STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs **Supreme Court No. 154128**

JUSTLY JOHNSON,

Defendant-Appellant.

Court of Appeals No. 311625
Lower Court No. 99-005393-01

On Appeal from the Court of Appeals
Deborah Servitto, P.J.; Henry Saad, J.; Coleen O'Brien, J.

PEOPLE'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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Counterstatement of Jurisdiction

The People concur with defendant-appellant's statement of jurisdiction.

Counterstatement of Questions Presented

I. **At an evidentiary hearing on a motion for relief from judgment, a trial court can decide that a witness is not credible and deny relief on that basis. The trial court here denied relief after finding that the testimony of the victim's son was not credible. Was this an abuse of discretion?**

The People answer no.
Johnson answers yes.
The trial court did not address this question.

II. **A single item of newly discovered evidence, which alone would not change the result, may warrant relief when combined with other new evidence *which also fell short on the prejudice prong*, but only if the combination of new evidence would make a different result more likely than not. Even considered together, the testimony of Skinner, Burnette, and Jackson would not change the result. Did Judge Callahan err in denying relief?**

The People answer no.
Johnson would answer yes.
The trial court did not address this question.

III. **A reasonable attorney could decline to pursue a potential witness if the witness was difficult to locate and there was no indication that they would cooperate or be helpful. Skinner moved to Philadelphia two days after his mother's funeral, didn't want to talk about his mother's murder, and had given no indication to anyone that he saw the killer. Was it reasonable for defendants' trial attorneys to forego a trip out of state to interview an eight-year-old potential witness?**

The People answer yes.
Johnson answers no.
The trial court would answer yes.

Counterstatement of Facts

I. Trial

In January 2000, Judge Prentis Edwards convicted defendant of first-degree felony murder, MCL 750.316, assault with intent to rob while armed, MCL 70.89, and felony firearm, MCL 750.227b, in the death of victim Lisa Kindred. The evidence at trial demonstrated that Johnson and his co-defendant, Kendrick Scott, shot Kindred while trying to rob her. The defendants later told their friends, Antonio Burnette and Raymond Jackson, what they had done.

Antonio Burnette testified at trial that he knew Johnson, whom he identified in court (326b-327b). He knew Johnson from the neighborhood, but he only knew him by the nickname Stank. He also knew a person whose nickname was Snoop, who he also knew from the neighborhood. Johnson (Stank) and Snoop were friends (327b).

He saw Johnson and Snoop on the evening of May 8, 1999. He saw them at a house on Bewick and Hurlbut. The house was not Johnson's or Snoop's. He had a conversation with Johnson and Snoop at that time. Johnson said that he was going in the house to use the phone and that was what he did. When he came back out, Johnson asked him if he wanted to go over to some female's house with him (328b).

At 10:30 p.m. that evening, he (the witness) went with his father. When he returned to the area of Bewick and Hurlbut later, at around 2:30 a.m., he saw Johnson and Snoop again at somebody's house on Bewick, whose name he did not recall. Then, he and Johnson went over to some female's house. After they left the female's house, they got into a car with Mike and the three of them went to his (the witness's) sister's

house because she was supposed to be having a party. Finding nobody there, they came back to Bewick. Snoop was still there on Bewick. At that point, Snoop told him something, and Johnson participated in this conversation. After Snoop said whatever it was he said (there was an objection by defense counsel as to what Snoop said), Johnson also said that Snoop shot her (331b-332b). After Snoop said what he said, and Johnson said what he said, he (the witness) learned that a woman had been shot; he found this out when he went to go get a "blunt" and he saw an ambulance and the police in the neighborhood (334b).

The next morning, he was interviewed by the police, and he gave them a written statement. The police wrote the statement out, and he read it and signed it. He made an effort to tell the police everything that he knew about the lady getting shot (334b-335b). He told the police that Johnson said that Snoop had shot somebody. He testified that this was true (337b).

The witness also acknowledged having testified at the preliminary examination that before his father came and picked him up, Snoop and Johnson had talked to him about their plans for the night. He acknowledged having testified at the preliminary examination that Johnson and Snoop had been talking about "hitting a lick" that night. The witness testified that what he had testified to at the preliminary examination had been true, and it was still true. He acknowledged having testified at the preliminary examination that Johnson and Snoop talked to him about coming with them to "hit a lick," but that he told them no. That was true then, and it was still true (338b-341b).

After his father dropped him back off on Bewick, and after Johnson and Snoop told him about Snoop having shot a woman, Johnson said that he was going to make a phone call, and Johnson asked him if he wanted to go over to some female's house. After Johnson made his phone call, he heard Johnson then call his girlfriend and ask her to come and get him (342b).

When Johnson was talking about how Snoop had shot the lady, Johnson said that the reason that she was shot was because she owed Snoop some money. The witness was then asked if, at the preliminary examination, he had testified that the reason that the lady was shot was because she would not come out with any money; he responded that he did say that at the preliminary examination, and that that was true (342b-343b).

When asked if Johnson said anything about the type of gun that was used on the night in question, the witness responded that Johnson told him that it was a rifle, an AK. When asked if he saw either Johnson or Snoop with any kind of gun that night, the witness responded not that he remembered. After having his memory refreshed with his preliminary examination testimony, the witness testified that he saw Johnson and Snoop with an AK-47 and a .22. When asked if he saw what happened to those guns, the witness responded that he saw Johnson take a sheet out of Snoop's house and wrap up one of the guns and put it in his girlfriend's car. The next morning, he saw Snoop put the other gun in his girl's car (346b-349b).

After he had the conversation with Johnson and Snoop, he got into Snoop's car and went to sleep. He was awakened the next morning by a police officer, and taken downtown to answer questions about the lady getting shot (349b).

It was sometime after he got out of the police lockup, after giving the police a statement, that he received a communication that he was going to get killed (350b).

On cross-examination, Burnette testified that he knew a person named Rita. He went to Rita's home with Johnson at some point on May 9. From there, he and Johnson went to a 4H club, and from there they went back to Rita's house. He did not know what time this was; all that he knew was that it was at night. He and Johnson spent an hour at Rita's house and then from there, they walked to a place where he bought some weed. From there, he and Johnson went to a store on Warren and Pennsylvania. He still did not know what time this was. He and Johnson then ran into a cousin of his (the witness's) who told them about a party that his sister was having at her house. He and Johnson then went to the Amoco gas station on the corner of Warren and Cadillac. There were no ambulances or police cars at this gas station at that time. At that gas station, they met Mike, a friend of his. He and Johnson got in Mike's car and they drove to his sister's house to find that his sister was not even there. They then drove around for about half an hour, and then Mike dropped him and Johnson off on East Fort (350b-356b).

The witness acknowledged that he had been drinking and smoking marijuana during the day. He did not think that his drinking and smoking had any effect on his ability to talk, see, or hear. The witness testified that when the police got him out of the vehicle, he thought that he was under arrest, maybe a suspect in this case. When asked if he was afraid of being at Homicide, he responded that he was not (357b-359b). The police told him that he would be charged with this homicide, but that did not scare him (363b). At Homicide, an officer wrote out his statement, which he signed. He

acknowledged that in that statement, he said nothing about Johnson having admitted that he participated in this shooting. That was true then, and it was still true now (360b-361b).

About guns being put in cars, the witness acknowledged having testified at the preliminary examination that he saw Snoop put the gun in the trunk of the car at 7:00 or 8:00 a.m. on May 9 (361b-362b). He testified that it was after Mike dropped him and Johnson off that he saw an ambulance (366b).

On redirect examination, the witness testified that when he had the conversation with Snoop about hitting a lick, Johnson was there, but Johnson did not participate in the conversation. The witness then acknowledged that at the preliminary examination, he testified that both Johnson and Snoop talked about hitting a lick. Also on redirect, the witness reiterated that his father picked him up from the neighborhood at around 10:30 p.m. and took him with him to take his aunt someplace. He reiterated that it was around 2:30 a.m. when his father then dropped him back off in the neighborhood, around Bewick and Hurlbut (366b-368b).

The witness reiterated that he saw Johnson and Snoop putting guns in their girlfriends' cars. He was asked if he saw this before or after he had the conversation with them about the lady getting shot; he responded that he saw this after he had the conversation with them about the lady getting shot. He knew that Johnson put the gun in his girlfriend's car that night, and that Snoop put the gun in his girlfriend's car the next morning. He saw Snoop do this after he went to sleep in Snoop's car, but before the police came and got him out of that car (368b-370b).

The witness was asked about when he saw the ambulance and stuff at the gas station. He was asked if Johnson was with him when he saw this; he responded that Johnson was not with him then. He had gone up to the gas station but they would not let him in. He testified that he never did see Johnson any more that night. He was then asked when he had the conversation with Johnson and Snoop about the lady getting shot; he responded that that was around 3:30 a.m. The witness was asked how he could have a conversation with Johnson if he never saw him again that night. The witness responded that he had gotten back from being dropped off by his father at around 2:30 a.m., that he, Johnson, and Snoop all chilled out at Snoop's house, smoking a blunt (weed), and then Johnson left, and Snoop said that he was going to bed, so he went out and stuck around for a minute, and that is when he went up to the gas station, to buy another blunt (cigar), and he saw the ambulance and they would not let him into the gas station. He then went back to Snoop's car. When asked when it was that he had the conversation with Johnson and Snoop, the witness responded that it was before Johnson left Snoop's house. He was asked when it was that he saw the guns being put into the cars. He responded that he saw Johnson do this before he went to the gas station, and he saw Snoop do this the next morning (370b-375b).

The witness was asked when it was that he and Johnson were riding around in Mike's car; he responded that it was before his father picked him up to go to his aunt's. When his father picked him up, neither Johnson nor Snoop were with him. The witness then testified that Johnson and Mike were with him when he saw the ambulance and the police cars at the gas station. Then, Mike dropped him and Johnson off on East Forest, and from there, they went to Snoop's house, and from

Snoop's house, he and Johnson went around the corner of Bewick, and that is when the police told them to walk on the other side of the street (373b-374b).

On examination by the court, the witness was asked if he was able to see what type of gun Johnson put into the trunk of his girlfriend's car; he responded that he was not able to see what type of gun it was, except that it was a long gun. When asked if he knew who had the AK-47, the witness responded that Snoop had that gun, and that Johnson had a .22 rifle. Also on the court's examination, the witness testified that when he went up to the gas station to get a cigar, it was then that he saw the ambulance. After seeing that, he came back and they all went in the house, "they" being him, Johnson, and Snoop. They then went around the corner, and his older brother came around where they were and talked to Snoop and Johnson and asked him why he was not at home. When his brother left, he, Johnson, and Snoop went back to Snoop's house and started talking and smoking weed. It was during this conversation that Johnson said that Snoop had shot the woman because she would not come out with the money. Finally, the witness testified, still on the court's examination, that it was before his father picked him up that he had the conversation with Johnson and Snoop about hitting a lick, which, he said, meant to rob somebody. Johnson said that that was what they were going to do, and Snoop invited him to join in (378b-382b).

On redirect examination by the prosecutor, the witness testified that when he saw the guns taken out and put in the cars, one was wrapped in a blanket, and one was wrapped in a sheet (66). He had seen the guns before they were wrapped up (385b).

Raymond Jackson testified that he knew Johnson from the neighborhood for some years (386b). He knew him by the nickname Stank, but he also knew that his name was Justly (387b).

In the early morning hours of May 9, 1999, there was a shooting that occurred outside of his house on Bewick. He actually heard the shot. He had been in his living room asleep, and the shot woke him up. He did not look outside immediately, but at some point, he did. What he saw when he looked out was a police car. The police car was in front of the field next to his house (387b-388b).

He saw Johnson later on that same morning as Johnson was getting out of the car with his mother. Johnson came down to his house and asked him about all of the TV cameras that were outside, and he answered Johnson. Johnson then came in his house and said Happy Mother's Day to his (the witness's) grandmother. Johnson then told him about what had happened outside of his house. Johnson told him that he did a lick. When asked what this meant to him, the witness testified that it had a number of meanings, like winning at a dice game or getting over on somebody, and it also meant robbing somebody (389b-391b). Johnson also told him that he messed up and he had to shoot. When asked if he thought that Johnson was talking about shooting craps when he said that he had to shoot, the witness responded that he did not know, because Johnson was so drunk (393b).

The witness was asked about two statements he made to the police. He made the first statement the night of the shooting before he talked to Johnson. He made a second statement to the police a day or two after his first statement. In the second statement, he told the police about Johnson having come over to his house. The police

knew about Johnson having been over at his house because the police arrested Johnson when he was coming out of his (the witness's) house (393b-394b).

The witness continued with his testimony, testifying that Johnson said that the shooting happened by the field, by the vacant lot next to his house. Johnson told him that it had been him and Snookie. He testified that Snookie's real name was Kendrick Scott, who lived on Hurlbut (395b).

The witness testified that on the night of the shooting, he saw Snookie hand his girlfriend, a girl who lived down the street from him (the witness), something long wrapped up in clothes. He saw this after the shooting had occurred (397b).

The witness testified that at some point he got locked up on the 9th floor of police headquarters. Johnson and Snookie were also on that floor. Snookie kept hollering out something all night that caused him distress. There was also a time when Johnson walked by his cell and stopped, pointed his finger into his cell, and said, "I ain't going to believe the hype; I will get you." Johnson also said that whatever he (the witness) told the police, he (Johnson) was going to fuck him up (397b-401b).

On cross-examination, the witness testified that he had a brother named Eugene Jackson. Eugene did not live where he lived. When asked if had a good relationship with his brother, he responded, "Sometimes." The witness testified that his brother helped him with taking his medications and going to the doctor and stuff. The witness acknowledged taking a lot of medications, which included Zoloft and anti-abuse medicine, and he acknowledged that his medications made his vision blurry and made him forget things. He had just recently been at Riverview and Mercy Hospitals

because of his medical condition, which was, that sometimes he heard things, voices (402b-405b). He testified that he was currently suffering from depression (422b).

The witness testified that the second time that he was taken down to Homicide, the time that he actually stayed in jail there, the police did holler at him, but as far as them threatening him, they told him that they wanted to know what Stank had told him, and that if he did not tell them he could go to jail (412b-414b).

The witness testified that Johnson never told him that he hurt anybody. All that Johnson told him was that he had hit a lick, and that he messed up and had to shoot, but he did not say that he killed or hurt anybody. The witness testified that on the day that Johnson told him this, which was at his (the witness's) house, he and Johnson were in the house drinking, and he saw the detectives who he had talked to earlier outside. They asked him who Stank was and that is when Johnson came out of the house. The detectives approached Johnson and asked who he was, and Johnson told them that he was Stank (418b-419b).

On redirect, the witness testified that his brother Eugene was a good friend of Johnson's. He testified that his brother Eugene was in court now and had been sitting in court all of the time that he had been testifying. He testified that his brother approached him during lunchtime, and, in her (the prosecutor's) presence, told him that he did not appreciate him testifying (429b-430b).

The witness testified that Johnson came over to his house after the police brought him (the witness) back to his house, which was around 7:00 a.m., after he gave the police his first statement. Johnson came over in the afternoon, around 1:30 or 2:00 p.m., on May 10. It was while he and Johnson were in his house that he looked out and

saw the same detectives he had seen earlier at the police station. That was when he went outside and they asked him if he knew Stank. They had not asked him about Stank when he was at the police station earlier. Johnson was in his house at this point. When Johnson came out and identified himself as Stank, the detectives took Johnson away. It was then later that day that they came and got him (the witness). It was then that he made his second statement, the one in which he told the police that Johnson told him about hitting a lick and messing up and having to shoot.

William Kindred testified that Lisa Kindred, the deceased victim, had been his wife (245b). They had three children, who in May of 1999, were ages 8, 2, and newborn (246b).

On the evening of May 8, 1999, he, his wife, and their three children went to a drive-in theater. After that, they stopped by his mother's and sister's house on Bewick. They were all in their new Plymouth Voyager minivan. While he went up to the house, his wife and kids stayed in the van (246b-247b).

He went to his sister's to talk to his brother-in-law, Verlin Miller, about purchasing a motorcycle. This was sometime after midnight. Twenty minutes after they got to his sister's, his wife came up to the house to get him. They did not leave right then, however. His wife went back to the van and he stayed in the house talking to Miller. As he was finally getting ready to leave, he heard what sounded like a car door closing. He thought that Lisa was coming back into the house to get him to come out. When he and Miller went to the door, he saw their van taking off. The van's tires were squealing and it was speeding, which made him think that something was wrong. At the time that he saw the van taking off, he also saw a person running through the

field that was across the street from his sister's house. He tried to go after this person, but by the time he got out there, the person was gone. When he came back to where the van had been parked, he saw broken automobile glass; the glass was still warm. The van had gone in the direction of Warren. He could not see it at that point. He just started yelling, and a neighbor from across the street came out, and he told her to call the police. She did, and he talked to the police as well. He then went into his sister's house, where his sister told him that there was a gas station in the area. He borrowed his mother's car and went up to the gas station that his sister had told him about. That was where he saw their van. Both doors of the van were open and he also saw EMS there. Then, he saw his wife. EMS had her on a stretcher. They were putting his wife in the back of the EMS vehicle. He tried to get to her, but they would not let him. When EMS took his wife away, he tried to get his kids out of the van. Initially, the police, who were also on the scene, would not let him do that, but then they did. He noticed that the driver's side window of the van was missing (248b-251b).

He then went to the hospital where his wife had been taken, but he never saw her alive again. At the hospital, he was notified that his wife had died. Later, he got his wife's purse back from a detective (253b-254b).

On cross-examination, Mr. Kindred testified that his wife had driven the van over to his mother's and sister's. His wife parked the van across the street from his mother's and sister's house (255b).

The parties stipulated to the admission of the protocol of Chief Wayne County Medical Examiner Sawait Kanluen, which was read into the record, and which stated, in pertinent part, that the 35-year-old female victim sustained a single gunshot wound

to the left breast, with no evidence of close-range firing, and that several small irregular superficial wounds present on the left breast and chest were consistent with the decedent being shot through an intermediate target (265b-266b).

Defendant Johnson testified in his own behalf. He said that his father had given him the nickname Stank when he was a child (466b). He testified that he had contact with the police when he was at Raymond Jackson's house. How that came about was that the police were outside, and he walked up to them and gave them his name, and they took him downtown for questioning. At the time, he was residing with Yolanda Holt. He kept some of his personal belongings there (466b-467b).

At about 6:00 p.m. on May 8, 1999, he was on Warren and Connor; his girlfriend dropped him off there. From there, he went to Keesha's house on St. Clair Street, where he stayed until about 9:30 p.m. Then, he went over to Kendrick Scott's house. Kendrick Scott's nickname was Snookie. Antonio Burnette, who he only knew by the nickname Shorty, was there. Then, he and Shorty left Scott's house; Scott did not go with them. They walked up Hurlbut Street and then some other streets on their way to a Rita's house. He was going to hook Shorty up with Rita's cousin. He and Shorty then left Rita's house after a time and walked down various streets until they ran into Shorty's friend Mike at a gas station at Warren and Cadillac; this was around 12:00 a.m. There was nothing happening at this gas station at that time. They got into Mike's vehicle, and they all went looking for Shorty's sister's house because Shorty said that his sister was having a party (469b-473b).

At some point, Mike dropped him and Shorty off back at the gas station at Warren and Cadillac. It was now around 1:00 or 1:15 a.m. There was a bunch of

police cars at the gas station. As they were walking up toward the gas station, Shorty told him to act like his father. As they approached the gas station, a police officer told them to get the fuck away, so they went to the gas station across the street. From the gas station, he and Shorty went over to Kendrick Scott's house; it was now around 1:30 a.m. He talked to Snookie about seeing the police at the gas station. Snookie and Shorty then left and he stayed at Snookie's house and used the phone. He called his girlfriend Yolanda Holt to come and get him and she did. This was around 2:30 a.m. Holt took him over his mother's house. His mother was not there when he got there, so he and Holt sat in the car and talked for awhile. Holt then left and he went into his mother's house (472b-476b).

The next day, Holt came over and told him that the police were looking for witnesses in this case and that his name had come up. Upon her telling him that, he went over to Bewick Street, where his auntie and also Raymond Jackson lived. He got dropped off at his auntie's and he went down to Raymond's house. Raymond's grandmother was there. He never had any conversation about what he had seen at the gas station, about ambulances being there, nor did he say anything about hitting a lick. He just talked to Raymond about the neighborhood, and how it had changed since he had moved away. Then, the police pulled up outside, and, since he knew that they were looking for him as a witness, he went out there and approached them. They asked him to come with them, and he cooperated. He went downtown with them (476b-478b).

He never threatened Raymond. Furthermore, he never had a gun on him that night. He never carried a gun. He had nothing to do with the shooting (475b, 478b).

II. Evidentiary Hearing on Remand

The evidence and testimony at the evidentiary hearing on remand from this Court included the following:

Antonio Burnette testified that he knew Defendants Justly Johnson and Kendrick Scott (8b). He recalled testifying against these two Defendants at their respective trials relative to the murder of a woman on a particular night, that being May 9, 1999, in his neighborhood. He did not witness the murder himself, nor was he at the scene of the murder. At the time of the murder, he knew both Defendants, in that he hung around with them (9b).

The testimony that he gave against the two Defendants was not true. Neither of them ever confessed to him of robbing or shooting the woman who got killed on the night in question. Nor did he ever see either Defendant carrying a gun that night or the day after (10b).

The reason that he gave false testimony against the two Defendants was because the police had caught him with an ounce of weed, and they gave him some paperwork to sign, and his being a minor at the time, and not knowing what was going on, he signed it. He was afraid of the police, and thought that he would be charged with the murder. The police actually told him that he would be charged with the murder if he did not testify against the Defendants (10b-11b).

At the time of the murder, at around 12:00 a.m. or 1:00 a.m., on May 9, 1999, he was with Johnson, who he referred to as "Stank." They were hanging out on Mount Elliot and Vincent, at his cousin's house, and they left there and went to the home of

another of his cousins. He was not on Bewick Street at the time of the shooting (11b-12b).

Neither of the Defendants threatened him or anyone in his family to testify at the proceeding. Nor was he threatened or coerced by anybody else to get him to give the testimony he was giving at this hearing. He was currently in prison for fleeing and eluding, but he would be eligible for parole on April 21. The reason that he was giving the testimony that he was giving now was because by being in prison, he had time to think about the hurt that he had done to other people, and in order to change his life, he had to change the bad that he had done to other people (12b).

On cross-examination, the witness was asked if at the preliminary examination of the two Defendants, he had been asked by Scott's attorney if he was afraid of "these men at this time?," to which he responded, "Yes." He responded that he did not recall being asked that question, and giving that answer, but after reviewing the preliminary examination transcript, he acknowledged that he was asked that question and did give that answer. When asked if it were true that he was afraid of the two Defendants at that time, the witness responded that that was what the police wanted him to say, that is, the police told him that if Scott's attorney asked him if he was afraid of the two Defendants, he was to say that he was (13b-15b).

The witness was then asked if at Scott's trial, he was asked the following questions, and gave the following responses:

Q When the police were questioning you, did they threaten you to get you to tell what you knew?
A No.
Q Did they promise you anything to get you to tell them what you knew?
A No.
Q They advised you of your rights, however?

A Yes.
Q You're aware that you were under some suspicion?
A Yes.
Q Have you had any threats by anyone at all in connection with your telling the police and testifying?
A Yes.
Q From who?
A From the guys that be around the neighborhood. They come back and tell me things. (15b-16b).

The witness testified that he recalled this testimony, but it did not change the fact that the police gave him a piece of paper and told him what to say and how to say it. When asked if, when the attorney asked him at Scott's trial if he had been threatened by the police and he said, "No," that was a lie, the witness responded that it was. And it was also a lie when the attorney asked him if he had been promised anything to get him to tell what he knew, and he responded, 'No." (16b.)

On examination by the trial court, the witness was asked why he should be believed now when he was sworn to tell the truth at the trial of the two Defendants, and was now saying that he lied at those two trials. The witness acknowledged that he had been sworn to tell the truth at the two trials. When asked why his current testimony should be believed as opposed to the testimony that he gave at the trials of the two Defendants, the witness responded that back then, the police had "whooped" on him when he was in custody. The witness was asked if it were not true that he did not know the specific questions that he would be asked at trial. He responded that the police wrote down a list of questions. When the trial court asked the question again, the witness acknowledged that he did not know the specific questions that he would be asked at the trials (17b-18b).

Lameda Thomas testified that Raymond Jackson was her cousin (102b, 104b). Jackson was no longer alive, having died August 18, 2008 (103b). She was aware that Jackson had testified against Justly Johnson and Kendrick Scott at their trials (103b).

There were two times when Jackson talked to her about his role at the trials: at a birthday party and at a family gathering. These two occasions took place in 2002 and 2006. During a general conversation at these gatherings, Jackson said the had messed up and had lied. He told her that he lied because he was scared of the prosecutors. He never said anything about being scared of Johnson or Scott. Jackson and Johnson and Scott had all been close friends. When Jackson told her that he had lied, he appeared to be truthful (103b-105b).

On cross-examination, the witness testified that she knew that Johnson and Scott had been convicted of this murder. When asked what she did to try to correct this, once Jackson told her that he had lied, she responded that she signed an affidavit. This was in 2005. When asked what she did with the affidavit, she responded that she kept it and talked it over with her family's lawyer. When asked what she was planning on doing with the affidavit, the witness responded that she was going to keep it so that she could help Johnson and Scott out if they needed it. When asked why she did not try to help them out when her cousin told her that he lied in 2002, the witness responded that she was too young then. She was only 17 years old and in high school (105b-106b).

On examination by the trial court, the witness was asked if Jackson told her that everything that he testified to was a lie. She responded, "Yes, I do believe in the whole that it was all a lie" (107b).

On recross examination, the witness was asked if her cousin ever told her that when he was on the 9th floor of police headquarters that Johnson walked by his cell and said, "I'm going to fuck you up and I'm not going to sweat it" (107b-108b).[1] She responded that Jackson never told her that. When asked if it would surprise her that Jackson testified to that effect at Johnson's trial, the witness responded that it would surprise because her whole family was there when Jackson testified. She was asked the question again, and this time, she responded that it would not surprise her that Jackson testified to that effect at Johnson's trial, because Johnson was Jackson's friend. When asked if Jackson testified to this effect under oath, the witness surmised that perhaps Jackson was intimidated to say that by the police or by the prosecutor (108b-109b).

Charmous Skinner, Jr. testified that he went by the nickname CJ (117b). He testified that his birth date was September 24, 1990. His parents were Charmous Skinner and Lisa Kindred. He had lived in Michigan from the time that he was three years old until his mother was murdered. He was eight years old when his mother was murdered. At the time that his mother was murdered, he was living with his mother, her husband Will Kindred, his little sister, and his little brother. He had a close relationship with his mother (118b-119b).

[1]Jackson had testified at Johnson's trial that at some point he got locked up on the 9th floor of police headquarters (397b). Johnson and Scott were also on that floor. Scott kept hollering out something all night that caused him distress. There was also a time when Johnson walked by his cell and stopped, pointed his finger into his cell, and said, "I ain't going to believe the hype; I will get you." Johnson also said that whatever he (Jackson) told the police, he (Johnson) was going to fuck him up (397b-401b).

He recalled the day that his mother died. It was May 9, 1999, Mother's Day, in the early morning. He was with her when she died. She died at the gas station. His mother was killed in the car. He was in the front seat (119b-120b).

Earlier that evening, they had all gone to a drive-in movie. After the drive-in movie, they went to Will's family's house. He had been to this neighborhood before. His mother drove. When they got there, Will got out of the car and went into the house by himself. He was in the backseat at the time. Once Will got out of the car, he moved up to the front seat. He, his mother, and his siblings then waited in the car. His mother appeared to be agitated as they waited for Will. His mother was huffing and puffing under her breath, and swearing a little bit. His mother did not stay in the car the whole time. She got out of the car and went up to the house that Will had gone into. She knocked on the door, and, after a brief "altercation," she returned to the car (120b-122b).

It was when his mother got to the door of their car and opened it that he saw somebody. This somebody was an African-American man in his mid-30s, short, with short hair, a big beard, and a "big ass" nose. There was no light in the area except from the light from the car, that being the light that comes on when the car door is open. The man was behind his mother, not directly, but off to the side. He (the witness) was sitting in the front passenger seat when he observed this. He saw nobody else in that street but this man (123b-124b).

As the man approached his mother, he (the witness) heard a gunshot. When the gunshot went off, the side front window of the car broke. He did not hear anything said between the man and his mother before he heard the gunshot. He did not see the

man take anything from his mother or the car. After the gunshot went off, his mother got in the car and sped off to the nearest gas station. When they got to the gas station, his mother went to the back of the car, got a bag of ice from the cooler that they had taken to the drive-in movie, and then she got out of the car, "fell out," and died. He did not know at the time that his mother got back in the car that she had been shot. By that time, he was not thinking anything, but was just crying. He recalled an ambulance arriving (125b-126b).

The next morning, Will's mother told him that his mother had died. He recalled going to the funeral some time after, and presenting his mother with a Mother's Day card. He never was interviewed by any police officers or lawyers. After the funeral, he stayed with Will for about a week, and then he moved to Philadelphia to live with his grandmother (126b-127b).

While he was still in Michigan after his mother's funeral, he never talked to Will or his family about what he had seen that night. Nor did any of them ask him about it. Had a police officer asked him, before he left Michigan, to describe what he had seen that night, he would have told the truth. And if a police officer had asked him to view a lineup, he would have been able to identify the shooter if the shooter was in the lineup (127b-128b).

Once he moved to Philadelphia, where he lived with his grandparents and his sister, he saw his biological father. When asked if any of these people talked to him about his mother's death, the witness responded that they tried to, but he did not want to talk about it. He recalled them taking him to a counselor to talk about his mother, but he did not give the counselor any details about what he saw that night. The reason

that he did not want to talk about it was that he was trying to forget it. In the years following his mother's death, he never thought the police needed his account in order to solve the case. He thought the police had it all figured out (128b-129b).

Eventually, he got a letter from a reporter, Scott Lewis. This was around August 31, 2011. He responded to Lewis's letter, telling Lewis that he would help if need be, if the dude or dudes were in prison for killing his mother and they did not do it, but that if they did do it, he would help in the other direction. Also in his letter, he wrote to Lewis that, "I will never forget the person's face, and if it is him, I will testify against him. But if it's not, I would not mind testifying on his behalf." Lewis was the first person to whom he gave a description of the person. He was incarcerated in Pennsylvania when he had contact with Scott Lewis. He had been incarcerated for two years (129b-132b).

He graduated from high school in 2008. In between the time that he graduated from high school and the time that he went to prison, he had been living by himself, selling drugs. What he was in prison for when Scott Lewis contacted him was perjury. The charge of perjury, which he pled guilty to, was for lying on the stand. He lied to protect a friend who was charged with a double homicide (132b-133b).

After he spoke to Scott Lewis, he was contacted by the Michigan Innocence Clinic. This was in late 2011. He first spoke to the people from the Innocence Clinic on the phone, and then, when he met with them in person, he was shown a photo lineup He was shown one photo at a time from the array. He did not see the person who approached his mother in the photo array. When asked if he recognized Johnson or Scott in court, the witness responded that he did not (134b-136b).

On cross-examination, the witness acknowledged that in his Affidavit, he did not say that he heard a gunshot. He stated that he did not think that he needed to put that in his Affidavit inasmuch as the glass shattered, and there was a hole in his mother's chest. He acknowledged that he did not see a hole in his mother's chest at the time that he witnessed the event (137b-138b).

The witness testified that at the time that the glass shattered, his mother was in the process of getting back into the car, and she was halfway in the car. He reiterated that when he saw the man, the man was behind his mother, and a little off to her side. He assumed that the bullet came through the window. He knew that the man had a gun, but he did not know if the gun was a rifle or a handgun because he did not see that. Nor did he know if the man had the gun in his right hand or his left hand. When asked how long he had his eyes on the guy from beginning to end, the witness responded, "About 25 seconds," but he acknowledged that he was only guesstimating. He knew that the man was there long enough for him to get a good look at him. He did not hear the man say anything to his mother. All of a sudden, the man just shot (138b-140b, 145b-146b).

The witness testified that it was dark out, but the lighting from the car was good. This was because the car door was open, so that the inside dome light was on. When asked if that allowed him to see outside of the car, the witness responded, "Yeah, technically speaking, yeah, yeah." He did not remember if his minivan was parked on the right side of the street or the left side. He did not see what kind of clothing the man was wearing (146b-147b).

The witness testified that when he wrote his response letter to Scott Lewis's letter, he began by saying, "Wow, your letter really surprised me." When asked what it was that surprised him in Lewis's letter to him, the witness responded that it was "they was still trying to find out who killed my mother." The gist of Lewis's letter then was that "they're still trying to find out who really killed my mother." When asked if that suggested to him that the people who had been convicted of it had been wrongly convicted, the witness responded that Lewis did not suggest that. Rather, what suggested that were the papers that he got off of the Internet. When asked what papers he was referring to, the witness responded "news articles." These were not, however, news articles that he read before Lewis contacted him. They were news articles that he actually received from Lewis, authored by Lewis, from which he got the impression that the people who had been convicted for his mother's death had been wrongly convicted . When asked if his thought process, then, from the get-go, was that the two guys had been wrongly convicted, the witness responded that that was not his thought process from the get-go, but when he read "the stuff," it sounded like the police department had done a bad job (147b-149b).

Finally, the witness reiterated that had the police interviewed him, he would have given them a statement. But he acknowledged that this was so even though afterwards, six months later, he did not want to talk to anybody about it. So, the difference was the time frame. Had the police interviewed him on the night of the incident, he would have talked to them, but after the funeral he did not want to talk to anybody (149b-150b).

On examination by the trial court, the witness was asked if his mother and Will Kindred were getting along okay in the van when they were at the drive-in movie. He responded, "Yeah. I mean, yeah, I guess." When asked what grade he would have been in at the time, the witness responded that he did not know. Nor did he know what school he went to at that time. When asked if he remembered the name of his teacher, the witness responded, "If I don't know the school I went to, how would I know the name of my teacher?" When asked what kind of grades he got back then, the witness responded that he always got good grades, so he would assume that his grades were good back then. When asked what his favorite subject in school was, the witness responded that he had no favorite subject because he did not like school (158b-160b).

On further examination by the trial court, the witness testified that it was pitch black outside (163b). The court asked these questions and got these responses:

> THE COURT: A dome light and a van light shines down on the people that are inside the compartment and doesn't really show anything outside, does it?
>
> THE WITNESS: It does.
>
> THE COURT: Oh, it does?
>
> THE WITNESS: Yeah.
>
> THE COURT: All right. Were there lights outside at the time this incident happened?
>
> THE WITNESS: I don't recall.
>
> THE COURT: Was the porch light on of the house that your mom went to?
>
> THE WITNESS: I don't even think they have a porch. I don't remember a porch. (165b-166b).

On further examination by the trial court, the witness was asked these questions and gave these responses:

> THE COURT: It's a van, okay. Now you said that there was a person that was behind her?
>
> THE WITNESS: Yes.
>
> THE COURT: How far behind her was this person?
>
> THE WITNESS: Maybe six inches.
>
> * * * *
>
> THE COURT: And would it be fair to say that your mother was between you and this man that came up behind her?
>
> THE WITNESS: Between me?
>
> THE COURT: Your mother –
>
> THE WITNESS: The car. She was between herself, the car, and the car door. That's what she was between.
>
> THE COURT: Okay, all right. So the door was partially open, and she was inside the door?
>
> THE WITNESS: When she was shot?
>
> THE COURT: Yes.
>
> THE WITNESS: Yes.
>
> THE COURT: Okay. And this other individual, this man that was behind her would have been outside the door, right?
>
> THE WITNESS: Yes.
>
> THE COURT: About how far away from the side of the van would you say he was?
>
> THE WITNESS: Same amount of space. (168b-169b).
>
> * * * *

THE COURT: Now your mother and this person who killed her, basically, you never heard them say anything to each other?

THE WITNESS: No.

THE COURT: You said that this person came up behind your mother and there wasn't anything said between them, and the next thing you knew she had been shot and the window shattered to the van, correct?

THE WITNESS: Yes, next thing I knew –

THE COURT: That's all I asked you. (173b-174b.)

* * * *

THE COURT: Okay. The amount of time that she was outside the van and this person was behind her with nothing being said, how many seconds went by from the time she got up to the side of the van and the window shattering? Let's put it that way.

THE WITNESS: I don't know, I'm not going to estimate. I don't know.

THE COURT: Like real quick?

THE WITNESS: Long enough for me to see his face.

THE COURT: That's not what I asked you.

THE WITNESS: I'm saying you asked me how long.

THE COURT: That's not what I'm asking you.

THE WITNESS: How long do you need to recognize somebody?

THE COURT: That's not what I asked you. I'm asking you for a time.

THE WITNESS: I don't know. (174b-175b)

* * * *

THE COURT: I imagine you must have found it pretty interesting to be contacted by Mr. Lewis concerning this?

THE WITNESS: Yes.

THE COURT: Had anyone else ever contacted you concerning the defendants in this case, Justly Johnson or Mr. Kendrick Scott?

THE WITNESS: Yes.

THE COURT: Concerning their involvement or noninvolvement in this incident?

THE WITNESS: Yes.

THE COURT: Who else?

THE WITNESS: Wisconsin people.

THE COURT: The people in Wisconsin?

THE WITNESS: Yes.

THE COURT: At the University of Wisconsin Innocence Project?

(180b-181b). THE WITNESS: Yes.

* * * *

THE COURT: When the people from the University of Wisconsin Innocence Project spoke with you, did they show you any photo array?

THE WITNESS: No, I spoke with them on the phone one time –

THE COURT: That's all?

THE WITNESS: – and that was that.

THE COURT: And at the time the window broke on the van in which you were situated when your mother was shot, you can't tell us as to whether she was shot by either a handgun or a rifle?

THE WITNESS: No.

THE COURT: How many shots did you hear?

THE WITNESS: One.

THE COURT: One? And did you see a flash or muzzle flash from the gun?

(182b). THE WITNESS: No.

On redirect, the witness testified that when he got the phone call from the Wisconsin Innocence Project, he did not give them a description of the shooter. Scott Lewis was the first person to whom he gave a description (184b).

On recross, the witness testified that when the Wisconsin Innocence people contacted him, the only question they asked was, "Did you see what happened to your mother," to which he responded that he did. The Wisconsin Innocence people did not ask him if he could describe the person who did the shooting. He testified that the Wisconsin Innocence people said that they were going to fly out to see him in Pennsylvania, but he never heard from them again. This was in 2007 (185b-186b).

Introduction

The trial court heard the defendants' newly discovered evidence and didn't believe it. Moreover, the court gave sound reasons for making such a credibility finding, and so that finding cannot be clearly erroneous. Because the court's factual rejection of defendants' newly discovered evidence must stand, the circuit judge cannot possibly have abused his discretion by denying relief on that basis. That is the sum of the analysis, and yes, this case really is that simple.

As the trial court noted, there were several good reasons to doubt CJ Skinner's testimony. He claimed to be able to remember the perpetrator's face—a stranger to him—16 years after the fact. While defendant's expert claimed that such was possible, the trial court reasonably concluded that it wasn't likely. Moreover, as the court noted, it would be difficult to see the face of a person standing outside the driver's window of a car at night when the car's dome light is on, especially when there is another person in between. Trial courts are in the best position to make these credibility determinations, and this court should not be in the business of second-guessing them.

Similarly, the circuit court reasonably rejected the recantations of the two primary trial witnesses. They had testified under oath at trial, been cross-examined, and the jury (in Scott's case) and the judge (in Johnson's) believed them. Recantations are a dime a dozen, and that alone is sufficient reason to doubt them.

Thus, in answer to the court's questions:

1. The newly discovered evidence in this case was found incredible, and so cannot form the basis for relief under the fourth prong of *Cress*.

2. While it is true that, in general, other newly discovered evidence—if rejected in a prior MFRJ because it did not make a different result likely on a retrial—may be reconsidered when weighing the fourth *Cress* prong, in this case there *is* no additional weight to be introduced into the calculus, given the incredible testimony of Skinner, Burnette, and Jackson.

3. Defendants cannot possibly prove ineffective assistance of counsel: it was reasonable for trial counsel not to travel to Philadelphia to interview an eight-year-old who hadn't indicated that he'd seen the shooter; and even if it was objectively unreasonable to make that time-and-effort determination, Skinner's testimony was, as the trial court found, not believable, and so could not have influenced the trial.

The Court of Appeals should thus be affirmed, or an order issued holding that leave was improvidently granted.

Argument

I. At an evidentiary hearing on a motion for relief from judgment, a trial court can decide that a witness is not credible and deny relief on that basis. The trial court here denied relief after finding that the testimony of the victim's son was not credible. This was not an abuse of discretion.

Standard of Review

This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *People v Cress,* 468 Mich 678, 691 (2003). A mere difference in judicial opinion does not establish an abuse of discretion. *Id.* A trial court's factual findings are reviewed for clear error. *Id.* "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C); see also *People v Hartwick,* 498 Mich 192, 214 (2015).

Discussion

Judge Callahan observed Skinner testify and didn't believe his claim that neither defendant could be the shooter: Skinner was only eight to begin with when the murder occurred, and it would be very difficult for him to remember another person's face accurately more than 16 years later. Moreover, as the court noted, it was doubtful that Skinner actually got a good look at the perpetrator's face from inside the car with his mother in between them and the dome light on. And this Court has made clear that it should not substitute its own opinion of credibility for that of the trial court, as the recent Order of this Court in *People v Tyner,* 497 Mich 1001 (2015), indicates.

As the court knows, in order to warrant a new trial based on newly discovered evidence, a defendant must make the following showings:

> 1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.

Cress, 468 Mich at 692. Judge Callahan based his denial of defendants' MFRJ on the fourth prong: that they had not established that the new evidence made a different result probable on retrial. There are a number of reasons to support the trial court's finding in this regard that Skinner was not credible.

First, a seed was planted in Skinner's mind, if not in 2007 when the Wisconsin Innocence Project contacted him and asked him if he witnessed the shooting, then by way of Scott Lewis's letter to him and the articles that Skinner said that Lewis gave to him, that the person or persons who had been convicted of his mother's murder had been wrongly convicted.[2] That would then explain why he would not pick anybody out of the photo array. He could certainly surmise that the photographs of the "wrongly convicted" persons would be in the array. This would also explain why Skinner did not seem to want to answer the trial court's question about how long the episode took. Skinner's response, as if reading from a script, was that it took long enough for him to

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[2]Charmous Skinner, Jr. testified that the Wisconsin Innocence Project contacted him in 2007, and asked him, "Did you see what happened to your mother," to which he responded that he did, but they did not ask him if he could describe the person who did the shooting.

The Wisconsin Innocence Project got involved in Johnson's case before he filed his third Motion for Relief from Judgment. After Judge Edwards denied Johnson's second Motion for Relief from Judgment, the Wisconsin Innocence Project filed an application for leave to appeal in the Court of Appeals, which the court denied on February 1, 2009 (Court of Appeals No. 287529); the Wisconsin Innocence Project then filed on Johnson's behalf an Application for Leave to Appeal with this Court, which was denied on September 28, 2009 (Supreme Court No. 138618).

see the face of the shooter, and when told that that was not the question, Skinner persisted in not directly answering, until finally he relented and just said that he did not know.

Second, the picture that Skinner drew at the evidentiary hearing when he testified was a before-and-after picture. The before illustration shows his mother standing outside of the van in front of the man and slightly off to his right, and the after picture shows her halfway into the van, with the van door open, and the door separating his mother from the man. In other words, a person sitting in the passenger seat would have his view of the gunman at least partially blocked by the victim. And apparently the door through which Skinner allegedly saw the shooter would have been moving as Kindred opened it to get in. And then she was shot in the chest. The point being, not that it would be impossible to see the perpetrator, but that any glimpse of him would have been obstructed and fleeting.

Finally, the trial court noted that sitting in the passenger seat with the dome light of the van on against a dark outside background would have made it, if not impossible, very difficult to see anything out in the dark.[3] This comports with common

[3]The People recognize that defendants have attached three cases where courts have found it reasonable that a car's dome light could illuminate somebody outside of the car. But just because something is possible doesn't mean that a factfinder has to accept it as true. Moreover, the People submit that defendants' cases are distinguishable in that the identifier of the person standing outside of the car was not inside the car with the light shining down into the inner compartment of the car, as Skinner was. In *Tyner*, the identifier was in a different vehicle when he said that he viewed Tyner by way of the dome light of the vehicle that Tyner was in (the Opinion does not say whether the person the identifier identified as Tyner was inside or outside of the vehicle). In *Seals v Rivard*, the identifier was either in the driver's seat of his car or outside of the car when he said that he saw by way of his dome light the two robbers standing outside of his car. There would be a difference, the People assert, between sitting in the driver's seat and looking out because the dome light would be shining behind the identifier, and sitting in the passenger seat and having to look through the dome light out into the dark. And finally, in *Caldwell v Lafler*, the identifier was standing *outside* of his vehicle getting robbed and he was able to see the robber by way of his dome light.

sense: it is generally known that a dome light creates a mirror effect on the windows of a car. A factfinder may properly rely on common sense and everyday experience. *People v Simon,* 189 Mich App 565, 567 (1991).

None of the findings made by the trial court, with the exception of its finding that Skinner would have slept through the movie at the drive-in theater, which was speculative, were clearly erroneous. Certainly, the trial court's finding that Skinner's previous conviction for perjury in a murder case undermined his credibility here was not clearly erroneous. Nor were the court's findings clearly erroneous that Skinner's mother and the dome-light reflection on the window would have at least partially obscured Skinner's view of the perpetrator. Nor was the trial court's skepticism that Skinner would remember with any reliable detail the perpetrator's face after 16 years. As indicated, these factual findings preclude relief.

Defendants' response to these dispositive rulings is fourfold: (1) in evaluating Skinner's credibility the court ignored defendants' expert; (2) the court failed to weigh Skinner's testimony against the evidence at trial; (3) the court usurped the role of a jury; and (4) the court found that the defendants were guilty based on a different theory than what the prosecution advanced at trial. None of these objections hold water.

First, the defense expert merely testified that an eight-year-old child *could,* not that they *would,* and certainly not that this witness *did,* remember the face of a perpetrator 16 years after the fact. Second, the court did not need to weigh Skinner's testimony against the trial evidence, because he found the witness not credible. Only if he found Skinner credible would the court then proceed to evaluate his testimony

versus the evidence of guilt introduced at trial. Third, it is most definitely the role of a judge at a newly discovered evidence hearing to evaluate the strength of the new evidence, including whether it is believable at all. And fourth, while the court may have concluded that the defendants were more likely hired killers than incompetent robbers, that opinion is irrelevant to the issue at hand: the newly discovered evidence went to the identification of the perpetrators, not their intent.

As to the first of these, it is true, but irrelevant, that Judge Callahan did not mention defendant's expert in his oral decision. All Dr. Rosenblum testified to was that, in general, it might be possible for an eight-year-old child to remember the face of their mother's murderer years later. But nowhere did she testify that it was certain that they would, or even that it was likely. She did not even attempt to suggest that *Skinner's* claimed memory was accurate; she had never even spoken to him. Moreover, the law is replete with warnings that witnesses' memories fade over time, and specifically that the longer a witness waits before identifying someone as the perpetrator, the less reliable that identification will be. See, for example, *People v Kurylczyk,* 443 Mich 289, 306 (1993); and *Neil v Biggers,* 409 US 188, 199-200 (1972) (cited more than 5,500 times for the proposition, in part, that the length of time between the crime and the confrontation is relevant to the accuracy of the identification). Judge Callahan did not find that it was impossible for Skinner to remember the face of the perpetrator, just that it was "almost" so. That finding was not contradicted by Dr. Rosenblum, and it is buttressed by ample precedent. It was not clearly erroneous. That alone was sufficient to defeat defendants' motion.

Second, defendant cannot be correct that something minus zero equals a difference other than the minuend. That is, Judge Callahan found Skinner not believable; his impact on the trial then, of necessity, would have been zero. Defendant Scott's jury, and defendant Johnson's waiver-trial judge, found Burnette and Jackson credible and convicted defendants on that basis. Skinner's unbelievable testimony would not have changed that equation.

Third, despite what these defendants—and probably all prisoners in the Michigan Department of Corrections—would like the law to be, the law that *actually exists* holds that it is not enough to warrant a new trial merely for a prisoner to find a witness willing to challenge the proofs at trial. As this court has said, the trial is the main event in the criminal justice system, and the system does not reward parties who litigate their cases piecemeal. *People v Rao,* 491 Mich 271, 284-85 (2012). Both defendants here had a fair trial and their convictions were upheld on appeal. Thus they are presumed—not innocent as before trial—but *guilty*. In order to overcome that presumption, they must produce evidence of such weight that a different result is more likely than not on retrial. When as here the new evidence is not believable, it weighs nothing.

And it *is* up to the trial court to evaluate any new evidence as to its credibility, otherwise any prisoner would be entitled to a new trial as long as they could find someone to say they didn't do it. As Justice Benjamin Cardozo wrote while on the New York Court of Appeals,

> Three witnesses for the prosecution have stated under oath to the trial judge that their testimony upon the trial was false. *It became his duty to say whether they were conscience-stricken penitents, or criminal*

> *conspirators to defeat the ends of justice*. . . . I do not understand that even the judges who think this judgment should be reversed assert that he was wrong. *Their view is that, with such a conflict of oaths, he should have abandoned the search for truth, and turned it over to a jury*. That would have been an easy avenue of escape from a solemn responsibility, but I cannot satisfy myself that along that avenue lay the path of duty. I think it was the duty of the trial judge to try the facts, and determine as best he could where the likelihood of truth lay. . . . He was not at liberty to shift upon the shoulders of another jury his own responsibility. That would have been to make the conspiracy triumph. He was charged with a responsibility to seek the truth himself.

New York v Shilitano, 112 NE 733 (NY, 1916) (Cardozo, J., concurring).

It may be that Antonio Burnette was partially incorrect about his timeline, but so are many witnesses who have no reason to be watching a clock.[4] And Burnette was consistent in his testimony about what Johnson and Scott told him, and Jackson was consistent in his testimony about what Johnson told him. And there was a spent .22 caliber cartridge casing in front of 4470 Bewick, just as Burnette testified he saw Johnson and Scott with an AK-47 and a .22 rifle (348b; 378b-379b). There is nothing impossible about Burnette's and Jackson's testimony implicating defendants.

As for the trial court's musings regarding the motive for the murder, the People do not dispute that Judge Callahan said it had not been a robbery gone bad (which had been the prosecution's theory at trial). And the People agree that in order to convict defendants of felony murder, the prosecution had to prove that the underlying enumerated felony to support the felony murder charge, here attempted larceny, was committed.

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[4]Defendants speculate that Burnette couldn't have heard them confess to the murder, because he must have been arrested before the time he says this conversation took place, but speculation is not proof. It does appear that Burnette had to be significantly off in his timeframe regarding seeing Scott put a gun in the car, but he only testified to that at the preliminary exam and at Johnson's trial—not at Scott's trial.

As can be seen from a reading of this passage, the trial court based its opinion—that the murder of Lisa Kindred had not been the result of a robbery gone bad, but instead possibly a murder-for-hire involving the husband having hired the defendants—on the Roseville Police reports of domestic abuse. But there are three reasons the judge's off-hand opinion in this regard cannot affect the outcome. One, it is irrelevant because the issue was identification, not intent, and so the judge's comments are nothing more than dicta. Two, it is beyond the scope of the remand. And three, the records themselves are inadmissible and so could not possibly affect the outcome.

Clearly, the Roseville Police reports were beyond the scope of the remand, and the People objected to them on that basis (28b-30b). This Court's remand order in *Johnson* stated in pertinent part:

> [W]e REMAND this case to the Court of Appeals for consideration, as on leave granted, of the following issues: (1) whether trial counsel rendered constitutionally ineffective assistance by failing to call Charmous Skinner, Jr., as a witness at trial; (2) whether the defendant is entitled to a new trial on grounds of newly discovered evidence in light of the proposed evidence related to Charmous Skinner, Jr., as an eyewitness to the homicide; (3) whether appellate counsel rendered constitutionally ineffective assistance by failing to raise these two issues on direct appeal.

As can be seen, the claims regarding the victim's son were the subject matter of the remand from this Court. In his initial Application to this Court, Johnson did not even make any claim about evidence of domestic violence, and for good reason. He could not make this claim because, in his third Motion for Relief from Judgment, filed by the

Wisconsin Innocence Project in November of 2009, he had already raised ineffective assistance of trial counsel for the alleged failure to investigate and present evidence of domestic abuse on the part of Will Kindred against his wife, and that claim was rejected. In an Opinion and Order dated February 2, 2010, Judge Edwards (Judge Callahan's predecessor) rejected that claim. In his ensuing application to the Court of Appeals from the denial of his third Motion for Relief from Judgment, Johnson claimed as follows:

> **Justly Johnson is entitled to a new trial, or at least an evidentiary hearing, based on new evidence of ineffective assistance of counsel.**
>
> **A. Trial and appellate counsel performed deficiently.**
>
> **I. Trial and appellate counsel performed deficiently by failing to investigate and present evidence pointing to William Kindred as the true perpetrator.**
>
> **a. Evidence of William Kindred's history of violence toward the victim**

The Court of Appeals denied Johnson's application "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(G)(2) [sic] and MCR 6.508(D)," (Court of Appeals No. 298189), and this Court denied Johnson's Application for Leave to Appeal "because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." (Supreme Court No. 142526). As can be seen, a claim relating to domestic violence had already been denied in prior proceedings; thus its consideration in the instant successive Motion for Relief from Judgment was barred. MCR 6.502(G), and MCR 6.508(D)(2).

When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of that order. *People v Russell,* 297 Mich App 707, 714 (2012). That is what happened here, as far as the trial court giving its opinion about what the motive for the murder was. The trial court was simply not directed to address the motive for the murder, or give an opinion on what type of murder it was. The trial court's musings about what type of murder was involved, or what the motive of the murder was, were dicta.

Although the trial court did exceed the scope of this Court's Remand Order when it gave its opinion that this was a murder-for-hire, as opposed to a robbery gone bad, the trial court, nevertheless, also did do what it was directed to do, that is determine whether the testimony of Charmous Skinner warranted a new trial, either under an ineffective assistance of counsel theory or a newly discovered evidence theory. The trial court did not find Skinner to be a credible witness as far as his testimony that he saw the murderer and that it was neither Johnson nor Scott. And the trial court found that Johnson's trial counsel, as well as counsel for Scott, were not ineffective in not seeking out Skinner for trial. Thus, the trial court did address, and did arrive at a conclusion, relative to the issues that this Court directed it to do in its Remand Order, and the trial court must be affirmed in that regard.

But even if this Court considers the reports to be within the scope of the remand, they cannot legally affect the resolution of defendants' motion, because in order to satisfy the fourth *Cress* factor, the newly discovered evidence must be admissible. *People v Grissom,* 492 Mich 296, 324 (2012) (Kelly, J. concurring). And reports prepared by police officers or their affiliates are not admissible under MRE 803(6), the

business records exception, or MRE 803(8), the public records exception, because they are adversarial investigatory reports prepared in anticipation of litigation and thus lack the requisite indicia of trustworthiness. *People v McDaniel,* 469 Mich 409, 413-14 (2003); *Solomon v Shuell,* 435 Mich 104, 130-133 (1990).

Not only that, but the defendants' theory of admissibility as to those reports has to be as follows: because Will Kindred had been accused of domestic violence, he must have been guilty of it; because he had been guilty of domestic violence, he had the ongoing propensity to harm his wife; and because he had such a propensity, he likely acted on it in this particular circumstance and paid to have his wife killed. The absurdity of this line of reasoning, or at least its certifiably speculative nature, should be self-apparent. Not only that, but MRE 404(b) prohibits the introduction of an individual's prior bad acts if offered only to prove action in conformity therewith on a subsequent occasion. That is exactly what defendants attempt to do here.

Not only that, but simply showing an alleged motive for a murder (would Will Kindred really have set his wife up to be killed with their children in the car?) is not enough to make such evidence admissible without there being some nexus between the proffered evidence and the charged crime. See *State v Rabellizsa,* 903 P2d 43, 46-47 (Hawaii, 1995), and the cases cited therein.

But even if the reports could be considered in the remand and would somehow be admissible at trial, defendants should have actually introduced them at trial; nothing prevented them from doing so. Neither of them has ever explained why the evidence could not have been discovered for trial using reasonable diligence. Thus, the reports cannot pass the third prong of *Cress, supra*, which is that the party could not,

using reasonable diligence, have discovered and produced the evidence at trial. The bottom line is that Judge Callahan rejected the factual premises of defendants' claim, and those factual findings are supported by the record.

II. A single item of newly discovered evidence, which alone would not change the result, may warrant relief when combined with other new evidence *which also fell short on the prejudice prong*, but only if the combination of new evidence would make a different result more likely than not. Even considered together, the testimony of Skinner, Burnette, and Jackson would not change the result. Judge Callahan did not err in denying relief.

Standard of Review

This Court reviews court-rule interpretation de novo and under the same principles that govern the construction of statutes. *Fraser Trebilcock Davis & Dunlap PC v Boyce Tr. 2350,* 497 Mich 265, 271 (2015).

Discussion

Defendants omit in their briefs any acknowledgment of society's interest in finality, or of the court's interest in avoiding piecemeal litigation; but a defendant whose newly discovered evidence claim is rejected because the evidence could have been introduced at an earlier proceeding with reasonable diligence does not get to have his cake and eat it too by having that evidence considered again when he raises a subsequent claim of newly discovered evidence. In other words, procedural bars to relief are legitimate and enforceable. See *People v Grant,* 445 Mich 535, 546-47 (1994) (citing *Henry v Mississippi,* 379 US 443, 85 S Ct 564 (1965)). More specifically, MCR 6.508(D)(3) stands for the proposition that a defendant may not litigate newly

discovered evidence claims one at a time. The rule says that grounds for relief "which could have been raised on appeal from the conviction and sentence or in a prior [6.500] motion" cannot be considered unless the defendant establishes good cause and actual prejudice for failure to raise such grounds earlier. A defendant who knows or has reason to know about new evidence and who doesn't raise it, and who is denied relief on that basis, does not get to resurrect the evidence merely by finding some new witness to open the can of worms back up again.

That said, the People agree that, when a defendant has clean hands, and truly discovers new evidence one piece at a time, there is no basis to preclude the cumulative consideration of it, as long as it would all be admissible at a retrial. In other words, multiple items of evidence that could not have been diligently discovered at once—which when considered individually would not make a different result probable—would still warrant relief if, together, they would satisfy the fourth *Cress* prong. The reason is that, without a procedural bar in play, a defendant is entitled to a new trial where he can demonstrate that the post-conviction evidence would make a different result probable. And the fourth prong of *Cress* is a substantive consideration, not a procedural one. Thus it cannot matter that the evidence was not discovered all at once.

Correspondingly, however, the same logic requires that a trial court also consider the *prosecution's response* to the defendant's new evidence. That is, new evidence introduced by a defendant cannot form the basis for a new trial if it could be rebutted or significantly undermined by new evidence introduced by the People, such as would have happened at trial if the defendant had introduced the evidence then.

There can be no dispute that, if a defendant were to present a newly discovered alibi witness who testified credibly, a new trial would still not be warranted if the People then obtained proof positive disproving that the witness and the defendant had been together. Similarly, the door should be open for the prosecution to introduce *any* new evidence at an evidentiary hearing demonstrating what the People's response at a new trial would be. See, for example, *Darden v Wainwright,* 477 US 168, 186 (1986) (in an ineffective assistance case, "[a]ny attempt to portray petitioner as a nonviolent man would have opened the door for the State to rebut with evidence of petitioner's prior convictions"); and *Gibson v Georgia,* 178 Ga 707 (1934) ("in view of the rebutting evidence set forth in the counter showing made by the state, the alleged newly discovered evidence of those persons would not require the grant of a new trial").

None of this matters here, though, because the recantations of Burnette and, allegedly, Jackson, and the domestic violence reports add nothing to the *Cress* evaluation of Skinner's testimony. As indicated, the domestic violence reports are inadmissible and so could not possibly have an effect on a retrial. Recantations are inherently suspect, and it is not an abuse of discretion to deny relief because the trial judge does not believe the recanting witness. As the Kansas Supreme Court has said in this context:

> In this situation appellant contends that it is the function of the jury to weigh the testimony, and that there was nothing for the court to do but to grant a new trial. This contention cannot be sustained. The court, not the jury, passes on the motion for a new trial, and any evidence offered in support of it. Obviously, a court is not compelled to give credence to false testimony offered in support of a motion for a new trial. One who recants his sworn testimony in court necessarily raises a serious question as to his own veracity.

Kansas v Green, 211 Kan 887, 894 (1973) (internal punctuation omitted). Moreover, as indicated above, Jackson is dead, and his alleged recantation was not under oath subject to cross-examination. As such, like the police reports, it is not admissible at a retrial.[5] Regardless whether the other "evidence" introduced by defendants at the evidentiary hearing is considered, they are not entitled to relief.

III. A reasonable attorney could decline to pursue a potential defense witness if the witness was hard to locate, and there was no information available as to what they might say. Skinner moved to Philadelphia two days after his mother's funeral, didn't want to talk about his mother's murder, and had given no indication to anyone that he saw the killer. It was not objectively unreasonable for defendants' trial attorneys to forego a trip out of state to interview an eight-year-old potential witness.

Standard of Review

A defendant alleging ineffective assistance of counsel must demonstrate that his attorney acted in an objectively unreasonable fashion and that, but for counsel's error, the result of the proceedings probably would have been different. *People v Ackley,* 497 Mich 381, 389 (2015). Michigan's effective-assistance-of-counsel jurisprudence is the same as the federal standard examined in *Strickland v Washington,* 466 US 668, 104 S Ct 2052 (1984). *People v Pickens,* 446 Mich 298, 323 (1994).

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[5]Defendants maintain that the hearsay would be admissible as a statement against interest under MRE 804(b)(3) or as impeachment under MRE 806. But 804(b)(3) excludes statements offered to exculpate the accused "unless corroborating circumstances clearly indicate the trustworthiness of the statement." Defendants cannot meet that requirement. And 806 impeachment statements can still be excluded under MRE 403 if their probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, et cetera. See *People v Blackston,* 481 Mich 451, 461 (2008). Given the weak evidence of Jackson's alleged recantation, it would likely be excluded.

Discussion

Defendants can show neither objectively unreasonable conduct by their trial attorneys, nor prejudice, regarding their alleged "failure" to seek out and interview eight-year-old CJ Skinner. First, it was objectively reasonable not to travel to Philadelphia—where Skinner had moved right after his mother's murder—to interview him, when there was no indication that he had seen his mother's assailant. Second, even if they had gone to such lengths, there is no guarantee that Skinner would have spoken to them, and little reason to believe that his testimony would have been helpful.

To begin with, defendants cannot demonstrate that no reasonable attorney would have declined to travel out of state (or sent an investigator) to interview a child who had never indicated that he saw the perpetrator. Of course, in a perfect world, trial counsel would chase down every lead and explore every possible defense. But this world is not perfect, and "courts must recognize that counsel does not enjoy the benefit of unlimited time and resources." *Chandler v United States,* 218 F3d 1305, 1314 n14 (CA 11, 2000). To the contrary, "[e]very counsel is faced with a zero-sum calculation on time, resources, and defenses to pursue at trial." *Id.* Thus it is not unreasonable to decline to pursue an interview with a possible witness when doing so would require significant time-and-effort resources, without any indication that the witness would be helpful.

Here, there was nothing to suggest that Skinner would be cooperative with the attorneys representing the men accused of murdering his mother, or that his guardians

would have allowed such an interview to happen. Correspondingly, in his affidavit and at the hearing, Skinner acknowledged that after his mother's death, he shut down and repressed it, and that his family tried to make him talk to a counselor, but he never did. If the witness would not even talk to a counselor or therapist, there seems little likelihood that he would have been willing to talk to criminal defense lawyers. Further, nothing available to defendants' attorneys indicated that Skinner had seen the shooter; and even if they were to assume that he might have seen who did it, the possibility existed that he would have identified *one of their clients* as the perpetrator. At the very least, the prospect of calling of Skinner to testify would have highlighted the horror of having to watch one's mother be shot and killed, and generated sympathy towards the victim and her family.

Obviously, Skinner claimed at the evidentiary hearing that he would have talked, that he would have testified, and that he would have exonerated the defendants. But Judge Callahan reasonably doubted that Skinner actually remembered what he claimed to have he remembered. That is, the court made a finding that Skinner's testimony, if he had been called as a trial witness, would *not* have been helpful because it was doubtful that he got a good look at the perpetrator; and the court also noted that his testimony at a new trial would be further suspect because of the intervening 16 years. Again, this was a finding, after reviewing the other evidence and observing Skinner in the witness chair, that the trial court was authorized to make. And because Judge Callahan discredited Skinner, defendants cannot prove objectively unreasonable conduct or prejudice related to their trial attorneys.

Relief

Wherefore, the People respectfully request that this Honorable Court affirm the Court of Appeals or issue an order dismissing the appeal as improvidently granted.

Respectfully submitted,

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