STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v MSC No.

JULIAN KEY,
Defendant-Appellant.

COA No. 247719
Third Circuit Court No. 02-5202-01

NOTICE OF HEARING
DELAYED APPLICATION FOR LEAVE TO APPEAL
STATEMENT OF EXPLANATION

KYM L. WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals

JEFFREY CAMINSKY (P27258)
Principal Attorney, Appeals
1116 Frank Murphy Hall of Justice

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STATEMENT OF JURISDICTION AND NATURE OF RELIEF SOUGHT

On December 11, 2002, the trial court convicted Defendant of first-degree premeditated murder; on January 9, 2003, the court sentenced Defendant to life imprisonment.

On May 31, 2005, the Court of Appeals reversed Defendant's conviction in an unpublished opinion. The People filed this application on July –, 2005, seeking reversal of the decision of the Court of Appeals, and reinstatement of Defendant's conviction and sentence. The Court has jurisdiction under MCL §770.12, and MCR §7.301-302.

STATEMENT OF QUESTIO

I. **A party-admission is admissible as an exclusion from the hearsay rule, but in a joint trial, a co-defendant's "powerfully incriminating" confession is inadmissible, unless it satisfies a separate hearsay rule. Here, at their joint trial, the trial court admitted multiple statements by both co-defendants after each indicated an intention to testify, with a cautionary instruction limiting the jury's use of the evidence only against whoever made it. Did the trial court deny Defendant a fair trial by admitting the co-defendant's statements into evidence?**

Trial Court said:	*No.*
Court of Appeals said:	*Yes.*
Defendant says:	*Yes.*
People say:	*No.*

STATEMENT OF FACTS

The People adopt the following portion of the Court of Appeals opinion as part of their Statement of Facts:

> This case arises out of the tragic drive-by shooting death of three-year old Destiney Thomas on March 23, 2002. The prosecution's theory of the case was that Destiney was the innocent victim of a dispute over drug territory between defendants and Jackie Close and Eddie Smith. Close and Smith were friends with Terrell Brown, the boyfriend of Deneen Thomas, Destiney's mother. After Smith and Brown got into an argument with defendants, the green Jeep Cherokee that defendant Key was known to drive was fired upon and damaged while it was parked in front of the home of defendant Key's mother. Defendants saw a car that resembled Close's vehicle drive away shortly after the shots were fired. The prosecution maintained that defendants retaliated against Close and Smith: defendants and some friends drove in two separate vehicles, one of which was the green Jeep Cherokee, to Brown's house, where they believed they would find Close and Smith. Gunshots were fired from one or both vehicles, and some of the bullets penetrated the house, striking and killing Destiney.
>
> Deneen Thomas, Destiney's mother, testified that she lived at Brown's house. Close and Smith were both at Brown's house the day before the shooting. Smith and Sean Taylor were both at the house at the time of the shooting. Thomas hit the floor when the gunfire started, and although many shots were fired, she was unable to discern from which direction they came. After the gunfire stopped, Thomas found Destiney in a pool of blood in the room where she had been playing. The medical examiner testified that Destiney died as a result of a gunshot wound to the head.
>
> Terrell Brown was friends with defendant Key. Brown testified that there was some animosity between himself and defendant Pipes. At the time of the shooting, Brown was on the front porch; Smith was present, and Taylor was approaching the house. Just before the shooting started, Brown saw a car drive past the house. A green Jeep Cherokee then pulled up and stopped. Brown heard gunshots and dove into the house. Brown testified that the Jeep looked like the vehicle defendant Key was known to drive. According to Brown, the gunshots were fired from the passenger side of the Jeep. Brown heard Thomas scream and ran upstairs, where he saw Destiney on the floor. From a window, Brown saw the Jeep speed off after the shooting; however, he was unable see who was in the Jeep.
>
> Brown testified that approximately four days after the shooting, he gave the police defendant Key's name as the person in the Jeep, because he knew Key was known to drive the Jeep, and therefore blamed the shooting on him. Brown only

identified defenda[illegible]ey as the shooter because of the Jeep, [illegible]not actually see who was in the Jeep, and admitted lying to the police about seeing the driver of the Jeep. Brown did not give the police defendant Key's name as a suspect until several days following the shooting because he planned on "getting even" and "dealing with" the situation himself. Brown later told the police that he could not identify the shooter, and did not know if defendant Key was in the Jeep at the time of the shooting. After the shooting, Brown learned about a dispute between defendant Key and Close and Smith, which he relayed to the police. Brown thought he probably gave the name of defendant Pipes to the police. Brown believed the gun used in the shooting was an AK-47 by the way the shots were fired.

Terrence Mitchell, Close's brother, testified that he knew that defendants were friends and that defendant Key was known to drive a green Jeep Cherokee. At the time of the shooting, Mitchell was about one block away from Brown's house, when he heard gunfire. After it stopped, he saw a green Jeep Cherokee coming toward him at a "kind of fast" pace. Mitchell testified that when he was approximately ten to twelve feet from the Jeep, he saw defendant Pipes driving the vehicle, and defendant Key in the passenger seat; he did not see another car in the area besides the Jeep. Mitchell testified that he gave a statement to the police shortly after the incident, but believed that certain information was added by the police, including information about a small white car that was in the area. Mitchell claimed that he was forced to sign the inaccurate statement.

Before trial, Mitchell was required to testify pursuant to an investigative subpoena. He denied testifying at that proceeding that he saw a white car that appeared to be traveling with the Jeep, despite what the transcript stated. Mitchell also denied that he previously testified that two people were in the white car, including the passenger, who he knew by the name of Pierre; Mitchell claimed that the prosecutor or the court reporter fabricated such information.

Djuana Smith, defendant Key's girlfriend at the time of the shooting, owned a green Jeep Cherokee, and often allowed defendant Key to drive her vehicle. While Djuana was out of town, defendant Key borrowed the Jeep. She asked him to return it several times, but despite his assurances, defendant Key failed to do so. Defendant Key ultimately admitted that the Jeep was damaged by gunshots while it had been parked in front of his mother's home. Defendant Key told her that he did not know who fired the shots, but that it might have been someone with whom he had been in an argument. When Djuana eventually received the Jeep back, the rear window on the driver's side was shot out, and there were two or three bullet holes in it.

Casings collected from the street outside Brown's house were .30 caliber, and were all fired from the same weapon. Bullet fragments collected at the scene were also the same caliber as the casings, but it could not be determined if the bullets came from the same weapon as the casings. Ammunition of the type found at the scene is typically used in an AK-47 or SKS-type weapon. A bullet recovered from inside the

wall of the Jeep [illegible].45 caliber and possibly fired from a[illegible]er gun. The police found gun shot residue in at least one area of the Jeep, but the quantity of residue particles was insufficient to meet reporting standards to confirm the presence of gunshot residue. As a result, the forensic chemist was unable to determine if a gun was discharged or fired from inside the Jeep.

A fingerprint found on the top of the glass on the front passenger door outside the Jeep was a match to defendant Pipes' fingerprint. The position of the fingerprint on the glass was as if someone inside the vehicle extended his fingers over the top of the glass onto the outside of the vehicle.

Sean Taylor was unavailable as a witness, so his prior testimony was read to the jury. Taylor was friends with Brown, and was at Brown's house at the time of the shooting. Taylor did not know defendants. Before the shooting started, Taylor saw a small blue car drive by with a green Jeep Cherokee behind it. When the shooting began, Taylor ran into the back alley. Although he did not see any shots fired, he testified that the shots came from the blue car. Just before he ran away, Taylor saw a gun hanging out of the passenger side window of the blue car. He did not see anything hanging out of the windows of the Jeep. Taylor was unable to see the shooter in the blue car, but gave a partial description to the police.

Multiple statements from each defendant were admitted into evidence at trial. The trial court instructed the jury that each statement should only be considered against the defendant who made the statement, and not against the codefendant.

Defendant Key was arrested on March 26, 2002. After being advised of his constitutional rights, defendant Key signed a form acknowledging his rights and agreed to give a statement. Defendant Key was asked a series of questions, and a police officer wrote down his answers. After reviewing the statement and making some changes, defendant Key signed each page of the statement. Defendant Key admitted driving Djuana's Jeep on March 22, 2002, with defendant Pipes and Damon Clark. According to defendant Key, defendant Pipes got into an argument with Close and Smith about their drug territory. Later that day, defendant Key saw the Jeep get hit with five or six rounds of gunfire, and saw a car that resembled Close's vehicle leaving the scene--Close and Smith had been driving the same car earlier that day. Defendants Key and Pipes discussed seeking revenge against Close and Smith for shooting at the Jeep. According to defendant Key, defendant Pipes rented a car and drove it past Brown's house-- defendant Pipes shot at the house with a nine-millimeter gun, and Clark used an "AK." Another man, Pierre, followed them in the Jeep.

On March 27, 2002, defendant Key agreed to give another statement after being advised of his rights. Defendant Key initially denied that he fired any shots at the house or that he knew who fired the shots. He also denied being in the Jeep or

having any partici[illegible]on in the shooting. Defendant Key th[illegible]dmitted that he was involved in the shooting. Defendant Key explained that he and defendant Pipes had gotten into an argument with Close and Smith over their respective drug territories. After someone fired shots at his girlfriend's Jeep, defendant Key and some friends borrowed a car for a few hours. Defendant Key admitted that he and defendant Pipes were in the rental car, and fired several shots at Brown's house in retaliation, in an attempt to harm Smith. Their other friends followed in the Jeep to act as backup. Defendant Key appeared to admit that he used an AK-47.

On March 26, 2002, defendant Pipes was advised of and acknowledged his constitutional rights and agreed to talk about the shooting, although he was not under arrest at that time. Defendant Pipes admitted spending the day before the shooting with defendant Key. He recounted an incident with Smith and stated that the Jeep belonging to defendant Key's girlfriend had been damaged by gunfire. According to defendant Pipes, defendant Key told him that Close and Smith were the perpetrators. Defendant Key then made threats to "get" Smith, and stated that he was going to kill Smith. Following the shooting, defendant Key told defendant Pipes that he was trying to shoot Smith, and that he did not intend to shoot the little girl. According to defendant Pipes, a man named "Pierre" was with defendant Key--Pierre drove the Jeep, and either defendant Key or Pierre shot at the house from the vehicle.

On March 27, 2002, defendant Pipes again acknowledged his rights and agreed to give a statement. Defendant Pipes gave an oral statement, which was recorded by the police. Defendant Pipes refused to sign the written statement, but, over objection, the trial court admitted the statement. Defendant Pipes recounted that after defendant Key discovered that Smith was responsible for shooting the Jeep, defendant Key was "ready to go get" Smith. Defendant Pipes obtained a rental car, which defendant Key drove with Marcus to Brown's house. Defendant Pipes followed in the Jeep with Damon. Defendant Pipes abruptly ended the interview at that point.

On March 28, 2002, defendant Pipes gave yet another statement after being advised of his constitutional rights. Defendant Pipes recalled that on the day of the shooting, defendant Key told him that Smith shot up the Jeep, and that he knew where Smith could be found. Defendant Key asked defendant Pipes if he could borrow a car from someone so that defendant Key could kill Smith. Defendant Pipes provided defendant Key with a rental car, and defendant Pipes drove the Jeep. According to defendant Pipes, defendant Key and "Marcus" shot at the house. Defendant Key used a nine-millimeter gun, and Marcus used a rifle. Defendant Pipes denied firing any shots, but admitted to providing the car for defendant Key.

At the close of the prosecution's case, both defendants were unsure if they would testify, despite the fact that the trial court made its earlier rulings to admit the statements and have a consolidated trial on an offer of proof that both defendants would testify. The trial court had previously stated that it decided not to grant

separate trials bas[illegible]n the offer of proof that both defen[illegible]s would testify, but acknowledged that trial strategies often change during the course of trial. Both defendants ultimately refrained from testifying.[1]

At trial, the prosecution had introduced two statements by Julian Key into evidence at trial: the initial statement which excuplated himself and placed the blame on others, including Defendant Cedric Pipes;[2] and the a second statement, which indicated that he fired the shots himself, but acknowledged that Pipes was present.[3] The prosecution also introduced a statement which Cedric Pipes made to police, which acknowledged accompanying Key to the scene of the homicide.[4]

On December 11, 2002, the jury convicted both Defendants of first-degree premeditated murder. On January 9, 2003, the trial court sentenced both Defendant's to life imprisonment. On May 31, 2005, the Court of Appeals reversed the first-degree murder convictions of both Defendants in an unpublished opinion. The Court held that the introduction of each co-defendant's statement into evidence "violated each defendant's right of confrontation, because neither defendant testified at trial."[5]

The People now seek this Court's leave to appeal.

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[1]Slip Opinion, pp 1-5.

[2]T, 12/5/02, 65-69.

[3]T, 12/9/02, 111-116, 145-151.

[4]T, 12/9/02, 109-110.

[5]Slip Opinion, p 8.

ARGUMENT

I.

A PARTY-ADMISSION IS ADMISSIBLE AS AN EXCLUSION FROM THE HEARSAY RULE, BUT IN A JOINT TRIAL, A CO-DEFENDANT'S "POWERFULLY INCRIMINATING" CONFESSION IS INADMISSIBLE, UNLESS IT SATISFIES A SEPARATE HEARSAY RULE. HERE, AT THEIR JOINT TRIAL, THE TRIAL COURT ADMITTED MULTIPLE STATEMENTS BY BOTH CO-DEFENDANTS AFTER EACH INDICATED AN INTENTION TO TESTIFY, WITH A CAUTIONARY INSTRUCTION LIMITING THE JURY'S USE OF THE EVIDENCE ONLY AGAINST WHOEVER MADE IT. THE TRIAL COURT DID NOT DENY DEFENDANT A FAIR TRIAL BY ADMITTING THE CO-DEFENDANT'S STATEMENTS INTO EVIDENCE.

Standard of Review

The sole issue in this appeal is that the trial court erred in admitting statements which co-Defendant Julian Key made to police while in custody, given the constraints facing it when it made its ruling. In considering the claim, this Court reviews the trial court's decision on the admissibility of the evidence for an abuse of discretion,[6] its application of the appropriate legal principles *de novo*,[7] and any error to see whether it was harmless beyond a reasonable doubt.[8]

Discussion

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[6]MRE 403. *See, eg, People v Katt*, 468 Mich 272, 278 (2003); *People v Lukity*, 460 Mich 484, 488 (1999).

[7]*See, eg, People v Katt, supra; People v Starr,* 457 Mich 490, 494 (1998).

[8]*Neder v United States,* 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999). *See, eg, People v Graves,* 458 Mich 1476, 482 (1998); *People v Anderson (After Remand),* 446 Mich 392 (1994); *People v Robinson,* 386 Mich 551 (1972); *People v Solomon*, 220 Mich App 527 (1996).

Under MRE 801(d)(2), a party-opponent's admission is admissible into evidence as an exclusion to the hearsay rule — much like an unavailable witness' declaration against his own penal interests.[9] Where, however, a co-defendant's confession is "powerfully incriminating," then its use in the defendant's trial is simply not permitted, even with a cautionary instruction,[10] unless it satisfies another hearsay exception for admissibility.[11] And, under these circumstances, permissible methods of eliminating any prejudicial overflow include redacting the confession to eliminate any prejudicial references to the defendant,[12] the use of separate juries to decide the guilt or innocence of each co-defendant,[13] or the use of a bench trial so that a trained legal profession — rather than an untrained, lay jury — can separate the permissible and impermissible uses of the evidence.[14] However, where a co-defendant actually testifies — and is subject to cross-examination about a statement he made to police — then there is no constitutional error in admitting the prior statement.[15]

In addition, when ruling on a defense motion for severance, the trial court has the discretion to sever co-defendants' trials in the interests of promoting a fair determination of guilt or

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[9]MRE 804(b)(3). *Cf, Cruz v New York,* 481 US 186, 107 S Ct 1714, 95 L Ed 2d 162 (187).

[10]*Bruton v United States,* 391 US 123, 88 S Ct 1620, 20 L Ed 2d 476 (1968).

[11]*Cruz v New York, supra. See, eg, People v Scotts,* 80 Mich App 1 (1977).

[12]*See, eg, Richardson v Marsh,* 481 US 200, 107 S Ct 1702, 95 L Ed 2d 176 (1987); *United States v Hicks*, 524 F2d 1001 (CA5, 1975); *People v Macklin*, 46 Mich App 297 (1973). *Cf, Gray v Maryland*, 523 US 185, 118 S Ct 1151, 140 L Ed 2d 294 (1998).

[13]*See, eg, People v Brooks,* 92 Mich App 393 (1979).

[14]*See, eg, People v Butler,* 193 Mich App 63 (1992).

[15]*See, eg, Crawford v Washington,* 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004); *Bruton v United States, supra.*

innocence;[16] however, se[illegible]ance is required only on a showing[illegible]t it is necessary "to avoid prejudice to the substantial rights of the defendant."[17] As this Court noted in *People v Hanna*, this means that

> Severance is mandated...only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice.[18]

This means, among other things, that merely inconsistent defenses are not enough to mandate a severance — and that regardless of any "incidental spillover prejudice," which this Court has recognized to be "almost inevitable in a mult-defendant trial," the defenses must be "mutually exclusive or irreconcilable" before a trial court is obligated to sever the trials.[19]

Even so, basic to a wise exercise of the trial court's discretion is an accurate understanding of the circumstances at the time of trial. Accordingly, defendants are ordinarily estopped from making different factual representations at trial and on appeal,[20] and may not seek to raise on appeal a course of action which they urged upon the trial court.[21]

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[16]MCR 6.121(D).

[17]MCR 6.121.(C).

[18]*People v Hana, supra* at 348. *See also, Zaffiro v United States*, 506 US 534, 113 S Ct 933, 122 L ed 2d 317 (1993).

[19]*People v Hana, supra* at 349.

[20]*Cf, People v Gist*, 188 Mich App 610 (1991); *People v Margoes*, 141 Mich App 220 (1985); *People v Serr*, 73 Mich App 19 (1976).

[21]*See, eg, People v Buck*, 197 Mich App 404, 423 (1992); *People v Potra*, 191 Mich App 503, 517 (1991); *People v Baines*, 68 Mich App 385 (1976).

With these considerations in mind, it appears to the People that the Court of Appeals has erred in its resolution of the issues below, in a manner which should prompt this Court's intervention:

A. A trial court considering the admissibility of evidence, or ruling on a motion for severance, may reply upon a party's factual representations in making its ruling, and subsequent events will not affect the reasonableness of the court's exercise of discretion.

In this case, both co-defendant challenged the admission of their confession by pre-trial motion — and both, upon losing their suppression motion, also moved the trial court for a severance. Each, however, insisted that he wished to take the stand in his own defense, and represented through counsel that this would be their tactical choice at trial.[22]

Accordingly, at the time the court was charged with making the decision on the motion to sever, it is clear that the trial judge had no basis upon which to grant a severance: as both defendants, at the time the trial court was considering the matter of empaneling separate juries, represented to the court that they would be testifying,[23] the trial court's decision was correct at the time it was made: each defendant's testimony would eliminate any confrontation problem,[24] as well as any problem stemming from prejudice stemming from the parading one co-defendant's confession before their joint factfinder.[25] Since a reviewing court must view a ruling from the viewpoint of the court making

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[22]T, 9/12/02, 24-28.

[23]T, 9/12/02, 24-28.

[24]*See, eg, Crawford v Washington,* 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004).

[25]*See, Bruton v United States, supra.*

the decision — and review the decision only on the basis of the record made at the time[26] — it follows that we must confine ourselves to the record available at the time of the trial court's ruling in this case, in order to determine whether that court abused its discretion.

Viewing the record at the date of decision, it appears that the trial court's ruling is unassailalble: both defendants indicated their intention to testify, eliminating any potential evidentiary problems; and given the state's preference for joint trials, it appears that the trial court's ruling denying the request for separate juries was appropriate. The fact that subsequent events altered the landscape is unfortunate, but this Court cannot justify overturning the outcome due to the defendants' changed minds without sanctioning legal gamesmanship: simply put, unless both defendants are estopped from relying upon subsequent events in order to challenge discretionary rulings made in advance of trial, either can guarantee a new trial for the other by the simple expedient of a changed mind. Representing that they will testify forms a critical basis for the trial court's ruling; and permitting a litigant to manufacture error simply by going back on his word makes a mockery of our judicial system. As then-Judge Levin noted in *People v Brocato*:[27]

> Counsel cannot sit back and harbor error to be used as an appellate parachute in the event of jury failure.

In this case, the trial court's ruling was correct when made, and cannot be converted into error by actions within the unique control of one of the parties. Accordingly, Defendants must abide by the representations made during the course of the ruling, and the Court of Appeals erred in looking beyond the then-existing record in overturning their convictions. And to the extent that

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[26]*Cf, People v Siegal*, 95 Mich App 594, 602 (1980); *People v Cutler*, 73 Mich App 313 (1971)(Courts review hearing transcript, not trial, to decide whether trial judge erred in admitting evidence).

[27]*People v Brocato*, 17 Mich App 277, 305 (1969).

current law does not recognize the real possibility for gamesmanship by litigants bent on wresting an illegitimate advantage by their own mispresentations,[28]

B. Even if this Court permits co-defendants to assure error by misrepresenting their intentions to testify, any error in admitting the co-defendant's statement was harmless under the facts of this case.

In the event that this Court concludes that the trial court should not have taken defendants at their word, the People acknowledge that the trial court erred in admitting co-defendant Key's statements to police in Defendant's trial, without undertaking some remedial measures — such as dual juries, or redaction of the statements, as defense counsel requested — to guard against the risk that the jury would misuse the evidence. Under the facts of this case, however, it is clear that the error was harmless, and does not entitle Defendant to a new trial.

Here, the record discloses multiple statements by both co-defendants — some acknowledging the speaker's role, some attempting to shift blame to others. But to allow the jury to assess the credibility of each, the prosecutor needed to place the statements in context, to show the evolving stories, and permit the factfinder to sort out which portions of which statements were the truth. But the final version of Key's statement[29] — which Defendant appears to overlook[30] — was considerably

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[28]The People acknowledge that this sort of "misrepresentation" need not come about through cynical manipulation of the system: humans are often capable of rational thought; and a defendant who is faced with the choice of keeping his word, testifying before an apparently hostile jury, and being convicted, or declining to take the stand and assuring himself of a new trial and second chance at drawing a sympathetic jury, is unlikely to take the stand.

[29]T, 12/9/02, 111-116, 145-151.

[30]DEFENDANT'S BRIEF, 8, 14-15.

different than the initial version that Defendant challenges, and is largely consistent with Defendant's own confession, which was also placed before the jury.[31]

In order for a preserved, constitutional error to warrant reversal, it must be clear that the error was not harmless beyond a reasonable doubt.[32] This means, among other things, that if a rational jury would have convicted the defendant of the charged offense even without the error,[33] then there was "no reasonable possibility" that the error contributed to the guilty verdict,[34] and there is no reason to reverse the conviction.[35] In this case, the evidence against both defendants was ample: it is undisputed that the three-year old victim was shot in her own bedroom by a drive-by shooting,[36] Terrence Mitchell, a neighbor who knew all the principals, testified that he saw Defendant driving the co-defendant away from the murder scene in a green Cherokee shortly after the shooting.[37] — the same vehicle from which other witnesses saw passing by the victim's house at the time the shots were being fired. In addition, both defendants made statements — which were largely consistent with each other, as well as with the other evidence in the case. [38]

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[31]T, 12/9/02, 109-110.

Defendant's statement ended before the shooting took place, but identified the same actors and their roles consistently with Key's statement.

[32]*See, eg, People v Graves, supra; People v Anderson, supra; People v Solomon, supra.*

[33]*People v Mass,* 464 Mich 615, 640 n 29 (2001).

[34]*People v Smith (On Remand),* 249 Mich App 728, 730 (2002).

[35]*People v Anderson, supra. See also, Chapman v California,* 386 US 18, 87 S Ct 824, 17 L Ed 2d 705 (1967); *Arizona v Fulminante,* 499 US 279, 111 S Ct 1246, 113 L Ed 2d 302 (1991).

[36]T, 12/3/02, 35-40, 257-262.

[37]T, 12/4/02, 69-76.

[38]T, 12/9/02, 145-152.

Accordingly, as any error which the trial court made in permitting Defendant's jury to hear the co-defendant's statement to police had no appreciable effect on the outcome, the Court of Appeals erred in failing to take the state of the proofs into account in overturning his conviction. Moreover, given this Court's decision in *People v Sheppard*[39]— and the Court of Appeals' own previous unpublished decisions when faced with a similar point of law[40] — it appears that this issue is ripe for this Court's consideration.

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[39]*People v Sheppard*, 472 Mich 343 (2005)

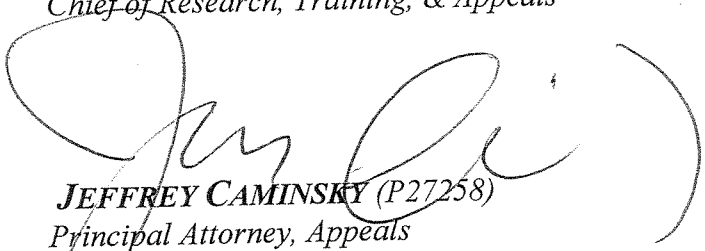
[40]*People v Chabaan, & Juarez*, COA ##253513, 253751, decided March 29, 2005.

RELIEF

WHEREFORE, this Court should grant the People leave to appeal, reverse the decision of the Court of Appeals, and reinstate Defendant's conviction and sentence below.

KYM L. WORTHY
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training, & Appeals



JEFFREY CAMINSKY *(P27258)*
Principal Attorney, Appeals
1116 Frank Murphy Hall of Justice
Detroit, Michigan 48226
Phone: 313-224-5846

Dated: July 7, 2005

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