

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Judge Jansen, Judge Redford, and Judge Yates

CHAMAR AVERY,

Supreme Court No. 165554

Plaintiffs-Appellant,

Court of Appeals No. 359535

v

Court of Claims No. 17-000245-MZ

STATE OF MICHIGAN,

Defendants-Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	ii
Statement of Jurisdiction	iv
Counter-Statement of Questions Presented.....	v
Statutes and Rules Involved	vi
Counter-Statement of Facts and Proceedings	3
Argument	16
I. The Court of Claims properly resolved Avery’s lawsuit through a trial in accordance with the WICA and the Court of Claims Act.....	16
A. Standard of Review	16
B. Analysis	16
II. The WICA does not confine the Court of Claims to considering only new evidence.	18
A. Standard of Review	18
B. Analysis	18
III. The Court of Claims did not clearly err in concluding that Avery failed to prove by clear and convincing evidence that he did not perpetrate the crime.....	29
A. Standard of Review	29
B. Analysis	29
Conclusion and Relief Requested.....	35
Word Count Statement.....	36

INDEX OF AUTHORITIES

Cases

Avery v Prelesnik,
524 F Supp 2d 903 (WD Mich, 2007)..... 3, 4

Avery v Prelesnik,
548 F3d 434 (CA 6, 2008)..... 3, 4

Douglas v Allstate,
492 Mich 241 (2012)..... 29

Jesperson v Auto Club Ins Ass’n,
499 Mich 29 (2016)..... 16, 18

Miller-Davis Co v Ahrens Const, Inc,
495 Mich 161 (2014)..... 29

People v Carines,
460 Mich 750 (1999)..... 16, 18

People v Ginther,
390 Mich 436 (1973)..... passim

People v Sexton,
461 Mich 746 (2000)..... 29, 33

People v Watkins,
491 Mich 450 (2012)..... 24

Sands Appliance Servs v Wilson,
463 Mich 231 (2000)..... 29

Sanford v State,
506 Mich 10 (2020)..... 28

Statutes

28 USC 2513(b)..... 25

CT ST 54-102uu(b)..... 27

MA ST 258D § 1(F)..... 25

MCL 600.6422..... 17

MCL 600.6422(1)..... 18

MCL 600.6431 5

MCL 600.6443..... 16

MCL 691.1752..... 28

MCL 691.1752(b)..... 26

MCL 691.1753..... 16, 27

MCL 691.1755(1)..... 19, 25

MCL 691.1755(1)(c)..... passim

Md State Fin & Proc 10-501(b) 27

Minn Stat 590.11(4)..... 25

NC ST 148-83..... 27

Other Authorities

Merriam-Webster’s Collegiate Dictionary
 (11th ed, 2020)..... 23

Rules

MCR 105..... 23

MCR 2.517(A)..... 35

MCR 2.517(A)(1) 29

MCR 2.517(A)(2) 29

MCR 2.613(C)..... 29

MRE 101..... 18

MRE 401..... 19, 20, 21

MRE 402..... 19, 20, 24

MRE 801(D)(1)(A) 11

MRE 802..... 24

STATEMENT OF JURISDICTION

Defendant-Appellee State of Michigan agrees with Plaintiff-Appellant Chamar Avery that this Court has jurisdiction to hear this case pursuant to MCR 7.303(B)(1) and MCL 600.215(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751, *et seq*, creates a cause of action against the State of Michigan in the Court of Claims. Avery filed his action against the State in accordance with this statute. Did the Court of Claims err by holding a trial to resolve Avery's lawsuit?

Appellant's answer: No.

Appellee's answer: No.

Trial court's answer: Did not answer.

Court of Appeals' answer: No.

2. Section 5(1) of the WICA sets forth the elements that must be proven to show entitlement to relief, including three showings based on new evidence. The Court of Claims, in deciding whether Avery met these elements, heard witnesses from both parties, including an eyewitness from the criminal trial. Did the statute limit the court to considering only the new evidence?

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: Did not answer.

Court of Appeals' answer: No.

3. Section 5(1)(c) of the WICA, requires plaintiffs to prove by clear and convincing evidence that new evidence demonstrates that they did not commit the crimes of which they were convicted. Here, an eyewitness highly familiar with Avery identified him as the perpetrator, and a co-defendant implicated Avery in his guilty plea testimony. Did the Court of Claims err by concluding that Avery failed to prove by clear and convincing evidence that he did not perpetrate the crime.

Appellant's answer: Yes.

Appellee's answer: No.

Trial court's answer: No.

Court of Appeals' answer: No.

STATUTES AND RULES INVOLVED

MCL 691.1752(b)

(b) “New evidence” means any evidence that was not presented in the proceedings leading to plaintiff’s conviction, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to plaintiff’s conviction. New evidence does not include a recantation by a witness unless there is other evidence to support the recantation or unless the prosecuting attorney for the county in which the plaintiff was convicted or, if the department of attorney general prosecuted the case, the attorney general agrees that the recantation constitutes new evidence without other evidence to support the recantation.

MCL 691.1755(1)

(1) In an action under this act, the plaintiff is entitled to judgment in the plaintiff’s favor if the plaintiff proves all of the following by clear and convincing evidence:

(a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.

(b) The plaintiff’s judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.

(c) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial.

MRE 401

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MRE 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

INTRODUCTION

This case illustrates the distinction between novelty and jurisprudential significance. The Court of Claims in this case faced a novel task—deciding the first WICA case not resolved by stipulation of the parties or dismissed through motion practice. Avery’s claims of error on appeal, however, lack jurisprudential significance, varying wildly and lacking meaningful statutory support.

As to his first claim of error—the Court of Claims’ decision to resolve his claim through a trial—Avery in the Court of Appeals failed to identify any statutory provision indicating that WICA actions, unlike all other lawsuits, are resolved through a procedure other than trial. Now, before this Court, Avery has abandoned this claim of error, conceding that the statute does not prohibit trials.

As to the second claim of error—the Court of Claims’ consideration of evidence other than “new evidence”—Avery’s argument has not only lacked statutory support but also contradicted itself over time. In the Court of Claims, Avery argued against the admission of the criminal trial record, arguing that the court could only consider live witness testimony. In the Court of Appeals, Avery changed course and argued for the first time that the court below could only consider new evidence, which Avery defined as the portions *of the criminal trial record* that pertained to his new evidence. Before this Court, Avery has changed course again, redefining new evidence to include the live testimony of witnesses, but only those witnesses who did not testify in the criminal trial. Ultimately, each version of Avery’s argument on appeal runs counter to the fact that the WICA

contains no provision limiting or expanding the evidence that the Court of Claims may consider.

Finally, as to the third claim of error—the Court of Claims’ factual determination that Avery had not demonstrated his innocence by clear and convincing evidence—Avery asks this Court to second-guess the fact finder’s credibility determinations. Again, this argument has been inconsistent on appeal. In the Court of Appeals, Avery focused on the Court of Claims’ finding of credibility as to eyewitness Jacklyn Barker. In this Court, however, Avery largely ignores Barker and focuses instead on the court’s credibility determination as to co-defendant Terrance Holmes. Regardless, as to both witnesses, the Court of Claims’ credibility determinations are supported by the record, as is its conclusion that Avery could not demonstrate his innocence by clear and convincing evidence.

Thus, while this case is interesting as the first wrongful imprisonment case to be tried in this state, the legal and factual questions raised on appeal lack jurisprudential significance. Accordingly, the State respectfully requests that this Court deny leave to appeal or, in the alternative, issue an opinion affirming the Court of Appeals.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Avery's prior criminal proceedings¹

Avery was convicted of second-degree murder in 2000 in connection with the shooting of Geoffrey Stanka. *Avery v Prelesnik*, 548 F3d 434, 435–436 (CA 6, 2008). Stanka, a pizza delivery man, was shot and killed on Dayton Street in Detroit on January 15, 2000. *Id.* at 435. Jacklyn Barker, who lived on Dayton Street across the street from the scene of the crime, identified Avery, along with co-defendants Recho Burns and Terrance Holmes, as the perpetrators. (Def's App'x, pp 734–735, Preliminary Examination Transcript.)² Barker knew all three men from the neighborhood and had known Avery and his family for “[a] very long time.” (*Id.* at 730, 742.) Avery and Burns were tried and convicted together, while Holmes separately pled guilty. *Avery v Prelesnik*, 524 F Supp 2d 903, 909, 919 (WD Mich, 2007); (Def's App'x, p 250, Holmes Plea Transcript; Def's App'x, p 661, 11/16/21 Trial Transcript).

¹ The facts of Avery's criminal case are found in *Avery v Prelesnik*, 524 F Supp 2d 903 (WD Mich, 2007), the federal district court's opinion granting Avery habeas relief, and *Avery v Prelesnik*, 548 F3d 434 (CA 6, 2008), the Sixth Circuit's opinion affirming. The Court of Claims, in its written opinion, relied on these court opinions in setting forth the factual background on Avery's criminal case. (Pl's App'x, pp 14–16, COC Op).

² Barker's preliminary examination testimony was entered into evidence in the bench trial before the Court of Claims and thus is part of the record on appeal. (See Pl's App'x, p 80, 11/15/21 Trial Transcript (identifying trial exhibits); Pl's App'x, p 17, COC Op (identifying exhibits entered into evidence).) Barker's trial testimony, which Avery has included in his appendix, (Pl's App'x, p 170, 06/27/00 Trial Transcript), was not entered into evidence and thus is not part of the record on appeal. (See Pl's App'x, p 80, 11/15/21 Trial Transcript; Pl's App'x, p 17, COC Op.)

Avery appealed his conviction, and the Court of Appeals remanded for a *Ginther*³ hearing. *Avery*, 548 F3d at 436. At the hearing, Avery argued that he received ineffective assistance of counsel based on his attorney's failure to investigate certain alibi witnesses. *Id.* Avery presented the testimony of two alibi witnesses at the hearing—Damar Crimes and Darius Boyd—and he also testified on his own behalf. *Id.*

At the conclusion of the hearing, the trial court denied relief. *Id.* at 436. The court found the alibi testimony “incredibly inconsistent on some basic times and facts” and found Boyd’s testimony in particular “totally incredible,” suggesting “a manufacturing of testimony.” *Id.* Avery appealed, and the Court of Appeals affirmed. *Id.* This Court denied leave to appeal. *Id.*

Avery sought habeas relief, and the federal district court granted relief based on ineffective assistance of counsel. *Avery*, 524 F Supp at 911. The Sixth Circuit affirmed, concluding that counsel’s failure to investigate the alibi witnesses was “sufficient to undermine confidence in the outcome of the jury verdict.” 548 F3d at 439 (quotation marks omitted). The court further explained, “We do not ask whether Avery was ultimately innocent, but, rather, whether he was deprived a reasonable shot of acquittal. Here, the jury was deprived of the right to hear testimony that could have supplied such reasonable doubt.” *Id.* (quotation marks omitted). On this basis, the Sixth Circuit affirmed the grant of habeas relief. The U.S. Supreme Court denied certiorari. *Avery v Prelesnik*, 558 US 932 (2009).

³ *People v Ginther*, 390 Mich 436 (1973).

WICA pretrial proceedings

In 2017, Avery filed his lawsuit against the State of Michigan seeking compensation under the WICA. (Pl's App'x, p 70, Register of Actions). The Court of Claims initially dismissed Avery's claim based on the failure to file a notice of intent to sue, as was required by MCL 600.6431 at that time. (*Id.* at 71.) After the Legislature amended the statute to exempt WICA claims from its requirements, this Court remanded Avery's claim to the Court of Claims. (*Id.* at 72.)

In the lead-up to trial, the parties filed several motions addressing the evidence to be considered at trial. The State moved to introduce the transcripts from Avery's criminal trial, arguing that the transcripts were necessary to determine (1) whether Avery had presented "new evidence" as defined by the WICA and (2) whether that new evidence demonstrated his innocence by refuting the evidence of guilt presented at the criminal trial.⁴ (Def's App'x, p 1, Def's Mtn to Admit Trial Transcripts). Avery, in response, argued that the rules of evidence governed the trial in this case and that the trial transcripts were inadmissible hearsay. (Def's App'x, p 7, Pl's Response to Def's Mtn to Admit Trial Transcripts.) Avery specifically distinguished his WICA action from habeas proceedings, where

⁴ While the State's motion only sought the admission of the trial transcripts, the State made clear that it supported the introduction of the entire criminal trial record, including the *Ginther* hearing transcripts containing the testimony of Avery's alibi witnesses. (See Def's App'x, p 217, Def's Response to Pl's Motion in Limine to Deem Certain Matters Admitted) ("[T]he State would support the admission into evidence of the entire record of Avery's criminal conviction and the reversal of that conviction, including the trial transcripts, the *Ginther* transcripts, the register of actions, and the accompanying court opinions.")

the underlying trial transcripts are considered, explaining that habeas proceedings “are fundamentally different from WICA” proceedings because “there is no separate trial” in the habeas context. (*Id.* at 12.)

Avery, for his part, filed two pretrial motions relating to the evidence to be considered: the first seeking to exclude various portions of the criminal trial record, and the second seeking the admission of certain discovery materials. (See Def’s App’x, p 213, Pl’s Mtn to Exclude Certain Anticipated Evidence and Receive Certain Anticipated Evidence; Def’s App’x, p 224, Pl’s Mtn in Limine for Court to Deem Certain Matters Admitted.)

As to each motion, the court granted in part and denied in part. As to the State’s motion to admit the trial transcripts, the court ruled that the transcripts were admissible for the non-substantive purpose of determining whether Avery had presented new evidence. (Def’s App’x, p 243, Order Granting in Part Def’s Motion in Limine.) While the court agreed that the WICA also required Avery to refute the evidence of his guilt, the court held that the criminal trial transcripts were nonetheless inadmissible hearsay and could not be admitted as substantive evidence. (*Id.*) As to Avery’s motions, the court ruled that it was premature to exclude portions of the criminal trial record that may be admissible as impeachment but agreed to admit portions of the discovery materials identified by Avery. (Def’s App’x, p 246, Order Granting in Part Pl’s Mtn in Limine to Exclude Certain Evidence and Receive Certain Evidence; Def’s App’x, p 248, Order Granting in Part Pl’s Mtn in Limine Regarding Admissions.)

WICA bench trial

At trial, the parties did not dispute that Geoffrey Stanka was murdered between 7 p.m. and 8:30 pm on the night of January 15, 2000. (Pl's App'x, p 14, COC Op; Pl's App, p 9 n 2.) The sole issue was whether Avery could show, by clear and convincing evidence, that new evidence demonstrated that he did not perpetrate the crime. (Pl's App'x, p 23, COC Op.) Six witnesses testified at trial: Avery, Damar Crimes (an alibi witness), LaVelle Crimes (Damar's brother), Jacklyn Barker (the eyewitness), Terrence Holmes (Avery's co-defendant), and Dr. Brian Cutler (an expert witness).⁵ (*Id.* at 17.)

Barker testified that, in January 2000, she lived in the same neighborhood as Avery and had known him since they were both children. (Def's App'x, p 456, 11/15/21 Trial Transcript.) On the night of January 15, 2000, Barker was inside her house when she saw a car pull up across the street. (*Id.* at 458.) She then heard a gunshot, looked outside, and saw three men jump out of the vehicle and run away. (*Id.* at 459.) As she watched, one of the men turned around and ran back to pick something up. (*Id.* at 460.) As he knelt down and looked up, Barker saw his face and recognized Avery. (*Id.* at 461.) Barker testified that she recognized the other two men as Terrence Holmes and Recho Burns.⁶ (*Id.*) Barker explained that, even

⁵ Of these, Damar Crimes and Avery were the only witnesses who also testified at the *Ginther* hearing. Thus, two of Avery's witnesses—LaVelle Crimes and Dr. Cutler—were new witnesses, as was Terrence Holmes.

⁶ When Holmes later testified regarding his own guilty plea to the robbery of Stanka, he confirmed that Burns was also convicted for the murder of Stanka. (Def's App'x, p 661, 11/16/21 Trial Transcript.) Avery, during his testimony, confirmed that Burns is still in prison. (*Id.* at 393.)

though it was dark outside, the snow on the ground and the illumination from the streetlights made it light enough to see. (*Id.* at 462.)

Barker acknowledged that she did not identify Avery, Holmes, or Burns to the police immediately after the shooting. (*Id.* at 464.) She also acknowledged that she was shown a lineup containing Avery and did not identify him out of the lineup, (*Id.* at 465), and that she signed a line-up sheet identifying another man as the perpetrator, (*Id.* at 503–504). She testified that she did not identify Avery, Holmes, and Burns because she was afraid of them. (*Id.*) Regarding the line-up specifically, Barker also testified that she did not identify the three men because she believed that they could hear her voice and recognize her. (*Id.* at 465–466.) When asked why she did eventually identify the three men to the police two weeks later, she explained that she was motivated by the fear of knowing the men were still out there and by knowing it was “the right thing to do.” (*Id.* at 466.)

According to Avery, on the evening of January 15, 2000, he was getting his car fixed at Crimes Towing. (*Id.* at 395.) He testified that, prior to arriving at Crimes Towing, he went to the auto parts store with LaVelle and Jellyroll, two mechanics from Crimes Towing. (*Id.* at 371.) He did not remember how he came to be with the two of them. (*Id.* at 423.) Avery introduced into evidence a receipt from the auto parts store timestamped 2:43 pm. (*Id.* at 372, 427.) He could not recall what time he arrived at Crimes Towing but testified that it was getting dark. (*Id.* at 373.) He also testified that the auto parts store was a couple minutes from Crimes Towing. (*Id.* at 424.)

Per Avery, while he was waiting at Crimes Towing for his car to be repaired, Damar Crimes arrived, and the two of them walked to Darius Boyd's house. (*Id.* at 373–374.) At some point, Avery testified, LaVelle called to let him know that his car was ready. (*Id.* at 378.) Avery could not initially recall how long he was at Boyd's house, but after reviewing his *Ginther* testimony, he testified that it was about an hour and a half. (*Id.* at 378–379.) He testified that he and Damar walked back to Crimes Towing and then drove together to Damar's friend's house and back to Darius's house, where Avery dropped off Damar. (*Id.* at 380–381.) After that, according to Avery, he drove home, where he arrived around 10 p.m. (*Id.* at 383.)

Damar Crimes also testified that he and Avery met up at Crimes Towing on January 15, 2000. (*Id.* at 433.) He testified, however, that they met up around 4:30 or 5:00 p.m. and left to go to Boyd's house around 5:00 or 5:30 pm. (*Id.* at 433–434.) When confronted with his *Ginther* testimony by Avery's counsel, Damar agreed that he had testified previously that they left Crimes Towing around 7:00 pm. (*Id.* at 434–435.) He testified that his brother LaValle called him around 7:30 or 8:00 pm. to let them know the car was ready and that they walked together back to the shop. (*Id.* at 437.) He claimed that, from there, they went to a friend's house, and Avery eventually dropped him off at Boyd's house around 9:00 pm. (*Id.* at 438.)

Damar also testified that he was a long-time friend of Avery's and considered Avery to be "family." (*Id.* at 431–432.) On cross-examination, Damar confirmed that, after Avery had been arrested, he learned about the arrest and Avery's pending murder trial. (*Id.* at 441.) He testified, however, that he did not reach out

to Avery or his family to let them know that he was purportedly with Avery when the crime occurred. (*Id.* at 441–442.) After the parties’ examination, the court questioned Damar on why he would not have reached out to Avery’s family to help his close friend who was potentially heading to prison. (*Id.* at 443.) Damar had no explanation:

THE COURT: All right, I’m going to ask you one question, Mr. Crimes, if you don’t mind.

THE WITNESS: Yes, sir.

THE COURT: I’m perplexed by your testimony that you did not reach out to Mr. Avery’s family after you found out that he was arrested for the murder.

THE WITNESS: Right.

THE COURT: Do you have an explanation as to why? I think most friends, close friends would reach out if they thought their friend was being hauled into the police department for something that they didn’t do.

THE WITNESS: *I don’t have an explanation for it.* [*Id.* (emphasis added).]

Following Damar’s testimony, LaVelle Crimes testified that he also had known Avery for many years because Avery’s mother had dated LaVelle’s brother. (*Id.* at 444.) LaVelle explained that he had towed Avery’s car to Crimes Towing the previous day—Friday, January 14th. (*Id.* at 445.) On January 15th, he picked up Avery and drove him to the auto parts store and then to the shop. (*Id.* at 445–446.) He recalled starting work on Avery’s car around 4:00 or 4:30 pm. and taking about two or two-and-a-half hours to finish the repairs. (*Id.* at 446–447.) He then called Damar to let him know the car was ready. (*Id.* at 447.)

Avery's expert witness, Brian Cutler, testified as to various factors to consider when weighing an eyewitness identification—such as lighting, distance, exposure time, and level of stress. (*Id.* at 618–620, 11/16/21 Trial Transcript.) He acknowledged, however, that these factors pose less of a concern when the eyewitness was familiar with the person identified. (*Id.* at 635–636.)

Finally, Terrence Holmes testified regarding his guilty plea to Stanka's murder. (*Id.* at 652.) At the WICA trial, Holmes denied any involvement in the murder of Stanka. (*Id.* at 655–656.) When confronted with the plea hearing transcript, Holmes agreed that he testified at that hearing that he arranged with Burns and Avery to rob Stanka.⁷ (*Id.*) He also agreed that he testified at the plea hearing that he was in the car with Avery, Burns, and Stanka when Burns shot Stanka in the head. (*Id.* at 654–656.)

On cross-examination by Avery's counsel, Holmes testified that he pled guilty because he was scared and because his mother asked him to. (*Id.* at 668.) When asked by the court how he knew so many details of the shooting at his plea hearing, Holmes claimed that he repeated the story he had heard. (*Id.* at 677–679.) Holmes could not explain where he heard these details, however, and denied having learned the details of the crime from either the police or the neighborhood. (*Id.* at 679–680.) Holmes admitted that he also acknowledged guilt at his sentencing, expressing his “deepest apologies” and asking for “forgive[ness]” from Stanka's family. (*Id.* at 677.)

⁷ The plea hearing transcript was admitted under MRE 801(D)(1)(A) as a prior statement under oath. (*Id.* at 651–652.)

Shortly after the trial, the Court of Claims issued an opinion holding that Avery had not shown entitlement to relief under the WICA. (Pl’s App’x, p 26, COC Op.) In reaching this conclusion, the court relied primarily on Barker’s testimony and Holmes’ plea hearing testimony. (*Id.* at 23–24.)

As to Barker, the court found her testimony “candid and straightforward, at least on the main points,” and found her identification of Avery “steadfast and believable.” (*Id.* at 24.) The court noted that Barker knew Avery personally and had no reason to lie about what she had seen. (*Id.* at 23.) The court concluded that “Barker’s identification of plaintiff—a person she knew—was not close to incredible or worthy of no belief, as argued by plaintiff.” (*Id.* at 24.) Rather, while Barker’s testimony contained inconsistencies as to certain details, “when it came to where she was standing when she viewed plaintiff and the fact of viewing him and what he was doing just before she saw his face, Barker was consistent.” (*Id.*)

As to Holmes, the court noted the detail with which Holmes was able to describe the shooting at his plea hearing:

Holmes set out in detail (a) the agreement the three had to rob Stanka, (b) that Burns called Stanka on the phone to get him into the area, (c) the plan to meet up shortly after the robbery to split up any monies taken from Stanka, (d) the fact that Burns only drew the weapon once he got in the car with Stanka, (e) that Burns shot Stanka in the head, and (f) that they all ran from the scene and met up soon after (and in accordance with the plan) to split up the money. [*Id.* at 24–25.]

The court concluded that, while it might be possible that Holmes learned these facts elsewhere, as he had claimed, it was “too difficult . . . to ignore the sworn, detailed testimony from Holmes on the basis that it was all a lie.” (*Id.* at 25.)

Regarding the testimony of Avery's witnesses, the court found that their testimony "d[id] not come close to tipping the scale toward clear and convincing evidence that plaintiff did not perpetrate the crime." (*Id.*) As to LaVelle Crimes, the court noted that "[t]here was no suggestion that LaVelle went with plaintiff and Damar over to Boyd's house or otherwise spent time with plaintiff during the hours in question." (*Id.* at 19.) And as to Damar Crimes, the court reasoned that "Damar could not explain why he didn't go to plaintiff's family or the authorities to let them know plaintiff was with him at the time of the crime" and "[t]hat fact significantly decreased the believability of his testimony." (*Id.* at 25–26.) Further, the court added that "Damar's demeanor during his testimony made it appear like he was there to just get the story out, as opposed to telling an important story of compelling truth." (*Id.*)

Ultimately, the court concluded that "although the Court is inclined to find that [Avery] did perpetrate the crime as testified to by Barker and Holmes (at the plea hearing), it need only conclude—and does conclude—that there was not clear and convincing evidence that he did not perpetrate the crime." (*Id.* at 26.)

The Court of Appeals' Decision

Avery raised three arguments in the Court of Appeals: (1) the Court of Appeals erred by holding a trial to resolve his WICA claim, (2) the court erred by not applying a presumption of innocence, and (3) the court erred in finding Barker's testimony credible. (Def's App'x, p 296, Pl's COA Br.) The Court of Appeals disagreed with Avery on all three issues.

As to the first issue, the Court of Appeals concluded that Avery's argument both lacked legal support and was waived. The court first noted that "[n]o statute, rule, or case prohibits the Court of Claims from conducting a trial in an action brought under the WICA" and that "[p]laintiff has not cited any law that supports his position." (Pl's App'x, p 8, COA Op.) As to Avery's assertion that the Court of Claims could consider only "new evidence," meaning only the *Ginther* transcripts, the Court of Appeals held that this position not only "lack[ed] any legal support" but also would "prevent the trial court from fulfilling its legislatively mandated judicial responsibility" of determining whether Avery had shown innocence. (*Id.*) Finally, the Court of Appeals also held that Avery waived this argument below by clearly "indicating his approval to have a trial conducted on his claim." (*Id.*)

As to the second issue, the Court of Appeals held that a presumption of innocence does not apply in the context of the WICA. The court distinguished a WICA claim from a criminal prosecution, explaining that in a civil action under the WICA the plaintiff bears the burden of establishing by clear and convincing evidence that he or she did not commit the crime at issue. (*Id.*) To apply a presumption of innocence, the court concluded, would render the WICA's statutory burden of proof meaningless. (*Id.* at 9.)

Finally, as to the third issue, the Court of Appeals concluded that the Court of Claims did not clearly err in finding Barker credible. The Court of Appeals found that the lower court appropriately "considered the entire record before it, including historical inconsistencies in Barker's conduct and inconsistencies in her various

testimonies.” (*Id.* at 10.) Further, the Court of Appeals held that the record supported the Court of Claims’ conclusion that Barker “testified consistently regarding her identification of plaintiff at the scene of Stanca’s robbery and murder.” (*Id.*) The Court of Appeals noted the various inconsistencies in Barker’s testimony that Avery had highlighted but concluded that those inconsistencies “do not leave us with a definite and firm conviction that the trial court made a mistake in finding Barker’s testimony credible.” (*Id.*) Ultimately, the Court of Appeals concluded that Avery “failed to establish that the trial court committed plain error in any respect.” (*Id.*)

In dissent, Judge Jansen argued that a trial was inappropriate because the “the state had already declined the opportunity to retry” Avery after his conviction was overturned. (*Id.* at 13.) Judge Jansen also believed the trial to be “grossly unfair” because the State was permitted to present “two witnesses . . . who testified at the plaintiff’s original trial,”⁸ while “the statute limits plaintiff to presenting ‘new evidence.’” (*Id.*) Instead, Judge Jansen argued, the Court of Claims should have “held an evidentiary hearing limited to plaintiff’s new evidence.” (*Id.*)

In a footnote responding to the dissent, the majority noted that the trial “was neither unfair nor violative of plaintiff’s rights.” (*Id.* at 10.) Instead, as envisioned by the statute, Avery introduced his new evidence, and the State presented admissible evidence in rebuttal. (*Id.*)

⁸ This assertion appears to be based on a mistaken understanding that Holmes testified at Avery’s criminal trial.

ARGUMENT

I. The Court of Claims properly resolved Avery’s lawsuit through a trial in accordance with the WICA and the Court of Claims Act.

A. Standard of Review

This Court reviews de novo a question of statutory interpretation. *Jesperson v Auto Club Ins Ass’n*, 499 Mich 29, 34 (2016). Unpreserved claims of trial error are reviewed for plain error. *People v Carines*, 460 Mich 750, 761–764 (1999).

B. Analysis

As soon as Avery filed his complaint in the Court of Claims, his case began heading toward trial. The State of Michigan, represented by the Attorney General, answered Avery’s complaint, and the Court of Claims issued a scheduling order setting dates for the exchanging of witness lists and the closure of discovery. After discovery closed, the court set a trial date and, on the appointed date, held a trial to determine whether Avery could show entitlement to relief. The parties, through motions in limine, raised evidentiary questions about trial, but the parties never disputed that a trial was appropriate or necessary.

Neither the parties nor the Court of Claims erred in this shared understanding. The WICA and the Court of Claims Act together make clear that WICA actions, like all court actions, are resolved through a trial. By its terms, the WICA creates “an action for compensation against this state in the court of claims.” MCL 691.1753. The Court of Claims Act, in turn, provides that cases filed in the Court of Claims are resolved by bench trial. MCL 600.6443. Further, the Court of

Claims Act provides that proceedings in the Court of Claims are governed by the same rules that apply to the circuit courts. MCL 600.6422 (“Practice and procedure in the court of claims shall be in accordance with the statutes and court rules prescribing the practice in the circuit courts of this state, except as otherwise provided in this section.”) Together, these provisions lead to the unremarkable conclusion that actions under the WICA are also resolved through trials.

In the Court of Appeals, Avery argued for the first time that the Court of Claims erred by holding a trial. (See Def’s App’x, pp 302–303, Pl’s COA Brief.) He asserted that the court should have considered *only* the new evidence that resulted in the reversal of his convictions and the dismissal of his charges, meaning only the *Ginther* transcripts. (*Id.* at 300–307.) In other words, the court should not have heard any live witness testimony and should have reviewed only the *Ginther* transcripts. (*Id.* at 305–306 (“2021 testimony from Damar Crimes, Lavelle Crimes, and Jacklyn Barker does not fit into this definition [of new evidence] because their 2021 testimony was not what resulted in Avery being acquitted.”).)

Avery now, in his supplemental brief, has abandoned this argument. Without acknowledging his prior position, he states, “To be clear – the WICA does not *prohibit* trials – it simply creates a claims system where trials are procedural unicorns.” (Pl’s Supp Br, p 3 (emphasis in original).) He argues that the WICA reflects a legislative intent to minimize the number of cases that need trials, but he no longer argues that the Court of Claims erred by conducting a trial. (*Id.* at 3–4.)

What he claims instead is that, if the Court of Claims had not considered Barker’s testimony, then a trial would not have been necessary. (*Id.* at 4.) The implication, assumedly, is that Avery could have won on a motion for summary disposition had the Court not considered Barker’s testimony. Avery does not address the fact that, without a trial, the court would also not have heard the testimony of his witnesses, two of whom—LaVelle Crimes and Dr. Cutler—did not testify at the *Ginther* hearing in Avery’s criminal case. Regardless, as is discussed in the next section, the WICA nowhere limits the Court of Claims to considering only new evidence.

II. The WICA does not confine the Court of Claims to considering only new evidence.

A. Standard of Review

This Court reviews de novo a question of statutory interpretation. *Jesperson*, 499 Mich at 34. Unpreserved claims of trial error are reviewed for plain error. *Carines*, 460 Mich at 761–764.

B. Analysis

As discussed above, the Court of Claims is governed by the same statutes and rules that govern the state circuit courts. MCL 600.6422(1). Thus, to determine the admissibility of evidence in a WICA trial conducted in the Court of Claims, the appropriate starting point is the Michigan Rules of Evidence, which “govern proceedings in the courts of the state.” See MRE 101.

Under the rules of evidence, the baseline rule is that “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court.” MRE 402. And evidence is relevant if it has “any tendency to make the existence of any fact of consequence more probable or less probable.” MRE 401.

Thus, in the context of the WICA, unless otherwise provided, any evidence relevant to the required factual showings is admissible. Those factual showings are set forth in MCL 691.1755(1):

(1) In an action under this act, the plaintiff is entitled to judgment in the plaintiff's favor if the plaintiff proves all of the following by clear and convincing evidence:

(a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.

(b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.

(c) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial.

In this case, the only question at issue was whether Avery could show, by clear and convincing evidence, that new evidence demonstrated that he “did not

perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction.” MCL 691.1755(1)(c). Accordingly, any evidence making this contested fact “more probable or less probable” is relevant and presumed admissible under MRE 401 and MRE 402.

At least three general categories of evidence are relevant to this inquiry.

First, and most obviously, the new evidence itself is relevant. Determining whether new evidence demonstrates innocence requires the fact finder, at a minimum, to consider the new evidence and weigh its probative value in showing that a plaintiff did not perpetrate the crime of which the plaintiff was convicted.

Second, and just as obviously, evidence of guilt is also relevant to the question of a plaintiff’s innocence. Evidence of guilt, whether evidence presented to the jury in the criminal trial (such as Barker’s testimony in this case) or evidence that was not presented to the jury (such as Holmes’ guilty plea), would tend to make less likely that new evidence demonstrates a plaintiff’s innocence. In other words, the fact finder must weigh the evidence of guilt against the new evidence in determining whether the new evidence shows that a plaintiff did not perpetrate the crime of which he or she was convicted.

Third, and importantly, any exculpatory evidence presented at the original criminal trial is also relevant to this inquiry. For example, if a plaintiff presented alibi testimony at the criminal trial, that evidence would tend to make more likely that new evidence does in fact establish innocence. For this reason, Avery’s concern raised in his application brief (also raised by Judge Jansen in her dissent) that the

Court of Appeals’ decision permits “the State to produce *any* evidence while limiting the people who were wrongfully imprisoned to new evidence” is unfounded. (See Pl’s App, pp 7–8 & 16–17; Pl’s App’x, p 13, COA Dissent.) While the statute requires a plaintiff to identify “new evidence” that was not presented at the criminal trial, any exculpatory evidence that *was* presented at trial is relevant to the determination of whether the new evidence establishes innocence. The statute does not limit the plaintiff to presenting only new evidence on the question of whether he or she perpetrated the crime.

Thus, applying the rules of evidence to the statutory inquiry, at least the new evidence, any evidence of guilt, and any evidence of innocence previously presented to the jury will generally be relevant and admissible. Avery argues, however, that *only* new evidence is substantively admissible in the context of a WICA trial. The basis for his conclusion is unclear, made more difficult by his shifting definition of “new evidence.”⁹ The summary of his argument in his supplemental brief is that “the Legislature meant what it wrote.” (Pl’s Supp Br, p 5.) Looking to his application brief, which his supplemental brief incorporates by reference, (*id.*), he appears to raise two separate arguments: (1) only new evidence is relevant under MRE 401 and thus admissible under the rules of evidence and (2) the statute

⁹ As discussed above, Avery argued in the Court of Appeals that only the *Ginther* hearing transcripts were “new evidence” and that the WICA precludes consideration of live testimony. (See Def’s App’x, pp 303–306, Pl’s COA Brief.) He now argues that only live testimony of witnesses not presented at the criminal trial constitutes “new evidence,” meaning that only Barker’s testimony should have been excluded from the WICA trial. (See Pl’s Supp Br, p 4.)

expressly prohibits the admission of evidence other than new evidence. (See, e.g., Pl’s App, p 5 (“The Court of Appeals erred by holding that the testimony of Jacklyn Barker was relevant”); *id.* at 6 (“The text of the WICA excludes relying on evidence other than ‘new evidence’”)) While the distinction is important, neither argument holds up.

As to the argument that only new evidence is relevant to the statutory inquiry, Avery misapprehends that inquiry. Avery articulates the inquiry as follows: “Simply put, to meet their burden under the first clause of § 1755(1)(c) a claimant must produce ‘new evidence’ that is incompatible with their participation in the crime for which they were convicted.” (*Id.* at 9.) In other words, Avery reads the statute as limiting the court to determining solely whether new evidence is facially “incompatible” with guilt, which is a far cry from proving by clear and convincing evidence that the plaintiff in fact “did not perpetrate the crime.”

For purposes of this inquiry, Avery argues, the evidence of guilt from the criminal trial is relevant “exclusively for the purpose of developing a sufficient understanding of the facts to determine whether evidence is ‘new’ within the meaning of the statute and whether that new evidence is incompatible with the evidence supporting the original conviction.”¹⁰ (*Id.* at 8–9.) Thus, Avery concedes

¹⁰ Again, Avery not only failed to raise this argument in the Court of Claims—he argued the exact opposite. In his response to the State’s motion to introduce the criminal trial transcripts, he argued that, because the rules of evidence governed the WICA trial, the State could only introduce evidence from the criminal trial through the testimony of live witnesses. (Def’s App’x, p 7, Pl’s Response to Def’s Mtn to Admit Trial Transcripts.)

that consideration of evidence from the criminal trial is necessary, but he asserts that the court must review this evidence only facially, without considering its probative value or weighing it substantively against the new evidence.

Avery's relevance argument is contrary to both the text of the statute and the rules of evidence. As to the statutory text, § 1755(1)(c) requires a plaintiff to present new evidence that "demonstrates" innocence, not new evidence that is merely indicative of innocence or facially incompatible with the evidence of guilt presented at the criminal trial. "Demonstrate" means "to show clearly" or "to prove or make clear by reasoning or evidence." *Merriam-Webster's Collegiate Dictionary* (11th ed, 2020). Thus, the statute requires that new evidence "show clearly" or "prove or make clear" a plaintiff's innocence by clear and convincing evidence. Avery's assertion that a plaintiff need only present new evidence that is facially incompatible with guilt is contrary to the text of the statute and would fundamentally alter—and undermine—the WICA's statutory scheme rooted in actual innocence.¹¹

As to the rules of evidence, Avery's assertion that evidence from the criminal trial is pseudo-admissible for only a facial review and not substantive consideration has no support in those rules. The rules do contemplate that evidence may occasionally be admissible for one purpose and not another. See MCR 105

¹¹ As the Sixth Circuit alluded to in the context of Avery's habeas claim, new exculpatory evidence may warrant reversal without, in fact, establishing actual innocence. Cf. *Avery*, 548 F3d at 439 ("We do not ask whether Avery was ultimately innocent, but, rather, whether he was deprived a reasonable shot of acquittal.").

(providing that “the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly”). Avery draws an analogy to one such situation—otherwise-hearsay evidence being offered for a purpose other than to prove the truth of the matter asserted. (PI’s App, p 9.) But in that context, the limitation is necessary because MRE 802 declares hearsay inadmissible. In the context of § 1755(1)(c), by contrast, no provision of the statute and no rule of evidence declares evidence that was presented at the criminal trial substantively inadmissible.¹² As a result, because that evidence is relevant to the factual question at issue, it is presumed to be substantively admissible under MRE 402. Thus, the rules of evidence do not support Avery’s assertion that evidence of guilt is admissible for only a facial review and not substantive consideration.

As to his argument that the statute expressly limits the Court of Claims to the consideration of “new evidence,” this argument too lacks support in the text of the statute. As an initial matter, if the statute did in fact purport to exclude otherwise-admissible evidence from consideration, then a separation of powers analysis would be necessary, as the rules governing admissibility of evidence are generally the exclusive province of the courts. See *People v Watkins*, 491 Mich 450, 472–473 (2012) (asking whether a statute affecting the admissibility of evidence “is an impermissible rule governing the practice and procedure of the courts or a valid

¹² This is separate from the question of whether the criminal trial records, i.e., transcripts and other documents, are hearsay and thus inadmissible under the rules of evidence. Here, Avery is arguing that any evidence in any form previously presented at the criminal trial—including Barker’s live testimony at the WICA trial—is substantively inadmissible, which has no support in the rules of evidence.

enactment of substantive law”). This inquiry is unnecessary, however, because the statute is silent as to what evidence may or may not be considered.

The sister-state statutes cited by Avery illustrate this point. Avery notes that a minority of wrongful imprisonment compensation statutes from other states contain provisions addressing what evidence the court may consider in an action under the statute. (Pl’s Supp Br, pp 6–7.) These primarily serve to *expand* the scope of admissible evidence to include evidence previously excluded from the criminal trial or otherwise constituting hearsay.¹³ See, e.g., MA ST 258D § 1(F) (allowing for the admission of evidence previously excluded under the Fourth Amendment); Minn Stat 590.11(4) (allowing for the admission of prior court records). Unlike these statutes, the WICA does not contain a provision addressing the admissibility of evidence. Avery points to § 1755(1)(c) as an equivalent provision, but this is simply wrong. Section 1755(1) sets forth the required showings for relief; unlike the statutes that Avery cites, § 1755(1) says nothing about the admissibility of evidence. Accordingly, the rules of evidence govern.

Avery questions why the WICA would limit the definition of “new evidence” if any evidence can ultimately be considered. (See Pl’s App, p 17.) He highlights specifically the WICA’s exclusion of recantations from the definition of “new

¹³ Notably, Avery does not identify a single statute that restricts the evidence a court can consider to only new evidence. In fact, the only statute Avery identifies that restricts in any fashion the evidence a court can consider is the federal compensation statute, which requires the plaintiff to obtain a court certificate setting forth the facts establishing innocence prior to filing for relief and then limits consideration to that certificate. See 28 USC 2513(b). Thus, if the WICA did limit consideration to only new evidence, it would be an extreme outlier.

evidence” unless supported by other evidence, asking how this exclusion makes sense if the court can consider any relevant evidence. (See *id.*, citing MCL 691.1752(b).)

The answer to this question is straightforward but requires some explanation. Without new evidence, a plaintiff cannot show entitlement to relief under § 1755(1)(c) because he or she cannot establish that new evidence demonstrates innocence. Thus, if a plaintiff filed a WICA claim citing only a recantation as new evidence, then the claim would fail—not because the recantation is *inadmissible* but because the plaintiff cannot satisfy § 1755(1)(c). If, however, the plaintiff also provides a new alibi witness, then the plaintiff may have a viable claim. In that scenario, the recantation would likely be “new evidence” because it would be supported by the alibi witness. See MCL 691.1752(b). But, even if the recantation were somehow not new evidence, it would still be relevant to the question of whether the alibi witness establishes the plaintiff’s innocence. Thus, in either scenario, the recantation is relevant and admissible, but only in the latter scenario is the plaintiff’s claim viable. Again, § 1755(1)(c) sets forth the elements for relief; it does not address the admissibility of evidence.

Avery also argues that his reading of the statute better aligns with the Legislature’s intent to streamline WICA claims. In support, he points to the requirement that claimants attach supporting documentation to their complaint and the fact that both the Attorney General and the local prosecutor may answer the complaint. (See Pl’s Supp Br, pp 3–4.)

Avery's legislative intent argument only further highlights the rift between his proposed standard and the statute's plain language. As an initial matter, both provisions that he identifies arguably serve purposes other than efficiency—the former deters frivolous claims, and the latter permits the local prosecutor a voice in the proceedings. Even if an intent to streamline litigation could be divined from these provisions, however, that would not warrant reading into the WICA an implicit limitation on the evidence the Court of Claims can consider. The Michigan Legislature chose to accomplish compensation for the wrongfully imprisoned through court actions filed in the Court of Claims.¹⁴ As a result, such claims are resolved through trials and governed by the rules of evidence. Thus, Avery's legislative intent argument has no basis in the statutory scheme.

Avery's proposed standard does, however, run counter to the Legislature's expressed intent to compensate the innocent. When the Legislature enacted the WICA, it made factual innocence the touchstone for eligibility for relief. See MCL 691.1753 (“An individual convicted under the law of this state and subsequently imprisoned in a state correctional facility for *1 or more crimes that he or she did not commit* may bring an action for compensation against this state in the court of

¹⁴ While most states resolve wrongful imprisonment claims through the court system, a minority of states task extra-judicial entities with reviewing such claims. See, e.g., CT ST 54-102uu(b) (claim filed with the Claims Commissioner); Md State Fin & Proc 10-501(b) (claim filed before an administrative law judge); NC ST 148-83 (claim filed before the Industrial Commission). See generally Michigan Innocence Project, *Key Provisions in Wrongful Conviction Compensation Law – 2022*, <https://www.law.umich.edu/special/exoneration/Documents/IP%20-%20Key%20Provisions.pdf> (last accessed Nov. 16, 2023) (“Nationally, 27 of the 37 states with compensation laws adjudicate claims through courts . . .”).

claims as allowed by this act.” (emphasis added)). This Court has also recognized that innocence is central to the purpose of the statute. See *Sanford v State*, 506 Mich 10, 22 (2020) (“The ‘unfairness or injustice’ addressed by the WICA is the imprisonment of an innocent person . . .”).

Avery’s proposed reading would prevent the Court of Claims from meaningfully considering the question of innocence. Rather than weighing the impact of the new evidence on the evidence of guilt presented at the criminal trial, the court would be required to uncritically accept new evidence that is facially incompatible with guilt. In this case, that would mean requiring the Court of Claims to declare Avery eligible for relief despite finding that Avery was likely guilty of the crime. (See Pl’s App’x, p 26, Court of Claims Op.) Such a result would be fundamentally opposed to the plain language and stated purpose of the statute, which is to compensate plaintiffs for “crimes that [they] did not commit.” See MCL 691.1752. A WICA trial serves a truth-seeking function after the reversal of a conviction. Toward this end, the statutory text, the rules of evidence, and express legislative intent all support the conclusion that the Court of Claims may consider all evidence relevant to the question of innocence, including evidence of guilt presented at the criminal trial.

III. The Court of Claims did not clearly err in concluding that Avery failed to prove by clear and convincing evidence that he did not perpetrate the crime.

A. Standard of Review

A trial court's findings of fact are reviewed for clear error. MCR 2.613(C); *Sands Appliance Servs v Wilson*, 463 Mich 231, 238 (2000). "A factual finding is clearly erroneous if there is no substantial evidence to sustain it or if, although there is some evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 172–173 (2014) (citations omitted). "[I]f resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, [this Court] will defer to the trial court, which had a superior opportunity to evaluate these matters." *People v Sexton*, 461 Mich 746, 752 (2000). See also MCR 2.613(C) ("[R]egard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.")

B. Analysis

Following a bench trial, a court is required to "find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." MCR 2.517(A)(1). See also *Douglas v Allstate*, 492 Mich 241, 257 (2012). "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without over elaboration of detail or particularization of facts." MCR 2.517(A)(2).

The Court of Claims in its written opinion set forth detailed factual findings supporting its conclusion that Avery failed to establish by clear and convincing evidence that he did not perpetrate the crime. As to Damar Crimes, Avery's primary alibi witness, the court found that "his demeanor during his testimony made it appear like he was there to just get the story out, as opposed to telling an important story of compelling truth." (See Pl's App'x, pp 25–26, COC Op.) As to Jacklyn Barker, by contrast, the court noted that she "was clearly emotional numerous times during her testimony" and found her to be "candid and straightforward." (*Id.* at 23–24.) As to Terrance Holmes, the court acknowledged Holmes' claim that his plea testimony was falsified but found it "too difficult . . . to ignore the sworn, detailed [plea] testimony from Holmes on the basis that it was all a lie." (*Id.* at 25.) Based on Barker's testimony and Holmes' plea, the court ultimately concluded that Avery had failed to present clear and convincing evidence that he did not commit the crime.

An examination of the trial record supports the court's conclusion. Avery presented four witnesses at trial, including his testimony on his own behalf. Of these four witnesses, two provided alibi testimony—Damar Crimes and Avery himself. While LaVelle Crimes also testified to the events on the date in question, he did not claim to have been with Avery at the time of the crime, which the parties agreed occurred between 7:30 and 8 pm. (See Pl's App, p 1 (adopting the Sixth Circuit's recitation of the facts).) Instead, LaVelle testified that he began working on Avery's car around 4:00 or 4:30 pm and called Damar to tell him the work was

finished two or two-and-a-half hours later, i.e., between 6:00 and 7:00 pm. (Def's App'x, pp 446–447, 11/15/21 Trial Transcript.) Thus, as the Court of Claims correctly found, LaVelle Crimes did not provide Avery with an alibi. (Pl's App'x, p 6, COC Op (“There was no suggestion that LaVelle went with plaintiff and Damar over to Boyd's house or otherwise spent time with plaintiff during the hours in question.”).)

As to Damar and Avery, the timing of their narratives was inconsistent. Avery testified that he went with LaVelle first to the auto-parts store and then to Crimes Towing. (*Id.* 371–373.) He did not recall when he arrived at Crimes Towing, but his receipt from the auto parts store was timestamped 2:43 pm, and he testified that the shop was only a couple minutes from Crimes Towing. (*Id.* at 372, 424, 427.) Thus, while he testified that it was getting dark when he arrived at Crimes Towing, (*id.* at 373), the timestamp on the receipt indicates that he would have arrived around 3:00 pm. Damar initially testified that he met Avery at Crimes Towing around 4:30 or 5:00 pm, (*id.* at 433–434), which aligns generally with LaVelle's testimony that he began work on the car around 4:00 or 4:30 pm. Avery's counsel impeached Damar, however, with his *Ginther* hearing testimony that he met up with Avery around 7:00 pm. (*Id.* at 434–435.) He then testified that LaVelle called him around 7:30 pm or 8:00 pm to tell him the car was finished, (*id.* at 437), which conflicted with LaVelle's testimony that he called Damar between 6:00 and 7:00 pm.

Taken together, these accounts indicate that the events described more likely took place in the afternoon and early evening, rather than later in the evening when the crime occurred. Damar and Avery did testify that they were together for a brief period after picking up Avery's car at the shop, but this testimony was vague, with both

witnesses testifying that they stopped together at an unnamed friend's house before Avery dropped off Damar. (See Def's App'x, pp 380–381 (Avery), 438 (Damar), 11/15/21 Trial Transcript.) Thus, even putting aside the credibility concerns highlighted in the Court of Claims' opinion, the testimony of Avery's witnesses was of questionable value in providing an alibi for Avery at the time of the crime.

As to Dr. Cutler, Avery's expert witness, his testimony was also of limited value given Barker's familiarity with Avery. On the one hand, Dr. Cutler testified to common pitfalls surrounding eyewitness identifications that may have been implicated in Barker's identification of Avery. These factors included exposure time, (*id.* at 618), lighting, (*id.* at 618–619), distance, (*id.* at 619), stress, (*id.* at 620), and the possibility of unconscious transference, (*id.* at 617). Dr. Cutler also testified, however, that familiarity between the eyewitness and the person identified increases identification reliability, (*id.* at 635–636), that familiarity decreases concerns of misidentification based of poor viewing conditions, (*id.* at 635), that stress tends to cause a witness to focus on important details, (*id.* at 638), and that unconscious transference has found only mixed support in empirical studies, (*id.* at 636). Thus, Dr. Cutler's testimony was limited in challenging Barker's testimony and arguably bolstered her credibility by highlighting the importance of familiarity between the witness and the subject.

Avery, in arguing that the court clearly erred, focuses primarily on the court's evaluation of Holmes' plea testimony. He asserts that the court "ignored that Mr. Holmes unambiguously perjured himself during his plea hearing." (Pl's Supp Br, p 9.) Avery emphasizes Holmes' testimony at the plea hearing that he was outside the car

when the victim was shot, which Avery cites as proof that Holmes was making up his narrative at the plea hearing. (*Id.*)

But Avery ignores the basis for the Court of Claims' decision to believe Holmes' plea testimony over his testimony in the WICA hearing—the fact that Holmes could not provide an explanation of how he learned the details of the crime for purposes of his plea testimony. Holmes expressly denied having learned the details of the crime from the police, from other inmates in jail, or from the neighborhood. (Def's App'x, p 679–680, 11/16/21 Trial Transcript.) When the court asked Holmes directly, “How is it that you can provide all that detail if, in fact, you were not there?”, Holmes responded vaguely, “Fear for your life make you do some strange things.” (*Id.* at 678.) And none of this addresses the fact that Holmes also acknowledged that he apologized to the victim's family at his sentencing and asked for their forgiveness for his actions. (*Id.* at 677).

Thus, the Court of Claims did not “ignore” an “unambiguous” record as to Holmes' testimony. Instead, the court reasonably found it too difficult to believe Holmes' claim that the details of the crime provided at his plea hearing were entirely fabricated. This conclusion, made by the finder of fact based “on the credibility of witnesses or the weight of the evidence,” is entitled to deference.¹⁵ See *Sexton*, 461 Mich at 752.

¹⁵ Because the court did not clearly err in believing Holmes' plea testimony over his WICA trial testimony, and because Avery concedes that Holmes' plea and trial testimonies are new evidence, even if this Court were to conclude that the WICA only permits consideration of new evidence, the result below would be the same. (See Pl's App'x, p 24, COC Op (“The second reason why plaintiff could not meet the burden of proof on this issue is the testimony of Holmes.”).)

Finally, Avery fires off three quick reasons why the court erred in finding Barker credible—(1) Dr. Cutler’s testimony, (2) inconsistencies between Barker’s testimony and Holmes’ plea testimony, and (3) inconsistencies between Barker’s testimony in the criminal trial and at the WICA trial. (Pl’s Supp Br, p 9.)

None of these points demonstrate that the Court of Claims clearly erred. As to the first, Dr. Cutler’s testimony did not meaningfully call into question Barker’s identification of Avery, nor did his testimony address why Barker would falsely identify Avery, Holmes (who pled guilty to robbing Stanka), or Burns (who is currently serving a life sentence for murdering Stanka). As to the second, in highlighting the relatively minor inconsistencies between Barker’s narrative and Holmes’ plea testimony, Avery ignores the fact that these narratives were *largely consistent*. Holmes’ plea testimony primarily serves to corroborate Barker’s testimony as to the who (Avery, Holmes, and Burns), what (robbing and murdering the pizza delivery man), and the where (in a car on Dayton Street) of the crime. And finally, as to Avery’s third point, Avery does not provide any details as to the inconsistencies in Barker’s testimony. (See Pl’s Supp Br, p 9; Pl’s App, p 27 n 15.) Regardless, the Court of Claims did not ignore that Barker’s WICA trial testimony was not perfectly consistent in every detail with her trial testimony from twenty years earlier. (See Pl’s App’x, p 11, COC Op.) But the court found that “when it came to where she was standing when she viewed plaintiff and the fact of viewing him and what he was doing just before she saw his face, Barker was consistent.” (*Id.*)

Ultimately, Avery has not shown that the Court of Claims clearly erred in finding that Avery had not demonstrated by clear and convincing evidence that he did not commit the crime. The court, in satisfaction of MCR 2.517(A), set forth detailed findings of fact supporting its conclusion, and the record supports those findings. Accordingly, this Court should not accept Avery invitation to second-guess the court's credibility determinations to reach a different conclusion.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, the State respectfully requests that this Court either deny leave to appeal or issue an opinion affirming the Court of Claims.

Respectfully submitted,

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