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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION August 19, 2026 1:48 PM
v	No. 376370 Ionia Circuit Court
MATTHEW RYAN RADEMACHER, Defendant-Appellant.	LC No. 2021-018204-FC

Before: BOONSTRA, P.J., and YOUNG and KOROBKIN, JJ.

YOUNG, J. (*concurring*).

I begin by saying that I agree with the majority, which affirms the trial court's exclusion of the *Ginther* hearing testimony in this case without closing the door to the admission of *Ginther* hearing testimony at a future trial. I write separately to emphasize some observations highlighted by counsel at oral argument and to encourage the Michigan Supreme Court to consider whether a different test may be warranted for determining when unavailable witness testimony may be admitted at trial.

First, appellate counsel noted, as the majority does, that the prosecutor objected to the scope of Dr. Spitz's testimony. That objection was sustained, thereby narrowing the scope of questioning and affecting this Court's "similar motive" analysis. Second, and as the majority also acknowledges, the prosecutor did not receive *but also did not request* advanced summaries of the expert testimony to prepare for the *Ginther* hearing. That, too, affected this Court's "similar motive" analysis. In other words, rather than treating foregone opportunities as a strike against the party opposing admission, they instead serve as evidence of a different motive at the hearings. That seems to be in keeping with our (limited) case law.

In *People v Farquharson*, 274 Mich App 268; 731 NW2d 797 (2007), our Court adopted the "fact-specific inquiry" from *United States v DiNapoli*, 8 F3d 909 (CA 2, 1993) to assess whether the individual opposing the admission of testimony had a "similar motive" to examine the witness-in-question at the earlier hearing. *Farquharson*, 274 Mich App at 278. In *DiNapoli*, 8 F3d at 914, the Second Circuit addressed foregone opportunities by the prosecutor:

> Though the availability of substantial ways of challenging testimony that were not pursued by an examiner is pertinent to the "similar motive" inquiry, especially when such techniques appear far more promising compared to the cross-examination undertaken, the unused methods are only one factor to be considered.

". . . both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive." *Id.* at 915. And again, when the foregone "techniques appear far more promising" than those employed, this is an observation that favors exclusion. *Id*. at 914.

By interpreting MRE 804 in this way, we have, as Judge Pratt of the Second Circuit predicted, given prosecutors a great deal of power. As this case demonstrates, the similar-motive assessment requires the circuit judge to identify the interest of the prosecutor and the "intensity" of that interest. *Id.* at 916 (Pratt, J., dissenting). Often, the best evidence of that intensity is, in Judge Pratt's words, "the prosecutor's post hoc, self-serving, un-cross-examined statements as to his own motives." *Id*. Consequently, as this case demonstrates and as Judge Pratt predicted, "whether [] testimony may be presented at trial by a defendant [is] entirely in the prosecutor's control, a result that seems at odds with the main objective of going to trial—permitting the jury, not the prosecutor, to determine what is the truth." *Id*. at 917. Nevertheless, this Court faithfully applied the test this Court adopted and, as the majority acknowledges, expert testimony is unique in ways that, regardless of a prosecutor's actions or intent, may favor exclusion.

I write separately to say, aside from everything stated above, there exists a different way of assessing whether the testimony of unavailable witnesses may be admitted. See, e.g., *Wahl v State*, 441 P3d 424, 428-429 (Alas, 2019) (highlighting the differences between the Second Circuit's approach and the Sixth Circuit's approach and adopting the latter). I leave it to our Supreme Court to consider that approach or any alternatives to it.

/s/ Adrienne N. Young