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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUNIOR BLACKSTON,

Petitioner-Appellee,

v.

LLOYD RAPELJE,

Respondent-Appellant.

No. 12-2668

Appeal from the United States District Court for the Eastern District of Michigan at Detroit
No. 2:09-cv-14766—Arthur J. Tarnow, District Judge.

Argued: November 20, 2013

Decided and Filed: February 17, 2015

Before: DAUGHTREY, KETHLEDGE, and DONALD, Circuit Judges.

COUNSEL

ARGUED: B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Kimberly A. Jolson, JONES DAY, Columbus, Ohio, for Appellee. **ON BRIEF:** B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Kimberly A. Jolson, JONES DAY, Columbus, Ohio, for Appellee.

DAUGHTREY, J., delivered the opinion of the court in which DONALD, J., joined. KETHLEDGE, J. (pp. 28–30), delivered a separate dissenting opinion.

AMENDED OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. Petitioner Junior Fred Blackston is a Michigan state prisoner serving a life sentence for murder following his retrial and conviction in state court. Before the second trial was held, two of the state's key witnesses recanted their testimony. Because those witnesses were later determined to be unavailable at the new trial, the court ordered their earlier testimony read to the jury, while at the same time denying Blackston the right to impeach their testimony with evidence of their subsequent recantations. After exhausting his state remedies unsuccessfully, Blackston sought federal habeas relief, contending that the state unreasonably abridged his clearly established federal

constitutional right to confrontation. The district court granted a conditional writ. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the murder of Charles Miller, a 22-year-old Michigan resident who disappeared late in the night of September 12, 1988. His fate remained a mystery until 1999, when a cold-case investigation team began re-interviewing Miller's former friends and associates. One of these associates, Charles Dean Lamp, admitted involvement in the disappearance and eventually led police to the location of Miller's skeletal remains, buried in the woods near Lamp's property. Lamp explained that he and the petitioner in this case, Junior Fred Blackston, had decided to kill Miller together and carried out the killing with the assistance of a third man, Guy Carl Simpson.

The state charged Blackston with first-degree murder. In exchange for his testimony, the state granted Simpson immunity from prosecution and permitted Lamp to plead guilty to a lesser-included charge of manslaughter. No physical evidence connected Blackston to Miller's death, so the state's case depended entirely on the testimonial evidence of five witnesses: the accomplices Lamp and Simpson; Darlene Rhodes Zantello (Blackston's ex-girlfriend); Rebecca Krause Mock (the victim's girlfriend); and Roxann Krause Barr (Mock's sister).

The details of the killing itself come almost entirely from the testimony of Lamp and Simpson at Blackston's initial trial. According to them, Blackston was angry at Miller because he believed

Miller was planning to rob Blackston's cocaine wholesaler, a man named Bennie Williams. Lamp suggested that they kill Miller, using one of Lamp's rifles, and bury him near Lamp's property. Blackston agreed. To lure Miller to the ambush site, Blackston invited Miller to join them for a night-time raid on a clandestine marijuana field known to be in the area. Simpson arrived unexpectedly at Blackston's house that evening, and ended up joining the proposed raid.

Lamp and Simpson further testified that Lamp drove all four men (plus Blackston's one year-old daughter) to a wooded area near Lamp's property. Once there, Lamp handed Blackston a hunting rifle and walked ahead to find the pre-dug hole in which they planned to bury Miller after killing him. Simpson hung back with Miller and Blackston. Once Lamp reached the hole, he yelled, "I found it." Simpson then saw Blackston raise the rifle and shoot Miller in the back of the head or neck. After the shooting, Simpson and Blackston dragged Miller's body to the hole and threw it in; Blackston then climbed into the hole and cut off Miller's ear. Lamp filled in the hole with dirt and concealed it with underbrush. The three men drove back to Blackston's house at about 12:30 a.m. on September 13.

The defense impeached Simpson and Lamp's credibility on several grounds, including charges that they had fabricated their testimony in exchange for favorable deals with the government. The defense also identified inconsistencies among Simpson's earlier stories relating to Miller's disappearance—

Simpson had, at various times, identified other individuals as the killer (including Lamp), and had also claimed that Miller was still alive. The state attempted to rehabilitate Simpson's credibility with evidence of prior statements consistent with his trial testimony, including written statements to his brother and to Zantello.

Darlene Rhodes Zantello, Blackston's long-time girlfriend, also testified against Blackston at his first trial. At the time of Miller's disappearance in 1988, Blackston and Zantello lived together. They had one child and Zantello was pregnant with a second. Zantello testified that on the night of Miller's disappearance, she experienced abdominal pains and made an emergency trip to the hospital with Blackston's sister Sheila. When she left her home for the hospital, Blackston, Miller, and Simpson were together at the house. When she returned from the hospital around midnight, she said, no one was home.

Zantello testified that after Blackston and Simpson returned to the house later that night, she overheard them discussing gory aspects of a killing of some kind. The discussion (which Zantello remembered only vaguely) included references to a severed ear, vast amounts of blood, and Blackston "almost bl[owing] [somebody's] whole head off." The defense impeached Zantello with her admittedly bad memory, bad hearing, and history of alcoholism and drug use. She was also questioned about prior inconsistent statements she had made, some of which exculpated Blackston.

Rebecca Mock and Roxann Barr were members of the same social circle as both Blackston and Miller. They testified that Blackston made certain incriminating statements to them in the weeks following Miller's disappearance. According to Mock, who was Miller's former girlfriend, Blackston twice admitted involvement in Miller's death. First, at a party in a public park, Blackston admitted to shooting Miller and cutting off his ear. Later, at a second party at Zantello's house, Blackston again hinted at his involvement but offered no details.

Barr, who is Mock's younger sister, testified that she was present at each of the two parties at which Mock supposedly heard Blackston confess to the murder. Barr testified, however, that Blackston "never said that he shot [Miller] himself." Instead, she recalled that Blackston identified Lamp as the shooter at the first party and made no incriminating statements at the second party. The defense impeached both sisters with evidence of their intoxication at the time of the purported admissions, as well as with their admitted history of alcohol, marijuana, cocaine, and crack use. Barr conceded that she had used drugs the night before testifying at trial.

Blackston's defense at trial was to deny participation in the murder and instead offer an alibi. He called his three sisters—Sheila, Shirley, and Linda—as witnesses, each of whom testified that Blackston was at home throughout the entire night of September 12-13. Sheila testified that she drove Zantello to the hospital that night and that Blackston was home alone with the child when she

and Zantello returned. Shirley testified that she visited Blackston's home shortly after midnight and found him in the house with the child and their sister Linda. Linda testified that she got into a fight with her husband at 11:30 p.m. on September 12 and went to her brother's house to cool down. She said that her brother was there until she left at 12:45 a.m. Blackston also called Williams (the former cocaine wholesaler), who denied ever knowing Miller and also denied that anyone ever brought him a human ear.

The jury convicted Blackston of Miller's murder. However, the trial judge reversed Blackston's conviction after determining that he had misinformed the jury regarding the extent of Simpson's immunity deal. The state announced its intention to retry Blackston.

Before the second trial began, Zantello and Simpson prepared written statements in which they recanted their testimony from the first trial. Zantello's statement was signed and notarized. In it, she wrote that her earliest statements to police, in which she exculpated Blackston, were correct and that her contrary trial testimony was untrue. Blackston was at home with their daughter when she returned from the hospital, she wrote, and she never overheard any conversation about a killing or a severed ear. Zantello wrote in her affidavit that she testified falsely because the state promised to drop an array of criminal charges pending against her and against her then-boyfriend.

Simpson's recantation was signed but not notarized. Like Zantello, he stated that his trial

testimony was false and that Blackston was not involved in Miller's death. He claimed that Blackston remained at home during the marijuana raid, that Lamp, not Blackston, killed Miller, and that a shovel, not a rifle, was the murder weapon. Simpson claimed that he perjured himself because of prosecutorial pressure and because Lamp (who had a reputation for violence and whom Simpson feared) had made threats against Simpson and his family.

At the second trial, the state called Simpson as the first witness for the prosecution, but Simpson's testimony swiftly went awry. Although physically present in the courtroom, Simpson behaved erratically, refused to answer substantive questions, and conditioned his willingness to testify on the satisfaction of various bizarre requests (for example, he wanted the judge to recess court so that he could take a shower). The trial judge soon tired of this behavior and had Simpson removed from the courtroom. Pursuant to Michigan Rule of Evidence 804, the judge then deemed Simpson to be an "unavailable" witness and, over defense objections, ordered Simpson's testimony from the first trial read to the jury. The judge overruled the defense's request that Simpson's recantation also be read to the jury, reasoning that the recantation was not admissible as a *prior* inconsistent statement.

Zantello's testimony followed a similar track. Called by the prosecution, Zantello took the stand but was essentially unresponsive to questioning—she answered each question either by claiming memory loss or asserting her privilege against self-incrimination. As with Simpson, the trial judge

deemed Zantello "unavailable" and ordered her testimony from the first trial read to the jury. The defense sought to have Zantello's recantation read to the jury as well, but the judge again denied the motion, citing the same basis. After the recitation of her earlier testimony, Zantello took the stand and was briefly questioned again, to similarly little effect. Before Zantello left the stand, defense counsel was able to interpose a single question averring to the existence of the recanting affidavit. Zantello, however, refused to answer, and the judge immediately cut off further questioning. The testimony of all remaining witnesses was consistent with their testimony during the first trial. The second jury convicted Blackston of first-degree murder.

Blackston moved for a new trial, arguing that the recantations should have been admitted under Michigan Rule of Evidence 806.[1] At a hearing on the motion, the trial judge conceded that he "didn't really think about [Rule] 806 when I kept these statements out, but now that I've thought about 806, I would agree that it would appear to say that they should

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[1] Michigan Rule of Evidence 806 provides:

(A) When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

(B) Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's

hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.

come in." Nevertheless, he refused to order a new trial, ruling that the recantations were unfairly prejudicial to the prosecution and, therefore, would have been excluded under Rule 403 in any event.[2] More than simple inconsistent statements, the judge deemed the recantations "epistles, in some senses . . . and an advocacy for acquittal. It goes far beyond a mere statement." The court also found that both witnesses, particularly Simpson, were "manipulating" the trial process and that their recantations were simply attempts to get Blackston acquitted while still taking advantage of the leniency given to them by the state for testifying at the first trial. As a result, the judge decided that the recantations could be excluded under Rule 403 as "unfairly prejudicial," "self-serving," and "suspect."

Blackston appealed, and the Michigan Court of Appeals reversed and remanded for a third trial, holding that the trial court erred in refusing to allow evidence of recantation by Simpson and Zantello under both the state rules of evidence and the federal right of confrontation. *People v. Blackston*, No. 245099, 2005 WL 94796, at *5-*7, *8 n.3 (Mich. Ct. App. Jan. 18, 2005). The Michigan Supreme Court reversed the Court of Appeals, remanding with instructions to "evaluate the harmless error question by considering the volume of untainted evidence in support of the jury verdict." *People v. Blackston*, 705 N.W.2d 343, 343 (Mich. 2005). On remand, the

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[2] Michigan Rule of Evidence 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .

Michigan Court of Appeals found that the error was not harmless and reaffirmed its order for a new trial. *People v. Blackston*, No. 245099, 2007 WL 1553688, at *1 (Mich. Ct. App. May 24, 2007). The Michigan Supreme Court again reversed the Court of Appeals, finding that it was not error to exclude the recantations and, in the alternative, that the state's other evidence rendered any error harmless. *People v. Blackston*, 751 N.W.2d 408, 413, 419 (Mich. 2008).

Unsuccessful in the state courts, Blackston sought federal habeas relief. The district court granted a conditional habeas writ on one of Blackston's claims, finding that Blackston's "Sixth Amendment right of confrontation and his Fourteenth Amendment right to due process were violated by the trial court's refusal to permit Petitioner to impeach the prior testimony of two key prosecution witnesses with their recanting statements." *Blackston v. Rapelje*, 907 F. Supp. 2d 878, 884 (E.D. Mich. 2012). This appeal followed.

DISCUSSION

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limits federal habeas relief] for violation of the right to confrontation, as well as other federal constitutional and statutory rights, to cases involving state proceedings that "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

I. Clearly Established Law

Under AEDPA, we must first determine whether there is "clearly established" law governing the case. *See Carey v. Musladin*, 549 U.S. 70, 74-77 (2006). Law is "clearly established" when Supreme Court precedent unambiguously provides a "controlling legal standard." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). "[C]learly established" law should be construed narrowly. *See Wright v. Van Patten*, 552 U.S. 120, 125 (2008); *Musladin*, 549 U.S. at 76. Nevertheless, "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied' . . . . The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Panetti*, 551 U.S. at 953 (quoting *Musladin*, 549 U.S. at 81 (Kennedy, J., concurring)).

A. There is a clearly established right to impeach the credibility of an adverse witness using the witness's own inconsistent statements.

The state concedes the existence of a clearly-established "right under the Confrontation Clause to cross-examine a witness to probe that witness'[s] reliability and bias, which includes a right to impeach with inconsistent statements." Indeed, the Supreme Court's Sixth Amendment jurisprudence leaves no question about a criminal defendant's right under the Confrontation Clause to "impeach, i.e., discredit, the [state's] witness[es]." *Davis v. Alaska*,

415 U.S. 308, 316 (1974). Mere physical confrontation is not constitutionally adequate, because "one of the important objects of the right of confrontation [is] to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses." *Berger v. California*, 393 U.S. 314, 315 (1969); *see also Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). As a result, constitutionally adequate confrontation must include the meaningful opportunity to challenge the state's witnesses for "prototypical form[s] of bias." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). Such forms include the witness's criminal history or status as a parolee or probationer, *Davis*, 415 U.S. at 316, any immunity or plea deals between the witness and the state, *Van Arsdall*, 475 U.S. at 679, and other "prejudices, or ulterior motives" from which "jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 316, 318; *see also Olden v. Kentucky*, 488 U.S. 227, 232 (1988). A witness's own inconsistent statements are among these "prototypical forms of bias" because they "undoubtedly provide[ ]valuable aid to the jury in assessing [witnesses'] credibility." *Harris v. New York*, 401 U.S. 222, 225 (1971); *see also Davis*, 415 U.S. at 316-17 ("[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of crossexamination." (citing *Greene*, 360 U.S. at 496)).

In general, challenges to the credibility of witnesses will occur through cross-examination because "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316.

However, the Supreme Court has flatly "reject[ed] the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'" *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004) (quoting 3 J. Wigmore, Evidence § 1397, at 101 (2d ed. 1923)).

B. The state's arguments against the existence of clearly established law are unconvincing.

The state challenges the existence of clearly established confrontation law. It argues that: (1) no "clearly established law . . . addresses the circumstance in which a State court concludes that prejudice warrants exclusion to vindicate the integrity of the judicial process," and (2) that the Confrontation Clause only guarantees a right to impeach through live cross-examination of witnesses who are physically present in the courtroom. We conclude that neither of these arguments seriously calls into question the constitutional right at issue here.

In support of its first argument, the state relies on *Mattox v. United States*, 156 U.S. 237 (1895). The defendant in that case was, like Blackston, twice convicted of murder. *See id.* at 240. Also as in Blackston's case, one of the witnesses against the defendant recanted his original testimony, then died, and thus became unavailable to testify at the second trial. *Id.* The Supreme Court held that the recantations were properly excluded in the second trial under a then-existing rule of evidence that

barred admission of a witness's inconsistent statements except where the offering party first laid a foundation by calling the witness to explain the inconsistency. *Id.* at 249-50. "The fact that the witness was dead was held not to change the rule." *Id.* (citing *Hubbard v. Briggs*, 31 N.Y. 518, 536 (1865)).

As a holding that, by its own terms, merely interprets a rule of evidence, *Mattox* has little relevance to the present case. The portion of the opinion cited by the state neither discusses the Confrontation Clause nor frames its decision in constitutional terms. *See id.* at 245-50. Nor does its holding remain good law even as an evidentiary matter: "The *Mattox* rule"—with its requirement of laying a "foundation" before introducing inconsistent statements—is "long abandoned in federal court," *Whitley v. Ercole*, 642 F.3d 278, 289 (2d Cir. 2011), and has been rejected by both the Michigan and the Federal Rules of Evidence. Indeed, in the advisory committee notes to Rule 806, the drafters single out the *Mattox* case for express disapproval. Fed. R. Evid. 806 Advisory Committee's Note.

Perhaps recognizing this, the state argues that *Mattox*'s evidentiary holding should nonetheless be understood to embody Confrontation Clause principles because the *Mattox* Court discussed the Confrontation Clause elsewhere in the opinion (as part of a separate, constitutional holding not in dispute here). But, such an unwarranted extension reads into the *Mattox* opinion something that simply is not there, because the proposition in *Mattox* on which the state relies is clearly and explicitly

premised on common-law evidentiary principles, not constitutional ones. The Court laid down the rule after conducting a lengthy survey of common-law practices in this country and in England. Its discussion of the foundation rule does not mention the Confrontation Clause (or, indeed, any constitutional provision or principle), and there is nothing to suggest that the *Mattox* Court intended to constitutionalize *sub silentio* the common law precedents on which it relied. At any rate, even if *Mattox* could be read to stand for the principle that the right of confrontation may yield to a firmly rooted rule of evidence, this rule would have no place within the Supreme Court's modern confrontation jurisprudence. *See Crawford*, 541 U.S. at 53-54.

Going to the state's broader argument—that the fear of "prejudice . . . [to] the judicial process" is a novel one and thus outside the realm of clearly established law—we find the argument misplaced. The Supreme Court has in fact spoken to the situation where a state raises "legitimate interests in the criminal trial process" as a reason to curtail confrontation. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (citing *Mancusi v. Stubbs*, 408 U.S. 204 (1972)). Tension between a defendant's right to "exposure of a witness'[s] motivation in testifying," *Van Arsdall*, 475 U.S. at 678 (quoting *Davis*, 415 U.S. at 316-17) (internal quotation marks omitted), and a trial court's latitude "to impose reasonable limits on such cross-examination based on concerns about, among other things, . . . prejudice," is not new. *Id.* That tension arises within the context of a clearly established legal landscape. Thus, the state's argument that the recantations were too prejudicial

to permit exposure to the jury is better understood as falling under AEDPA's "unreasonable application" prong, and, accordingly, we address it in more detail in Part II below.

In support of its second "clearly established" argument—that there is no clearly established right to impeach testimonial hearsay through anything but live cross-examination—the state relies on the Supreme Court's decision last term in *Nevada v. Jackson*, 133 S. Ct. 1990 (2013). In that case, Jackson, a state prisoner, sought habeas relief from a conviction for sexual assault. *Id.* at 1990. The victim, his then-girlfriend, initially inculpated Jackson but later recanted her accusation. *Id.* at 1991. She then recanted the recantation and ultimately testified against Jackson at trial. *Id.* The defense attacked the witness's credibility extensively, cross-examining her regarding the initial recantation and also her past history of filing unsubstantiated police reports against Jackson. *Id.* Pursuant to a local rule of evidence, however, the state trial court refused to allow the admission of the police reports themselves into evidence, or to allow the defendant to call police officers to testify to the jury about them. *Id.* The local rule at issue required a defendant to provide the court with notice of his intent to introduce such evidence, and Jackson had failed to do so. *Id.* at 1993. The Ninth Circuit held that this rule violated the defendant's right to present a complete defense, *Jackson v. Nevada*, 688 F.3d 1091, 1097-1104 (9th Cir. 2012) (relying in part on *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)), but the Supreme Court reversed, *Jackson*, 133 S. Ct. at 1993-94, holding that:

> No decision of this Court clearly establishes that this notice requirement is unconstitutional. . . . The admission of extrinsic evidence of specific instances of a witness' conduct [i.e., the uncorroborated rape reports] to impeach the witness'[s] credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial. No decision of this Court clearly establishes that the exclusion of such evidence for such reasons in a particular case violates the Constitution. . . . [T]his Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes.

The state agrees that *Jackson* is relevant to this case only if Simpson's and Zantello'srecantations are "extrinsic evidence" within the meaning of the decision. For several reasons, we have little difficulty concluding that the recantations are not extrinsic evidence. A leading treatise defines "[e]xtrinsic evidence of inconsistent statements" as "the production of *other witnesses'* testimony about the statements." 1 McCormick on Evid. § 36 (7th ed.) (emphasis added). The third-party documents and testimony at issue in *Jackson* certainly satisfy this definition. Likewise, the federal authorities cited in *Jackson* also involve third-party impeachment. *See Jackson*, 133 S. Ct. at 1994 (citing *Jordan v. Warden, Lebanon Corr. Inst.*, 675 F.3d 586, 597 (6th Cir. 2012) ("[T]he Confrontation Clause does not guarantee a criminal defendant the right to impeach one witness through the cross-examination *of*

another witness, regardless of whether the testimony would address credibility or bias." (emphasis added)). In *Jackson*, too, the impeachment went only to a collateral matter—that is, the witness's conduct in filing police reports unrelated to the incident on trial. *Id.* In holding that the Confrontation Clause does not *require* that defendants be allowed to introduce extrinsic evidence of such collateral acts, the *Jackson* Court simply stated the corollary of its long-established rule that "the Confrontation Clause d[oes] not *prohibit* the introduction of '(d)ocumentary evidence to establish collateral facts.'" *Dutton v. Evans*, 400 U.S. 74, 97-98 (1970) (Harlan, J., concurring in result) (emphasis added) (quoting *Dowdell v. United States*, 221 U.S. 325, 330 (1911)) (emphasis added). Here, the witnesses' recanting statements do not go to their credibility on collateral matters, nor do they involve impeachment using other witnesses' testimony; rather, they directly undermine the veracity of testimony from the first trial using the recanting witnesses' own words.

We also note that the evidence in *Jackson* was excluded due to the defendant's failure to comply with the notice-and-hearing requirements of Nevada's rape-shield law. 133 S. Ct. at 1993. Such requirements were expressly held constitutional by the Supreme Court in *Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991), and are without analogue in this case. Moreover, and perhaps more importantly, it is undeniable that in *Jackson* itself, the defendant's right to confront was fully and robustly satisfied; defense counsel in *Jackson* enjoyed "wide latitude to cross-examine" at trial and used this opportunity to confront the witness with all of the impeachment

material at issue in the case. 133 S. Ct. at 1991. Bringing in the reports themselves as extrinsic evidence would have added little to that record, and it is hardly a surprise that the Court found that exclusion for failure to satisfy the notice-and-hearing requirements fell short of a constitutional violation.

Resisting this conclusion, the state offers a competing definition of extrinsic evidence. It would define the term to encompass *all* forms of evidence other than in-person, face-to-face cross-examination. The witnesses' recantations meet this definition, the state argues, because the recantations are documents written on paper rather than statements spoken aloud during live cross-examination. But Blackston, unlike the petitioner in *Jackson*, has never sought to have the recantations themselves admitted as physical, documentary evidence; Blackston seeks only to have them recited to the jury in the same manner as Simpson's and Zantello's inculpatory testimony from the first trial. Perhaps anticipating this distinction, the state asserted at oral argument in this matter that even if not admitted as documentary evidence, the recantations still would constitute extrinsic evidence because a third party—namely, some courtroom official—would have to recite the absent witnesses' words to the jury. It strikes us as illogical, however, to posit that a witness becomes a third party to himself simply because his words are read to the jury by a court officer. Indeed, the testimony from Blackston's first trial was read to the second jury in precisely this manner, making it too "extrinsic evidence" under the state's overly broad definition.

There is a deeper problem with the state's position, however. In-person cross-examination is obviously possible only where the witness is physically available to testify in the courtroom and then elects to do so. Yet the Confrontation Clause applies not only to those witnesses who appear in court, but to *all* who "bear testimony" against the accused. *Crawford*, 541 U.S. at 51 (quoting 2 N. Webster, An American Dictionary of the English Language (1828)). Although the state does not contest that Simpson and Zantello "bore testimony" against Blackston, it nonetheless argues, in effect, that the Confrontation Clause has no purchase against them because of the manner in which the state presented their testimony to the jury. This position is untenable. It would render many forms of admissible testimonial hearsay immune from challenge, thereby confounding the Confrontation Clause's goal of "ensuring that convictions will not be based on the charges of . . . unchallengeable [ ] individuals." *Kentucky v. Stincer*, 482 U.S. 730, 751 (1987) (quoting *Lee v. Illinois*, 476 U.S. 530, 540 (1986)); *see also* Advisory Committee's Notes on Fed. R. Evid. 806 ("The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified."). The Supreme Court has made clear that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless," *Crawford*, 541 U.S. at 51, and we do not think it plausible that the *Jackson* Court intended to adopt *sub silentio* the very outcome it rejected in *Crawford*. In short, we conclude that *Jackson* neither alters or abridges defendants'

clearly established right to confront witnesses with their own inconsistent statements and other "prototypical form[s] of bias." *Van Arsdall*, 475 U.S. at 680; *see also Davis*, 415 U.S. at 315-16.

II. Unreasonable Application

Habeas relief is warranted under § 2254(d)'s "unreasonable application" clause when "the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410. Therefore, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 654 (2004)). Although "this standard is difficult to meet," AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Id.* "Unreasonable application" deference is also tailored to the rule underlying the habeas claim: "'[T]he more general the rule' at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—'the more leeway [state] courts have in reaching outcomes in case-by-case determinations.'" *Renico v. Lett*, 559 U.S. 766, 776 (2010) (quoting *Yarbrough*, 541 U.S. at 654) (internal quotation marks omitted); *see also Harrington*, 131 S. Ct. at 786. In applying AEDPA's unreasonable-application clause, we are mindful of the Supreme

Court's admonishment that "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Crawford*, 541 U.S. at 54.

A. Evidence in the recantations was "prototypical impeachment material."

Blackston enjoys a clearly established right to impeach adverse witnesses in order "to show a prototypical form of bias on the part of witnesses, and thereby to expose 'to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Olden*, 488 U.S. at 231 (quoting *Van Arsdall*, 475 U.S. at 680); *see also Davis*, 415 U.S. at 318. A witness's own inconsistent statements, including recantations of prior inculpatory testimony, undeniably bear on a witness's bias and credibility, *United States v. Hale*, 422 U.S. 171, 176 (1975), as does "the exposure of a witness'[s] motivation in testifying," *Davis*, 415 U.S. at 316. Simpson's recantation was inconsistent with his trial testimony. It also explained his motivation in testifying falsely, namely, his allegation of prosecutorial threats to charge him with "obstructing justice [with] fourth degree habitual supplements, thus subjecting [him] to a life sentence," and receipt of threats by Lamp against his family. Zantello's recantation was also inconsistent with her trial testimony, and it too explained her motivations for testifying falsely. She said that she testified falsely against Blackston in exchange for dismissal of serious criminal charges against both herself and her then-boyfriend, whom she feared because he was abusive. This kind of impeachment evidence falls squarely within the Supreme Court's Confrontation

Clause precedents. *See, e.g.*, *Olden*, 488 U.S. at 231-32 (confirming the right to impeach witness over motive to lie to protect romantic relationship); *Van Arsdall*, 475 U.S. at 680 (confirming the right to impeach over plea deal in exchange for testimony); *Alford v. United States*, 282 U.S. 687, 693 (1931) (confirming the right to show that a witness's "testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention").

B. The state's rationales for denying confrontation are objectively and fail to justify denying Blackston the right to impeach adverse witnesses.

Where the state court offers multiple justifications for its decision, "*each* ground" must be "examined and found to be unreasonable" before habeas relief is appropriate. *Wetzel v. Lambert*, 132 S. Ct. 1195, 1199 (2012). The state court advanced several theories in support of its decision, and the state elaborates upon these theories in its briefing. These rationales, which overlap to some extent, include the following arguments: (1) that the recantations added cumulatively to impeachment from the first trial, rendering the first trial's confrontation constitutionally adequate, *see Blackston*, 751 N.W.2d at 415-17, (2) that the recantations were unfairly prejudicial to the prosecution and thus excludable under Rule 403, *see id.* at 414-15; (3) that the recantations represented a wrongful attempt to manipulate the justice system and perpetuate a fraud on the court, *see id.* at 414 n.18; and (4) that, as to Zantello, the exclusion of her recantation was not unreasonable because Blackston

was able to confront her adequately at the second trial, *see id.* at 416. We address each ground in turn and conclude that none represents a reasonable basis for excluding the impeachment evidence.

i. Confrontation at Blackston's first trial was not constitutionally adequate because the recantations contained important new information and were not cumulative.

The Michigan Supreme Court found, and the state argues, that Simpson and Zantello were confronted adequately at the first trial and that further impeachment based on the recantations would be "largely cumulative." *Blackston*, 751 N.W.2d at 415-17. However, the fact that some impeachment occurred at the first trial does not mean that the thwarted impeachment would have been immaterial or cumulative. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("[W]e do not believe that the fact that the jury was apprised of other grounds for believing that the witness . . . may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one.").

We conclude that the difference between the recantations and the impeachment at the first trial was one of kind, not degree, and that the state court was objectively unreasonable in concluding otherwise. First, the recantations were not cumulatively impeaching; no other evidence gave the jury any specific reason to believe that the witnesses were lying on the stand during the first trial. At most, impeachment at the first trial established that

around the time of Miller's disappearance (more than ten years before trial) the witnesses made statements inconsistent with their trial testimony. Those earlier statements were fragmentary, poorly remembered, and internally contradictory, and in some cases the witnesses denied making them. In Zantello's case, the defense asked only a single question regarding an earlier statement of hers said to exculpate Blackston, but Zantello denied any recollection of making this statement. Simpson was questioned more extensively about his statements from the time of Miller's disappearance, and he was willing to concede that he had at "different times . . . told different things," but these early accounts were scattered and contradictory. He had variously blamed Lamp, blamed one Kirk Pippens, and claimed that Miller was not actually dead. He denied making some of the statements ascribed to him by the defense. And, as the prosecution was quick to point out, he also had made early statements inculpating Blackston, on the basis of which the state argued that Simpson had always told "pretty much the same story" about the disappearance and murder.

By contrast, the witnesses' recanting statements specifically averred that their trial testimony was untrue, something the defense was able to suggest only obliquely at the first trial. In their recantations, the witnesses also "provided lengthy explanations for why they had lied," *Blackston*, 751 N.W.2d at 414, explanations that the defense did not, and could not, have used to impeach their reliability during cross-examination at the first trial. These explanations included Zantello's claim that her abusive boyfriend

coerced her into testifying against Blackston in exchange for dismissal of his felony charges; the fact that Zantello's own criminal charges were dismissed in exchange for her testimony; Simpson's account of the prosecutor's threat to charge him as a habitual offender unless he incriminated Blackston; and Lamp's threats against Simpson's family. Simpson's description of the murder itself—that Lamp killed Miller with blows from a shovel—is also unique. The defense labored to prove that Miller died from blunt-force trauma rather than a gunshot, but had no basis (other than inconclusive expert testimony) to contest Simpson and Lamp's testimony that the murder was accomplished with a gun.[3]

Second, the Supreme Court has recognized that in the absence of any physical evidence, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." *Napue*, 360 U.S. at 269. Here, there was no physical evidence linking Blackston with the murder and, in such a situation, additional impeachment tending to tip the credibility balance cannot be brushed aside as cumulative. *See id.* The witnesses' credibility—particularly Simpson's—was critical to the state's case. At the second trial, the prosecution mentioned Simpson ten times in opening arguments and over 20 times in closing, four times telling the jury during closing arguments that Simpson's story was "entirely consistent the whole time, all the way up to the testimony you heard from

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[3] The state repeatedly argued in closing that "there is no evidence in this case whatsoever that this was not the result of a gunshot wound."

a prior hearing." It would have been impossible for the prosecution to have characterized Simpson's reliability in this manner had the jury known that his trial testimony was bookended with inconsistent statements, both exculpatory to Blackston. That information would have added a great deal of substance and credibility to the defense's first-trial impeachment, and it was unreasonable to dismiss it as being merely cumulative. We return to this subject in our discussion of harmless error below.

ii. Fear of causing prejudice to the prosecution was an objectively unreasonable basis for denying confrontation.

The state trial court and the Michigan Supreme Court found that the recantations' "undue prejudice outweighed their probative value," allowing for their exclusion under Michigan Rule of Evidence 403. *Blackston*, 751 N.W.2d at 411. Several concerns drove this Rule 403 reasoning: (1) that as "advocacy for acquittal," the recantations were excessively favorable to Blackston; (2) that the recantations unfairly impugned the prosecution and "inject[ed] the specter of prosecutorial corruption into the trial" in a manner that could not be rebutted through crossexamination, 751 N.W.2d at 415; and (3) that the recantations were inherently unreliable because they resulted from attempts to game the system through self-serving statements.

None of these concerns justifies excluding what the state concedes is admissible evidence and, as a result, Rule 403 is an objectively unreasonable basis for denying Blackston the right to confrontation.

According to the Supreme Court, for example, "'[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quoting Advisory Committee's Notes on Fed. R. Evid. 403). That former witnesses against Blackston are now advocating for Blackston's acquittal would undoubtedly cause "[s]erious damage to the strength of the State's case," *Davis*, 415 U.S. at 319, but that does not implicate the kind of *improper* unfairness envisioned by the drafters of Rule 403. *See Old Chief*, 519 U.S. at 180. There would be nothing improper about the jury's relying on the recanting statements to conclude that Simpson and Zantello lacked credibility and that their testimony should be entitled to little substantive weight.

In addition, the state's concerns about the reputation of the prosecutor's office cannot trump a defendant's constitutional right to explore the pressure that office put on testifying witnesses. The Supreme Court's cases establish as much. *See Van Arsdall*, 475 U.S. at 679; *Alford*, 282 U.S. at 693. To the extent that the recantations contained genuinely prejudicial material regarding prosecutors' character or motivations, those sections "could have been redacted." *Blackston*, 751 N.W.2d at 414. But rather than redact the recantations to satisfy the state's concerns, the trial court "cut[ ] off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Van Arsdall*, 475 U.S.

at 679. "[T]he State cannot, consistent with the right of confrontation, require the petitioner to bear th[is] full burden . . . ." *Davis*, 415 U.S. at 320.

Finally, whether or not the state courts were justified in some "skeptic[ism]" of Zantello's and Simpson's reliability, it was plainly a misapplication of Rule 403 to prevent the jury from hearing the recantations on that basis. The Confrontation Clause "is a procedural rather than a substantive guarantee," *Crawford*, 541 U.S. at 61, one that applies regardless of whether the judge is swayed personally by the material's substantive persuasiveness. Nor are mere reliability concerns under Rule 403 the sort of "paramount" state interests that would allow the exclusion of evidence, let alone trump a defendant's confrontation rights. *Davis*, 415 U.S. at 319-20. Perhaps the most telling remark by the state judge at the second trial was his decision to reject the recantations because he did not believe that the recantations were "credible." However, the question of witness credibility is the most fundamental issue that a jury resolves. It is quintessential material for the jury and, plainly, not within the province of the judge.

iii. Witnesses' purported fraud-on-the-court does not trump defendant's right to confront.

Next, the state argues that it was reasonable to exclude the recantations because they were the product of the witnesses' "attempt[ ] to perpetrate a fraud on the court," by "ma[king] [themselves] unavailable for the second trial by being manipulative." As the state sees it, the witnesses'

"advocacy for acquittal," combined with their "contrived unavailability," is "an affront to justice, one that is unfairly prejudicial to the process." The state argues that it thus has a legitimate interest in "shield[ing] the judicial process from [such] contrived 'perjury.'"

As a variation on the well-known doctrine of forfeiture-by-wrongdoing, this theory also fails to establish an objectively reasonable basis for obstructing a defendant's right of confrontation. The Confrontation Clause recognizes "only those exceptions established at the time of the founding," which were limited to "the rule of forfeiture by wrongdoing," and "dying declarations." *Crawford*, 541 U.S. at 54, 56 n.6, 62. Because forfeiture by wrongdoing "extinguishes confrontation claims on essentially equitable grounds," *id.* at 62, the defendant's right to confront may be extinguished only by the *defendant's own* wrongful conduct. It is clearly established that Blackston may not lose his confrontation right based on the wrongdoing of third-parties. *Id.* (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878)). The state does not suggest that Blackston caused Simpson or Zantello to recant their testimony or to make themselves unavailable for trial. Therefore, any "wrongdoing" by the witnesses is insufficient to nullify Blackston's right to confront. *See Reynolds*, 98 U.S. at 158 (holding that the forfeiture doctrine requires a witness to be "absent by *his* [i.e., defendant's] own wrongful procurement" (emphasis added)).

iv. The second cross-examination of Zantello was not constitutionally adequate.

Finally, the state argues that Blackston had a constitutionally adequate opportunity to confront Zantello at the second trial, confrontation that occurred after Zantello's first-trial testimony had been read to the jury. At that point, Zantello again took the stand and was briefly questioned by both sides. Consistent with her earlier behavior, she responded to each question with either a claim of memory loss or an assertion of Fifth Amendment privilege. At the very end of this cross-examination, Zantello and defense counsel had the following exchange:

> Q: Do you remember making a statement that Fred [Blackston] was home when you got home and that you had lied under oath originally because you had been threatened – your life was threatened by Mr. Lowder?
>
> A: No, I do not.

The court immediately intervened and cut off further questioning. The state contends that this exchange placed evidence of the recantation before the jury and, thus, provided Blackston with all the confrontation to which he was constitutionally entitled (at least with regard to Zantello).

This argument also fails. We cannot consider such a cursory and immediately-halted exchange constitutionally adequate. Posing futile questions to a non-responsive witness is not constitutionally

adequate cross-examination, because "[c]onfrontation means more than being allowed to confront the witness physically." *Davis*, 415 U.S. at 315. Zantello failed to respond or even acknowledge the question in a meaningful way, and the judge's swift intervention robbed the exchange of whatever substance it might have enjoyed. We note that similarly flawed "questioning"—in which a lawyer recited facts into the record under the guise of questioning a non-responsive witness—received the Supreme Court's disapproval in *Douglas v. Alabama*, 380 U.S. 415, 416-17, 421 (1965) ("[E]ffective confrontation of Loyd was possible only if Loyd affirmed the statement as his. However, Loyd did not do so, but relied on his privilege to refuse to answer."). This rationale, too, was an objectively unreasonable basis for exclusion.

Moreover, upon retrial, the insufficiently justified denial of Blackston's right to effective cross-examination of Simpson and Zantello implicates more than simply the defendant's right to confront the witnesses arrayed against him. As the United States Supreme Court has recognized since at least 1948, "[a] person's right to . . . an opportunity to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948) (cited in *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)). Indeed, the Constitution, through the Due Process Clause, "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane*, 476 U.S. at 690 (*quoting California v. Trombetta*, 467 U.S. 479, 485 (1984)); *see also Boggs v. Collins*, 226 F.3d 728, 743 (6th Cir. 2000) (noting that "where

procedural rules or trial court decisions have excluded evidence in a way that denies a defendant a fair trial, the Supreme Court has found a violation of that defendant's right to present a defense," a right that "emerges from the Sixth Amendment's Confrontation Clause and the Due Process Clause of the Fourteenth Amendment"). Here, the state trial court permitted the prosecution to introduce at retrial prior statements of two witnesses without allowing Blackston the opportunity to present his defense to those accusations by explaining, through those witnesses' own words, the full context and legitimacy of the prior statements. The deeply ingrained constitutional right to a fair trial cannot countenance allowing such a one-sided, prejudicial presentation of evidence to deprive an individual of liberty. If any theme at all runs through the protections afforded by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, it is that we will not tolerate heavy-handed governmental attempts to skew the evidence placed before finders of fact in criminal prosecutions. We today refuse to be party to abrogation of such a hallowed principle.

III. The Error Was Not Harmless.

A. Legal standard

A violation of the Confrontation Clause does not warrant automatic reversal but, rather, is subject to harmless-error analysis. *Van Arsdall*, 475 U.S. 681-82. In the context of federal habeas corpus, a constitutional error will warrant relief only if the error "'had [a] substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*

v. Abrahamson, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). This standard applies whether or not the state appellate court recognized the error. *Fry v. Pliler*, 551 U.S. 112, 117 (2007) ("The opinion in *Brecht* clearly assumed that the *Kotteakos* standard would apply in virtually all § 2254 cases."). The deferential posture of § 2254(d)(1) is understood to be "subsume[d]" within *Brecht* review, which is itself deferential. *Fry*, 551 U.S. at 120. When considering whether a Confrontation Clause violation was harmless under *Brecht*, we consider the factors laid out in *Van Arsdall*, 475 U.S. at 684. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless depends upon a host of factors . . ." *Id.* Those factors include: "the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of the cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.*

Before discussing harmless error under this or any other standard, however, the state asks us to alter the circuit's approach to analyzing harmless error under *Brecht* and AEDPA. Specifically, the state requests that we deploy our "supervisory powers" to "require the district courts to follow a two-step process as a prudential matter," citing *Johnson v. Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009).

However, we have previously been presented with this proposal and have rejected it: "The answer in this Circuit is that *Brecht* is always the test, and there is no reason to ask both whether the state court 'unreasonably' applied [clearly established federal law] under the AEDPA and, further, whether the constitutional error had a 'substantial and injurious' effect on the jury's verdict." *Ruelas v. Wolfenbarger*, 580 F.3d 403, 412 (6th Cir. 2009).

The state also argues that *Harrington*, 131 S. Ct. 770, effectively overruled *Fry* and altered the familiar *Brecht* standard. *Harrington*, however, did not involve harmless error and cited neither *Fry* nor *Brecht*. Post-*Harrington*, we have continued to apply *Brecht* in the manner mandated by *Fry*. *See, e.g.*, *Jones v. Bagley*, 696 F.3d 475, 485 (6th Cir. 2012) *cert. denied*, 134 S. Ct. 62 (2013) (No. 12-9678) (applying *Brecht* post-*Harrington*). We adhere to that precedent here.

B. The error was not harmless under the *Brecht* and *Van Arsdall* standard.

A careful review of the record and the last reasoned state-court opinion leaves little doubt that the constitutional error here had the "substantial and injurious effect or influence" required by *Brecht*. 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 776). In its opinion, the Michigan Supreme Court reached a contrary conclusion for three primary reasons. It found: (1) that the facts contained in the recantations were "largely cumulative," *Blackston*, 751 N.W.2d at 415-16; (2) that "the volume of untainted evidence against [Blackston] was significant," *id.* at 419; and (3) that Zantello's and Simpson's credibility was

irrelevant, because their first-trial testimony "interlock[ed]" with the other evidence. *Id.* at 417.

We have already discussed the state's argument that the recantations were merely cumulative and have held that they were not. That analysis applies equally to the issue of harmless error. We now address the state's other two arguments in turn, by reference to the *Van Arsdall* factors cited above.

i. Zantello and Simpson were critical to the state's case.

As our discussion has previously noted, Simpson's testimony was the linchpin of the state's case against Blackston. He was the first witness called by the state, and one of only two witnesses able to testify *directly* to Blackston's participation in the murder—all the other testimony consisted of admissible hearsay. Simpson was the only witness who testified he *actually saw* Blackston shoot Miller—Lamp testified that he handed Blackston a rifle, but claimed that it was too dark for him to see the actual shooting. As noted above, the prosecution referred to Simpson dozens of times in opening and closing arguments and repeatedly assured the jury that "Mr. Simpson was entirely consistent in what his version of the events was." These repeated references to Simpson and his testimony make it difficult to conclude that Simpson was not an important part of the prosecution's case. *See Van Arsdall*, 475 U.S. at 684. As also previously noted, no physical evidence linked Blackston to the murder. Witness testimony was therefore crucial. *See Napue*, 360 U.S. at 269.

Simpson's testimony was equally important for a second reason: it "reinforced and corroborated" Lamp's account of the murder. *Arizona v. Fulminante*, 499 U.S. 279, 299 (1991). Without Simpson's bolstering of Lamp's account, Lamp's credibility would not have been as strong.

Zantello's testimony was also important. She undermined Blackston's lone argument for acquittal: an "alibi defense [that] depended solely on the testimony of his three sisters." *Blackston*, 751 N.W. 2d at 419. Blackston's sisters testified that Blackston did not leave his house the night the murder occurred. In her trial testimony, Zantello flatly contradicted this alibi and was the only non-accomplice witness to do so. Her recanting affidavit, by contrast, corroborated the alibi testimony of Blackston's three sisters. Given these factual inconsistencies—and given the lack of non-accomplice testimony supporting the state's position—there seems little question that Zantello's testimony assisted the state in convincing the jury to disbelieve the defense's alibi witnesses. Indeed, as the state court itself reasoned, the jury likely found the testimony of Blackston's sisters "suspect because of their obvious bias in favor of their brother." *Id.* By contrast, Zantello was Blackston's long-time romantic partner, the mother of his four children, and someone the jury might have expected to come to his defense. Her testimony undermining his alibi would have been particularly damaging and, logically, her recantation would have been equally harmful to the prosecution.

ii. The state's remaining case against Blackston was weak.

Although recognizing that "Zantello's and Simpson's original inculpatory testimony certainly would strengthen the prosecution's case," *id.*, the state court determined that "the volume of untainted evidence against defendant was significant," *id.*, and "alone established beyond a reasonable doubt that defendant was at least an accomplice to first-degree, premeditated murder." *Id.* at 418. On appeal, the state describes the untainted evidence as "overwhelming" and "devastating." This characterization of the untainted evidence cannot withstand fair-minded scrutiny.

The record unambiguously establishes that the state's untainted case was not strong. It consisted solely of testimony by Lamp, Barr, and Mock. Lamp was an admitted accomplice to the murder. As such, he had an interest in shifting blame to Blackston. Indeed, Lamp's trial testimony makes clear that he, and not Blackston, played the leading role in planning and executing the murder. Lamp testified that it was his idea to kill Miller and that it was he who suggested the idea to Blackston, not the other way around. Lamp also chose the murder location (which was adjacent to his property), provided the weapon, dug the hole, and drove Miller to the ambush site. It was Lamp, not Blackston, who attempted to threaten Simpson into silence, and it was Lamp who finally resolved the mystery of Miller's disappearance by leading police to the burial site (Simpson had attempted to do so years earlier, but was unable to find it). Given the extent of Lamp's admitted involvement in the murder—and in light of

the favorable deal he received from the state—a jury was unlikely to have credited his testimony without the benefit of Simpson's "reinforc[ing] and corroborat[ing]" account. *Fulminante*, 499 U.S. at 299.

The evidence presented by the state's other two witnesses against Blackston, the sisters Mock and Barr, was also weak. They testified that Blackston admitted to involvement in Miller's killing, but this testimony is dubious in at least two ways. First, both Mock and Barr admitted that they were intoxicated when Blackston made his admissions to them. Drunk witnesses are generally not reliable ones, as a witness's intoxication at the time of the events in question could affect the determination of the jury's verdict. Equally damaging is the fact that the sisters contradicted each other's testimony in critical regards: according to Mock, Blackston admitted killing Miller and cutting off his ear; Barr, by contrast, testified that Blackston "never said that he shot [Miller]" but, instead, identified Lamp as the killer. Furthermore, Mock claimed that Blackston made a second admission to her at a party at Zantello's house, but Barr, who was present, could not recall any confession occurring at that time. The sisters were also both heavy drug users, and Barr admitted to using drugs the night before she gave testimony at trial.

The state-court opinion offered no reasoned answer to Mock's and Barr's credibility problems. Although recognizing that Mock and Barr were "always drinking when they were together," *Blackston*, 751 N.W.2d at 418 & n.27, the state court

opinion made no attempt to address the likely impact of their intoxication on the reliability of their testimony. Likewise, the state court brushed aside as a "minor discrepanc[y]" the fact that Mock and Barr contradicted each other regarding the killer's identity, instead focusing on the sisters' agreement that Blackston had in some way "participated" in the killing. *Id.* But the state's entire theory of the case was that *Blackston* had killed Miller, and the identity of the killer is thus a critical fact that cannot be dismissed as a minor detail. Finally, the state court reached this conclusion only by applying an erroneous and unreasonably demanding legal standard. It reasoned that to establish harmful error, Blackston would need to show that "the jury would have *entirely* discredited Mock [and Barr]'s testimony." *Id.* at 418 n.27 (emphasis added). But the *Brecht* standard and *Van Arsdall* factors do not require proof that the state's untainted witnesses are *totally* unworthy of belief. We look to "the *overall* strength of the prosecution's case," *Van Arsdall*, 475 U.S. at 684, which remains weak whether the sisters' testimony is accorded modest weight or none at all. As a result, the negation of Simpson's and Zantello's far-more-damaging first-trial testimony would have had the "substantial and injurious" impact *Brecht* and *Fry* require.

iii. The witnesses' credibility is not made irrelevant by the purportedly interlocking nature of the state's evidence.

The state court also found that "Simpson's and Zantello's inculpatory testimony . . . clearly coincided with the untainted evidence." *Blackston*, 751 N.W.2d

at 419. On appeal, the state develops this statement into the argument that "[b]ecause [the state's] evidence was interlocking and there was no way it could have been coordinated, the case was not dependent on the individual credibility of Simpson or Zantello." Because the witnesses' individual trustworthiness was irrelevant, the state argues, "any evidence undermining [Simpson's and Zantello's] credibility would have no bearing on the verdict." This argument is puzzling. Given the lack of physical evidence, it is clear that the verdict *depended* on which witnesses the jury found to be most credible. *See Napue*, 360 U.S. at 269. Furthermore, all of the witnesses in this case lived in close physical and social proximity to each other in a small town in rural Michigan. The notion that "there was no way [the witnesses' similar testimony] could have been coordinated" is unreasonable on its face.

In sum, given our resolution of the *Van Arsdall* factors, our only reasonable conclusion is that the constitutional error had the "substantial and injurious effect or influence in determining the jury's verdict" required under *Brecht* and *Fry*. The state court found otherwise, but for the reasons explained above, that decision was objectively unreasonable under AEDPA and *Harrington v. Richter*.

CONCLUSION

In sum, we have found Blackston's confrontation rights to be clearly established by the decisional authority of the Supreme Court. We have also addressed each of the state's arguments justifying the denial of confrontation and found them objectively unreasonable. Finally, owing to the

importance of the tainted witnesses to the state's case and the weakness of the state's other evidence, we must conclude that the constitutional error was not harmless. As a result, we AFFIRM the district court's conditional grant of a writ of habeas corpus.

DISSENT

KETHLEDGE, Circuit Judge, dissenting. Although I agree with much of what the majority says in its opinion, one point of disagreement is dispositive. To begin, Blackston's claim is that, under the Confrontation Clause, he was entitled to admit Simpson's and Zantello's recantations as evidence in his second trial. The problem with that claim, at least on habeas review, is that not a single Supreme Court case holds that the Confrontation Clause guarantees *any* right to admit evidence—extrinsic or not—at trial. Instead the Clause guarantees two things: first, the defendant's right to *exclude* certain out-of-court statements of a witness whom the defendant had no opportunity to cross-examine, *see Crawford v. Washington*, 541 U.S. 36, 68 (2004); and second, the defendant's right to *cross-examine* witnesses about matters especially important to their credibility, *e.g.*, their potential bias or motive to present false testimony at trial. *See Davis v. Alaska*, 415 U.S. 308, 318 (1974); *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Olden v. Kentucky*, 488 U.S. 227, 230 (1988) (per curiam).

Neither right was violated here. Under *Crawford*, Blackston undisputedly had no right to exclude from his second trial Simpson's and Zantello's testimony from the first, since Blackston's lawyer extensively cross-examined each of them about that very testimony. *See Crawford*, 541 U.S. at 68. More to the point, *Davis*, *Van Arsdall*, and *Olden*, by their express terms, establish only a right of cross-examination—that is, a right to *pose certain questions* to a live witness at trial. *See Davis*, 415 U.S. at 313-14, 318 (defendant had right to question witness about his burglary conviction and probation status); *Van Arsdall*, 475 U.S. at 679 (defendant had right to question witness about the dismissal of charges against him); *Olden*, 488 U.S. at 229-30, 233 (defendant had right to question witness about her extramarital relationship). And that right of cross-examination is simply different from a right to admit evidence, even evidence of a witness's own inconsistent statements. Thus, the putative confrontation right that Blackston asserts here is not clearly established by the Supreme Court's precedents.

The majority's mistake in concluding otherwise, I respectfully suggest, is twofold. First, the majority observes that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless[,]" op. at 17 (quoting *Crawford*, 541 U.S. at 51); and the majority then concludes that, if we were to deny habeas relief here, we would "adopt *sub silentio* the very outcome [the Court] rejected in *Crawford*," op. at 17. But that conclusion does not follow. In *Crawford,* the Supreme Court *itself* regulated the admission of out-of-court

statements under the Confrontation Clause, when it held that, subject to certain exceptions not relevant here, "[t]estimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." 541 U.S. at 59. That standard is undisputedly met here. Thus, a decision to deny relief in this case would not "leav[e] the regulation of out-of-court statements to the law of evidence[.]" *Id*. at 51. Instead, a decision to deny relief would leave the regulation of those statements to the standard set by the Supreme Court in *Crawford*—which, on habeas review, is where we are obliged to leave it.

The second mistake is similar. For purposes of direct review, the majority's argument might be a strong one: if Simpson and Zantello had offered live testimony in Blackston's second trial to the effect of their testimony in the first, there is little question that, under the *Davis* line of cases, Blackston would have had a right to cross-examine each of them about their recantations. Only the fortuity of the witnesses' unavailability at the second trial prevented Blackston from exercising that right. Thus, the majority concludes, the Confrontation Clause required admission of the recantations.

The problem, again, is that the *Davis* line of cases establishes only a right of crossexamination, not a right to introduce evidence. *See supra.* Thus, the majority's reasoning amounts to an extension of the holdings from those cases, rather than an application of them. And that distinction is one the Court has spoken to directly. "Section 2254(d)(1)

provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 134 S. Ct 1697, 1706 (2014) (emphasis in original). As I read *Woodall*, that is the end of the matter; but I add that there are reasonable arguments against extending the *Davis* line of cases to require admission of the recantations at issue here. Those reasons include that, had the recantations been admitted, the prosecution would have had no ability to cross-examine Simpson or Zantello about them; and that Blackston's crossexamination of those witnesses in the first trial—the transcript of which was admitted as evidence in the second—was vigorous indeed.

I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JUNIOR FRED BLACKSTON,

Petitioner,

v. Case No. 2:09-cv-14766
Honorable Arthur J. Tarnow

LLOYD W. RAPELJE,

Respondent.
_____/

ORDER GRANTING RESPONDENT'S MOTION FOR IMMEDIATE CONSIDERATION AND A STAY AND GRANTING RESPONDENT'S MOTION TO SEAL THE STATE CORRECTIONS RECORD

Petitioner Junior Fred Blackston is serving a life sentence for the first-degree murder of Charles Miller in 1988. Petitioner challenged his state conviction in a *pro se* habeas corpus petition. On December 5, 2012, the Court granted relief. The Court held that the trial court violated Petitioner's constitutional rights to due process and to confront the witnesses against him by refusing to permit Petitioner to impeach the testimony of two key prosecution witnesses with their recanting

statements. The Court ordered the State to release Petitioner unless it took steps to retry him within ninety days of its opinion and order.

Respondent Lloyd W. Rapelje has appealed the Court's opinion and order granting a conditional writ of habeas corpus. Currently pending before this Court are Respondent's motion for immediate consideration and a stay and his motion to seal the state corrections records.

In his motion to seal, Respondent alleges that he is relying on portions of Petitioner's corrections records in his motion for a stay. The corrections records are not available to the public, and they include presentence investigation reports, which are confidential.

Consequently, Respondent's motion to seal [Doc. #19, filed Jan. 4, 2013] is **GRANTED**. No further action is necessary, because the records have already been sealed.

In his motion for a stay, Respondent asks the Court to stay the operation of its opinion and order granting habeas relief pending resolution of his appeal to the United States Court of Appeals for the Sixth Circuit. Respondent contends that a stay is necessary because the appellate case is likely to remain pending beyond the ninety-day period the Court afforded the State to retry Petitioner.

When determining whether to grant a stay, a court must consider the following four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Generally, when a federal district court grants habeas corpus relief in favor of a state prisoner, the district court or the court of appeals will grant a stay of judgment. *Wolfe v. Clarke*, 819 F. Supp.2d 574, 578 (E.D. Va. 2011) (citing Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure, Sixth Edition § 36.4[d] (Matthew Bender) (collecting cases), *judgment affirmed*, 691 F.3d 410 (4th Cir. 2012).

This Court ordered the State to release Petitioner unless it took steps to re-try Petitioner within ninety days of the Court's dispositive opinion and order, which was signed and entered on the docket on December 5, 2012. The State has opted not to release Petitioner. It plans to re-try him even if the Court of Appeals affirms this Court on appeal. Therefore, the only issue is whether the State should attempt to re-try Petitioner within ninety days of December 5, 2012.

Regardless of whether the State is likely to succeed on appeal, the Court believes that the other *Hilton* factors weigh in favor of granting a stay. The possibility exists that the Court of Appeals will reverse this Court's decision and deny Petitioner a

new trial. Should that occur, the State will have been irreparably injured by expending the resources necessary to retry Petitioner. Thus, the State's interest in a stay is strong, and the second *Hilton* factor favors the State.

The third factor requires a determination of whether issuance of the stay will substantially injure other parties interested in the proceeding. Petitioner is serving a sentence of life imprisonment without the possibility of parole, and the State plans to retry him even if the Court of Appeals affirms this Court. Consequently, there is a strong possibility that Petitioner will be required to remain in state custody regardless of the outcome of the appeal. If the State prevails on appeal, Petitioner will continue serving his life sentence, and if the State loses on appeal, Petitioner is likely to be held in pretrial custody pending a new trial. Issuance of the stay is not likely to substantially injure Petitioner, and the third factor weighs in the State's favor.

The fourth and final factor requires consideration of where the public interest lies. The public has an interest in the prompt and efficient administration of justice, *see Wilson v. Mintzes*, 761 F.2d 275, 280 (6th Cir. 1985), and the avoidance of unnecessary relitigation. For the State to proceed with a new trial when the possibility exists that this Court will be reversed on appeal does not advance the public's interest in judicial economy. The Court therefore finds that the fourth factor weighs in the State's favor.

On balance, three of the four factors weigh in the State's favor. Accordingly, Respondent's motion for immediate consideration and for a stay [Doc. #18, dated Jan. 4, 2013] is **GRANTED**.

s/Arthur J. Tarnow
Arthur J. Tarnow
Senior United States District Judge

Dated: January 23, 2013

I hereby certify that a copy of the foregoing document was served upon counsel of record on January 23, 2013, by electronic and/or ordinary mail.

s/Catherine A. Pickles
Judicial Assistant

Michigan Supreme Court
Lansing, Michigan

Opinion

Chief Justice:
Clifford W. Taylor

Justices:
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman

FILED JUNE 25, 2008

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v No. 134473

JUNIOR FRED BLACKSTON,
Defendant-Appellee.

BEFORE THE ENTIRE BENCH

CORRIGAN, J.

At issue in this case is whether defendant is entitled to a new trial on the basis of his argument that two unavailable witnesses' written recantations were improperly excluded from defendant's second trial. A transcript of the witnesses' testimony from the first trial was admitted as evidence at the second

trial and defendant sought to admit the recanting statements for purposes of impeachment. The Van Buren Circuit Court denied defendant's motion to introduce the statements. The court also denied defendant's motion for a new trial, in which defendant argued that the statements were improperly excluded. The Court of Appeals reversed and ordered a new trial. We conclude that defendant is not entitled to a new trial because the trial court acted within its discretion when it excluded the recantations and denied defendant's motion for a new trial. Further, any error that may have occurred was harmless. Accordingly, we reverse the Court of Appeals judgment and remand to that court for consideration of any remaining issues advanced by defendant in his claim of appeal.

FACTS AND PROCEEDINGS IN THE CIRCUIT COURT

In 2001 and 2002, juries twice convicted defendant, Junior Fred Blackston, for the first-degree murder of Charles Miller.[1] In 1988, Miller was executed and buried in a field near defendant's home in Allegan County. Miller's disappearance remained unsolved until codefendant Charles Lamp ultimately led the police to Miller's body in 2000. At defendant's first trial, codefendants Lamp and Guy Simpson testified against him. The prosecutor permitted Lamp to plead guilty of manslaughter, while Simpson received complete immunity for his

[1] Because the trial court acknowledged that it had incorrectly informed the first jury about the nature of a codefendant's plea agreement, it granted defendant's first motion for a new trial.

testimony. Both codefendants testified that defendant, Lamp, and Simpson took Miller to the field where defendant shot Miller and cut off his ear to show it to a local drug dealer, Benny Williams, as proof that Miller was dead. Lamp testified that he helped defendant plan and execute the murder after defendant learned that Miller planned to rob Williams.

Defendant testified at the first trial but not at the second. Defendant agrees that the victim was at defendant's house on the night he was murdered. Through alibi witnesses, defendant asserted that he did not leave the house with Miller, Lamp, and Simpson. The defense contended that defendant remained home with his 1 1/2-year-old daughter. The child's mother-defendant's girlfriend at the time, Darlene (Rhodes) Zantello-was pregnant. All parties agreed that she left her 1 1/2-year- old daughter with defendant when Zantello went to the hospital that night because she was experiencing pain. Lamp and Simpson testified that defendant brought his daughter along and left her sleeping in the back seat of the car during the crime.

Zantello testified at the first trial that, when she returned home from the hospital that night, defendant was not present but returned later with Simpson. Zantello overheard Simpson say "that was like a movie with all that blood." She also recalled hearing the men mention an ear being cut off, a pre-dug hole or grave, and that defendant "almost blew his whole head off."

Rebecca (Krause) Mock, Miller's girlfriend at the time of his death, and Mock's sister, Roxann (Krause) Barr, also testified that, in 1990, defendant had admitted his involvement in the murder to them. They said that defendant cried, confessed his participation, and stated that he felt badly about their acts. The police confirmed that shortly after defendant confessed Mock and Barr reported defendant's confession to them.

Defendant's three sisters each confirmed his alibi. Each sister attested that she had visited defendant's house-and had found him home with his daughter on the night of September 12, 1988, when Miller disappeared. Defendant also produced Williams, who claimed to have known nothing about Miller's death. The investigators acknowledged that they had been unable to link Williams to Miller's murder.

The second jury trial took place in 2002. In the interim, both Simpson and Zantello proffered written statements[2] recanting their former testimony. Simpson claimed that only he and Lamp participated in the murder and that he had implicated defendant for personal advantage under pressure from the prosecutor. Zantello claimed that an abusive boyfriend had pressured her; he sought to gain favor with the prosecutor in a separate case against him. In her recanting statement, she denied having overheard Simpson and defendant talking about the

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[2] Zantello submitted a sworn and notarized statement. Simpson signed his statement, which included his assertion that the allegations therein were true, but his statement was not sworn and notarized.

murder and claimed that defendant was home when she returned from the hospital. Neither Simpson nor Zantello testified at the retrial. Simpson refused to testify. Zantello stated that she could not remember the night of the crime, her previous statements to the police, her previous testimony, or the contents of her recanting affidavit, which she had completed only three months earlier. The trial court declared both witnesses unavailable. It admitted their testimony from the first trial under MRE 804(b)(l), which establishes a hearsay exception for former testimony of an unavailable witness. Without citing any authority, defense counsel moved to admit the written recantations to impeach the unavailable witnesses. The court ruled the recantations inadmissible under MRE 613, which addresses prior statements of present witnesses, because the inconsistent statements in the recantations were not asserted *before* the former testimony. The court also ruled that Simpson and Zantello were attempting to manipulate the trial process by conveniently becoming unavailable to testify. Further, it ruled that because the recanting statements could not be cross-examined the prosecutor would be prejudiced by their contradictory claims regarding defendant's innocence.

Defendant was convicted again of first-degree murder and again moved for a new trial. For the first time, he argued that the recanting statements should have been admitted under MRE 806, which permits impeachment of hearsay declarants.[3] The

[3] MRE 806 states:

court agreed that the statements *could have been* admitted under MRE 806, but opined that it would have excluded them under MRE 403-because their undue prejudice outweighed their probative value-even if defendant had raised his argument under MRE 806 at trial. The court opined that the statements were highly suspect. Not only did they contain collateral and damaging allegations that could not be challenged on cross-examination, but the witnesses had conveniently rendered themselves unavailable to testify just seven and three months, respectively, after they completed their recantations. Therefore, defendant's new argument for admission under MRE 806 did not justify a new trial.

APPEAL

Defendant appealed and the Court of Appeals reversed and remanded for a new trial, concluding

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> When a hearsay statement, or a statement defined in Rule 80l(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant *may* be attacked, and if attacked *may* be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been

(continued ...)

(... continued)

> admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. [Emphasis added.]

that the statements should have been admitted under MRE 806. The Court held that any prejudice could have been remedied by redacting portions of the statements and instructing the jury to consider them only for their impeachment value.[4] Applying the harmless error standard of review for nonconstitutional error, it concluded that the error required reversal because, more likely than not, it had been outcome determinative.[5]

This Court vacated the Court of Appeals opinion and remanded for that court to "fully evaluate the harmless error question by considering the volume of untainted evidence in support of the jury verdict, not just whether the declarants were effectively impeached with other inconsistent statements at the first trial." We also directed the Court of Appeals to consider whether the error, if any, was harmless beyond a reasonable doubt.[6] On remand, the Court of Appeals repeated its conclusion that the statements should have been admitted and, therefore, that the trial court abused its discretion when it denied defendant's new trial motion. The Court of Appeals also concluded that the error was not harmless beyond a reasonable doubt and again ordered a new trial.[7] The prosecution applied for leave to appeal to

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[4] *People v Blackston,* unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 245099) *(Blackston I),* pp 5-8, vacated 474 Mich 915 (2005).

[5] *Id.* at 9.

[6] *People v Blackston,* 474 Mich 915 (2005).

[7] *People v Blackston (On Remand),* unpublished opinion per curiam of the Court of Appeals, issued May 24, 2007 (Docket No. 245099) *(Blackston II).*

this Court and we ordered oral argument to consider whether to grant leave or take other action.[8] We now reverse.

STANDARD OF REVIEW

The correct standard of appellate review of defendant's claimed evidentiary error has generated considerable debate in this case. The prosecution originally conceded that any error was preserved constitutional error-because it implicated defendant's confrontation rights-and therefore subject to review for whether it was harmless beyond a reasonable doubt.[9] But the Court of Appeals found it unnecessary to decide whether the error was constitutional in nature. It held that reversal was required even under the less stringent standard for nonconstitutional error, concluding that it was more probable than not that the error was outcome determinative.[10] Our order of remand presumed that the standard governing preserved constitutional error applied.[11] The prosecution now argues that any evidentiary error is subject to plain error review because defendant did not sufficiently preserve the claim of error at trial.[12] Because we conclude that

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[8] 480 Mich 929 (2007).

[9] *People v Carines,* 460 Mich 750, 774; 597 NW2d 130 (1999); *Blackston I, supra* at 9 n 3.

[10] *Carines, supra* at 774; *Blackston I, supra* at 9 n 3 and accompanying text.

[11] 474 Mich 915 (2005).

[12] Under the plain error standard, defendant would be obliged to show that (1) an error occurred, (2) the error was plain or obvious, and (3) the error affected the outcome of the trial. *Carines, supra* at 763. Reversal is then warranted only if

the error, if any, was harmless under any of these standards, and because the Court of Appeals did not explicitly analyze which standard of review was appropriate, we find it unnecessary to resolve this question.

A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion.[13] A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes.[14]

ANALYSIS

First, we conclude that the trial court acted within its discretion in denying defendant's motion for a new trial. At trial, defendant moved that he be "allowed somehow" to introduce the unavailable witnesses' statements as impeachment evidence.[15] At the new-trial hearing, he argued that MRE 806 required admission of the statements. The trial court concluded that evidence impeaching hearsay

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defendant is actually innocent of the crime or if the error "'seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings ....'" *Id.,* quoting *United States v Olano,* 507 US 725, 736; 113 S Ct 1770; 123 LEd 2d 508. (1993) (internal citation omitted; brackets in original).

[13] *People v Cress,* 468 Mich 678, 691; 664 NW2d 174 (2003).

[14] *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003).

[15] The dissent asserts, and the prosecution appears to assume, that defendant moved for admission under MRE 613. *Post* at 7 n 5, 21. The trial transcript reveals to the contrary that defendant did not cite any court rules. In the face of his failure to cite any authority, the trial court itself cited MRE 613 among its reasons for denying defendant's motion.

declarants that qualifies for admission under MRE 806 is not *automatically* admissible. Rather, other jurisdictions have held with regard to the rule's counterparts, FRE 806 and similar state provisions, that such evidence is still subject to the balancing test under MRE 403 or its equivalent. The trial court's conclusion is supported by the plain language of MRE 806, which provides that the credibility of the declarant "*may* be attacked, and if attacked *may* be supported .... " (Emphasis added.) There is nothing in the rule of evidence that *requires* admission of an inconsistent statement, and MRE 806 provides no greater leeway regarding admissibility of a statement for impeachment purposes than is granted to litigants offering impeachment evidence in general.[16] This Court expressly permits employing a balancing analysis under MRE 403 when considering the admissibility of other forms of impeachment evidence. See *People v Brownridge,* 459 Mich 456, 461; 591 NW2d 26 (1999). Thus, it is within the trial court's discretion to exclude the evidence "if its probative value is

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[16] We fail to see the relevance of the dissent's suggestion that "[i]t is undisputed that if Simpson and Zantello had testified against defendant at his second trial, the statements at issue here would have been admissible as prior inconsistent statements." *Post* at 10. We cannot know what testimony Simpson and Zantello would have given if they had testified at the second trial. It is pure speculation to assume that the content of their testimony would have justified admission of their recantations. Further, we have no reason to assume that their recantations' admissibility under these hypothetical circumstances would be "undisputed." To the contrary, the extent of their admissibility would be debatable and even the admissible portions would be carefully considered under MRE 403.

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.[17]

"Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony" by the trial judge. *People v VanderVliet,* 444 Mich 52, 81; 508 NW2d 114 (1993). Assessing probative value against prejudicial effect requires a balancing of several factors, including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. *People v Oliphant,* 399 Mich 472, 490; 250 NW2d 443 (1976). Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence. *People v Mills,* 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). As we have previously noted, a party may strike "'as hard as he can above, but not below, the belt.'" *People*

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[17] See, e.g., *Vaughn v Willis,* 853 F2d 1372, 1379 (CA 7, 1988); *Arizona v Huerstel,* 206 Ariz 93, 104; 75 P3d 698 (Ariz, 2003); cf. *United States v Grant,* 256 F3d 1146, 1155 (CA 11, 2001) (requiring admission of evidence under FRE 806 but leaving open whether FRE 403 may sometimes bar evidence otherwise admissible under FRE 806).

v Vasher, 449 Mich 494, 501; 537 NW2d 168 (1995), quoting McCormick, Evidence (2d ed), § 185, p 439.

In this case, the court ruled that the recantations would have qualified for admission under MRE 806, but concluded that their prejudicial nature outweighed their probative value under MRE 403. The court reasoned that their probative value was limited because both Zantello and Simpson had been effectively impeached during cross-examination at the first trial. Zantello's testimony at the first trial revealed that she had initially told the police that defendant was home on the night of the murder and only later asserted his absence. Further, Simpson had regularly changed his story; his statements varied regarding defendant's involvement in the crime.

The court also concluded that the recantations were highly prejudicial; Zantello and Simpson did not merely recant their former accusations, but provided lengthy explanations for why they had lied. Simpson's statement in particular amounted to an epistle advocating defendant's acquittal. The court opined that Simpson's statement likely would not have been admissible even if he had testified. At a minimum, Simpson would have been vigorously cross-examined regarding the statement had he testified. Yet, because he rendered himself unavailable at the second trial, he foreclosed the possibility of cross-examination regarding his wide-ranging assertions.[18]

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[18] The court also opined that Simpson had consistently attempted to manipulate the trial process by recanting but then

We conclude that the court's decision was principled and supported by Michigan law. The trial court reasonably excluded the statements because they were highly unfairly prejudicial. Most significantly, to the extent that the statements' irrelevant or unfairly prejudicial content could have been redacted as suggested by the Court of Appeals, their remaining contents would have been largely cumulative.

Simpson's recantation, which is unsworn,[19] is an eight-page missive, more than half of which is devoted to recounting hearsay statements purportedly made by various attorneys associated with the case. For example, Simpson asserts that the prosecutor regularly advised Simpson that he "does not believe in 'God,'" and that defendant's own attorney encouraged Simpson to testify against defendant because Simpson would be "crazy" not to accept the prosecutor's offer of immunity. The general tenor of the recantation is that the prosecutor essentially admitted to Simpson that he intended to convict defendant without regard to

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engineering his own absence. Simpson recanted only after receiving the benefit of immunity from prosecution and then would not cooperate with the judge at the retrial lest he lose that immunity. Before the retrial, Simpson wrote to the judge that he would refuse to testify. He ultimately appeared before the court, but the court declared him unavailable after he refused to take the stand.

[19] Indeed, as the dissent notes, *post* at 2 n 1, Simpson confirmed that he accused defendant of the murder each time Simpson testified under oath; he accused defendant under oath in response to an investigative subpoena as well as at the first trial. Simpson asserted that defendant was not present at the murder only in unsworn, out-of-court statements.

whether defendant was innocent. Simpson claims that the prosecutor forced Simpson to commit perjury at the first trial in order to achieve his goal. These unsworn statements would inject the specter of prosecutorial corruption into the trial in a manner that the prosecutor could not directly challenge given that Simpson refused to take the stand; the allegations injected issues into the trial that went far beyond Simpson's credibility. Therefore, their potential for misleading or confusing the jury-and, thus, their potential for unfair prejudice-was great.

With respect to Zantello's recanting statement, she claims to have previously perjured herself as a result of cajoling statements by a former boyfriend, who never testified and was never cross-examined about his involvement. Although Zantello testified briefly at the second trial, she was unable to answer the prosecutor's questions because she did not "recall what [she] said" and did not want to "incriminate [her]self because of [her] former testimony" inculpating defendant. Both witnesses were thus unwilling or unable to testify regarding the contents of the statements that they signed just seven and three months, respectively, before the retrial.

For these reasons, the trial court reasonably concluded that the statements' potential for prejudice was great. They largely contained unduly prejudicial hearsay and accusations regarding collateral issues with the potential to mislead the jury. As the Court of Appeals correctly observed, the statements could have been redacted to the extent that their contents were inadmissible or unduly prejudicial. But the remaining information was still

properly excluded because it was largely cumulative when used for its only admissible purpose: impeachment.[20] Because Simpson and Zantello were impeached with information substantially similar to the information contained in the statements, we cannot agree with the dissent that exclusion of the statements "resulted in the jury being painted a false picture." *Post* at 17.

Specifically, Simpson's statement admits that he made inconsistent statements to police beginning in 1989 "when doing so served [his] best interest[s]. (ie: getting-deals [sic] on other non-related offenses)." He states that he lied at the first trial to avoid perjury charges and gain immunity from prosecution. He also reiterates that Lamp had threatened to kill him or his family if he implicated Lamp. He proceeds to give an account of events on the night of the murder in which he asserts that Lamp, not defendant, killed Miller. Simpson's cross-examination during the first trial, which was read at the second trial, had similarly revealed that Simpson told varying stories over the years regarding who was responsible for the murder in order to gain personal advantage. His testimony also revealed that he had been threatened by Lamp. Simpson also explicitly acknowledged during the first trial that, if he did not accuse defendant of the murder at trial as he agreed to do in exchange for full immunity, Simpson would face various charges, including perjury. The second jury was fully informed of Simpson's immunity deal.

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[20] Significantly, as will be discussed further *infra,* the central error of the Court of Appeals' analysis is that it considers the statements' contents for their truth, rather than merely for impeachment purposes.

Zantello's statement similarly repeats assertions that she made at the first trial and that were read into the record at the second trial. At the first trial and in her recanting statement, Zantello confirmed that she originally told the police that she knew nothing about the murder and did not overhear defendant and Simpson talk about any murder. Indeed, as with Simpson, the primary permissible use of Zantello's recantation would have been to show the jury that she had reverted to a previous version of her story, not that she was claiming defendant's innocence for the first time. Accordingly, it is significant that defense counsel succeeded in confronting Zantello with the fact that she had recanted by explicitly asking her at the second trial whether she remembered making a statement that defendant "was home when [she] got home and that [she] had lied under oath originally because [she] had been threatened." She simply answered: "No, I do not."

Under these circumstances, the admissible portions of both statements were largely cumulative to the remaining evidence relevant to Simpson's and Zantello's credibility, which was presented at both trials and, with regard to Zantello, which was expanded on during her live testimony at the second trial. Therefore, the trial judge-who had become familiar with the witnesses over the course of two trials-did not abuse his discretion when he denied defendant's motion for a new trial on the basis of defendant's argument that admission was required under MRE 806. At a minimum, the trial court was called upon to make a close, discretionary decision regarding whether the danger of undue prejudice

that the statements presented outweighed their probative nature. Moreover, the court was required to consider defendant's claim for admission on the basis of an argument that defendant did not advance until after trial and, therefore, which the court was unable to evaluate contemporaneously at the time of the objection. Indeed, at trial, defendant not only failed to cite a single court rule, but he moved to admit each statement in its entirety; he did not argue for admission under MRE 806 of redacted versions of the statements to avoid unfair prejudice to the prosecution. Under these circumstances, we disagree with the dissent's contention that exclusion of the statements amounted to error, let alone *plain* error. "[T]he trial court's decision on a close evidentiary question ... ordinarily cannot be an abuse of discretion." *People v Sabin (After Remand),* 463 Mich 43, 67; 614 NW2d 888 (2000). Here, where the court was faced with the witnesses' unfairly prejudicial and largely cumulative inconsistent statements, we cannot say that the court's decision lay outside the range of principled outcomes.

Further, the trial court's discretionary decision in this case differs from that of the trial court in *United States v Grant,* 256 F3d 1146, 1155 (CA 11, 2001), on which the dissent relies. In *Grant,* a co-conspirator never testified because he had been deported before the trial took place. *Id.* at 1153. The co-conspirator's previous, arguably inculpatory statements were read into the record; the statements circumstantially linked the defendant to the conspiracy but did not directly name him as a conspirator. *Id.* at 1152-1153. At trial, defense counsel properly moved under FRE 806 for

admission of exculpatory statements the co-conspirator made after he had been deported, in which he affirmatively claimed that the defendant was uninvolved. *Id.* at 1153.[21] The trial court denied the motion, ruling that the exculpatory statements were not actually inconsistent with the co-conspirator's earlier, circumstantially inculpatory statements. *Id.* The Eleventh Circuit Court of Appeals reversed, concluding that the trial court's view of inconsistency was too narrow and that the exculpatory statements would have significant probative value with regard to the credibility of the purportedly inculpatory statements. *Id.* at 1153-1155.

The circumstances of *Grant* differ from those of the case before us in crucial respects. First, the exculpatory statements in *Grant* were significantly more probative because they appear to have been the co-conspirator's *only* exculpatory statements. For this reason, in contrast to the instant case, they were not cumulative. Second, although the prosecutor in *Grant* observed on appeal that the exculpatory statements were unreliable because they were made only after the co-conspirator was deported, the trial court in *Grant* did not find that the coconspirator explicitly attempted to manipulate the trial process by injecting collateral issues into the trial or gained an advantage by changing his story. Rather, as noted earlier, the court concluded that the statements did

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[21] Thus, in contrast to the case before us, defense counsel contemporaneously argued for admission under FRE 806 *at trial*. Yet the prosecutor did not argue that admission created undue prejudice until the issue was reviewed on appeal. *Id.* at 1155.

not directly contradict each other. In sum, without regard to whether we agree with the *Grant* court's holding, we conclude that *Grant* is distinguishable.[22]

Most significantly, even if the trial court in this case erred, any error was harmless under each of the potentially applicable standards of review. The harmless error analysis employed by the Court of Appeals was clearly erroneous for several reasons. On remand, when considering the effect of any error on the remaining evidence presented at trial, the Court reasoned:

> Lamp's testimony would be subject to the utmost scrutiny, given his undisputed involvement in the murder, his plea agreement, and defendant's theory, supported by many of the impeaching statements that were not admitted, that Lamp had done the shooting himself. Further, much of the interlocking testimony concerned the allegation that defendant killed Miller and cut off his ear at the direction of drug dealer Benny Williams. However, police testified that they had no evidence connecting Williams to the murder, Williams testified that he did not know Miller and had not received one of his ears,

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[22] We agree with the dissent that the facts of *Vaughn v Willis,* 853 F2d 1372, 1379 (CA 7, 1988), are not perfectly comparable to those of the instant case. Here, the facts fall on a spectrum somewhere between those of *Grant* and those of *Vaughn*. But the mere fact that the unique circumstances of this case and those of *Vaughn* are different in no way requires the conclusion that the trial court abused its discretion here.

> and police also testified that there was no physical evidence indicating that Miller's ear had been cut off. Regarding Mock and her sister, there was testimony that they and defendant were always drinking when they were together. Further Mock, her sister, and Z[a]ntello, who was supposedly present during some of the discussions, gave differing accounts of what defendant said. Lastly, we conclude that the evidence overwhelmingly supported that defendant knew something about the murder, but his role, and the extent of his knowledge and participation or assistance, largely depended on Simpson's testimony.[23]

First and foremost, the court erred as a matter of law by considering the recanting statements for improper purposes. It erroneously concluded that defendant's theory that Lamp committed the shooting without defendant's aid would have been supported "by many of the impeaching statements that were not admitted, that Lamp had done the shooting himself." To the contrary, had the statements been admitted, they could not have been directly considered as evidence in favor of the defense theory. They could have been used *only* for the purpose of impeaching the credibility of Simpson and Zantello.[24] MRE 806. Thus, *at the very most,* the statements would have

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[23] *Blackston II, supra* at 9.

[24] The dissent similarly errs when it asserts that the content of the recantations would have supported defendant's claim of innocence instead of being used only to undermine the credibility of Zantello and Simpson. See, e.g., *post* at 20.

caused the jury to discredit entirely Simpson's and Zantello's testimony inculpating defendant. The remaining untainted evidence-in the form of testimony from Lamp, Mock and Barr-alone established beyond a reasonable doubt that defendant was at least an accomplice to first-degree, premeditated murder.

The Court of Appeals mischaracterizes the untainted evidence by essentially dismissing the very significant testimony of Mock and Barr. The sisters both described a specific night and location at Lion's Park where defendant tearfully apologized and admitted to them that he had participated in Miller's murder.[25] Mock recalled that defendant specifically told her that defendant pulled the trigger and cut off Miller's ear. Barr recalled defendant saying that defendant was present at the murder but thought that he said Lamp had pulled the trigger. Barr also testified that, around the time of the murder, she had been at someone's house and "they were saying that Charles' ear was in the freezer." Most significantly, Mock attested that, in April 1990, in light of defendant's confessions, Mock convinced him that he should speak with the police. Defendant initially agreed to do so the next day. Mock called the police and told them about defendant's admissions but, by the time the police contacted defendant, he refused to provide them any details. Michigan State Police Detective Sergeant Dana Averill confirmed that Mock contacted the police and that Mock, Barr,

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[25] Defendant confessed twice: once at Lion's Park, to Mock and Barr, and on a separate occasion to Mock and Zantello at Zantello' s house after defendant had moved out of the house.

and Zantello gave statements regarding defendant's admissions.[26] Overall the substantially consistent testimony of Mock and Barr, which was confirmed in part by Averill's testimony, provided strong evidence against defendant. Significantly, their testimony also directly corroborated Lamp's testimony and added to his credibility. The Court of Appeals clearly erred when it simply discounted their testimony because they were "always drinking when they were together" and "gave differing accounts of what defendant said."[27]

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[26] Averill also spoke to defendant at that time and testified that defendant never specifically denied his involvement but was uncooperative and said something like, "When the time comes, the truth will come out and I'll tell you when I'm ready."

[27] The dissent also discredits the testimony of Mock and Barr. But, contrary to the dissent's implications, their testimony was consistent with regard to defendant's critical admissions that he was present during and directly involved in the murder. For example, Barr *did* come to believe that defendant cut off Miller's ear; she simply could not remember whether defendant or someone else had first told her this. She admitted that she remembered only "pieces" of defendant's confession to her and Mock because she had been drinking at the time. The dissent also emphasizes that Mock was a suspect during the investigation of Miller's death. *Post* at 19. But there is no reason to conclude that the jury would have entirely discredited Mock's testimony for this reason. As Mock explained during her testimony, Mock had been a suspect but she had not been singled out by the police; rather, she explained that "[e]verybody was" a suspect at the time. Overall, the dissent focuses on minor discrepancies among the details of Mock's and Barr's testimony. But such discrepancies are unsurprising when the testimony

(continued ...)

Finally, because Zantello's and Simpson's recantations could not have been introduced for their truth, defendant still would have been left to rely on the defense theories that he presented at trial to cast doubt on the consistent testimony from Lamp, Mock, and Barr. His primary alibi defense depended solely on the testimony of his three sisters, which was suspect because of their obvious bias in favor of their brother. Defendant also relied, as does the dissent, on Williams's unsurprising testimony that, although Williams was a "fairly large-scale cocaine dealer" at the time of Miller's murder, he did not commission the murder. A police officer also attested that the police were unable to link Williams to the crime. But, significantly, even the defense conceded in closing argument that Miller planned to steal from Williams; the defense simply argued that Lamp, "having heard Mr. Miller ... was going to steal from Benny Williams, fearing that he, Mr. Lamp, was next, he decided that Miller had to die first." Regarding the lack of physical evidence establishing that Miller's ear had been cut off, all parties agreed that Miller's remains were skeletal and that most of the soft tissue had decayed. Contrary to the implications of defendant and the dissent, no testimony or physical evidence affirmatively suggests that Miller's ear was *not* severed. The defense also attempted to divert the jury from Lamp's description of the crime by presenting several experts who opined that Miller may have been killed by blunt force, rather than by a

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(... continued)

occurred a decade after the relevant events and conversations took place. The jury had reason to credit their testimony precisely because of the substantial similarity of their memories of the relevant events despite this significant lapse in time.

bullet. Yet Lamp himself testified that Lamp had access to guns and therefore encouraged defendant to shoot Miller instead of beating him to death, that Lamp provided the gun defendant used to kill Miller, and that Lamp sold the gun after the crime. Therefore, the defense theory that Miller was beaten, rather than shot, did little to inculpate Lamp and exculpate defendant.

In sum, the volume of untainted evidence against defendant was significant. The facts do not cast reasonable doubt on the prosecutor's theory of the case. In particular, nothing in the record suggested that Mock and Barr had any motive to falsely implicate defendant. They came forward early in the investigation and the details and timing of their testimony were directly confirmed by the police. Although Zantello's and Simpson's original inculpatory testimony certainly would strengthen the prosecution's case, their testimony was not critical for the prosecution because defendant's culpability was clearly established by the other witnesses. Moreover, because the jury had already heard the evidence impeaching Simpson and Zantello that was offered at the first trial, and had obviously chosen to disregard it, the likelihood that the jury would have been convinced by cumulative impeachment evidence was slight in light of the fact that Simpson's and Zantello's inculpatory testimony so clearly coincided with the untainted evidence. In light of the volume of untainted evidence against defendant, any error did not affect the outcome of the case.

CONCLUSION

We hold that the trial court did not abuse its discretion when it denied defendant's motion for a new trial on the basis of defendant's argument that MRE 806 required admission of Simpson's and Zantello's highly prejudicial and cumulative recantations. Further, any error would also have been harmless under any of the potentially applicable standards of review. The Court of Appeals erred as a matter of law by considering the recantations for the truth of the matters of asserted, instead of as impeachment of the recanting witnesses' testimony, and improperly dismissed the testimony of two key prosecution witnesses. For these reasons, we reverse the judgment of the Court of Appeals and remand the case to that court for consideration of defendant's remaining issues on appeal.

Maura D. Corrigan
Clifford W. Taylor
Elizabeth A. Weaver
Robert P. Young, Jr.

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v No. 134473

JUNIOR FRED BLACKSTON,
Defendant-Appellee.

MARKMAN, J. (*dissenting*).

Following a jury trial, defendant was convicted of first-degree murder. However, the trial court granted defendant's motion for a new trial because the jury was misinformed regarding the extent of the immunity granted to a witness in exchange for that witness's testimony against defendant. After the first trial, but before the second trial, two witnesses, in signed, written statements, recanted the testimony that they had provided in the first trial against defendant. Although the trial court admitted these witnesses' testimony from the first trial, the trial court excluded their recanting statements. Following a second jury trial, defendant was again convicted of first-degree murder. The Court of Appeals reversed and remanded for a new trial, concluding that the trial court had abused its discretion in excluding the recanting statements and that the error was not harmless. The majority here today reverses the Court of Appeals, concluding that the trial court did not abuse its discretion in excluding the statements and that any error was harmless. Because I agree

with the Court of Appeals that the trial court abused its discretion in excluding the statements and that this error was not harmless, I dissent.

I. FACTS AND PROCEDURAL HISTORY

In 2001, following a jury trial, defendant was convicted of first-degree murder for the shooting death of Charles Miller in 1988. During this first trial, Guy Simpson, an alleged accomplice who was given full immunity in exchange for his testimony against defendant, testified that defendant, Charles Lamp, and himself were present when Miller was shot, but that defendant was the one who actually shot Miller.[1] He also testified that defendant cut off Miller's ear and that defendant had told him that he needed to show Miller's ear to Benny Williams, a local drug dealer. Simpson admitted that he had, in the past, told several different versions of the events, including one in which only he and Lamp, and not defendant, were involved in Miller's death. However, a police officer testified that Simpson's version of the events had always been the same-- defendant was the shooter-- on the occasions that he had interviewed Simpson. Simpson also confirmed that Lamp had, in the past, threatened to kill him if he

[1] Before Simpson testified, Simpson stated that his previous statement under oath against defendant, pursuant to an investigative subpoena, was not truthful, and that he now wanted to testify truthfully, but he was concerned that if he did so he could be charged with perjury. When the court instructed him that he, indeed, could be charged with perjury if he testified differently from his previous statement, Simpson stated, "so, it'll put a hindrance on my testimony today." Neither the jury at the first trial nor the jury at the second trial was privy to this conversation.

endangered Lamp's plea agreement in any way. Finally, Simpson testified that defendant had an affair with Lamp's wife.

Lamp, who testified pursuant to a plea agreement under which he pleaded guilty of manslaughter and received a 10- to 15-year sentence, also testified that defendant shot Miller while Lamp and Simpson were present, and that defendant cut off Miller's ear. Lamp further testified that defendant killed Miller for Williams. He admitted that he had once threatened to kill Simpson if Simpson talked to the police. Lamp eventually took the police to the location where Miller's remains were found.

Darlene Zantello, defendant's girlfriend at the time of the murder but no longer so at the time of the trial, testified that when she arrived home on the night of the murder, nobody was there; defendant and Simpson arrived later, and she heard them talking about blowing someone's head off and cutting someone's ear off. She also testified that about a year or two later, while they were all drinking, she heard defendant say to Rebecca Mock, Miller's girlfriend at the time of his death, that he was sorry that "they did what they did," although he did not say that he was the one who did it. On cross-examination, Zantello denied that she had initially told the police that defendant was at home when she arrived there and that defendant was not involved in Miller's death.

Rebecca Mock and her sister, Roxann Barr, testified that one night when they were all drinking, defendant admitted being present when Miller was

killed. However, Mock and Barr offered differing accounts of what exactly defendant said, including whether he stated that he killed Miller.[2]

Three of defendant's sisters supported his alibi defense. They all testified that he was at home on the night that Miller was killed. According to Lamp and Simpson, defendant killed Miller for Williams, but Williams testified that he did not know Miller or anything about Miller's death, and there is no evidence linking Williams to Miller. In fact, a police officer testified that the police had concluded that Williams was not involved in the murder. Finally, contrary to the testimony of Simpson and Lamp, the police testified that there was no physical evidence indicating that Miller's ear had been cut off.

After the first trial, the trial court granted defendant's motion for a new trial because the jury had been misinformed regarding the extent of the immunity that was granted to Simpson in exchange

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[2] Mock testified that defendant said that he was the shooter, but Barr testified that defendant did not admit to being the shooter. In addition, Mock testified that defendant said that he cut off Miller's ear, but Barr testified that she did not think that defendant said anything about cutting off Miller's ear. Both Mock and Barr admitted that Mock had been a suspect in Miller's murder.

In addition, Lamp testified that when he arrived at defendant's house, Simpson was already there and Miller arrived later. However, Simpson testified that when he arrived at defendant's house, Miller was there, and Lamp arrived later. Meanwhile, Mock testified that defendant and Lamp came to her house to pick Miller up, but that Miller was not ready then, so he went to defendant's house later. Finally, Zantello testified that Simpson was at defendant's house before Miller.

for his testimony against defendant. After the first trial, but before the second trial, Simpson and Zantello provided signed and written statements recanting the testimony that they had presented against defendant at his first trial.

Simpson's signed and written statement explained that Lamp was the one who shot Miller, and that defendant was not even present when Lamp did so. Simpson stated that defendant was at home when he left with Miller and Lamp, and that defendant was still at home when Lamp dropped him off at defendant's house later that evening after Lamp shot Miller in front of Simpson. As far as he knew, defendant was at home that entire evening. Simpson further stated that the prosecutor threatened to charge him with obstruction of justice if he did not testify against defendant, but promised him "full immunity" if he testified against defendant, even though Simpson asserted that he told the prosecutor that defendant was innocent. He also explained that all his statements to the police implicating defendant were given while he was incarcerated for unrelated crimes and were given to benefit himself while he was facing criminal charges. Finally, he explained that he was not making these statements because of his friendship with defendant as he had not seen defendant in over 11 years.

Similarly, Zantello explained in a signed, written, notarized affidavit that the first statement that she gave to the police was the truth; that is, defendant was at home when she arrived home that evening and she did not know anything about Miller's murder. She explained that about 10 months

after the murder, she was arrested for disorderly conduct and was instructed to implicate defendant in Miller's murder. She further explained that her boyfriend at the time of defendant's first trial, Robert Lowder, was released from jail even though he had two felony charges pending against him. Lowder told her that if she testified against defendant, he would not go to prison for his felony charges. The prosecutor in charge of Lowder's case was also the prosecutor in charge of defendant's case, and she was afraid of Lowder. The two felony charges pending against Lowder were for beating her. Finally, she admitted that she never overheard any conversations about Miller's murder, and that defendant had always told her that he was not involved in Miller's murder.[3]

At defendant's second trial, the court ruled that Simpson and Zantello were unavailable on the basis of their unwillingness to testify and alleged memory problems.[4] Although the trial court admitted these

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[3] Defendant argues that it is unlikely that Zantello is lying to help him, given that she sent a letter to defendant the day after she testified against him at his first trial stating that she hated him and hoped that he would die in prison, and she signed the affidavit recanting her testimony against defendant after this.

[4] Simpson said that he would testify after he was allowed to shower because apparently he was in the "hole" the night before and was not allowed to shower. The trial court deemed this to be a refusal to testify. Simpson did not testify even though his counsel warned him on the record that there was a "strong possibility" that he would be charged with perjury if he did not testify and that he was "risking his immunity that was granted to him." Zantello took the stand and stated that she could not recall any of the events because of her long-term drinking

witnesses' testimony from the first trial as prior testimony of unavailable witnesses under MRE 804(b)(l), it excluded their subsequent recanting statements. In 2002, following a second jury trial, defendant was again convicted of first-degree murder.

The trial court denied defendant's motion for a new trial, holding that although the witnesses' recanting statements were admissible under MRE 806, they were properly excluded under MRE 403.[5] The Court of Appeals subsequently reversed and remanded for a new trial. *People v Blackston,* unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 245099). In response to the prosecutor's application for leave to appeal, this Court vacated the Court of Appeals judgment and remanded to the Court of Appeals "for reconsideration of the issue whether the

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problem. One of the issues that defendant raised on appeal was whether the trial court erred in considering Simpson and Zantello unavailable. Given its holding on the present issue, the Court of Appeals did not address this issue.

[5] During defendant's second trial, defense counsel objected to the exclusion of the recanting statements on the basis of MRE 613 (prior inconsistent statements), but not on the basis of MRE 806 (attacking credibility of declarant). However, defendant raised the MRE 806 argument in his motion for a new trial. Although the majority claims that defendant did not even rely on MRE 613 at trial, *ante* at 9 n 15, the prosecutor has repeatedly conceded to the contrary. See Plaintiff-Appellant's Application For Leave, pp 4, 15, and Plaintiff-Appellant's Supplemental Brief, p 2. Further, what remains most significant in this regard is that defendant attempted to introduce the recanting statements and the trial court excluded them, and, as discussed later, this constituted a plain error that justifies a new trial.

trial court's error, if any, in excluding the statements in question was harmless beyond a reasonable doubt." 474 Mich 915 (2005). This Court further stated, "The court should fully evaluate the harmless error question by considering the volume of untainted evidence in support of the jury verdict, not just whether the declarants were effectively impeached with other inconsistent statements at the first trial." *Id.*

On remand, the Court of Appeals held that the error was not harmless beyond a reasonable doubt, and, thus, again reversed and remanded for a new trial. *People v Blackston (On Remand),* unpublished opinion per curiam of the Court of Appeals, issued May 24, 2007 (Docket No. 245099). In response to the prosecutor's second application for leave to appeal, we ordered and heard oral argument on whether to grant the application or take other peremptory action. 480 Mich 929 (2007). The majority now reverses the Court of Appeals.

II. STANDARD OF REVIEW

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *Elezovic v Ford Motor Co,* 472 Mich 408, 419; 697 NW2d 851 (2005). A trial court's decision to deny a motion for a new trial is likewise reviewed for an abuse of discretion. *Barnett v Hidalgo,* 478 Mich 151, 158; 732 NW2d 472 (2007). The court abuses its discretion when it chooses an outcome falling outside the principled range of outcomes. *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003).

I agree with the majority that it is unnecessary to determine whether the error here was preserved, constitutional error or unpreserved, non-constitutional error. However, unlike the majority, I reach this conclusion because I believe that even assuming that the error was unpreserved, non-constitutional error, and thus that the most difficult standard for defendant to satisfy is applicable, the error here was not harmless and defendant is entitled to a new trial. As will be discussed more thoroughly in part III(B), assuming that the error is unpreserved, non-constitutional error, defendant must satisfy the plain-error standard of review, which requires him to establish: (1) that there was error; (2) that the error was plain; (3) that the error affected the outcome of the lower court proceeding; and (4) that the error resulted in the conviction of an actually innocent defendant or that the error ""seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings .... "" *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999) (citation omitted). In my judgment, he has clearly satisfied even this standard.

III. ANALYSIS

A. EXCLUSION OF EVIDENCE

As discussed earlier, although the trial court admitted Simpson's and Zantello's testimony from the first trial, it excluded their subsequent recantations. I agree with the Court of Appeals that the trial court abused its discretion when it excluded this evidence. MRE 806 provides:

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. [Emphasis added.]

MRE 806 specifically states that when hearsay statements are admitted, the credibility of the declarant may be attacked by any evidence that would have been admissible if the declarant had testified. It is undisputed that if Simpson and Zantello had testified against defendant at his second trial, the statements at issue here would have been admissible as prior inconsistent statements.[6]

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[6] MRE 806 states that a defendant may introduce evidence that attacks the credibility of declarants if this evidence would have been "admissible for those purposes if declarant had testified as a witness." That is, if the recanting statements would have been admissible to attack the credibility of the declarant if the declarant had testified according to the hearsay statement, they are admissible to attack the credibility of the declarant when only the hearsay statement is admitted.

At the motion for a new trial, the trial court agreed that the recanting statements were admissible under MRE 806, but concluded that the statements were "more prejudicial [than] probative," and, thus, were properly excluded under MRE 403. MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"Evidence is not inadmissible simply because it is prejudicial. Clearly, in every case, each party attempts to introduce evidence that causes prejudice to the other party." *Waknin v Chamberlain,* 467 Mich 329, 334; 653 NW2d 176 (2002). ""Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion of relevant matter under Rule 403 .... "" *Id.* (citations omitted). "In this context, prejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for

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Contrary to the majority's view, *ante* at 10 n 16, MRE 806 requires us to assume that the declarant's testimony would have been consistent with the hearsay statement. Moreover, again contrary to the majority's view, *ante* at 10 n 16, I believe it is "undisputed" that the recanting statements here would have been admissible had declarants testified at trial, particularly given that the prosecutor has not argued otherwise even though this is one of the requirements of MRE 806.

exclusion." *People v Vasher,* 449 Mich 494, 501; 537 NW2d 168 (1995). MRE 403 ""is not designed to permit the court to 'even out' the weight of the evidence ... or to make a contest where there is little or none."" *Waknin,* 467 Mich at 334 (citations omitted). Instead, the rule only prohibits evidence that is unfairly prejudicial. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford,* 458 Mich 376, 398; 582 NW2d 785 (1998).

Given that the excluded evidence at issue here would have impeached two critical prosecutorial witnesses, this evidence cannot possibly be considered "marginally probative evidence," and, thus, cannot possibly be considered "unfairly prejudicial." Therefore, the trial court's holding to the contrary "fall[s] outside th[e] principled range of outcomes," *Babcock,* 469 Mich at 269, and thus constitutes an abuse of discretion.

Where a Michigan rule of evidence is modeled after its federal counterpart, it is appropriate to look to federal precedent for guidance, *People v Barrera,* 451 Mich 261, 267; 547 NW2d 280 (1996), although the latter is never dispositive. Both MRE 806 and MRE 403 are identical to their federal counterparts. In *United States v Grant,* 256 F3d 1146 (CA 11, 2001), a co-conspirator, Deosie Wilson, made statements during the conspiracy to an undercover police officer that implicated the defendant. Subsequently, Wilson signed an affidavit stating that the defendant was not involved in the crimes. The trial court admitted Wilson's statements to the

undercover police officer, but excluded Wilson's subsequent affidavit. *Id.* at 1152-1153. The Eleventh Circuit Court of Appeals reversed, concluding that the affidavit was admissible under FRE 806 and could not be excluded under FRE 403. That court explained:

> Rule 403 is an "extraordinary remedy," whose "major function ... is limited to excluding matter[s] of scant or cumulative probative force, dragged in by the heels for the sake of [their] prejudicial effect." The Rule carries a "strong presumption in favor of admissibility." Wilson's inculpatory co-conspirator statements were important pieces of evidence in the government's case. The impeaching statements in the affidavit would serve to cast doubt on Wilson's credibility and would have significant probative value for that purpose. Whatever prejudice to the government that might occur from admitting the affidavit statements could not substantially outweigh their probative value, anymore than it could if those affidavit statements had been admitted for impeachment following live testimony of Wilson to the same effect as his co-conspirator statements. [*Id.* at 1155 (citations omitted).]

In *Vaughn v Willis,* 853 F2d 1372 (CA 7, 1988), plaintiff Terry Vaughn, an inmate, testified that defendant Henry Willis, a guard, helped several inmates rape Vaughn. Alvin Abrams, another inmate, testified during a deposition that he saw

Willis help the inmates rape Vaughn. Before the trial in this civil action, Abrams wrote a letter to Willis's attorney stating that he would not testify at the trial and that he had made some mistakes during his deposition. Subsequently, Abrams was allowed to correct the mistakes made in his deposition, which simply pertained to the sequence in which the assailants entered Vaughn's cell, and again swore to the truthfulness of the deposition testimony. However, at trial, Abrams refused to testify, stating, in the absence of the jury, that he would not testify because he feared for his life, as well as the lives of his family. *Id.* at 1377-1378. The trial court admitted Abrams's deposition testimony, but excluded Abrams's letter to Willis's attorney on the basis that "the possibility of prejudice far outweighed any probative value the letter might have." *Id.* at 1379.

The Seventh Circuit Court of Appeals affirmed the trial court's decision to exclude the letter for several reasons. First, the letter's probative value was minimal because it was "very ambiguous." *Id.* at 1379. Second, the letter had the potential of confusing the jury because it referred to mistakes that the witness had made in his prior testimony, but those mistakes pertained only to irrelevant details and had subsequently been corrected. *Id.* at 1380. The court's third reason for affirming the trial court's decision to exclude the letter was that the witness did not want this letter disclosed because he "fear[ed] for his safety and that of his family." *Id.*

In the instant case, the trial court held that *Vaughn* is "more akin to our case in the sense that, although it wasn't prior trial testimony, it was prior

testimony given in a deposition where there was a full right to cross examine, and the subsequent statement was a letter." I respectfully disagree. Both *Grant* and the instant case involve a statement by a witness/accomplice followed by a recanting statement by that same witness/accomplice. *Vaughn,* on the other hand, involved a statement by an eyewitness, not an alleged accomplice, followed by a letter refusing to testify, not a recanting statement. Unlike in *Grant* and in the present case, the letter in *Vaughn* did not assert that the witness's earlier statement was untrue. The probative value of the letter in *Vaughn* does not even remotely compare to the probative value of the subsequent recanting statements in *Grant* and in the present case because in the latter cases, the witnesses expressly stated that their previous statements were untrue. Furthermore, unlike in *Vaughn,* the recanting statements at issue in *Grant* and in the instant case were not at all ambiguous. To the contrary, they very clearly stated that the previous statements were untrue. In addition, unlike in *Vaughn,* neither *Grant* nor the instant case involves a witness who wants his subsequent statement excluded because he fears for either his own or his family's safety.

Grant and the instant case are similar in another respect. In *Grant,* the prosecutor argued that the subsequent statement should be excluded because it would provide a "complete defense" and because it was "particularly unreliable." *Grant,* 256 F3d at 1155. Similarly, in the instant case, the trial court excluded the subsequent statements because they were an "advocacy for acquittal" and because the witnesses' "manipulative nature" made him

"skeptical." However, the Court in *Grant* rejected these arguments, stating:

> The evidence of the affidavit statements could do no more than impeach and could not provide "a complete defense" if the government requested the limiting instruction to which it would have been entitled. See *Weeks v. Angelone,* 528 U.S. 225, 234, 120 S.Ct. 727, 733, 145 L. Ed.2d 727 (2000) ("A jury is presumed to follow its instructions.").
>
> The government's second fallback argument is that Wilson's affidavit statements were properly excluded from evidence because they were particularly unreliable . . . . The government maintains that because the statements in the affidavit were so unreliable, admitting them would not have affected the outcome of the trial-sort of a harmless error argument.
>
> The government's argument on this point is more than a little inconsistent with its Rule 403 argument that the affidavit statements were terribly prejudicial to its case. Putting that inconsistency aside, however, Rule 806 made the statements admissible for impeachment purposes, and the point of admitting inconsistent statements to impeach is not to show that they are true, but to aid the jury in deciding whether the witness is credible; the usual argument of the party doing the impeaching is that the inconsistent statements show the

> witness is too unreliable to be believed on important matters. See *United States v. Graham,* 858 F.2d 986, 990 n. 5 (5th Cir. 1988) ("[T]he hallmark of an inconsistent statement offered to impeach a witness's testimony is that the statement is not hearsay within the meaning of the term, i.e., it is not offered for the truth of the matter asserted, see Fed.R.Evid. 801(c); rather, it is offered only to establish that the witness has said both 'x' and 'not x' and is therefore unreliable."). Given all the circumstances of this case, that strategy might well have worked to undermine the probative effect of Wilson's co-conspirator statements to such an extent that the verdict on the conspiracy charge would have been different. For that reason, we reverse Grant's conviction on that charge. [*Grant,* 256 F3d at 1155-1156.][7]

These same arguments should likewise be rejected in this case. The subsequent statements here are not admissible to prove that defendant was not the shooter. Instead, they are admissible to show that two of the prosecutor's witnesses are not credible. As the Court of Appeals explained:

> [T]he statements were not offered to prove the truth of what was in them, but to attack

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[7] Although the majority concedes that *Vaughn* is distinguishable from the instant case, it argues that *Grant* is also distinguishable from the instant case. *Ante* at 17-18. While *Grant* and the instant case are not identical, for the reasons discussed earlier, I believe that *Grant* is sufficiently similar to be of considerable guidance.

> the witnesses' credibility. As in *Grant,* the very reason the court excluded the statements, because it questioned the veracity and credibility of the witnesses, made the statements all the more probative on the credibility issue. Defendant should have been free to show the jury that the witnesses were unworthy of belief. Credibility is always a question for the jury, and the court erred in concluding that it would have been proper to insulate the jury from the witnesses' contradictory statements. [*Blackston (On Remand), supra* at 7-8.]

The probative value of the recanting statements was not substantially outweighed by the danger of unfair prejudice under MRE 403. The probative value of these statements is evinced by the fact that there is a specific rule of evidence, MRE 806, that provides that this very kind of evidence, i.e., evidence attacking the credibility of a declarant when that declarant's hearsay statement is being used against the defendant, is admissible. The probative value of these recanting statements was especially significant given that the prior testimony of these two witnesses was obviously extremely damaging. The only "unfair prejudice" at issue in this case was caused by the trial court's exclusion of the recanting statements, because it resulted in the jury being painted a false picture. If the recanting statements had been placed before the jury, the prosecutor would, of course, have been free to argue to the jury that the recanting witnesses had manufactured their testimony. However, instead, the jurors were told that one witness previously testified that defendant was the

shooter and the other one testified that she overheard defendant and a co-defendant talking about blowing somebody's head off *without* being informed that the first witness subsequently stated that defendant was not even present when the victim was killed and that the second witness subsequently stated that she never heard defendant talking about the murder. This was critical evidence of which the jury, in fairness, should not have been deprived. For these reasons, I agree with the Court of Appeals that the trial court abused its discretion in excluding the recanting statements.[8]

B. HARMLESSNESS OF ERROR

I also agree with the Court of Appeals that the error was not harmless. Simpson testified that defendant was the shooter. However, Simpson testified against defendant in exchange for full immunity; before testifying at the first trial, he indicated that he wanted to testify truthfully but was concerned that he would be charged with perjury if his testimony conflicted with his previous statement; Simpson has told several different versions of the events; in his very first statement to the police,

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[8] The majority argues that the recanting statements included irrelevant and unfairly prejudicial content; however, as the majority concedes, any such material could have been redacted. *Ante* at 12, 14. The key assertions made in the recanting statements were that these witnesses' prior testimonies against defendant were untruthful; these assertions were clearly not irrelevant or unfairly prejudicial and thus should not have been excluded from the jury. In addition, for the reasons discussed later in the "harmless error" section, I disagree with the majority that the recanting statements were merely cumulative, *ante* at 12, 14-16, 23.

Simpson said that Lamp was the shooter and that defendant was not even there, which is consistent with his most recent statement; Simpson testified that defendant cut off Miller's ear, but the police testified that there is no physical evidence indicating that Miller's ear had been cut off; Simpson testified that defendant killed Miller for Williams, but Williams testified that he did not even know Miller and the police indicated that there was no evidence that Williams was in any way involved with Miller's death; and Lamp threatened to kill Simpson if he said anything to the police to endanger his plea agreement, a threat on which Simpson believed Lamp would follow through.

Lamp also testified that defendant shot Miller. However, Lamp also testified against defendant in exchange for a plea agreement; Lamp testified that defendant cut off Miller's ear, but the police testified that there was no physical evidence indicating that Miller's ear had been cut off; Lamp testified that defendant killed Miller for Williams, but Williams testified that he did not even know Miller, and the police indicated that there was no evidence that Williams was in any way involved in Miller's death; Lamp threatened to kill Simpson if he said anything to the police to endanger his plea agreement; defendant had an affair with Lamp's wife; and, finally, Simpson has stated that Lamp shot Miller.

Zantello testified that defendant was not at home when she arrived at home and that she overheard defendant and Simpson talking about blowing off somebody's head. However, in her very first statement to the police she said that defendant was

home when she arrived there and that defendant was not involved in Miller's murder, which is consistent with her most recent statement; and she testified that she overheard defendant and Simpson talking about cutting off somebody's ear indicating that Miller's ear had been cut off.

Mock testified that defendant told her that he shot Miller. However, Mock was a suspect in Miller's murder; Barr, who witnessed the same conversation, testified that defendant did not say that he was the shooter[9] and that they were all drunk when this confession allegedly occurred; and, finally, Mock testified that defendant said that he cut off Miller's ear, but Barr testified that she did not think that defendant said anything about cutting Miller's ear off, and the police testified that there was no physical evidence indicating that Miller's ear had been cut off.

There are also inconsistencies between the testimonies of Lamp, Simpson, Mock, and Zantello regarding who showed up when at defendant's house on the night that Miller was murdered. See note 2, *supra.* Finally, three of defendant's sisters testified that defendant was home the night that Miller was killed.

The evidence against defendant, in other words, was anything but overwhelming. All the prosecutor's

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[9] The majority claims that there were only "minor discrepancies" between Mock's and Barr's testimony. *Ante* at 21 n 27. Given that Mock testified that defendant said that he was the one who killed Miller and Barr testified that defendant did not say he was the one who killed Miller, I disagree.

witnesses had compelling motives to lie. Simpson, Lamp, and Mock were all suspects. Zantello was defendant's ex-girlfriend and, according to Zantello, her then-current boyfriend, who beat her, forced her to testify against defendant because the prosecutor--the same prosecutor prosecuting defendant's case--allegedly promised him no prison time if she did so. Under these circumstances, excluding Simpson's and Zantello's written statements that indicated that defendant was innocent was not harmless error. These statements could very well have caused the jury to have reasonable doubt about defendant's guilt.

The prosecutor argues that the recanting statements are cumulative because the jury already heard evidence that Simpson and Zantello had made prior inconsistent statements. However, Zantello's earlier inconsistent statement made to the police just after the incident and while she was still living with defendant did not undermine her first trial testimony to the extent that her later written statement would have. As the Court of Appeals explained:

> The jury heard evidence that Zantello's first statements to police were that defendant was home when she returned from the hospital, and that she knew nothing about Miller's disappearance except that defendant was not involved. However, these statements were given shortly after Miller's disappearance, and when Zantello was living with defendant. The jury could have easily decided that the earlier inconsistent

statements did not undermine the trial testimony, reasoning that Zantello had given a statement in March, 1990 that incriminated defendant, and that at the time of trial, Zantello was no longer involved with defendant, and was therefore no longer willing to lie in his behalf. The fact that Zantello reaffirmed her earlier position shortly before the second trial would have undermined her trial testimony in a way that the earlier statements could not. [*Blackston (On Remand), supra* at 8.]

In addition,

[r]egarding Simpson, although he was impeached with having given prior inconsistent versions of what happened to Miller, as set forth above, and he admitted at the first trial that he had told Jody Harrington shortly after the shooting that only he and Lamp were involved, he also admitted telling police that he never made such a statement to Harrington. Further, Detective Sergeant Averill testified that Simpson had remained consistent in the version of events he claimed to have witnessed, and stated that Simpson's testimony at defendant's first trial had been consistent with this version of events. Had Simpson's inconsistent written statement . . . been admitted under MRE 806, the jury would have had a very different view of Simpson's credibility. [*Id.]*

Because the evidence against defendant is by no means overwhelming, and because the excluded evidence was significantly probative, I agree with the Court of Appeals that the error here was not harmless.

Even assuming that the issue was not properly preserved because, although defendant objected to the exclusion of the evidence on the basis of MRE 613, he did not object on the basis of MRE 806, MRE 103(d) provides that unpreserved "plain errors affecting substantial rights" can be raised for the first time on appeal.[10] As discussed in part II, in

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[10] The prosecutor arguably should be precluded from asserting that the issue is unpreserved given that, in his brief to the Court of Appeals, he conceded that defendant "had brought a motion for a new trial on this basis expressly under MRE 806, and thereby, preserved the issue for appeal" and stated that as "a preserved claim of constitutional error, this Court must determine whether the people have established beyond a reasonable doubt that any error was harmless." Moreover, the error was arguably properly preserved under MRE 103, which provides:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

order for a defendant to obtain relief for an unpreserved error, the defendant must establish: (1) that there was an error; (2) that the error was plain; (3) the error affected the outcome of the lower court proceedings; and (4) the error resulted in the conviction of an actually innocent defendant or that

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> Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
>
> * * *
>
> (d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Given that the trial court excluded evidence, all that was required to preserve the issue under MRE 103(a)(2) was to make "the substance of the evidence ... known to the court." Nobody disputes the fact that "the substance of the evidence was made known to the court." Further, the error arguably denied defendant his right to confront witnesses against him, and thus was arguably of constitutional dimension.

(continued ...)

(... continued)

If the error was constitutional, preserved error, the prosecutor would be required to prove that the error was harmless beyond a reasonable doubt. *People v Anderson,* 446 Mich 392, 406; 521 NW2d 538 (1994). If the error was non-constitutional, preserved error, defendant would be required to prove that it was more probable than not that the error was outcome determinative. *People v Lukity,* 460 Mich 484, 495-496; 596 NW2d 607 (1999). As discussed in part II, it is unnecessary to determine whether the error was constitutional or non-constitutional, or preserved or unpreserved, because even assuming that it was unpreserved, non-constitutional error, defendant is entitled to relief.

it ""seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings ...."" *Carines,* 460 Mich at 763 (citation omitted). Because Simpson's and Zantello's recanting statements are clearly admissible under MRE 806, and should not have been excluded under MRE 403, there was error, and the error was plain. Because the evidence against defendant was by no means overwhelming, the exclusion of the recanting statements of the prosecutor's two critical witnesses may very well have been outcome determinative, and the error may have resulted in the conviction of an actually innocent defendant.

Alternatively, the error certainly and seriously affected the fairness, integrity, and public reputation of the judicial proceeding. The jury was affirmatively apprised that two witnesses previously testified against the defendant (one testified that he saw defendant shoot Miller and the other testified that she heard defendant talking about shooting Miller), but it was never told that these witnesses subsequently signed written statements indicating that defendant was actually innocent. By restricting the jury's access to *all* of the available evidence, the trial court presented the jury with a highly distorted view of the state of the evidence against defendant and thereby deprived the defendant, and the community, of a fair trial. Therefore, even assuming that the issue is unpreserved, there was plain error requiring reversal.

IV. CONCLUSION

The trial court abused its discretion in allowing the jury to hear the hearsay testimony of two critical

witnesses, while excluding their recanting statements, and in denying defendant's motion for a new trial. Therefore, I would affirm the judgment of the Court of Appeals that reversed the trial court and remanded this case for a new trial.

Stephen J. Markman
Michael F. Cavanagh
Marilyn Kelly

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

UNPUBLISHED
May 24, 2007

No. 245099
Van Buren
Circuit Court
LC No. 00-011976-FC

ON REMAND

JUNIOR FRED BLACKSTON,

Defendant-Appellant.

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court, which vacated our original opinion and remanded to this Court

> for reconsideration of the issue whether the trial court's error, if any, in excluding the statements in question was harmless beyond a reasonable doubt. The court should fully evaluate the harmless error question by considering the volume of untainted evidence

> in support of the jury verdict, not just whether the declarants were effectively impeached with other inconsistent statements at the first trial. If the court concludes that the error was harmless, it should consider defendant's remaining allegations of error. [*People v Blackston*, 474 Mich 915 (2005).]

We conclude that the error was not harmless beyond a reasonable doubt.

For ease of understanding, we reprint portions of our original opinion, *People v Blackston*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 245099):

> Defendant was convicted of first-degree murder, MCL 750.316, and was sentenced to life imprisonment. He appeals as of right, and we reverse and remand for new trial.
>
> This case stems from a homicide that occurred more than fifteen years ago. On the evening of September 12, 1988, Charles Miller disappeared after visiting defendant's Bangor home. On July 10, 2000, Charles Dean Lamp, a codefendant, led police to a site one-half mile from his home, where the buried remains of a body matching Miller's description were found. Defendant was subsequently arrested and charged in connection with Miller's death.
>
> A jury trial was held in April 2001, and defendant was found guilty of first-degree

murder. However, the trial court granted defendant's motion for new trial based on the trial court's misinforming the jury regarding the prosecution's grant of immunity to prosecution witness Guy Carl Simpson in exchange for his testimony. A second jury trial took place in October 2002.

At this second trial, Simpson appeared in court, but resisted giving testimony. He was found to be unavailable, and the court admitted his testimony from the first trial together with an instruction clarifying the prosecutor's grant of immunity. A written statement Simpson had given after the first trial, in which he recanted his testimony, explained why he had testified as he had, and stated that only he and Lamp were with Miller when he was killed, was not admitted.

According to Simpson's testimony at the first trial, which was read to the jury at the second trial, on the evening of September 12, 1988 Simpson was dropped off at the home of defendant and defendant's then girlfriend, Darlene (Rhodes) Zantello, for an unannounced visit sometime between 10:00 and 10:30 p.m. When Simpson arrived, defendant and his one-year-old daughter were at home, and Zantello may have been there at that time as well. Miller also was at defendant's house when Simpson arrived. Between one-half hour and one hour after Simpson arrived, Lamp, who was also a friend of defendant's, and whom Simpson did

not like, arrived at defendant's home. Lamp announced that he wanted to steal some marijuana from a field he knew about. Miller was known to have a knack for finding marijuana plants, and Simpson assumed that it had been planned in advance that Miller would go with Lamp and defendant to get the marijuana. Defendant originally stated that he could not go because he had to stay with his daughter, since Zantello had left by then, and suggested that Simpson accompany Lamp and Miller in his stead. Eventually, however, all four men, together with defendant's daughter, left the home to go steal the marijuana.

Lamp drove into the woods, driving around for approximately forty-five minutes before turning off onto an unpaved "two-track" road and stopping. All four men got out, while the child was left sleeping in the car, and Lamp took a rifle out of the trunk of his car and handed it to defendant. Lamp walked off some distance ahead of the others, allegedly to look for the field, while defendant, Miller, and Simpson followed behind. Shortly thereafter, Lamp called out that he had found the field, and at that point defendant turned and shot Miller one time, and Miller fell to the ground, apparently dead. Lamp then rejoined Simpson and defendant, and Simpson and Lamp moved Miller's body to a nearby, pre-dug grave and placed Miller in the grave. Defendant then jumped down into the grave and returned a

moment later with something in his hand, which Simpson believed to be one of Miller's ears. Lamp then filled in and disguised the grave, and the three men returned in Lamp's car, along with defendant's daughter, to defendant's home. Approximately one half-hour later Lamp left to go home, while Simpson remained at defendant's home for the remainder of the night.

Simpson testified that several days after the murder Lamp told him that they had killed Miller because Miller had "gotten in over his head with the wrong people." Simpson testified that defendant told him that he needed to show Miller's ear to Benny Williams. Several days after the murder, Simpson was with defendant when he took a bag, which Simpson believed contained Miller's ear, and threw it in a nearby river.

Simpson admitted that in the past he had told several different versions of the events surrounding Miller's disappearance, including that only he (Simpson) and Lamp, and not defendant, were involved in Miller's death; that an entirely different person, Charles Pippin, committed the crime; and that Miller was not really dead, but rather was simply working in another state. Simpson admitted that he had made his statements with an eye to his own personal gain, and further admitted that if he testified to a different set of events at defendant's trial, he would probably lose his grant of

immunity and would risk perjury charges. Simpson also confirmed that Lamp had, in the past, threatened to kill him if he gave any information regarding Miller's murder to the police or if he endangered Lamp's own plea-agreement in any way.

Simpson's testimony as to the events surrounding Miller's death was largely corroborated by Lamp. Lamp, who was testifying pursuant to a pleabargain under which he was permitted to plead guilty of manslaughter and receive a ten to fifteen year sentence in exchange for his testimony, testified that defendant was angry with Miller because he believed Miller was planning to rob Benny Williams, a local drug dealer who supplied defendant with cocaine. As a result, Lamp and defendant had discussed killing Miller three or four times, and ultimately they decided to take Miller out to a pre-selected, isolated area on the pretext of stealing marijuana, and to shoot him and bury his body in a pre-dug grave. The two men located an appropriate area not far from where Lamp then lived, off an unpaved two-track road, and several nights before Miller's murder they prepared a grave at this location, with both Lamp and defendant taking turns digging.

Lamp testified that on the night of Miller's murder, he drove to defendant's house, and when he arrived he found that not only was defendant there, but Simpson was present as

well. Lamp was not happy that Simpson was there, because they did not like each other, but defendant took him aside and informed him that Simpson was going to assist in the murder. Approximately a half-hour after Lamp arrived, Miller was dropped off at defendant's house, and then the four men, together with defendant's daughter, got into Lamp's car and drove to the pre-selected site. As previously planned by Lamp and defendant, when they arrived at the site, Lamp handed defendant a rifle, which he took from the trunk of the car, and then Lamp walked alone ahead of the others to find the pre-dug grave. When he found the grave, he shouted back to the others and then he heard a single gunshot. He then went back to the others, where he found Miller lying on the ground with blood seeping from the back of his head and defendant holding the rifle in his hands. Lamp, Simpson, and defendant carried Miller's body to the awaiting grave, defendant jumped in and cut off Miller's ear, and then the three men filled in the grave and disguised it so that it would not be discovered. Lamp stated that he subsequently sold the rifle.

Lamp confirmed that he had once threatened to kill Simpson when he found out Simpson was wearing a hidden wire in an attempt to incriminate Lamp and defendant, but insisted it was merely an idle threat and that he had no intention of ever following through on it.

Rebecca (Krause) Mock, Miller's girlfriend at the time of his death, and her sister Roxanne (Krause) Barr, who lived with Miller and Mock at the time Miller was killed, both testified that defendant admitted being present at Miller's murder, although their testimony differed with regard to whether defendant admitted shooting Miller.

Darlene Zantello, formerly Darlene Rhodes, who was defendant's girlfriend at the time of Miller's death, was called to the stand by the prosecution, but denied having any memory of the events of the night Miller died, her prior statements to police, her prior testimony, or an affidavit she signed after the first trial. The court established through questioning that Zantello had been an alcoholic for many years, and had suffered head injuries. The court found Zantello to be unavailable as a witness, pursuant to MRE 804, and permitted the prosecution to read Zantello's testimony from defendant's first trial into the record.

At the first trial, Zantello testified that she lived with defendant in September 1988, that she was pregnant at that time, that on the night of Miller's death she had experienced severe stomach pains and had gone to the hospital. Zantello testified that she spent three or four hours at the hospital before returning home to find the house empty. After unsuccessfully trying to locate her daughter at a friend's, she laid down and fell

asleep. She was awakened some time later when defendant and Simpson returned to the house. Zantello testified that she heard Simpson say something to defendant like "that was like a movie with all that blood," and that she very vaguely recalled someone saying something regarding someone's ear being cut off. She also had a vague recollection of Simpson saying something about almost blowing someone's whole head off and about a pre-dug hole. Zantello testified that when Miller's girlfriend, Mock, came to the house looking for him, defendant denied any knowledge of his whereabouts. A year or two later, however, after Zantello and defendant had broken up, defendant came over to Zantello's house where Mock was then living. He became weepy and said he was sorry that "they did what they did," but he did not say that he himself had done anything.

Following the reading of her testimony into the record, Zantello was recalled to the stand. On cross-examination she denied any recollection of telling police in 1988 and 1990 that defendant was at home when she returned from the hospital. When defense counsel began to question her regarding the affidavit executed after the first trial in which she stated that her first statement to the police was true and her testimony at trial was not, the trial court stopped the questioning on the basis that the affidavit was executed after the first trial, and

therefore was not a *prior* inconsistent statement.

Three of defendant's sisters, Shirley Gargus, Sheila Blackston, and Linda Johnson, each testified as to defendant's whereabouts on the night of Miller's murder and confirmed Zantello's assertion that she went to the hospital that night. Gargus testified that on September 12, 1988 around 11:00 p.m. Sheila Blackston stopped by to leave her children for Gargus to baby-sit. Blackston had Zantello with her, and told Gargus that she was taking Zantello to the hospital for stomach pain. Around midnight, Blackston called her from the hospital and asked her to go check on defendant, since he had been left alone with his and Zantello's oneyear-old baby. When she arrived at defendant's house a few minutes later defendant and the baby were at home.

Blackston confirmed Gargus' testimony, stating that on September 12, 1988 she took Zantello to the hospital around 11:00 p.m. for stomach pain, and dropped her own children off with Gargus on the way to the hospital. When she returned Zantello to Zantello's and defendant's home after leaving the hospital, defendant was at home.

Johnson testified that on September 12, 1988 she got into a fight with her husband and went over to defendant's house around 11:30 p.m. to calm down. She stated that when she arrived, defendant and the baby

were at the house alone, asserted that the only visitor during the time she was at defendant's house was defendant's friend Lonnie Johnson, who visited for approximately twenty minutes around midnight, and told the court that when she left defendant's home at around 12:45 a.m. defendant was still at home.

Defendant also called Benny Williams. Williams asserted that he had not known Miller, that he had never asked anyone to kill Miller, that he did not know anything about Miller's death, and that no one had ever brought him a human ear. Williams did admit, however, that in 1988 he was a cocaine dealer in Bangor. A police officer had earlier testified that the police concluded that Williams was not involved in the murder.

The prosecution's experts expressed the opinion that Miller died from a gunshot wound to the neck. Defendant's experts expressed the opinion that Miller's injuries were caused by blunt force trauma.

II

Defendant first argues that the trial court abused its discretion when it denied his motion for a new trial, which was based on the claim that the court had erred in barring defendant from impeaching the prior recorded testimony of two witnesses with inconsistent statements made after the two

had testified in defendant's first trial but before defendant's second trial. The court agreed that the statements were, in fact, admissible under MRE 806, but determined that they were nonetheless properly excluded because the statements were more prejudicial than probative and, thus, were inadmissible under 403. We agree with defendant that the court erred in denying him the right to impeach the witnesses with these statements.

* * *

First, as the trial court recognized, and the prosecution does not contest, MRE 806, rather than MRE 613, governs the use of Simpson's and Zantello's statements for impeachment purposes. MRE 806 provides:

> ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT
>
> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C),(D) or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any

> requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Defendant should have been permitted to impeach the witnesses with their statements under MRE 806, which permits the credibility of a declarant of an admitted hearsay statement to be attacked with any inconsistent statement made at any time, and without regard to whether the witness is afforded an opportunity to deny or explain.

* * *

Federal courts have held that Rule 403[1] is an extraordinary remedy, the major function of which is to exclude matters "of scant or cumulative probative force, dragged in by the heels for the sake of their prejudicial effect," and have stated that FRE 403 carries a strong presumption in favor of admissibility. *United States v Grant*, 256 F3d 1146, 1155 (CA 11, 2001), quoting *United States v Utter*, 97 F3d 509, 514-515 (CA 11, 1996), *United*

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[1] Where a Michigan Rule of Evidence is modeled after its Federal Evidentiary Rule counterpart, this Court can look to federal precedent for guidance. *People v Barrera*, 451 Mich 261, 267; 547 NW2d 280 (1996).

States v Cross, 928 F2d 1030, 1048 (CA 11, 1991), and *United States v Church*, 955 F2d 688, 703 (CA 11, 1992). At the same time, however, federal courts have also noted that a reviewing court must remember that the trial court, and not the appellate court, is in the best position to assess the extent of the prejudice caused to a party by a piece of evidence, and have further stated that when a trial court has given careful attention to a balancing of prejudice and probative value, appellate courts should be particularly mindful of their duty not to reverse absent a clear abuse of discretion. *Vaughn v Willis*, 853 F2d 1372, 1380 (CA 7, 1988), quoting *United States v Long*, 574 F2d 761, 767 (CA 3 1978), and *United States v Garner*, 837 F2d 1404, 1416 (CA 7, 1987).

The general principle that witness credibility is for the jury to determine is not disturbed by FRE 403. Therefore, evidence should not be excluded under FRE 403 because the trial court considers a witness unworthy of belief. Instead, "balancing probative worth against unfair prejudice involves the trial court giving full credit to the [evidence] and then considering probative worth against unfair prejudice." 1 Mueller & Kirkpatrick, Federal Evidence (2d ed), § 94. See *United States v Thompson*, 615 F2d 329, 332 (CA 5, 1980) (reversing trial court because FRE 403 does not authorize judge to "protect" jury from contradictory testimony, nor exclude evidence because judge "does not

find it credible"); *Bowden v McKenna*, 600 F2d 282, 284 (CA 1, 1979) (weighing probative value against unfair prejudice under FRE 403 means probative value "if the evidence is believed, not the degree the court finds it believable").

* * *

In the instant case, recognizing the appropriate standard of review, we nevertheless are persuaded that the trial court abused its discretion in denying the motion for new trial on the basis that barring the use of the statements to impeach the witnesses was supported by MRE 403. The court concluded that use of the statements would have been unfairly prejudicial because the statements went beyond mere statements and were arguments for acquittal, and the court believed that the witnesses had deliberately made themselves unavailable and given the statements "to have [their] cake and it too." However, the statements were not offered to prove the truth of what was in them, but to attack the witnesses' credibility. As in *Grant*, the very reason the court excluded the statements, because it questioned the veracity and credibility of the witnesses, made the statements all the more probative on the credibility issue. Defendant should have been free to show the jury that the witnesses were unworthy of belief. Credibility is always a question for the jury, and the court erred in concluding that it

would have been proper to insulate the jury from the witnesses' contradictory statements. Further, the court was free to redact any portions of the statements that did not amount to a statement inconsistent with the witness' hearsay statement.

In a supplemental brief filed in propria persona, defendant raises a similar argument with respect to other witnesses who would have testified to prior inconsistent statements of Simpson in which he stated that only he and Lamp were involved in Miller's murder. Anticipating defendant's calling such witnesses, as was done in the first trial, the prosecutor asked the court to exclude the testimony of any witness who would testify to a prior statement that was not brought to the witness' attention under MRE 613(b). Defense counsel agreed that she intended to call a number of such witnesses, and had affidavits from such witnesses, including some who were not known at the time of the first trial. The court ruled the testimony inadmissible. For the reasons discussed above, this testimony was admissible under MRE 806, and the court erred in excluding it.

We reject the argument that the court's error was harmless because Simpson and Zantello had already been effectively impeached with inconsistent statements at the first trial. The jury heard evidence that Zantello's first statements to police were that

defendant was home when she returned from the hospital, and that she knew nothing about Miller's disappearance except that defendant was not involved. However, these statements were given shortly after Miller's disappearance, and when Zantello was living with defendant. The jury could have easily decided that the earlier inconsistent statements did not undermine the trial testimony, reasoning that Zantello had given a statement in March, 1990 that incriminated defendant, and that at the time of trial, Zantello was no longer involved with defendant, and was therefore no longer willing to lie in his behalf. The fact that Zantello reaffirmed her earlier position shortly before the second trial would have undermined her trial testimony in a way that the earlier statements could not.

Regarding Simpson, although he was impeached with having given prior inconsistent versions of what happened to Miller, as set forth above, and he admitted at the first trial that he had told Jody Harrington shortly after the shooting that only he and Lamp were involved, he also admitted telling police that he never made such a statement to Harrington. Further, Detective Sergeant Averill testified that Simpson had remained consistent in the version of events he claimed to have witnessed, and stated that Simpson's testimony at defendant's first trial had been consistent with this version of events. Had

> Simpson's inconsistent written statement and the testimony of other witnesses regarding other inconsistent statements been admitted under MRE 806, the jury would have had a very different view of Simpson's credibility. We conclude that defendant has shown the requisite prejudice - - that upon a review of the entire record, it is more probable than not that the error in denying the admission of substantial impeachment evidence was outcome determinative. [*Blackston, supra,* slip op at 1-6, 8-9.]

We again conclude that the trial court's exclusion of the evidence was, in fact, error.

We now reconsider whether the error was harmless beyond a reasonable doubt "by considering the volume of untainted evidence in support of the jury verdict. . . ." The prosecution makes much of the interlocking nature of the testimony. However, Lamp's testimony would be subject to the utmost scrutiny, given his undisputed involvement in the murder, his plea agreement, and defendant's theory, supported by many of the impeaching statements that were not admitted, that Lamp had done the shooting himself. Further, much of the interlocking testimony concerned the allegation that defendant killed Miller and cut off his ear at the direction of drug dealer Benny Williams. However, police testified that they had no evidence connecting Williams to the murder, Williams testified that he did not know Miller and had not received one of his ears, and police also testified that there was no physical evidence indicating that Miller's ear had

been cut off. Regarding Mock and her sister, there was testimony that they and defendant were always drinking when they were together. Further Mock, her sister, and Zentello, who was supposedly present during some of the discussions, gave differing accounts of what defendant said. Lastly, we conclude that the evidence overwhelmingly supported that defendant knew something about the murder, but his role, and the extent of his knowledge and participation or assistance, largely depended on Simpson's testimony. We cannot say with confidence that defendant would have been convicted of first-degree murder if the court had let in the impeaching evidence, as it was obliged to do.

We again remand for a new trial. If Simpson is again declared to be unavailable, his refusal to testify should be clearly developed on the record. Additionally, to avoid any further claims of ineffective assistance of counsel, all the witnesses defendant has identified as supporting his case should be identified for defense counsel on remand, together with the testimony defendant believes to be relevant. The trial court should ensure that a satisfactory explanation is provided somewhere in the record for absence of, or the decision not to call, any witness whose testimony is not presented.

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens

ORDER

Michigan Supreme Court
Lansing, Michigan

November 3, 2005

Clifford W. Taylor
Chief Justice

129397

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JUNIOR FRED BLACKSTON,

Defendant-Appellee.

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Justices

SC: 129397
COA: 245099
Van Buren CC:
00-011976-FC

_____/

On Order of the Court, the application for leave to appeal the January 18, 2005 judgment of the Court of Appeals is considered, and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to that court for reconsideration of the issue whether the trial court's error, if any, in excluding the statements in question was harmless beyond a reasonable doubt. The court should fully evaluate the harmless error question by considering the volume of untainted evidence in support of the jury verdict, not just whether the declarants were effectively impeached with other inconsistent statements at the first trial. If the court

concludes that the error was harmless, it should consider defendant's remaining allegations of error.

We do not retain jurisdiction.

CAVANAGH and KELLY, JJ., would deny leave to appeal.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 3, 2005 — *Corbin R. Davis*
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED January 18, 2005
Plaintiff-Appellee,	
v	No. 245099 Van Buren Circuit Court
JUNIOR FRED BLACKSTON,	LC No. 00-011976-FC
Defendant-Appellant.	

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant was convicted of first-degree murder, MCL 750.316, and was sentenced to life imprisonment. He appeals as of right, and we reverse and remand for new trial.

This case stems from a homicide that occurred more than fifteen years ago. On the evening of September 12, 1988, Charles Miller disappeared after visiting defendant's Bangor home. On July 10, 2000, Charles Dean Lamp, a co-defendant, led police to a site one-half mile from his home, where the buried remains of a body matching Miller's description were found. Defendant was subsequently arrested and charged in connection with Miller's death.

A jury trial was held in April 2001, and defendant was found guilty of first-degree murder. However, the trial court granted defendant's motion for new trial based on the trial court's misinforming the jury regarding the prosecution's grant of immunity to prosecution witness Guy Carl Simpson in exchange for his testimony. A second jury trial took place in October 2002.

At this second trial, Simpson appeared in court, but resisted giving testimony. He was found to be unavailable, and the court admitted his testimony from the first trial together with an instruction clarifying the prosecutor's grant of immunity. A written statement Simpson had given after the first trial, in which he recanted his testimony, explained why he had testified as he had, and stated that only he and Lamp were with Miller when he was killed, was not admitted.

According to Simpson's testimony at the first trial, which was read to the jury at the second trial, on the evening of September 12, 1988 Simpson was dropped off at the home of defendant and defendant's then girlfriend, Darlene (Rhodes) Zantello, for an unannounced visit sometime between 10:00 and 10:30 p.m. When Simpson arrived, defendant and his one-year-old daughter were at home, and Zantello may have been there at that time as well. Miller also was at defendant's house when Simpson arrived. Between one-half hour and one hour after Simpson arrived, Lamp, who was also a friend of defendant's, and whom Simpson did not like, arrived at defendant's home. Lamp announced that he wanted to steal some marijuana from a field he knew about.

Miller was known to have a knack for finding marijuana plants, and Simpson assumed that it had been planned in advance that Miller would go with Lamp and defendant to get the marijuana. Defendant originally stated that he could not go because he had to stay with his daughter, since Zantello had left by then, and suggested that Simpson accompany Lamp and Miller in his stead. Eventually, however, all four men, together with defendant's daughter, left the home to go steal the marijuana.

Lamp drove into the woods, driving around for approximately forty-five minutes before turning off onto an unpaved "two-track" road and stopping. All four men got out, while the child was left sleeping in the car, and Lamp took a rifle out of the trunk of his car and handed it to defendant. Lamp walked off some distance ahead of the others, allegedly to look for the field, while defendant, Miller, and Simpson followed behind. Shortly thereafter, Lamp called out that he had found the field, and at that point defendant turned and shot Miller one time, and Miller fell to the ground, apparently dead. Lamp then rejoined Simpson and defendant, and Simpson and Lamp moved Miller's body to a nearby, pre-dug grave and placed Miller in the grave. Defendant then jumped down into the grave and returned a moment later with something in his hand, which Simpson believed to be one of Miller's ears. Lamp then filled in and disguised the grave, and the three men returned in Lamp's car, along with defendant's daughter, to defendant's home. Approximately one half-hour later Lamp left to go home, while Simpson

remained at defendant's home for the remainder of the night.

Simpson testified that several days after the murder Lamp told him that they had killed Miller because Miller had "gotten in over his head with the wrong people." Simpson testified that defendant told him that he needed to show Miller's ear to Benny Williams. Several days after the murder, Simpson was with defendant when he took a bag, which Simpson believed contained Miller's ear, and threw it in a nearby river.

Simpson admitted that in the past he had told several different versions of the events surrounding Miller's disappearance, including that only he (Simpson) and Lamp, and not defendant, were involved in Miller's death; that an entirely different person, Charles Pippin, committed the crime; and that Miller was not really dead, but rather was simply working in another state. Simpson admitted that he had made his statements with an eye to his own personal gain, and further admitted that if he testified to a different set of events at defendant's trial, he would probably lose his grant of immunity and would risk perjury charges. Simpson also confirmed that Lamp had, in the past, threatened to kill him if he gave any information regarding Miller's murder to the police or if he endangered Lamp's own plea-agreement in any way.

Simpson's testimony as to the events surrounding Miller's death was largely corroborated by Lamp. Lamp, who was testifying pursuant to a plea-bargain under which he was permitted to plead guilty of manslaughter and receive a ten to fifteen

year sentence in exchange for his testimony, testified that defendant was angry with Miller because he believed Miller was planning to rob Benny Williams, a local drug dealer who supplied defendant with cocaine. As a result, Lamp and defendant had discussed killing Miller three or four times, and ultimately they decided to take Miller out to a pre-selected, isolated area on the pretext of stealing marijuana, and to shoot him and bury his body in a pre-dug grave. The two men located an appropriate area not far from where Lamp then lived, off an unpaved two-track road, and several nights before Miller's murder they prepared a grave at this location, with both Lamp and defendant taking turns digging.

Lamp testified that on the night of Miller's murder, he drove to defendant's house, and when he arrived he found that not only was defendant there, but Simpson was present as well. Lamp was not happy that Simpson was there, because they did not like each other, but defendant took him aside and informed him that Simpson was going to assist in the murder. Approximately a half-hour after Lamp arrived, Miller was dropped off at defendant's house, and then the four men, together with defendant's daughter, got into Lamp's car and drove to the preselected site. As previously planned by Lamp and defendant, when they arrived at the site, Lamp handed defendant a rifle, which he took from the trunk of the car, and then Lamp walked alone ahead of the others to find the pre-dug grave. When he found the grave, he shouted back to the others and then he heard a single gunshot. He then went back to the others, where he found Miller lying on the

ground with blood seeping from the back of his head and defendant holding the rifle in his hands. Lamp, Simpson, and defendant carried Miller's body to the awaiting grave, defendant jumped in and cut off Miller's ear, and then the three men filled in the grave and disguised it so that it would not be discovered. Lamp stated that he subsequently sold the rifle.

Lamp confirmed that he had once threatened to kill Simpson when he found out Simpson was wearing a hidden wire in an attempt to incriminate Lamp and defendant, but insisted it was merely an idle threat and that he had no intention of ever following through on it.

Rebecca (Krause) Mock, Miller's girlfriend at the time of his death, and her sister Roxanne (Krause) Barr, who lived with Miller and Mock at the time Miller was killed, both testified that defendant admitted being present at Miller's murder, although their testimony differed with regard to whether defendant admitted shooting Miller.

Darlene Zantello, formerly Darlene Rhodes, who was defendant's girlfriend at the time of Miller's death, was called to the stand by the prosecution, but denied having any memory of the events of the night Miller died, her prior statements to police, her prior testimony, or an affidavit she signed after the first trial. The court established through questioning that Zantello had been an alcoholic for many years, and had suffered head injuries. The court found Zantello to be unavailable as a witness, pursuant to MRE 804, and permitted the prosecution to read Zantello's testimony from defendant's first trial into the record.

At the first trial, Zantello testified that she lived with defendant in September 1988, that she was pregnant at that time, that on the night of Miller's death she had experienced severe stomach pains and had gone to the hospital. Zantello testified that she spent three or four hours at the hospital before returning home to find the house empty. After unsuccessfully trying to locate her daughter at a friend's, she laid down and fell asleep. She was awakened some time later when defendant and Simpson returned to the house. Zantello testified that she heard Simpson say something to defendant like "that was like a movie with all that blood," and that she very vaguely recalled someone saying something regarding someone's ear being cut off. She also had a vague recollection of Simpson saying something about almost blowing someone's whole head off and about a pre-dug hole. Zantello testified that when Miller's girlfriend, Mock, came to the house looking for him, defendant denied any knowledge of his whereabouts. A year or two later, however, after Zantello and defendant had broken up, defendant came over to Zantello's house where Mock was then living. He became weepy and said he was sorry that "they did what they did," but he did not say that he himself had done anything.

Following the reading of her testimony into the record, Zantello was recalled to the stand. On cross-examination she denied any recollection of telling police in 1988 and 1990 that defendant was at home when she returned from the hospital. When defense counsel began to question her regarding the affidavit executed after the first trial in which she stated that her first statement to the police was true and her

testimony at trial was not, the trial court stopped the questioning on the basis that the affidavit was executed after the first trial, and therefore was not a prior inconsistent statement.

Three of defendant's sisters, Shirley Gargus, Sheila Blackston, and Linda Johnson, each testified as to defendant's whereabouts on the night of Miller's murder and confirmed Zantello's assertion that she went to the hospital that night. Gargus testified that on September 12, 1988 around 11:00 p.m. Sheila Blackston stopped by to leave her children for Gargus to baby-sit. Blackston had Zantello with her, and told Gargus that she was taking Zantello to the hospital for stomach pain. Around midnight, Blackston called her from the hospital and asked her to go check on defendant, since he had been left alone with his and Zantello's one-year-old baby. When she arrived at defendant's house a few minutes later defendant and the baby were at home.

Blackston confirmed Gargus' testimony, stating that on September 12, 1988 she took Zantello to the hospital around 11:00 p.m. for stomach pain, and dropped her own children off with Gargus on the way to the hospital. When she returned Zantello to Zantello's and defendant's home after leaving the hospital, defendant was at home.

Johnson testified that on September 12, 1988 she got into a fight with her husband and went over to defendant's house around 11:30 p.m. to calm down. She stated that when she arrived, defendant and the baby were at the house alone, asserted that the only visitor during the time she was at defendant's house

was defendant's friend Lonnie Johnson, who visited for approximately twenty minutes around midnight, and told the court that when she left defendant's home at around 12:45 a.m. defendant was still at home.

Defendant also called Benny Williams. Williams asserted that he had not known Miller, that he had never asked anyone to kill Miller, that he did not know anything about Miller's death, and that no one had ever brought him a human ear. Williams did admit, however, that in 1988 he was a cocaine dealer in Bangor. A police officer had earlier testified that the police concluded that Williams was not involved in the murder.

The prosecution's experts expressed the opinion that Miller died from a gunshot wound to the neck. Defendant's experts expressed the opinion that Miller's injuries were caused by blunt force trauma.

II

Defendant first argues that the trial court abused its discretion when it denied his motion for a new trial, which was based on the claim that the court had erred in barring defendant from impeaching the prior recorded testimony of two witnesses with inconsistent statements made after the two had testified in defendant's first trial but before defendant's second trial. The court agreed that the statements were, in fact, admissible under MRE 806, but determined that they were nonetheless properly excluded because the statements were more prejudicial than probative and, thus, were inadmissible under 403. We agree with defendant

that the court erred in denying him the right to impeach the witnesses with these statements.

Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Jones,* 236 Mich App 396, 404; 600 NW2d 652 (1999). The decision whether to admit evidence also is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider,* 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine,* 467 Mich 242, 250; 650 NW2d 659 (2002). Furthermore, an evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Smith,* 243 Mich App 657, 680; 625 NW2d 46 (2000), remanded on other grounds 465 Mich 931 (2001).

First, as the trial court recognized, and the prosecution does not contest, MRE 806, rather than MRE 613, governs the use of Simpson's and Zantello's statements for impeachment purposes. MRE 806 provides:

ATTACKING AND SUPPORTING
CREDIBILITY OF DECLARANT

> When a hearsay statement, or a statement defined in Rule 801(d)(2)(C),(D) or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Defendant should have been permitted to impeach the witnesses with their statements under MRE 806, which permits the credibility of a declarant of an admitted hearsay statement to be attacked with any inconsistent statement made at any time, and without regard to whether the witness is afforded an opportunity to deny or explain.

MRE 403 provides that evidence that is otherwise relevant may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. "Unfair prejudice" means more than merely that the evidence is damaging to the challenging party. *People v Mills,* 450 Mich 61, 75; 537 NW2d 909, mod on other grounds 450 Mich

1212 (1995). Rather, what is meant by the phrase "unfair prejudice" in MRE 403, is "an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *People v Vasher,* 449 Mich 494, 501; 537 NW2d 168 (1995).

In other words, evidence is said to be " 'unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.' " *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Federal courts have held that Rule 403[1] is an extraordinary remedy, the major function of which is to exclude matters "of scant or cumulative probative force, dragged in by the heels for the sake of their prejudicial effect," and have stated that FRE 403 carries a strong presumption in favor of admissibility. *United States v Grant*, 256 F3d 1146, 1155 (CA 11, 2001), quoting *United States v Utter*, 97 F3d 509, 514-515 (CA 11, 1996), *United States v Cross*, 928 F2d 1030, 1048 (CA 11, 1991), and *United States v Church*, 955 F2d 688, 703 (CA 11, 1992). At the same time, however, federal courts have also noted that a reviewing court must remember that the trial court, and not the appellate court, is in the best position to assess the extent of the prejudice caused to a party by a piece of evidence, and have

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[1] Where a Michigan Rule of Evidence is modeled after its Federal Evidentiary Rule counterpart, this Court can look to federal precedent for guidance. *People v Barrera*, 451 Mich 261, 267; 547 NW2d 280 (1996).

further stated that when a trial court has given careful attention to a balancing of prejudice and probative value, appellate courts should be particularly mindful of their duty not to reverse absent a clear abuse of discretion. *Vaughn v Willis*, 853 F2d 1372, 1380 (CA 7, 1988), quoting *United States v Long*, 574 F2d 761, 767 (CA 3 1978), and *United States v Garner*, 837 F2d 1404, 1416 (CA 7, 1987).

The general principle that witness credibility is for the jury to determine is not disturbed by FRE 403. Therefore, evidence should not be excluded under FRE 403 because the trial court considers a witness unworthy of belief. Instead, "balancing probative worth against unfair prejudice involves the trial court giving full credit to the [evidence] and then considering probative worth against unfair prejudice." 1 Mueller & Kirkpatrick, Federal Evidence (2d ed), § 94. See *United States v Thompson*, 615 F2d 329, 332 (CA 5, 1980) (reversing trial court because FRE 403 does not authorize judge to "protect" jury from contradictory testimony, nor exclude evidence because judge "does not find it credible"); *Bowden v McKenna*, 600 F2d 282, 284 (CA 1, 1979) (weighing probative value against unfair prejudice under FRE 403 means probative value "if the evidence is believed, not the degree the court finds it believable").

Defendant and the prosecution both discuss *Vaughn, supra*, and *Grant, supra,* as the relevant cases. The trial court relied on *Vaughn, supra,* in concluding that it would have properly barred use of

the statements for impeachment under MRE 403. We find *Vaughn* distinguishable and *Grant* on point.

Vaughn involved a civil suit by a prisoner against a guard, alleging that the guard had deliberately or recklessly exposed him to sexual assaults. Another prisoner had given a pretrial deposition in which he corroborated that the plaintiff had been sexually assaulted, and testified that the defendant guard had told him to keep silent about the assaults and to say that he saw nothing. Before trial, the prisoner witness wrote defense counsel a letter stating that he would not testify at trial and that he would not attest to the accuracy of his deposition. At trial, the witness refused to testify, stating that he feared for his life and the lives of his family members. The court admitted the deposition transcript but did not allow the use of the letter for impeachment. On appeal, the Seventh Circuit upheld the admission of the deposition transcript and the trial court's rulings, concluding that the use of the letter for impeachment would have been more prejudicial than probative.

The court agreed with the trial court's conclusion that the letter "could mean anything. . . . It would not enlighten the jury at all to read this letter," and found the letter "very ambiguous."[2] The court stated

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[2] The letter read:

> I am not going assign this transcript against V. Willis and V. Terry. Two wrong don't make a right.
>
> I am not going to testify in this case I made a lots of mistakes

that read in isolation, it could not determine the letter's significance. The court also observed that parts of the letter apparently dealt with mistakes the witness had made in his deposition and had been permitted to correct after mailing the letter, so that the comments in the letter could be interpreted by the jury in a manner highly prejudicial to the plaintiff. Further, the court noted the trial court's dilemma arising from the fact that the witness refused to testify because "he was scared to death of the people he is going to testify about." The court observed that if the trial court had permitted the jury to consider the letter, it also would have had to permit disclosure that the letter and the refusal to testify were a product of the witness' fear for his safety and that of his family, and that the defendant had made it clear that he did not want such disclosure made. None of these factors were present in the instant case. The statements here were not ambiguous, there was no danger of misinterpreting their meaning, and there was no impediment to full disclosure of the circumstances of their being made.

In contrast, the facts of *Grant, supra,* are analogous. In *Grant*, the prosecution used as evidence against Grant statements made by a co-conspirator in the course of the conspiracy. These statements were admitted under FRE 801(d)(2)(E). Grant attempted to impeach the coconspirator's statements with an affidavit that his attorney had obtained from the co-conspirator after the co-conspirator was deported to Jamaica. The court did

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I would like to see you person. Let me say this V. Terry don't have anything coming by law.

not allow the impeachment, finding that the statements were not inconsistent. The Court of Appeals reversed, finding that the affidavit's statements were admissible for impeachment purposes under FRE 806. The court then addressed the prosecution's argument that the affidavit was inadmissible under FRE 403 because if believed, it would provide a complete defense rather than merely impeaching the coconspirator's hearsay statements. The court rejected that argument, observing that rule 403 is an "extraordinary remedy" that carries "a strong presumption in favor of admissibility," and that the affidavit could do no more than impeach and could not provide a complete defense if the prosecution requested the limiting instruction to which it would have been entitled. *Grant, supra* at 1155. The court also rejected the prosecution's argument that the affidavit statements were properly excluded because they were unreliable:

> Rule 806 made the statements admissible for impeachment purposes, and the point of admitting inconsistent statements to impeach is not to show that they are true, but to aid the jury in deciding whether the witness is credible; the usual argument of the party doing the impeaching is that the inconsistent statements show the witness is too unreliable to be believed on important matters. *See United States v Graham*, 858 F2d 986, 990 n 5 ([CA5,] 1988) [stating the same proposition]. [*Grant*, *supra* at 1156.]

In the instant case, recognizing the appropriate standard of review, we nevertheless are persuaded

that the trial court abused its discretion in denying the motion for new trial on the basis that barring the use of the statements to impeach the witnesses was supported by MRE 403. The court concluded that use of the statements would have been unfairly prejudicial because the statements went beyond mere statements and were arguments for acquittal, and the court believed that the witnesses had deliberately made themselves unavailable and given the statements "to have [their] cake and it too." However, the statements were not offered to prove the truth of what was in them, but to attack the witnesses' credibility. As in *Grant*, the very reason the court excluded the statements, because it questioned the veracity and credibility of the witnesses, made the statements all the more probative on the credibility issue. Defendant should have been free to show the jury that the witnesses were unworthy of belief. Credibility is always a question for the jury, and the court erred in concluding that it would have been proper to insulate the jury from the witnesses' contradictory statements. Further, the court was free to redact any portions of the statements that did not amount to a statement inconsistent with the witness' hearsay statement.

In a supplemental brief filed in propria persona, defendant raises a similar argument with respect to other witnesses who would have testified to prior inconsistent statements of Simpson in which he stated that only he and Lamp were involved in Miller's murder. Anticipating defendant's calling such witnesses, as was done in the first trial, the prosecutor asked the court to exclude the testimony

of any witness who would testify to a prior statement that was not brought to the witness' attention under MRE 613(b). Defense counsel agreed that she intended to call a number of such witnesses, and had affidavits from such witnesses, including some who were not known at the time of the first trial. The court ruled the testimony inadmissible. For the reasons discussed above, this testimony was admissible under MRE 806, and the court erred in excluding it.

We reject the argument that the court's error was harmless because Simpson and Zantello had already been effectively impeached with inconsistent statements at the first trial. The jury heard evidence that Zantello's first statements to police were that defendant was home when she returned from the hospital, and that she knew nothing about Miller's disappearance except that defendant was not involved. However, these statements were given shortly after Miller's disappearance, and when Zantello was living with defendant. The jury could have easily decided that the earlier inconsistent statements did not undermine the trial testimony, reasoning that Zantello had given a statement in March, 1990 that incriminated defendant, and that at the time of trial, Zantello was no longer involved with defendant, and was therefore no longer willing to lie in his behalf. The fact that Zantello reaffirmed her earlier position shortly before the second trial would have undermined her trial testimony in a way that the earlier statements could not.

Regarding Simpson, although he was impeached with having given prior inconsistent versions of what

happened to Miller, as set forth above, and he admitted at the first trial that he had told Jody Harrington shortly after the shooting that only he and Lamp were involved, he also admitted telling police that he never made such a statement to Harrington. Further, Detective Sergeant Averill testified that Simpson had remained consistent in the version of events he claimed to have witnessed, and stated that Simpson's testimony at defendant's first trial had been consistent with this version of events. Had Simpson's inconsistent written statement and the testimony of other witnesses regarding other inconsistent statements been admitted under MRE 806, the jury would have had a very different view of Simpson's credibility. We conclude that defendant has shown the requisite prejudice - - that upon a review of the entire record, it is more probable than not that the error in denying the admission of substantial impeachment evidence was outcome determinative.[3]

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[3] Defendant asserts that the error denied him his constitutional right to confront witnesses against him. The prosecution concedes

> In reviewing the parallel federal rule of evidence, FRE 806, the federal courts have found that the improper exclusion of impeachment evidence implicates a defendant's right of confrontation where the trial court admitted the testimony of an unavailable hearsay declarant. See *United States v Burton*, 937 F2d 324, 328 (CA 7, 1991); *United States v Moody*, 903 F2d 321, 329 (CA 5, 1990); and *Smith v Fairman*, 862 F2d 630, 638 (CA 7, 1988).

Under standard of review, the prosecution states, "As a preserved claim of constitutional error, this Court must determine whether the people have established beyond a

In light of this conclusion, we do not reach defendant's additional claims of error, except to note that if Simpson is again declared to be unavailable, his refusal to testify should be clearly developed on the record.

Reversed and remanded for new trial. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens

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reasonable doubt that any error was harmless. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999)." The prosecution argues that there was no error because the impeachment evidence was more prejudicial than probative, and that even if there was error, the error is harmless in light of the other impeachment evidence. We have rejected these arguments above. Although conceded by the prosecution, we do not decide whether the error is of constitutional magnitude, and instead have analyzed the case under the more stringent standard applied to non-constitutional error.

No. 12-2668

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUNIOR BLACKSTON, Petitioner-Appellee, v. LLOYD RAPELJE, Respondent-Appellant.	)	**FILED** May 05, 2015 DEBORAH S. HUNT, Clerk O R D E R

BEFORE: DAUGHTREY, KETHLEDGE, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Kethledge would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt
Deborah S. Hunt, Clerk

AFFIDAVIT OF FACT

STATE OF MICHIGAN)
)ss
COUNTY OF VAN BUREN)

DEFENDANT'S EXHIBIT
4
6/13/09

I Darlene Rhodes Zantello, being first duly sworn, say that the following it true to the best of my knowledge and belief:

(1) That the first time I talked to Det. Averill, and Chief Wydick back in 5/19/89, was the truth, of what I known about the death of Charles Paul Miller.

(2) I told Det. Averill, and Chief Wydick, that I didn't know anything about the Miller case except Fred Blackston didn't kill anyone. This was on 5/19/89.

(3) On 3/15/90, I was arrested on Disorderly person.

(4) On 3/15/90, while still under arrest, I was asked to tell a story about Mr. Blackston, and was giving the information to put in the story. So I did.

(5) The story I told on 3/15/90 was not true.

(6) I testify to that story at Mr. Blackston Murder trial on 4/10/01. My testimony was not true.

(7) Right before Mr. Blackston's murder trial, My ex-boyfriend (Robert Lowder) was released from Van Buren County Jail. He was in jail on felony charges for beating me up while out on bond for a felony charge of beating me. So he was release with at lest two felony charges pending against him.

(8) Mr. Robert Lowder made me testify.

(9) Mr. Robert Lowder, took me to the court house to testify at Mr. Blackston's trail and Mr. Lowder was to testify at Mr. Blackston's trial too, but he did not. The Prosecutor told Mr. Lowder at court he would not need him.

(10) Mr. Lowder, told me, that he would not get sent to prison for his felony charges if he and I testify against Mr. Blackston.

(11) Mr. Lowder, and I was interview in 2000, and we both made up false stores at this interview.

(12) Mr. Lowder, and Myself, both testify at a Prosecutor's Grand Jury in 2000. I testify to false statement's that I had made before. Because Mr. Lowder told me to, he (Mr. Lowder) had felony charges, in Van Buren in front of the same prosecutor Scott Smith at this time.

(13) I'm very scared of Mr. Lowder.

(14) I'm no longer living with Mr. Lowder or seeing him. I was involved with Mr. Lowder at and before the time of Mr. Blackston's trial.

(15) I did tell all this information in 2000 to Shirley Gargus, Donna Gargu, and other people around Bangor area. Hoping they would tell all this information at trial. I did not want to testify. But felt I had no chose Mr. Lowder and the prosecutor were pressing me to testify against mr. Blackston.

(16) The only true thing I know about the Miller case is: I went to the Hospital on Spet. 12, 1988 and Siela LeadingHam (use to be Siela Keetion) took me to the Hospital, when I was leaving My house, Charles Miller was walking up to my yard, and when I got back home that night Mr. Blackston was there and My Daughter (Donna). Donna was in bed asleep. I went to bed and I did not hear any conversation between Fred Blackston or anyone. Only Mr. Blackston, are Daughter and I were there no one else that night. That I know of.

(17) I never heard mr. Blackston or Simpson ever talk about any murder.

(18) Mr. Blackston has **always** told me, he was never involved in Charles Miller death.

Darlene Zantello
DARLENE RHODES ZANTELLO
P.O. BOX 191
BANGOR, MI 49013

SUBSCRIBED AND SWORN TO
BEFORE ME THIS *31st* DAY OF
July ~~*2001*~~ *2002*

Adeline M. Starks
NOTARY PUBLIC
VAN BUREN, MI
MY COMMISSION EXPIRES: *4-14-2006*

ADELINE M. STARKS
Notary Public, Van Buren County, MI
My Commission Expires Apr. 14, 2006

Submitted Statement by Guy "Carl" Simpson
March 29th, 2002.

DEFENDANT'S EXHIBIT
#5
00-11976

The following is a complete and true statement involving and surrounding the trial of Junior Fred Blackston in the case of People v Junior Fred Blackston, case No# 00-11976FC.

In this case Defendant Blackston was tried and convicted of First Degree Murder in the death of Charles Paul Miller.

My name is Guy "Carl" Simpson. I was one of two co-defendants in Mr. Blackston's case. the following is an accurate account of certain things that transpired during the pre-trial stages of the case, as well as at the trial itself.

All statements made herein are true to the best of my knowledge and belief.

I Carl Simpson have not been threatened, or coerced in any way or by any one into making these statements. I am making them because they are true. Mr. Blackston was wrongfully convicted of this crime, and it is my desire that justice be done where this man is concerned.

On or about March 7th 1989 I gave an oral statement to Detective Averill of the Michigan State Police regarding this case. Since 1989 I have made several statements when doing so served my best

interest. (ie: getting-deals on other non-related offenses)

In order for me to acquire any such deals, I was told by law enforcement not to change my story as they were convinced due to rumors throughout the area of Mr. Miller being "shot" that Mr. Blackston was the guilty one, and that it was Mr. Blackston who "pulled the trigger".

I was untruthful with law enforcement officers in 1989 and subsequently thereafter. I never truly thought that this case would come to trial, and out of the three of us that were suspects the only story the police would believe was that Mr. Blackston was the guilty one, so that is the story I gave to benefit myself.

At the time of my initial statement to police I was very much afraid of Mr. Lamp who was the other co-defendant in this case.

Mr. Lamp at that time was a very dangerous person who has threatened my life on more than one occasion, as well as the lives of my family should I ever tell the truth of his involvement. Mr. Lamp had an array of weapons and a very violent temper_ Coupled with the fact that he never liked me. I had no reason to doubt his continuous threats toward me.

At the time when this case was actually brought against us, I realized that I did not want an innocent man to take the fall for another man's actions. At that time I went to the prosecutor and explained to him that I was not willing to testify that Mr. Blackston killed Charles Miller.

It was also at that time that I revealed my previous untruths to Prosecutor Smith.

Prosecutor Scott Smith advised me that his position was that this case had been open for far too long, and that it was time to bring it to a close, further, that he really did'nt care which one of us was actually responsible for the killing, but that his entire case was already built around Mr. Blackston being the "trigger man" and since this was his last big case before he left the Prosecutor's office that he was proceeding as planned with "Freddie" being the one who actually killed Charles Miller.

The truth is that to my knowledge Fred Blackston never left his house on the evening that Charles Miller was killed. This fact however was never brought out at trial through my testimony due to threats made by Prosecutor Smith that should I not testify to my previous statements, regardless of the untruths in which I had advised him of, that he would charge me with obstructing justice and fourth degree habitual supplements, thus subjecting me to a life sentence in which I would have had no way to defend those two charges.

I spoke with my attorney at the time (Gary Stewart) about the actual possibility of the obstructing charge being placed on me for refusing to testify, as the only proof on record of my previous story was from an investigative Subpoena in which I had "use immunity", and therefor at the trial, given full immunity or not, should I refuse to testify the only alternative that "I" could see Prosecutor Smith doing was to continue the open murder charge against me. However, my attorney advised me that

he himself was not "well versed" on obstructing and that he could not advise me as to that charge actually being a sound threat by the Prosecutor. The fact that the Prosecutor "threatened" me at all was improper. I Was forced to testify and forced to commit perjury on the stand. I did not wish to testify, nor was I afraid of proceeding to trial, as the Prosecutor could in no way prove the required elements in their entirety against me to substantiate Aiding and Abetting murder. The prosecutor "may" have overlooked that aspect yet I knew of it all along.

During the pre-liminary stages of this case I spoke several times with Attorney Olson, many of these conversations were out of the presence of Mr. Blackston. I advised Attorney Olson that the remains that Mr. Lamp led officers to were not in fact the remains of Charles Paul Miller, I was prepared to show such proof of this fact during my trial.

Since Mr. Blackston and I were (at that time) to have a consolidated trial I passed the information that I had along to Attorney Olson and advised her to research into this for Mr. Blackston's benefit.

At the time Prosecutor Smith offered me the plea agreement of accessory after the fact, I discussed this plea with Attorney Olson. I did so to get an idea of the percentage of success that she would have of obtaining an acquittal for Mr. Blackston should I accept the offered plea.

Attorney Olson advised me that as the plea that was offered actually subjected me to no more time than I was already serving on an unrelated case, in

her opinion I should accept the plea agreement and that she would be able to handle me on cross examination. I expressed to Attorney Olson that quite naturally any testimony not favorable for "Fred" could not be of benefit to him, and that my main concern was that I did'nt want to see Mr. Blackston get convicted of this crime as there would be no justice in that.

Attorney Olson assured me that my accepting the agreement offered me would not make a significant difference in the outcome as she had what she felt to be a strong case and that I should take the deal, further that I would be "'crazy" not to do so.

After discussing this plea offer with Mr. Blackston's Attorney, and with my wife, I accepted the offered plea agreement.

For the next couple of days after accepting said plea I found it difficult to sleep at night. I basically accepted the plea in considering my wife and two children that I have waiting for me at home. However, after much consideration upon doing the right thing, I could'nt see myself following through in helping (regardless of how slight) the Prosecutor convict an innocent man.

I called my Attorney, Gary Stewart, and advised him that I was writing a letter to the Judge explaining why I must decline on my plea agreement and that I wanted him (Attorney Stewart) to deliver the letter to the Judge on my behalf.

Attorney Stewart advised me that the Judge may not agree to allow me to pull the plea agreement. I

advised him that should the Judge decline my request that he would have to hold me in contempt. I was doing 7-15 yrs so I will "not" testify as it was'nt the right thing to do.

Prosecutor Smith, upon hearing of my decision, had officers take me down to the video room so that he could speak with me via video from the courthouse in South Haven.

Prosecutor Smith made it clear to me at that time that he could force me to testify and that he planned on doing so by granting me "full immunity". I advised Smith that I did'nt "want" his immunity, and further that I am prepared to proceed to trial. I advised Smith that I felt that I had a very strong case, and honestly not afraid of the outcome as God knows my culpability regarding this case, and that if I was convicted that it would'nt be by the law.

Smith advised me (as he had done in the past) that he does not believe in "God" and furthermore whether or not I could obtain an acquittal on the open murder charge or not is no longer going to be the issue, and that once given full immunity should I still refuse to testify then he would add charges of obstructing justice, along with a fourth habitual supplement, and that I would not be able to dispute or defend myself against such charges, so I would still be subject to a life sentence.

My prior record coupled with an Attorney who admitted that he could be of no assistance, and a Judge that I was told was quite upset with me, I felt forced and pressured from Prosecutor Smith to take the stand. I once again considered my wife and

children, who did'nt deserve to lose me, nor did I feel that I deserved to do life over something that I should never have been subjected to seeing go down, . . . so, feeling threatened by the Prosecutor I took the stand and tried to help Mr. Blackston all that I could without actually perjuring myself in regard to my previous statement at the Investigative hearing.

I was hoping that the Jury would see that I was'nt being truthful in all that I said, yet that I was simply being forced by the Prosecutor to speak things that were untrue due to that fact, and that the Prosecutor was'nt truly concerned about justice in this case yet rather convicting an innocent man so that his last big case as a Prosecutor would not have been defeated.

To this point I feel that the truth should be, recognized and therefor at this time I am going to relay, the true events that occurred on September 12th, 1988. when Charles Paul Miller lost his life. The truth has been kept hidden for too long. To a degree that fact was partially my fault. yet when the actual case was brought forth, as I never thought that it would be, I went to the Prosecutor and expressed my wanting to do the right thing. I disclosed the untruths that I had expressed previously, and was denied by him the opportunity to "tell the truth", and instead threatened by him that should I do so that he would see to it that I would be subjected to a possible life sentence.

Before I continue I would like it to be clear to anyone reading this that Mr. Blackston and I are not "friends". I had not seen Mr. Blackston prior to this case being reopened for over 11 years. So for me to

say that him and I are friends that would be stretching reality a bit much.

However, Mr. Blackston is a human being, just as Mr. Miller was. There is nothing that can be stated to justify the taking of Mr. Miller's life. and to that point I bad no participation in taking Mr. Miller's life, nor did I agree to the taking of his life.

In the same token, Mr. Blackston does not deserve to have his life taken from him, and it was never my intentions to assist the Prosecutor in doing so by subjecting Mr. Blackston to a natural life sentence in prison, when in all reality was the equivalent of taking his life, the part of it that matters anyway . . . There was no justification in that. There was certainly no justice in that. And thus I am very saddened at what has occurred, not because he was my friend, as ones change in over 11 years, therefor I really don't know him anymore, but rather because Mr. Blackston was not and is not guilty of this crime, and should'nt be in prison as a result of it. I believe that had I not have been threatened, coerced, and forced to testify to untruths by the hands of an over zealous Prosecutor that he would not have been convicted.

That having been said, I would further like it to be noted that in coming forth with the truth in the following that I have not been threatened by anyone nor have I been given anything by anyone to persuade me into speaking the truth. I am doing so on my own free will in hopes that an innocent man may be helped in some way to regain the freedom that he deserves.

On the night of September the 12th 1988 I went over to Fred Blackston's house as I normally did to bullshit and get high. When I arrived I was told by Fred that him and Dean Lamp were leaving as soon as Fred's girlfriend returned from the hospital, to go and get some weed. I asked Fred where they were going and he told me to someplace that Dean knew about where there was alot of it being grown. We sat around for a few minutes and then Charles Miller showed up. Fred asked him "what's up?" after he came in and sat down. Charles said that Dean had told him a little while earlier that him (Fred) and Dean would be going out to snatch some weed tonight and asked him if he wanted to go. Fred did'nt seem happy about that but he did'nt really let Charles see that he was upset. After a few minutes Fred went into the kitchen for something and called for me to come in there for a minute. I went into the kitchen and Fred asked me if I would mind going with Dean and Charles to get the weed. I first asked Fred why he did'nt want to go himself. He first told me that it was because he did'nt think that Darlene would be back before Dean arrived. I remarked that Fred's sister who was there could watch his daughter until Darlene returned. But then Fred told me that he really did'nt want to go if Charles was going because Charles was too greedy for one reason and that he (Fred) was'nt at all happy that Dean invited Charles to go along without discussing it with him first. I told Fred that I'd go but that Fred knows that Dean and I don't get along and that Dean might not want me going. Fred said that when Dean got there that he would talk to Dean and see if it was alright. Dean showed up a little while later and Fred told Dean that he wanted to speak to him in the other

room. Fred and Dean went into the bedroom for a few minutes and when they came back into the livingroom Dean was ready to go and he asked me if I wanted to go with him and Charles. I said "sure I'll go", I figured Dean was cool with me going or else he would have not even have asked.

Dean, Charles, and myself left the house. Dean had me ride in the backseat so he (Dean) could talk with Charles. We went to Grand Junction, and ended up in some wooded area on some two-track. When we got out of the car Dean said for me to follow Charles and he was going up ahead to scout around for the entrance of the field. Charles and I started walking slowly in the direction Dean had went. After a few minutes Dean came back to us and told us that it was not too far ahead and we all began walking in the direction that Dean lead. After we went a little way Dean put up his hand and told us to stop. Then he went ahead around some trees. Charles and I waited for about a minute or so until we heard Dean tell us to come on ahead. Charles went around the trees and being as I could'nt see that well as it was dark and my eyesight isn't very good, I continued to follow Charles. Right after Charles went around the trees I heard some noise that sounded like the rustling of leaves and stuff. When I went around the trees I seen Dean standing there with a shovel in his hand and I watched him hit Charles in the head with the shovel. Charles fell down and I noticed that he fell in a hole. He was hurt by the shovel but he did'nt move right away, I asked Dean "what's up man?!" and he told me to shut up. He threw the shovel down and pulled out a pistol and pointed it at Charles. He said that Charles should pay his debts

and not try to rip off people's houses. Charles came to alittle and got to his feet and was getting out of the hole he was in when Dean stepped forward and kicked Charles in the hip. Charles spun around and Dean dropped down on one knee and shot Charles somewhere in the back of the head. Charles tightened up and fell backwards so that he was actually sitting on the edge of the hole with his feet dangling in the hole. Dean pointed the gun at me and told me to put Charles in the hole. I was'nt about to argue with him so I jumped in the hole and grabbed Charles by the front of the Carhart's that he was wearing and basically just swung him around and laid him face up in the hole. Then I got out of the hole. Dean looked at me for a minute and I really thought that he was going to shoot me along with Charles. Then he said for me to help him fill in the hole. I helped him fill in the hole and I was relieved to see him put the gun away. He told me several times that if I ever said anything to anyone about what he just did that I would end up in a hole too. I told him that he did'nt have to worry as I did'nt see nothing. He said if he could'nt get to me he would get to my mom who was at that time living in South Haven. Since Dean got out of school he has been trying to get a reputation as a "tough" guy, a real "bad-ass", I know him as being crazy and as having a bad temper, I had no doubt that he would carry out his threats against me or my family if I ever said that he did this.

After the hole was filled in and he looked around to make sure everything looked straight, him and I walked back to the car. Dean and I talked a little and although I knew that he did'nt like me, I think that

he just needed a few minutes as he seemed to be a little shaken up. He gave me a ride back to Fred's house and he left. I went inside and told Fred that we did'nt get any weed and he asked me what happened and I told him that things just got all fucked up. I rolled a joint and smoked about half of it with him and then told him that I was kinda tired and that I was going home and would see him tomorrow.

I think it was about two days or so later that I told Fred what actually happened. I told him that Dean would probably get nervous at some point and come and get me anyway. Fred did'nt act too surprised that Dean would actually shoot someone as he knew Dean just as I did. He did seem a little surprised that Dean actually did it with me with him and that I was still alive though. As I told Fred what happened I searched his face for any signs that would lead me to believe that he knew about it prior to my leaving the house with Dean, as I would have been pissed off to learn that he did and allowed me to go knowing that Dean does'nt like me. I am convinced that Fred did'nt know before I told him. I knew Fred well then, and I believe I would have been able to tell if he in fact did.

That is what really happened when Charles lost his life and as I said, even to this day, to my knowledge Fred never even left his house to go anywhere that night. I am upset that I told the versions that I did throughout the years. I never thought this case would come to trial as I did'nt know where the body was and I knew that Dean was'nt going to tell them. I feel ashamed for my

actions and very sorry for the Blackston family and for Fred's children who have had to spend undeserved time away from their Dad. I have children and I know how that is. I am very angered at the Prosecutor for not allowing me to step up and tell the truth when it mattered the most.

Respectfully Submitted,

Guy Carl Simpson