IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

RODNEY MCKEE,

Defendant-Appellant.
_____/

MSC No: 157646
COA No: 333720
Trial Ct No. 15-002788-FC
Jackson County Circuit Court

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_____/

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL FILED UNDER AO 2019-6

*****ORAL ARGUMENT REQUESTED*****

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I. WHETHER THE TRIAL COURT REVERSIBLY ERRED IN DENYING DEFENDANTS' MOTION FOR MISTRIAL AFTER THE ADMISSION OF EVIDENCE OF CORTEZ BUTLER'S OTHER ACTS?

Defendant-Appellant answers "Yes".

II. WHETHER THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO GRANT DEFENDANTS' MOTION FOR SEPARATE TRIALS BASED ON BUTLER'S CONFESSION.?

Defendant-Appellant answers "Yes".

III. WHETHER BUTLER'S CONFESSION WAS OBTAINED IN VIOLATION OF MIRANDA V ARIZONA, 384 US 436 (1966), AND DEFENDANTS MAY CHALLENGE THE ADMISSION OF BUTLER'S CONFESSION AGAINST THEM?

Defendant-Appellant answers "Yes".

STATEMENT OF JURISDICTION

On October 28, 2020, after considering the Application for Leave to Appeal the February 27, 2018 Michigan Court of Appeals Opinion and Order affirming convictions and sentences from Jackson County Circuit Court, which had been held in abeyance, this Court entered an Order directing supplemental briefing and oral argument limited to the issues addressed herein. After oral argument, this Court requested supplemental briefing on the issues herein. This Brief on Appeal is filed pursuant to MCR 7.305(H) and MCR 7.312(E).

STATEMENT OF CASE

Statement of Proceedings:

Defendant-Appellant, Rodney McKee, was convicted, after jury trial of solicitation to murder, (MCL 750.157B2), conspiracy to murder, premeditated first degree, (MCL 750.316A), and home invasion, first degree, (MCL 750.110A2), being sentenced on March 26, 2016 to respective terms of life, life, and 12 to 20 years.

A claim of appeal was filed and the Michigan Court of Appeals consolidated the appeal with the appeals of co-defendants Clifford McKee and Cortez Butler. On February 27, 2018, Defendant-Appellant's convictions were affirmed in an unpublished opinion. (App, A-1). Defendant-Appellant sought leave from this Court to appeal. On October 28, 2020, after considering the Application for Leave to Appeal the February 27, 2018 Michigan Court of Appeals Opinion and Order affirming convictions and sentences from Jackson County Circuit Court, which had been held in abeyance, this Court entered an Order directing supplemental briefing. Briefing was submitted and oral arguments conducted. After oral arguments, this Court issued another order requesting briefing on the issues addressed herein. This Brief is filed pursuant to MCR 7.305(H) and MCR 7.312(E).

Statement of Facts:

There is no dispute regarding the statement of facts, and Defendant-Appellant adopts the statement of facts laid out in previous briefs.

ARGUMENT

I. THE TRIAL COURT REVERSIBLY ERRED IN DENYING DEFENDANTS' MOTION FOR MISTRIAL AFTER THE ADMISSION OF EVIDENCE OF CORTEZ BUTLER'S OTHER ACTS.

Standard of Review:

"This Court reviews a trial court's decision regarding a motion for a mistrial for an abuse of discretion." *People v Caddell*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 343750, 343993), slip op at 4, citing *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "An abuse of discretion occurs when the trial court 'chooses an outcome that falls outside the range of principled outcomes.' " *People v March*, 499 Mich 389, 397; 886 NW2d 396 (2016).

In *People v. Dickinson,* 321 Mich.App. 1, 909 N.W.2d 24 (Mich. App. 2017), the Michigan Court of Appeals held:

> "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v. Lugo* , 214 Mich.App. 699, 704, 542 N.W.2d 921 (1995). "For a due process violation to result in reversal of a criminal conviction, a defendant must prove prejudice to his or her defense." *People v. Odom* , 276 Mich.App. 407, 421–422, 740 N.W.2d 557 (2007). Further, the moving party must establish that the "error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v. Gonzales* , 193 Mich.App. 263, 266, 483 N.W.2d 458 (1992).

"A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Schaw, 288* Mich App 231, 236; 791 NW2d 743 (2010). Case law in Michigan requires an affirmative showing of prejudice to the rights of the defendant to reverse a denial of a motion for mistrial. *People v. Jackson,* 100 Mich.App. 146 (Mich. App. 1980); *People v. Moran,* 36 Mich.App. 730, 194 N.W.2d 555 (1971); *People v. Qualls,* 9 Mich.App. 689, 158 N.W.2d 60 (1968), lv. den. 381 Mich. 763 (1968), cert. den. 393 U.S. 960, 89 S.Ct. 397, 21 l.Ed.2d 374 (1968).

In this case, the trial judge was alerted to the prejudice that would result from the prosecutor introducing Butler's other bad acts and then ruled that references to other homicides involving Butler was inherently prejudicial and would deny a fair trial.

Consider the trial court's own findings and rulings made concerning admissibility of evidence, the trial court ruled that a statement by Butler made to Dale Morgan about cutting someone up was allowed, but the "fact that [Butler] was involved in a homicide in Detroit isn't coming in. Another homicide afterwards that I think would be too prejudicial." (Hrng, 3/2/2016, 20; App A-27).

Another example is where, while considering the admissibility and prejudice from a 2014 Detroit homicide involving Butler during a Walker hearing, Judge Wilson stated "this stuff's never gonna come near going it at trial. What's being discussed here is not coming in at any trial." (Hrng. 2/26/2016, 94; App A-25).

During the trial, Judge Wilson again acknowledged the inherent prejudice of allowing evidence of Butler's involvement in prior murders to be heard by the jury deliberating Defendant-Appellant's guilt or innocence:

> The Court: Oh boy. This creates quite a dilemma in the sense that if your client gets up there and as part of cross-examination it's clear that there was – well, based on the testimony we've heard so far, that there were admissions about bodies in various counties, the problem is, allowing that statement to come in is too prejudicial, at least in the court's opinion, against the McKee's. It has nothing to do with their involvement in this particular case. It's not an admission adopted by either one of them…… But we get—because of the McKees being involved in the trial I think it creates an un – or creates too much of a prejudicial influence against the McKees to allow these array of other murders that been raised to come in. (T VI, 175-176; App A-119 - 120)

The trial court clarified the ruling of insurmountable prejudice should statements regarding Butler's other homicides be introduced at trial against Defendant-Appellant McKee agreeing that "those statements are, probably prejudices us to the point we can't get a fair and impartial trial." (T VI, 178; App A-121).

Despite the rulings and acknowledgement of prejudice, the prosecutor interjected those statements at trial by an accidental or deliberate misinterpretation of Butler's testimony seized upon during cross-examination. Therefore, this is not a case concerning an inadvertent non-responsive statement randomly and briefly inserted into the trial. Instead, the other acts evidence was deliberately introduced by the prosecutor during cross-examination of Butler during the trial.

Butler had been convicted of homicide in 1992, and as a prior conviction was admissible as to Butler and Det. Sullivan related statements made by Butler concerning the 1992 conviction. (T VII, 61-63; App A-135 - 136). Butler testified that he told police they could not hook him with the charged murder; the prosecutor began cross-examination asking what murders was he involved with other then the 1992 homicide and then introduced the exact statements previously ruled prejudicially inadmissible. (T VII, 38-40; App A-131 - 133). Once interjected by the prosecutor, it became impossible for Defendant-Appellant to have a fair trial. It was an abuse of discretion not grant the motion for mistrial.

This Court is presented with a record where the trial court found the other acts evidence was prejudicial and declared that once the evidence was admitted "probably prejudices us to the point we can't get a fair and impartial trial". Unlike other cases where prejudice is debatable, in this case, the trial court found the other acts evidence to be prejudicial and would deny a fair trial. It was an abuse of discretion that denied substantial rights and the denial of the motion for mistrial must be reversed. *People v Schaw,* 288 Mich App 231, 236; 791 NW2d 743 (2010).

II. THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO GRANT DEFENDANTS' MOTION FOR SEPARATE TRIALS BASED ON BUTLER'S CONFESSION.

Standard of Review:

Rulings regarding severance are reviewed for an abuse of discretion. *People v Bosca*, 310 Mich App 1, 43 (2015); *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008); *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001).

This Court in *People v. Furline,* 505 Mich. 16, 20-21, 949 N.W.2d 666 (Mich. 2020), noted the scope of severance law in Michigan:

> The decision to try two defendants jointly or separately lies within the discretion of the trial court, and that decision will not be overturned absent an abuse of that discretion. *People v. Hana* , 447 Mich. 325, 331, 524 N.W.2d 682 (1994) ; see also MCL 768.5.
>
> Under MCR 6.121(C), the trial court "must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." According to Hana , 447 Mich. at 346, 524 N.W.2d 682, "[s]everance 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." The affidavit or offer of proof must state "facts on which the court might determine whether ... a joint trial might result in prejudice." Id. at 339, 524 N.W.2d 682 (cleaned up). A court can reject statements that are "conclusory" or that "lack[ ] sufficient specificity to enable the trial court to accurately determine what the [joined defendants'] defenses would be, how the defenses would affect each other, and whether the

> defendants' respective positions were indeed mutually exclusive or merely inconsistent." Id. at 355, 524 N.W.2d 682. A defendant's claim of prejudice must be "substantiated" through "concrete facts." Id. We stressed in *Hana* that the failure to show prejudice to substantial rights, "absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." Id. at 347, 524 N.W.2d 682.

"[S]everance may be warranted when defendants' 'mutually exclusive' or 'antagonistic' defenses create a 'serious risk' of prejudice." *Furline*, 505 Mich at 21, quoting *Hana*, 447 Mich at 344-346. "As Hana acknowledged, severance may be warranted when defendants' 'mutually exclusive' or 'antagonistic' defenses create a 'serious risk' of prejudice. But we explained that the defenses must be 'irreconcilable' and create such great tension 'that a jury would have to believe one defendant at the expense of the other.' " *Furline*, 505 Mich at 21, quoting *Hana*, 447 Mich at 344-346. " 'Defenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant.' Prejudice requiring reversal occurs 'only when the competing defenses are so antagonistic at their cores that both cannot be believed.' " *Furline*, 505 Mich at 21, quoting *Hana*, 447 Mich at 349-350. "[S]everance should be granted 'only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.' " *Hana*, 447 Mich at 359-360, quoting *Zafiro v United States*, 506 US 534, 538; 113 S Ct 933, 122 L Ed 2d 317 (1993). "[R]eversible prejudice

exists when one of the defendant's substantive rights, such as the opportunity to present an individual defense, is violated." *Hana*, 447 Mich at 360 (citation and quotation marks omitted).

"Severance is mandated under MCR 6.121(C) 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. [*Hana*, supra at 346, 524 N.W.2d 682.]." *People v. Cadle*, 531 N.W.2d 761, 209 Mich.App. 467 (Mich. App. 1995)

The prosecution indicated that they would introduce an oral statement taken by police officers Merritt and Sullivan from codefendant Butler, (in which he confesses to murder and implicates codefendants), while in custodial detention, as substantive evidence against all defendants. The statement was offered as a both a confession against Butler, and as substantive evidence against Defendant-Appellant Rodney McKee. Counsel contested the admissibility against Defendant-Appellant and pointed out the prejudice from introduction of the hearsay statement and lack of confrontation.

The Michigan Court of Appeals summarized the substance of Butler's statement as related to the jury by the detectives:

> "After being assured that his interview was not being recorded, Butler confessed to the detectives that "Dorito Johnson" [Clifford McKee] had contacted him to "perform a hit" on a person who was going to testify against Rodney (Butler used a street name for Rodney and described him as a "very, very large man, 6'6", 6'7" and about 400 pounds") in an upcoming criminal case. Butler told detectives that he had traveled with Dorito Johnson from Detroit to

> Jackson and that Rodney who driving a white SUV, paid $5,000 of the agreed $10,000 fee up front." (MCA Opinion, 3; App A-3).

Defendant Appellant Rodney McKee, through counsel filed a Motion for separate trials, submitting an affidavit in support setting forth specific prejudice from the hearsay statement of Butler. As argued in that Motion: Defendant Butler states that he killed the victim in this case because he was paid to do so by Defendants Rodney and Clifford McKee. Defendant R. McKee will present evidence and testimony indicating that he did not pay Butler to kill anyone, and that he had no involvement in either the planning or the preparations of Ms. Craig's death. He has attached an affidavit of the same to this motion, as required under *Hana*. The jury will thus either have to believe that Butler is lying about who paid him, or that Rodney McKee is lying and he paid Butler to kill Ryan Marshall. There is no way for one jury, sitting at one trial of these two defendants together believe both men."

The trial court denied the Motion. First the trial court ruled the hearsay statement of Butler was non-testimonial and fit within the hearsay exception being information provided during an ongoing emergency, and then declined to recognize the irreconcilable nature of the defenses.

The trial court abused its discretion in ruling the hearsay statement of Butler was admissible as substantive evidence against Rodney McKee. At best, the use of the confession could only be used as an offer of a prior inconsistent statement to impeach Butler, should he testify at his trial. Where a prior inconsistent statement is used for impeachment purposes, it "is not regarded as an exception to the hearsay rule because it

is not offered as substantive evidence to prove the truth of the statement, but only to prove that the witness in fact made the statement." *Merrow v Bofferding ,* 458 Mich 617, 631 (1998). See also *People v Jenkins,* 450 Mich 249, 256-257, 260-261 (1995).

As to Rodney Mckee, Butler's confession – which Butler denies having made – the confession was inadmissible hearsay. This fact distinguishes McKee from *Hana*. In *Hana* on brother made a legally admissible statement to the police that was introduced at a joint trial. Unlike *Hana*, Butler's alleged confession was a legally inadmissible statement that could never be admitted at a separate trial. That circumstance was found to require severance as the means to provide a fair trial in *Zafiro v United States*, 506 US 534; 113 S Ct 933; 122 L Ed 2d 317, 325 (1993).

The general rule is that "prior unsworn statements of a witness are mere hearsay and are generally inadmissible as substantive evidence." *People v Lundy,* 467 Mich. 254, 257; 650 N.W.2d 332 (2002). "Extrinsic evidence of a prior inconsistent statement can be used to impeach but it cannot be used to prove the truth of the matter asserted, unless, of course, it falls within a hearsay exception." *People v Jenkins,* 450 Mich. 249, 273; 537 N.W.2d 828 (1995).

Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c) . An assertion is something capable of being true or false. See *People v Jones* (*On Rehearing After Remand*) , 228 Mich App 191, 204-205 (1998), modified in part and remanded 458 Mich 862 (1998).

Adding to the inherently unreliability of the alleged statement is that declarant Butler denied making the statement so there was no authentication of the statement that was offered. Not only was the alleged confession inadmissible hearsay, it also violated confrontation rights as the circumstances of the statement rendered it testimonial hearsay and was inadmissible pursuant to *Crawford v Washington* , 541 US 36 (2004).[1]

Rodney McKee pointed out specific constitutional rights of confrontation, due process, fair trial, and to present a defense, that would be violated by a joint trial that included the hearsay statements of Butler. *United States v Tootick*, 952 F2d 1078 (9th Cir, 1991)(holding that defenses are mutually exclusive when "acquittal of one codefendant would necessarily call for the conviction of the other."). The trial court committed clear error in claiming the statements fit a hearsay exception and abused its discretion in denying separate trials. A trial court "abuses its discretion when it makes an error of law" *People v Giovannini,* 271 Mich App 409, 417; 722 NW2d 237 (2006) (citation and quotations omitted)."[R]eversible prejudice exists when one of the defendant's substantive rights, such as the opportunity to present an individual defense, is violated." *Hana*, 447 Mich at 360 (citation and quotation marks omitted).

Under *Hana* and *Furline*, there are two parts of this inquiry. First, is what prejudice was identified before trial as a basis for separate trials, and, second, did the predicted

[1] This Court understandingly advised the parties not to address whether Butler's statements violated *Bruton v United States*, 391 US 123 (1968), which was a clear violation. With the jury instructed to receive the confession as substantive evidence of codefendant's guilt no reasonable jurist would disagree.

prejudice actually occur. When the prejudice actually occurred and a Motion for Mistrial made, it was an abuse of discretion not to grant the motion.

Hana requires reversal where this is a marginal case and where Butler's confession is the chief and decisive evidence of guilt against Rodney McKee and the requisite twofold prejudice identified in *Hana* occurred. First, joinder introduced, in effect a second prosecutor into the case as Butler claimed it was Dale Morgan and the McKees who were responsible for the death. Second, joinder required the jury to decide which codefendant to believe and transformed the trial from a contest between the People and the codefendants into a contest between the codefendants.

The joint trial created a situation where Butler would be expected to testify to deny making the statement and then to exculpate himself – which he did when saying it was Dale Morgan and the McKees, not Butler who was involved. Where Butler denied confessing, and could only make that claim by testifying at the joint trial and exculpate himself, a fair trial was denied to Rodney McKee. This is akin to what happened in *People v Hurst,* 396 Mich. 1, 4 (1976), stating that a defendant is entitled to a separate trial if it appears that a codefendant "may testify to exculpate himself and incriminate the defendant seeking a separate trial."

Severance was the only means to avoid this prejudice, and when not granted, it was an abuse of discretion for the trial court not to have ordered separate trials.

III. BUTLER'S CONFESSION WAS OBTAINED IN VIOLATION OF *MIRANDA V ARIZONA*, 384 US 436 (1966), AND DEFENDANTS MAY CHALLENGE THE ADMISSION OF BUTLER'S CONFESSION AGAINST THEM.

Standard of Review:

The Court reviews the trial court's ultimate decision on a motion to suppress de novo. *People v Roberts,* 292 Mich App 492, 502; 808 NW2d 290 (2011). Likewise, voluntariness and whether an accused has knowingly and intelligently waived his rights are reviewed de novo. *People v Tierney,* 266 Mich App 687, 707; 703 NW2d 204 (2005). However, the trial court's factual findings are reviewed for clear error. *People v Elliott*, 494 Mich 292, 300; 833 NW2d 284 (2013). "A finding is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Coomer,* 245 Mich App 206, 219; 627 NW2d 612 (2001).

The Michigan Court of Appeals ruled Butler's confession violated Miranda and was inadmissible. In reaching that holding, the Court of Appeals relied upon the following judicial precedents:

> We recognize that police are not categorically prohibited from lying to a suspect by, for example, falsely stating that they have evidence he committed the crime. See, e.g., *People v Hicks,* 185 Mich App 107, 113; 460 NW2d 569 (1990). But, there is a grave difference between this sort of lying and when police engage in trickery that wholly undermines the validity of a waiver by depriving "a defendant of knowledge essential to his ability to

understand the nature of his rights and the consequences of abandoning them." *Moran v Burbine,* 475 US 412, 424; 106 S Ct 1135; 89 L Ed 2d 410 (1986). See also 2 LaFave et al, Criminal Procedure, § 6.9(c) n 65 (4th ed.). For example, with regard to the necessity of informing a suspect that anything he or she says can and will be used against the individual, courts have found this advice is vitiated by subsequent police statements indicating that the conversation is "off-the-record," *Pillar*, 359 NJ Super at 268, "confidential," *Spence v State*, 281 Ga 697, 698-700; 642 SE2d 856 (2007), "between us," *Leger v Com,* 400 SW3d 745, 749 (Ky 2013), "between you and me," *Lee v State,* 418 Md 136, 156; 12 A3d 1238, 1250 (2011); *State v Stanga*, 617 NW2d 486, 489, 491 (SD 2000), or that giving a statement will not "hurt" the suspect, *Hart v Attorney Gen of Florida*, 323 F3d 884, 894 (CA 11 2003); *State v Puryear,* 441 NJ Super 280, 298; 117 A3d 1255 (2015). In contrast to the warnings required by Miranda, an assurance that the suspect's statements will not be used against him "purports to remove the specter of proving one's own guilt by making a statement." *Pillar*, 359 NJ Super at 273 (quotation marks and citation omitted). See also *Hart*, 323 F3d at 894; *United States v Walton*, 10 F3d 1024, 1030 (CA 3 1993). Thus, these types of misleading assurances that an individual's statement will not be used against him undermine the suspect's ability to knowingly and voluntarily waive his rights because this type of trickery deprives the defendant of the "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Hopkins v Cockrell*, 325 F3d 579, 584 (CA 5 2003).

Here, even more expressly than in other cases, the detective countermanded Miranda and assured Butler on December 16 that he was not "intending to use anything you say against you." Such an overt contradiction of Miranda has no place in the interrogation of Butler, and in the face of such a statement we cannot conclude that Butler's subsequent confession following this assurance was a product of a knowing and intelligent waiver of his rights. Cf. *Lee*, 418 Md at 157. (COA Opinion, 15).

That decision has not been appealed and reasonable jurists would not disagree with that holding.

During the December 16 interview, police assured Butler that the interview was not being recorded and that anything said during the interview would not be used against Butler. There is no disagreement on the facts that during this interview, one of the detectives told Butler that "I'm not intending to use anything you say against you." The detectives also assured Butler that the interview was not being recorded, and one of the detectives stated a second time that "it's not my intent to use anything you say against you."

In *United States v. Jacobs,* 431 F.3d 99 (3rd Cir. 2005) the court noted the established law pertaining to confessions:

> Statements made to a law enforcement officer are inadmissable into evidence if the statements are " ;involuntary." *Schneckloth v. Bustamonte,* 412 U.S. 218, 225-26, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); see also *Colorado v. Connelly,* 479 U.S. 157, 165, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (involuntary confessions violate the Due Process Clause of Fifth and Fourteenth Amendments). A statement is given voluntarily if, when viewed in the totality of the circumstances, it is the product of an essentially free and unconstrained choice by its maker. *Schneckloth*, 412 U.S. at 225, 93 S.Ct. 2041; *United States v. Swint*, 15 F.3d 286, 289 (3d Cir.1994). If an individual's will is overborne or that person's capacity for self-determination is critically impaired, her or his statements are involuntary. *Schneckloth*, 412 U.S. at 225-26, 93 S.Ct. 2041. A suspect's background and experience, including prior dealings with the criminal justice system, should be taken into account in the voluntariness inquiry. See *Oregon v. Bradshaw*, 462 U.S. 1039 1046, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983) (plurality); United States v. Velasquez, 885 F.2d 1076, 1086 (3d Cir.1989). A necessary predicate to a finding of involuntariness is coercive police

> activity. *Connelly*, 479 U.S. at 167, 107 S.Ct. 515. Further, there must be some causal connection between the police conduct and the confession. Id. at 164, 107 S.Ct. 515. The burden is on the Government to establish, by a preponderance of the evidence, that a challenged statement was voluntary. *Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972)...
> *U.S. v. Jacobs*, 431 F.3d 99 (3rd Cir. 2005)

In *United States v. Sater*, 477 F.Supp.3d 372 (M.D. Pa. 2020), noted the circumstances which render a statement involuntary which apply to Butler's statement:

> However, a misrepresentation of the law which makes it "impossible for the defendant to make a rational choice as to whether to confess" is more likely to render the confession inadmissible. *United States v. Rutledge ,* 900 F.2d 1127, 1129 (7th Cir. 1990) (emphasis in original). See, e.g., *United States v. Walton* , 10 F.3d 1024, 1031 (3d Cir. 1993) (false assurance that suspect's statements would not be used against him rendered confession involuntary); *United States v. Lall ,* 607 F.3d 1277, 1286 (11th Cir. 2010) (false promise not to prosecute defendant coerced confession); *United States v. Bonner ,* No. 1:09-CR-0072-02, 2010 WL 1628989, at *5 (M.D. Pa. Apr. 20, 2010), aff'd , 469 F. App'x 119 (3d Cir. 2012) (statements suppressed where officers falsely implied defendant could speak freely).

There is no dispute the officers made significant false representations of law, each of which has been recognized as rendering a statement involuntary. Here the officers gave false assurances the statements would not be used against him, false promise not to prosecute for the statements, and false promises that Butler could speak freely. A law enforcement officer's promise not to use a suspect's incriminating statement "may be the most significant factor in assessing the voluntariness of an

accused's confession in light of the totality of the circumstances." *United States v. Lall,* 607 F.3d 1277 at 1286 (11th Cir. 2010), (quoting *United States v. Walton,* 10 F.3d 1024, 1030 (3d Cir. 1993)).

A secondary question posed is whether others may assert the rights as third parties referring to *People v Wood,* 447 Mich 80, 89 (1994). In *Wood*, this Court noted: "As a general rule, criminal defendants do not have standing to assert the rights of third parties. For example, a defendant cannot assert a claim for suppression on the basis of unlawful invasion of the person or property of a third party. *Rakas v Illinois,* 439 US 128; 99 S Ct 421; 58 L Ed 2d 387 (1978)."

Defendant-Appellant submits this is the wrong question to ask as it excludes examination of the defendant's due process rights which are distinctly different than Butler's constitutional rights, but which protect against the use of involuntary or coerced statements at trial.

A criminal defendant has standing to object to the use of coerced witness testimony on the basis of a violation of the defendant's personal due process rights. *Valdez v. McKune*, 266 Fed. App'x 735, 739 (10th Cir. 2008) (stating that "a defendant may assert that his right to a fair trial has been violated by the use of testimony that has been unlawfully compelled from government witnesses".

Standing has even been expanded to allow defendants to object to the use of coerced statements for impeachment purposes, *LaFrance v. Bohlinger*, 499 F.2d 29, 35 (1st Cir. 1974) (finding that the Due Process Clause "protects the accused against pretrial illegality by denying to the government the fruits of its

exploitation of any deliberate and unnecessary lawlessness on its part," including situations where the government coerces a third-party); *Bradford v. Johnson*, 354 F. Supp. 1331, 1336-38 (E.D.Mich. 1972) (defendant had standing to object to the use of coerced witness testimony on due process grounds), and to the admission of an involuntary confession of a co-defendant. *United States v. Miller*, 250 F.R.D. 588, 597 (D. Kan.2008)(holding that co-defendants had standing to challenge the voluntariness of co-defendant Ross's confession, not based on a violation of Ross's constitutional rights, but on the basis of a violation of their own right to due process).

While *People v Woods* precludes defendants from asserting other individual's constitutional rights, it does not apply to challenges based upon the individual defendant's due process rights under the 5th, 6th and 14th Amendments to the United States Constitution.

Here, Defendant-Appellant may exercise his personal due process rights to challenge the admissibility of an illegally obtained statement.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant requests this Court find Defendant-Appellant's constitutional rights were violated by the refusal to sever trials and the admission of an improperly redacted codefendant statement, other bad acts, restriction on cross-examination and presentation of evidence denying due process and a fair trial and reverse the Michigan Court of Appeals, vacate the convictions and sentences and remand with instructions for a new trial.

Respectfully submitted by:

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Date: February 2, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Administrative Order 2019-6, the undersigned does certify that the word count for this Defendant-Appellant's Brief on Appeal, including footnotes, is 4,973 words, which is within the 16,000 word limit provided for briefs on appeal**.**

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