 years. They haven't seen these people in 28 years. Why the fuck would they care about Donnie McKiddie, or Mark Bollis, or John Anderson, people that don't even live in the state anymore? I put what John's 72 now? What?

Cooper: Yeah, he's older than I am, so yea.

Wehby: Yeah, so why would if they're gonna clear their conscience, why wouldn't they clear it all the way? I'm not, you know, they're giving the information is the only thing that they know. And they know that because they said that you told them that. And maybe it was bad luck on your part that you didn't mention anybody else when you told 'em about this, but that's you know that's how it's gonna be come out in court. But I'm I wanna be on your side I want to say that you were the 17-1 8 year old kid that got dumped on all the time and got fucked and took the fall for everything. But if this stuff comes back and if I put you having contact with that victim it makes everybody else's story look great, and makes you look like a liar. But if we get ahead of the curve, and we can admit

explain why your DNA or hair may possibly be on the victim or that cord then we can explain it. And say hey he forthcoming about this. It adds credence to the fact that yeah you were the fall guy you were just kinda the muscle-y kid that they center took on the jobs to take the fall for their shit and all of a sudden somebody whips out a gun and I said I gotta get the fuck out of here. But I can only do that if you can honestly tell me that you were in that house or that you had contact with the victim. So what is it? Did you have contact with David McKillop the night he was killed?

Cooper: I don't know a David McKillop.

Wehby: David McKillop is the guy that was shot and dead on the floor of the bedroom.

<11:43:39>

Cooper: **I have nothing further to say.**

Wehby: Okay. Alright.

Rzeppa: Well, we gave you your chance.

Wehby: (moving file materials, photographs on desk)

Rzeppa: You have to say that, we did all we could to give you your chance. I don't know why you're protecting these people. We told you before that we thought there were two victims in this one.

Wehby: And you're just following the same old thing that you did back then. You're letting them fucking throw you down as the fall guy.

Rzeppa: And without you telling us exactly how this went down, that's what you're doing.

Wehby: And I think you told us exactly how this went down, up until you got to that front porch. On that front awning.

Rzeppa: And that's why we wanna believe you. But we know we can't believe you without you telling us exactly what happened.

Wehby: You keep talking about how they how you're so stupid and you make bad mistakes. You've been making great decisions and doing what your supposed to be working your ass off the past 32 yeas. And you're about to fall right back in to that same old trap you were back in the day when those guys used you and screwed you. You're getting ready to take the fall for a bunch of fucking assholes. And like I told you before, I would do anything and everything to help you out and do whatever I can to investigate whatever it was that you wanted us to follow through with. And I said that I'd feel bad that if you take the fall for this by

yourself. But I'm at the point now I've done everything that I can and we're just gonna have to let it fall where it falls. I can't do anything else for you. If your not gonna. If you're gonna leave it at that then that's how we're gonna have to leave it. I'm not mad at ya I'm not gonna have any hard feelings toward ya and I'll go in there and I'm gonna tell your story like you told us. And then we're gonna let whatever happens after that happens after that. And if you wanna let these guys continue to walk free, and continue to use use Wilbern as the fall guy then that's the way it's gonna have to be.

<11:46:11 approx Wehby exits room>

Rzeppa: We know and you know you're leaving stuff out. I know you are. You know you are. We know there was other people involved. We know that. And here they are doin to ya in 2010 what they were doing to ya in 1978. Really after we've been working this case for a long time we sat down together and we did we felt we felt sorry for you. And we said we know there's more to this. We know there is.

Rzeppa: What else is there?

<11:49:53 approx>

Rzeppa: What else is there? You owe that to yourself. You owe it to your family.

<11:50:08 approx, Wehby returns>

Rzeppa: Think about this whole thing affected how many people.

Wehby: If it's tore you up, it's tore up these people that are talking now. This boy's dad died not knowing what his son was in to or why his son got killed.

Rzeppa: He does still have a mom. And sister.

Wehby: Who's dying of cancer. Just found that out.

Rzeppa: He had a brother. And friends. We talked to all the people who knew him. And how its affected them to this day. They never knew what happened. Why it happened.

<11:53:00 approx>

Rzeppa: Wil, look at me a second.

Cooper: (turns to face detective)

Rzeppa: What happened?

<11:53:19 approx>

Cooper: **Thank you for your time, I'm not talking anymore.** (turns away from detective).

Wehby: It's getting late.

Rzeppa: (Stands up)

Wehby: One more question, Wil. And we'll go to your cell. Did you shoot and kill this guy?

Cooper: No.

Wehby: Ok, let's go.

See Transcript of **Appendix B**, at pages 16-21.

If Mr. Cooper's comment at Bay City was not clear enough for the detectives ("See, **that's why I don't want to talk to you guys about this** because who do I have to collaborate anything I have to say?" **Appendix A** at p. 75) the defense continues to argue that when Mr. Cooper said "**No, we're done**" in Farmington Hills (Transcript of **Appendix B** at p. 16), the interview should have ended. And if *that* was not clear enough for the detectives, then any of the following also served as unambiguous conclusions to the interrogation: "**Take me back to my cell."** (*Id.*); **"Then take me back to my cell."** (*Id.*); **"I have nothing further to say."** (*Id.* at p. 19) and "**Thank you for your time, I'm not talking anymore."** (*Id.* at p. 20).

The detectives utterly ignored Mr. Cooper's invocation of his right to remain silent. The following morning they retrieved Mr. Cooper from his cell, engaged in chit-chat and the arraignment procedure, advised Mr. Cooper that he was still "under" the previously described *Miranda* rights, and continued the interrogation:

Wehby: You know, remember yesterday we pulled out this form, *Miranda* form?

Cooper: Uh huh.

> **Wehby:** Okay. You're still under that. It's still in effect. Um – it was a late night last night I know we ah – talked about a bunch of stuff and went over a bunch stuff. Wrote it all down once. Wrote it all down again. Now we're going to make it for a third time. We want to make sure that we got your story that you're stick with. That you're putting out there. Ok? We want to make sure that we got, we got it down right. That we don't make any mistakes on your part …on your part or our part. Ok?
>
> **Cooper:** Alright.

Transcript of **Appendix C** at p. 2-3.

There was no indication that Mr. Cooper initiated the conversation in any way. To the contrary, Mr. Cooper explained he was "trying to wake up", critiqued the coffee and jail food, then said "Alright, I guess I'm gonna try this." Transcript of **Appendix C** at p. 3-4. Mr. Cooper continued to deny being inside of the house for most of the interview, though the detectives spent much of the March 3rd interview insisting that they knew Mr. Cooper was in the house and that he needed to make that admission. About a third of the way through the interrogation, Mr. Cooper undertook a series of fruitless attempts to invoke his right to remain silent, beginning with "I think I'm done talking at this time. I've got a lot to think about. I've gotta use the bathroom." Detective Wehby responded as follows:

> "Wilburn that's fine and I understand that. That you've gotta got to the bathroom and you got a lot to think about. But, you got about three hours and we go over to the courthouse and then we're done.
>
> Fuckin pulling teeth. Not mad at you [Mr. Cooper]. Just mad at the fucking situation. This would be a lot fucking easier if we just fucking got all of this out on the table now. It's been a lot of wasted time – and a – and a lot of no sleep. Trying to help your ass out and we can't do it because last minute you don't wanna – you don't wanna go the last ten yards. You staying back here?"

Transcript of **Appendix C** at page 25 (of 71).

The interrogation continued. Mr. Cooper maintained that he was not in the house, which the detectives refused to accept. *See generally* **Appendix C**. Det. Wehby offered a variety of

scenarios, suggesting that McKillop pulled a gun on them or that people overreacted because they were on drugs. *See e.g.* Transcript of **Appendix C** at p. 42. In response to that line of questioning, Mr. Cooper said three times that he was not talking anymore. *Id.* ("I'm not going to say anything more"; "I'm not saying any more"; "Not right now".) Mr. Cooper said he had no information to provide. In fact, "I'm not saying anything", or varieties of that phrase, were uttered multiple times by Mr. Cooper for a good portion of the interview with denials or other answers to questions provided as well. *See e.g.* Transcript of **Appendix C** at p. 44 (twice invoked right to silence), p. 45 (three times); p. 47 (once); p. 48 (three times); p. 51 ("I'm not talking"); p. 55 ("take me to the courthouse, let's go" and, later, "let's go", and later, after more accusations "I figured it was going this way", and "I think it's time to take me to the courthouse" – a request that was explicitly refused by the detectives at this point and again on p. 58 when Mr. Cooper asked "Isn't [it] time to take me to court?"). Mr. Cooper finally admitted to being in the home after it became clear that "he would not be removed from that room until he told the officers what they wanted to hear." Defendant's Supplemental Memorandum, at. P. 11 (Attached as **Appendix F**).

PROCEDURAL BACKGROUND: At the arraignment in Circuit Court, the Assistant Prosecutor anticipated a Motion to Suppress Statements, and had "no objection to [a] *Walker*[17] Hearing." *Arraignment*, June 9, 2010 at page 4. According to the Docket Entries, a date was set for a *Walker* Hearing on August 13, 2010. *See "Pre-Trial"* hearing transcript of July 7, 2010 at page 4. The parties indicated that video tapes of the statements would be given to the Court with references to "minute markers, moments, passages---" to obviate the need for watching the entire tape and so that the Court was familiar with the tape "before the actual hearing" in which one witness was to be

[17] *People v Walker (on Rehearing),* 374 Mich 331 (1965).

called. *Id.* at 4-5. At a Status Conference, the Circuit Court Judge confirmed that she watched the tapes provided by the parties in their entirety and was prepared for legal argument. "*Status Conference"* transcript of September 21, 2010 at 3. Defense Counsel expressed his intention to provide legal argument in support of the motion. *Id.* at 3-4. After addressing unrelated issues, the Court indicated that the defense would have to schedule the motion and set pre-trial matters for October 6, 2010, and file any briefs, which were optional, the Friday before that date. *Id.* at 6-7. *See also* **Appendix D**, Motion to Suppress[18]. The prosecutor opposed relief on the merits of the Motion to Suppress in a filing dated October 5, 2010. **Appendix E**. Substitute counsel was appointed to represent Mr. Cooper at trial on October 6, 2010.

At a Status Conference on October 13, 2010, the Court advised that it was prepared to rule on the defense's pending Motion to Suppress, and again indicated that the Court had reviewed the tapes. "*Status Conference"* of October 13, 2010 at 3. The Court summarized the status of the Motion for substitute defense counsel:

> "What, what happened is there was brief argument and then I was told to watch six hours of tape. Then there was to be a closing argument which we never really got to. Mr. Fanego [original defense counsel] brought it on for hearing and then asked to withdraw. So there would be some opportunity to set the matter for closing if it's – I'd like to do that sooner rather than later because you know I don't want a lot of time to go by from my review of the tapes."

Id. at 4.

Substitute counsel had not had an opportunity to review the materials as of that date, but agreed to a hearing on November 24, 2010 for argument. *Id.* A "Supplemental Memorandum in

[18] The initial pleading itself is not contained in the Lower Court Records, and its filing is likewise not reflected in the actual Docket Entries, which may be either a filing or simple clerical error. There is an apparent or implicit reference in the Motion to Withdraw as Counsel transcript reflecting that the motion was filed. *Motion to Withdraw as Counsel* transcript of October 6, 2010 at 3-5. No mention is made of a written argument or motion in a subsequent hearing held on October 13, 2010. In any event, it is included herein for context to the response and subsequent filings properly filed and made part of the Lower Court Records.

Support of Defendant's Motion to Suppress His Statements" was filed by substitute counsel on November 12, 2010. **Appendix F**. The prosecutor's Response was filed on November 18, 2010. **Appendix G**. The Defense's Motion to Suppress was denied in transcribed Ruling on November 24, 2010, attached as **Appendix H** along with the Order Regarding Motion filed on November 29, 2010. The Court denied the Defendant's Motion to Suppress:

> "The Court reviewed the entire videotaped interview[19] and the applicable law.
>
> A defendant's invocation of the right to remain silent must be unambiguous and unequivocal. [*Berghuis v Thompkins,* 130 S. Ct. 2250 (2010)].
>
> A defendant who answers police questions following *Miranda* warnings waives his right to remain silent and any subsequent assertion of the right to remain silent must be affirmative and unequivocal. *People versus Davis*, 191 Mich App 29 (1991).
>
> There's no dispute that after arresting defendant on March 2, 2010 police advised defendant of his *Miranda* rights and he waived the right to remain silent and his right to counsel.
>
> Defendant answered the detective's questions for more than two hours before he made any statement indicating that he was not interested in talking. This is plainly not a case where the defendant on being advised of his rights expressed a desire to remain silent.
>
> Rather defendant's position is that two hours and fifty-six minutes after the questioning began at the Bay City Police Department he invoked his right to remain silent by stating quote, I don't want to talk to you about this, end of quote.
>
> Defendant argues that the detectives should have [ceased] questioning at that point and that they violated his rights by continuing the interrogation for twenty-three minutes and questioned him during the patrol car [ride] from Bay City to Farmington Hills.
>
> Defendant claims that he again invoked his right to remain silent during questioning at the Farmington Hills Police Department when after answering questions for about an hour defendant said no, we're done, take me to a cell and he expressed that he wanted to use the restroom.
>
> Defendant made additional statements later that same evening that he claims invoked [his] right including quote:

[19] The Court indicated in its ruling that the entire statement was watched. However, by the time of trial, the Court seemed to not know how long it was, asking repeatedly about the length of the videos around the time they were played for the jury. *See e.g.* T III, 182; T IV, 51, 59-61, 63, 65 (in this last reference, the Court told the jury "I'm informed that the other tape is three hours, but I really don't know.").

`I have nothing further to say.' End of quote and `thank you for your time I'm not talking anymore, it's too late.' End of quote.

Defendant argues that he invoked his right to remain silent yet again the following day, March 3rd. After about an hour of questioning which he freely answered the questions defendant said quote:

`I think I'm done talking about this incident.' End of quote.

Defendant's position is that these various statements of his desire to not talk about the shooting or to be taken elsewhere constitute invocation of the right to remain silent, but none of the statements could be construed as an unequivocal, unambiguous invocation of his right to remain silent. *See Davis, supra.*

At best defendant is indicating that he did not want to answer particular questions or talk about a particular subject or he wanted to address physical needs such as urinating or sleeping.

Further, defendant's behavior over the course of the several hours of questioning contradicts his present claim that he wished to remain silent. Defendant answered the detectives various questions and showed no reluctance to be questioned except as to the shooting.

Defendant's assertion that he wants to limit his answer and not a [sic] invocation of the right to remain silent. *People versus Spencer*, 154 Mich App 6 (1986),

Because the evidence does not show that defendant unequivocally, unambiguously invoked the right to remain silent his statement will not be suppressed on this ground.

Defendant further asserts that his statement should be suppressed because they were not made voluntarily and were the product of coercion. In determining whether a statement was voluntary the Court considers the totality of the circumstances. *People v Sexton,* 461 Michigan 746 (2000).

In support for his claim defendant notes that he was isolated from friends and family, was repeatedly questioned about stating that he didn't want to talk and was interrogated for several hours. The length and nature of the questioning was one of the many factors to be considered. *People versus* [*Cipriano*], 431 Michigan 315 (1988).

But the remaining [*Cipriano*] factors weigh against defendant's position. The police advised defendant of his rights which he stated that he understood. The police did not physically abuse him or threaten abuse and did not deprive him of food or sleep. There's not evidence that he lacked sufficient education or cognitive function to understand what was happening nor was he ill, intoxicated or under the influence of drugs. He was detained for about a day and was taken for an arraignment the day after his arrest.

Considering all of these circumstances defendant fails to demonstrate grounds for suppressing his statement and the motion is denied.

Ruling, November 24, 2010, attached as part of **Appendix H**, at 4-8.

ARGUMENT:

A. MR. COOPER INVOKED HIS RIGHT TO REMAIN SILENT

Both the United States Constitution and the Michigan Constitution protect criminal defendants against involuntary self-incrimination. US Const, Amend V; Const 1963, art 1 § 17.[20] In *Miranda v Arizona, supra,* the United States Supreme Court wrote:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates **in any manner**, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been invoked.

384 US at 436 (emphasis added).

Before custodial interrogation, the police must inform the suspect that he has the right, among others, to remain silent and not answer questions. *Miranda, supra* at 467-68. Once a suspect unequivocally invokes this right, the police must "scrupulously honor" that invocation, and may not continue interrogation unless the suspect initiates further conversation. *Michigan v Mosley,* 423 US 96, 104-06 (1975*)*; *People v Williams,* 275 Mich App 194, 198 (2007); *People v Catey,* 135 Mich App 714, 722 (1984) ("a suspect is free at any time to exercise his right to remain silent and all interrogation must cease if such right is asserted"). As such, "[s]tatements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his

[20] "Michigan's constitutional provision against self-incrimination, Const 1963, art 1, § 17, is construed in line with and no more liberally than the Fifth Amendment of the United States Constitution." *People v Geno,* 261 Mich App 624, 628 (2004*)* (citation omitted).

Fifth Amendment rights." *People v Howard,* 226 Mich App 528, 538 (1997). While a trial court may consider events preceding the responses, a suspect's response to interrogation after invoking his right to remain silent may not be used to argue that his invocation of the right was equivocal. *See Smith v Illinois,* 469 US 91, 100 (1984)(invocation of right to counsel). Moreover, even if a suspect initially waives his Fifth Amendment right to remain silent, he may invoke the right at any time later during the custodial interrogation. *Mosley, supra at 102-03*.

Recently, the United States Supreme Court clarified its holdings in *Miranda* and *Mosley* in *Berghuis v Thompkins,* 560 US __; 130 S Ct 2250 (2010) and held that a criminal suspect must unambiguously assert his Fifth Amendment right to silence in order to receive its attendant Fifth Amendment protections against self-incrimination.[21] *Berghuis* involved a case where a suspect understood his right to remain silent under *Miranda*, but, instead of affirmatively asserting that right, remained essentially silent during a three-hour interrogation before finally making inculpatory statements that were subsequently used against him at trial. Noting that Mr. Thompkins (the defendant in *Berghuis*) basically said nothing prior to making the inculpatory statements, the Court emphasized that had he simply stated that he did not want to talk to the police he would have sufficiently invoked his Fifth Amendment rights under *Miranda*, and the police would have been required to cease questioning him. *Berghuis, supra* at 2260. As the Court elaborated, "[i]f the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease." *Berghuis, supra* at 2263-2264.

Mr. Cooper clearly invoked his Fifth Amendment right to remain silent during his extended interrogation by Detectives Wehby and Rzeppa. He first did so in Bay City when he explained why

[21] *See also Davis v United States,* 512 US 452 (1994), where the Supreme Court held that a suspect must unambiguously assert his right to counsel under the Fifth Amendment during a custodial interrogation in order to require the police to cease all questioning. In *Berghuis*, the Court applied that same test to the assertion of the right to silence.

he no longer wanted to talk to the detectives: "See, **that's why I don't want to talk to you guys about this** because who do I have to collaborate anything I have to say?" (*See* Transcript of **Appendix A** at p. 75). Thereafter, he was taken to Farmington Hills. Though he did speak with the detectives again for a period of time after they arrived at the Farmington Hills Police Department, Mr. Cooper ***unambiguously*** invoked his right to remain silent multiple times in that interview by saying "**No, we're done**" (Transcript of **Appendix B** at p. 16) "**Take me back to my cell."** (*Id.*); **"Then take me back to my cell."** (*Id.*); **"I have nothing further to say."** (*Id.* at p. 19) and "**Thank you for your time, I'm not talking anymore."** (*Id.* at p. 20). Multiple invocations of the right to remain silent again the following day only fortify the conclusion that Mr. Cooper did not want to talk to the detectives whatsoever. *See generally* Transcript of **Appendix C** at pages 42-58 (described *supra*).

The trial court ruled that "none of the statements could be construed as an unequivocal, unambiguous invocation of his right to remain silent." *See Ruling*, attached as **Appendix H** at 6. The trial court suggested that "[a]t best" Mr. Cooper "did not want to answer particular questions or talk about a particular subject or he wanted to address physical needs such as urinating or sleeping." The Court went on to find that Mr. Cooper's "behavior" contradicted the claim that he invoked his right to remain silent, because he "answered the detectives various questions and showed no reluctance to be questioned except as to the shooting." The court found this simply an attempt to limit answers, not invoke the right to remain silent. *Id.* at 6-7.

The court's ruling on this point reflects a serious misunderstanding of both the facts of this case and the law. The defense does not dispute that Mr. Cooper offered answers or explanations on the subjects covered by the detectives even after Mr. Cooper explained "that's why I don't want to talk to you guys" (during the Bay City portion of the interview). However, there is nothing equivocal about "we're done." The detectives ignored that as well, and Mr. Cooper did provide

additional answers – none of which should have any bearing on the constitutional inquiry. *See Smith v Illinois, supra.* Anything after "we're done" should have been suppressed, and any confusion about whether "we're done" was unequivocal ends when Mr. Cooper says "I have nothing further to say". (Transcript of **Appendix B** at p. 19). *See Berghuis, supra* at 2260 (If the defendant says "that he wanted to remain silent or that he did not want to talk with the police…either of these simple, unambiguous statements…would have invoked his `right to cut off questioning.'")(quoting *Mosley* and *Miranda*, *supra*). Once a criminal suspect makes an unambiguous invocation of the right to terminate questioning by the police, the interviewing officer is obligated to end the interrogation. *Mosley, supra* at 102-104. That did not happen here. After even more questioning by detectives during the evening of March 2nd (but no further answers) Mr. Cooper said: "Thank you for your time, I'm not talking anymore." (Transcript of **Appendix B** at p. 19-20). It is worth pointing out that this last statement was made in response to the question "What happened?" *Id.* at p. 20. It was *not*, as the trial court found, a limited response to a specific to a question about the shooting – except insofar as the *entire interrogation* was about a shooting. Questioning after this exchange was a blatant violation of Mr. Cooper's right to remain silent. This is not a close issue.

The trial court's decision that Mr. Cooper's invocation of his right to remain silent was equivocal or ambiguous was clearly erroneous. *Adams, supra.*

Reversal is required.

B. MR. COOPER'S STATEMENTS WERE INVOLUNTARY

Both the Federal and state constitutional due process clauses bar the use of involuntary or coerced confessions at trial. US Const, Amends V and XIV; Mich Const 1963, art 1, § 17; *Miranda v Arizona, supra*; *Conte*, *supra. See also Mincey v Arizona,* 437 US 385, 398 (1978). The question of voluntariness turns on whether the defendant's will was overborne. *Lynum v Illinois,* 372 US 528, 534

(1963); *People v Cipriano,* 431 Mich 315, 334 (1988). If it has, the confession cannot be deemed "the product of a rational intellect and a free will." *Lynum*, 372 US at 534 (quoting *Blackburn v Alabama,* 361 US 199, 208 (1960)). In order for a confession to be involuntary under the Fourteenth Amendment, it must be the product of police misconduct. *Colorado v Connelly,* 479 US 157, 164 (1986); *People v Wells,* 238 Mich App 383, 388 (2000). In *Connelly*, the Court held that "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id.* at 164.

When considering whether a confession was voluntary, courts must evaluate the "totality of all the surrounding circumstances." *Cipriano*, 431 Mich at 333; *see also Arizona v Fulminante,* 499 US 279 (1991). In *Cipriano*, the Michigan Supreme Court set out a non-exhaustive list of factors courts should analyze in these scenarios. These factors include the defendant's age, education or intelligence level, pervious experience with law enforcement, repeated or prolonged nature of the questioning, length of detention before questioning, whether the defendant was advised of his constitutional rights, any unnecessary delay before bringing the defendant before a magistrate, whether the accused was injured, intoxicated, drugged, in ill health, deprived of sleep, food, or medical attention, and whether the defendant was physically abused or threatened with abuse. *Id.* at 334. No factor, however, is dispositive. *Id.*

It was argued prior to trial by the defense that Mr. Cooper's statements, and particularly the ultimate confession, were compelled because of the conduct of police, and that argument is incorporated herein. Specifically, the defense asserted that Mr. Cooper was isolated from his friends and family, was moved from Bay City to Farmington Hills, was repeatedly ignored when he invoked his right to remain silent, and was intentionally prevented from going to court – where an attorney would have been appointed for him. *See* Defendant's Supplemental Motion at p. 10-11 (Attached as

Appendix F). After protracted questioning spread over two days, Mr. Cooper finally told the detectives what they wanted to hear; a clear example overborne will. *Lynumn, supra.*

Here, the trial court correctly observed that "the length and nature of questioning was one of the many factors to be considered." (Transcript of Ruling, attached as **Appendix H** at p. 7). However, the Court was unpersuaded because the remaining factors weighed against Mr. Cooper: "The police advised defendant of his rights which he stated that he understood. The police did not physically abuse him or threaten abuse and did not deprive him of food or sleep. There's not evidence that he lacked sufficient education or cognitive function to understand what was happening nor was he ill, intoxicated or under the influence of drugs. He was detained for about a day and was taken for an arraignment the day after his arrest." *Id.* at 7-8.

The defense does not dispute that Mr. Cooper "understood" his rights; to be sure, he attempted repeatedly to *invoke* those rights (as set forth in sub argument A, *supra*) only to be repeatedly ignored. Irony aside, this factor most certainly should have weighed heavily in Mr. Cooper's favor, because *Miranda* teaches that "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Id.* at 474. Further, the defense argued that there was a delay by the detectives in bringing the defendant to Court. Defendant's Supplemental Motion at p. 11 (Attached as **Appendix F**). The prosecutor does not appear to have addressed any argument concerning voluntariness specifically in the written response to the trial court (**Appendix G**). Once the defense raises the issue of voluntariness, the prosecution must prove by a preponderance of the evidence that the defendant offered the statement voluntarily. *Lego v Twomey,* 404 US 477 (1972); *People v Sears,* 124 Mich App 735 (1983). Here, where the length of interrogation and length of delay were excessive and exacerbated by the detectives refusing to honor Mr. Cooper's right to remain silent, the trial court should have found the statements involuntary and granted the defense's motion to suppress.

C. ADMISSION OF THE STATEMENTS WAS NOT HARMLESS

Because these preserved errors affected Mr. Cooper's constitutional right to a fair trial devoid of unconstitutionally obtained evidence, this Court must determine whether the trial court's ruling that the statement was admissible was harmless beyond a reasonable doubt. *See People v Whitehead,* 238 Mich App 1, 7-8 (1999) citing *Arizona v Fulminante,* 499 US 279, 295 (1991) and *Chapman, supra* at 24; *See also People v Carines,* 460 Mich 750, 774 (1999).

Mr. Cooper's statements were the most damaging evidence against him at trial. The only physical evidence was a pillow case, electrical cord, bullets and bullet holes. (T II, 166). There was no scientific evidence from the 1978 collection linking the crime to any particular suspect. (T IV, 19). There were no weapons, no ballistics, and no trace evidence linked to anyone. (T IV 19-20). Though there was a blonde hair found on Mr. McKillop's body (T III, 71-73) (blonde, as described in the interrogation by Det. Wehby) Det. Wehby never did anything, as the detective in charge of the case, to procure the analysis of DNA obtained from Mr. Cooper in January of 2010. (T IV, 18). Mr. Cooper pointed out that Donnie McKitty had long blonde hair at the time as well. *See e.g.* Transcript of **Appendix A** at p. 17. At the time of trial there was no DNA evidence linking anyone to the crime. (T IV, 20).

Det. Wehby acknowledged that the evidence in the case was developed from interviews. (T IV, 20). Det. Wehby told Mr. Cooper in January of 2010 that he wanted to talk about "some other information we came up with in our other interviews and our investigation since" their discussion in December of 2006. (T III, 160). But the fact of the matter is, Mr. Cooper was a prime suspect when he was brought up by Bill Lolley in 2006 (T IV, 23), and not much developed after that. Presumably if it did, it would have come up at trial. The detectives really only had a strong case against Mr. Cooper when they went back to talk to him in 2010. The jury astutely wondered what took so long between interviews – given that there is virtually nothing else in this case to implicate

Mr. Cooper after Mr. Lolley's 2006 accusation. Apparently administrative red tape was to blame, according to Det. Wehby:

> The second interview, the length of time from the first interview and the second interview was us getting our tracking down, the information that we had also gathered from these interviews, the new names that we had gotten and the information that was provided to us from all these interviews that we did collectively.
>
> Also I think part of that would be there was a transformation at the prosecutor's office as far as a new prosecutor coming aboard. Ms. Cooper taking Gorcyca's place and there's a lot of confusion going on as far as case loads and things of that nature. But that was really the delay between the first and the second interview.

(T V, 12).

Mr. Lolley did identify Mr. Cooper as Mr. McKillop's shooter in 2006, based upon statements Mr. Cooper made to Lolley in 1978. In fact, Lolley described the murder as being premeditated by Mr. Cooper, with Mr. Cooper asking for a ride to commit the murder before it occurred, offering to share the proceeds from the murder-for-hire, and afterwards described information about Mr. Cooper tying victim up and multiple shots inflicted by Mr. Cooper himself. (T III, 9, 10, 11, 20). Mr. Lolley knew details about the crime that were not released in the paper. *See e.g.* T II, 143-145, 150. But if Lolley's information was enough, it stands to reason that Mr. Cooper would have been charged in 2006 and there would have been no reason to aggressively coerce a confession out of him in 2010. Further, if anything Lolley said about Mr. Cooper's statements were believable, Mr. Cooper likely would have been convicted of first degree *premeditated* murder, a theory rejected by the jury in its verdict. *See e.g.* T VI, 99.

In statements at Bay City and Farmington Hills on March 2, 2010, Mr. Cooper denied any involvement in the shooting itself, denied knowing that anyone even had guns, and believed they were just there to tie up, beat up and scare Jenkins into repaying a loan. *See generally* **Appendices A** and **B**. The prosecutor argued in closing that Mr. Cooper's statements indicating his intent to tie up

and beat up the victim constituted malice for purposes of a second degree murder charge. *See e.g.* Closing Argument at T VI 27. But most of Mr. Cooper's statements denied involvement in the murder itself, and concerned his involvement only in the debt repayment/enforcement. The question of malice was for the jury to decide, and killing someone (or even committing great bodily harm) is not an obvious way to obtain debt repayment. Mr. Cooper, however, ultimately admitted to being in the home and being involved with tying or wrestling with Mr. McKillop when the shooting occurred. **Appendix C**. The admission of the statements was not harmless. Even with other evidence implicating a defendant, a defendant's confession "is probably the most probative and damaging evidence that can be admitted against him." *Fulminante*, *supra* at 296. The prosecution had Det. Wehby read Mr. Cooper's confession into the record at trial during re-direct examination testimony. (T IV, 45-48). All portions of the statement made after Mr. Cooper invoked his right to remain silent should have been suppressed, including the ultimate confession which was involuntarily made.

Reversal is required.

SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse his convictions.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/Marla R. McCowan
BY:_____

Marla R. McCowan (P 57218)
Manager, Criminal Defense Resource Center
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: March 13, 2012