No. 24-879

IN THE

Supreme Court of the United States

JAMES TIMOTHY NORMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* 15 LAW PROFESSORS IN SUPPORT OF CERTIORARI

COLIN MILLER
Professor of Law & Thomas H. Pope Professorship in Trial Advocacy
UNIVERSITY OF SOUTH CAROLINA
JOSEPH F. RICE SCHOOL OF LAW
1525 Senate Street
Columbia, SC 29208

J. REMY GREEN
Counsel of Record
COHEN&GREEN P.L.L.C.
1639 Centre Street, Suite 216
Ridgewood, NY 11385
(929) 888-9480
remy@femmelaw.com

Counsel for Amici Curiae

120366

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici are law professors with an interest in courts applying the appropriate standards in determining the admissibility of evidence with an accusatory component.

SUMMARY OF THE ARGUMENT

In *Shepard v. United States*, 290 U.S. 96, 104 (1933), this Court laid out a clear rule regarding the exclusion of evidence with an accusatory component that could confuse jurors. According to Justice Cardozo's opinion, "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *Id.* This rule recognizes the dangers surrounding hearsay statements with an accusatory component and specifically the state of mind exception that was used by the prosecution in both *Shepard* and the case at hand. Thereafter, between 1940 and 1999, courts across the country routinely cited this *Shepard* standard in a variety of contexts, including cases involving accusatory hearsay, character evidence, and post-arrest silence. These words from *Shepard* about upsetting the balance of power were so popular that the United States Court of Appeals for the District of Columbia Circuit dubbed them the "oft repeated words of

1. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the amicus curiae, its members, or its counsel, made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties have received notice of intention to file this at least 10 days prior to the due date for this brief pursuant to this Court's Rule 37.2.

Justice Cardozo." *United States v. Brown*, 490 F.2d 758, 766 (D.C. Cir. 1973). Indeed, during this stretch of sixty years, this Court reaffirmed and reapplied this *Shepard* standard in *United States v. Hale*, 422 U.S. 171, 180 (1975). It also cited to this *Shepard* standard in creating the *Bruton* doctrine. *See Bruton v. United States*, 391 U.S. 123, 132 n.8 (1968).

With the turn of the century, however, courts have largely stopped citing this standard from *Shepard*, resulting in only three citations between 2000 and 2025, with one of them being in a dissenting opinion. Without addressing this *Shepard* standard, many courts now give great deference to jurors, defaulting to the belief that they can compartmentalize evidence with an accusatory component into permissible and impermissible purposes. This has created a split in how courts treat accusatory statements that implicate the *Bruton* doctrine and accusatory statements offered under the state of mind exception. Moreover, it has created a silent contradiction in a previously settled body of law: *Shepard* remains binding precedent—as do Circuit and State high court opinions following it—even as courts create new bodies of law that contradict it.

Recently, this Court reaffirmed that evidence can be so unduly prejudicial that its admission violates the Due Process Clause by rendering the trial fundamentally unfair. *See Andrew v. White*, 145 S.Ct. 75, 83 (2025). This Court should similarly grant certiorari in this case to reaffirm its holding in *Shepard*, clarify the splits that have emerged, and conclude that courts must exclude evidence with an accusatory component if it contains a risk of confusion so great as to upset the "balance of advantage." 290 U.S. at 97.

Finally, this case presents a particularly good vehicle to clarify this split, because of how clearly the jury was encouraged to make improper use of confusing evidence, even with the curative instruction the trial court gave after the fact. In closing, the government blew by its promise not to use the evidence for truth, citing the evidence admitted only for state of mind—"He is scared that Tim has people after him"—but then declaring: "*he was right*." Transcript of Closing Argument at 20, ECF No. 532 (emphasis added). Either *Shepard* still means that "[i]t will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else," or the lower courts that have silently split from it are right to ignore it. *Shepard*, 290 U.S. at 97. But either way, this Court should clarify, since only this Court can.

ARGUMENT

I. Pertinent Facts.

In June 2015, someone broke into the home of Robbie Montgomery. *United States v. Norman*, 107 F.4th 805, 808 (8th Cir. 2024). Robbie suspected her grandson Andre committed the break-in and wanted him to take a polygraph test. *Id.* Andre then responded via text message that he could not take a polygraph test because he had left town based on his fear of the defendant, Tim Norman. *Id.* at 810-11. Specifically, Andre texted that "'I been out of town cuz yu don't believe me n I'm not bout to get hurt from nobody for sum shit I didn't do...I'm telling yu know TIM IS AFTER ME,' and later, 'I'm not just bout to be sitting in STL wen I know Tim got people looking for me.'" *Id.* at 811 (typographical errors preserved in original).

Andre also texted: "I know what Tim is capable of doing, and I don't want anything to do with whatever he got going on." ECF No. 335, pg. 50.

At a pretrial hearing, the defense filed a motion *in limine* to bar the admission of these three text messages. *Id*. The prosecution responded that the text messages were being offered to prove Andre's state of mind and were not being offered to prove the truth of the matter asserted, *i.e.,* that Tim was after Andre and had people looking for him. *Id*. In response, the judge ruled that the first two text messages were admissible solely for the purpose of proving Andre's state of mind under Federal Rule of Evidence 803(3). *Id*. at 50-51; *Norman*, 107 F.4th at 811 ("The district court admitted the messages into evidence, reasoning that they showed that Andre's then-existing state of mind was fear of Norman. *See* Fed. R. Evid. 803(3).").

The court, however, sustained the defense objection to the admission of the third text message about "what Tim is capable of doing." ECF No. 335, pg. 51. The court ruled that this text message needed to be excluded "because it seems to the Court that that suggests some prior bad act on the part of Mr. Norman." *Id*. The text message was therefore inadmissible because "[i]t doesn't go to his state of mind for the limited purpose that the government is offering it." *Id*.

Subsequently during closing arguments, the prosecution returned to the two text messages that were admitted. Transcript of Closing Argument at 20, ECF No. 532. While discussing the requirement that the State prove intent, the prosecutor alluded to those text messages

by stating, "And this is the same time period, if you recall, that the victim is staying away from St. Louis, because he is scared. He is scared that Tim has people after him, *and he was right*." *Id.* (emphasis added). Aside from the text messages, there was no independent evidence that the defendant was after Andre or had people looking for him.

In addressing the defendant's appeal regarding these text messages, the Eighth Circuit focused primarily on their probative value. *Id*. at 811. Then, without any extended explanation, the Eighth Circuit quickly concluded that "in any case, Norman has not shown that a danger of *unfair* prejudice substantially outweighed this probative value. *See* Fed. R. Evid. 403." *Id.*

II. This Court should grant *certiorari* to reaffirm its holding in *Shepard*.

As discussed below, *amici* believe the Court needs to step in to clarify and harmonize the branching bodies of law in lower courts that apply—or do not apply, despite its application —*Shepard*'s clear exclusionary rule. Given *amici*'s particular expertise, they trace the doctrinal history of *Shepard*'s rule below, to show that an unsustainable split has emerged, that can only be resolved by this Court's intervention. Fair trials require fair rules: Balls should always be balls; strikes should always be strikes. But the split on *Shepard* allows prosecutions to throw pitches that are balls under this Court's decisions, but strikes under an emerging split.

A. In *Shepard v. United States*, this Court established that evidence with an accusatory component must be excluded when the risk of confusion is so great as to upset the balance of advantage.

In *Shepard v. United States*, 290 U.S. 96 (1933), this Court set forth a key evidentiary rule with specific applicability to the case at hand. In *Shepard*, a defendant appealed after being convicted of the murder of his wife. *Id.* at 97. At trial, the prosecution had introduced a conversation between the wife and her nurse while the wife was ill in bed. *Id.* The wife asked the nurse to retrieve a bottle of whiskey from a closet in the defendant's room. *Id.* When the nurse produced the bottle, the wife stated that this was the liquor she had drunk just before collapsing. *Id.* The wife then "asked whether enough was left to make a test for the presence of poison, insisting that the smell and taste were strange." *Id.* Finally, she stated, "'Dr. Shepard has poisoned me.'" *Id.* In denying the defendant's appeal, the United States Court of Appeals for the Tenth Circuit concluded that the wife's statements "were admissible…not as evidence of the truth of what was said, but as betokening a state of mind inconsistent with the presence of suicidal intent." *Id.* at 25.

This Court reversed. *Id.* It held that the defendant had presented evidence that his wife "had exhibited a weariness of life and a readiness to end it," making it proper for the prosecution to present hearsay statements evincing a different state of mind. *Id.* But "[w]hat the government put in evidence…was something very different." *Id.* Specifically, the prosecution presented the wife's "declarations as proof of an act committed by some

one else, as evidence that she was dying of poison given by her husband." *Id.* That is, it made non-hearsay, for-truth use of the statements. Critically, this Court added that "[t]his fact, if fact it was, the government was free to prove, but not by hearsay declarations." *Id.*

This Court also clearly explained why: Jurors would not be able to compartmentalize the statements into permissible and impermissible purposes *even* if they were given a limiting instruction. *Id.* Specifically, the *Shepard* Court noted that "[i]t will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else." *Id.* Instead, this Court concluded that "[d]iscrimination so subtle is a feat beyond the compass of ordinary minds." *Id.* Based upon what the wife said, "[t]he reverberating clang of those accusatory words would drown all weaker sounds." *Id.* All of this led this Court to conclude that "[w]hen the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *Id.*

B. From 1940-1999, courts regularly cited this *Shepard* standard to exclude evidence with an accusatory component in a variety of contexts.

In the wake of *Shepard*, courts across the country routinely cited this *Shepard* standard in a variety of contexts from 1940-1999. *Amici* have compiled a representative list of such opinions—from Circuit and State high courts—that reveal courts applying the *Shepard* standard to statements offered to prove the victim's state of mind, like in *Shepard* and

the present case, as well as evidence offered for many other purposes:[2]

> *State v. Prosper*, 926 P.2d 231, 236 (Kan. 1996) (holding that evidence of a criminal defendant's prior drug sales "was not admissible under K.S.A. 60–455");
>
> *State v. Hardy*, 451 S.E.2d 600, 614 (N.C. 1994) (holding that evidence of the victim's diary entries was improperly admitted to prove her state of mind);
>
> *Edwards v. State*, 502 So.2d 846, 850-52 (Ala. Crim. App. 1986) (holding that evidence of a criminal defendant's post-arrest silence was improperly admitted);
>
> *People v. Coleman*, 695 P.2d 189, 197-99 (Cal. 1985) (finding that statements by the victim accusing the defendant of prior acts of violence and expressing fear of future violence were improperly admitted);
>
> *People v. Madison*, 638 P.2d 18, 29-31 (Colo. 1981) (holding that statements by the victim expressing fear of the defendant were improperly admitted);

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2. The list is intended to be representative, not exhaustive. The point is that until the split described below emerged, *Shepard* would have resolved this case, in Petitioner's favor, uncontroversially.

People v. Conyers, 420 N.E.2d 933, 936 (N.Y. 1981) (finding that evidence of a criminal defendant's post-arrest silence was improperly admitted);

Clark v. United States, 412 A.2d 21, 25-27 & n.5 (D.C. 1980) (holding that statements by the victim expressing fear of the defendant were improperly admitted);

Wadley v. State, 553 P.2d 520, 524-25 (Okla. Crim. App. 1976) (finding that evidence of a prior assault by the defendant was improperly admitted to prove the state of mind of the victim);

United States v. Brown, 490 F.2d 758, 766-67 (D.C. Cir. 1973) (holding statements by the victim that he was afraid the defendant might kill him were improperly admitted);

Smith v. Sina, 477 F.2d 1140, 1146 (3rd Cir. 1973) (finding that evidence that other police officers were guilty of brutal police conduct shortly before the appellant's arrest was properly excluded);

State v. Davis, 515 P.2d 802, 806 (Kan. 1973) (holding that evidence of two prior heroin sales by the defendant was improperly admitted in prosecution for selling heroin);

Taylor v. Baltimore & O. R. Co., 344 F.2d 281, 284 (2nd Cir. 1965) (holding that evidence of

a prior inconsistent statement was properly excluded in a Federal Employers Liability Act case);

Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 912 (2nd Cir. 1962) (finding that evidence of the defendant's general proof of damage in antitrust action was improperly admitted);

People v. Hamilton, 362 P.2d 473, 480-81 (Cal. 1961) (finding that statements by the victim expressing fear of the defendant and his past violent conduct were improperly admitted);

Southwestern Publishing Co. v. Horsey, 230 F.2d 319, 324 (9th Cir. 1956) (holding that evidence of loss of esteem was improperly admitted in a libel action);

State v. Goebel, 218 P.2d 300, 306-07 (Wash. 1950) (holding that character evidence regarding unrelated crimes was improperly admitted against a criminal defendant);

Perper v. Edell, 44 So.2d 78, 80 (Fla. 1949) (holding that evidence of the defendant's mental incapacity was improperly admitted in a dispute over a real estate commission);

Perkins v. Nashua Mfg. Co., 16 A.2d 700, 703 (N.H. 1940) (holding that expert testimony on causation was improperly admitted in a personal injury action).

As shown by this representative list of opinions, most of these cases involved evidence with one of three types of accusatory components. First, as in *Shepard*, many of these cases involved statements by victims expressing fear of defendants while also accusing those defendants of bad acts that prompted such fear. *See, e.g., Hardy*, 451 S.E.2d at 614. Second, some of these cases involved character evidence accusing the defendant of committing bad acts other than those charged in the indictment. *See, e.g., Madison*, 638 P.2d at 29-31. Third, some of these cases involved accusatory evidence of post-arrest silence offered to raise an inference of guilt with the jury. *See, e.g., Edward*, 502 So.2d at 850-52. And they applied *Shepard*, without hesitation, to exclude that evidence and prevent its "reverberating clang" from "drown[ing] all weaker sounds." 290 U.S. at 97.

C. The *Shepard* standard has particular relevance in connection with accusatory statements offered under the state of mind exception.

Because the *Shepard* standard was announced in a case involving a hearsay statement offered to prove a victim's state of mind, it is understandable that courts during this period of time found it was particularly pertinent to this type of case. For example, in *People v. Talley*, 245 P.2d 633, 644-46 (Cal. Ct. App. 1952), an appellate court in California reversed a murder conviction because the trial court allowed the prosecution to admit the victim's statement expressing fear of the defendant. In reversing the conviction, the court cited the *Shepard* standard, finding that "[h]ere was a voice from the grave charging appellant with past acts of brutality and cruelty, and charging that he had made threats against his wife's

life." *Id.* at 645. The court then asked, "How could the jury possibly disentangle the charges in that letter and treat the letter only as evidence of state of mind, and forget about the substance of the charges?" *Id.*

Later in *People v. Coleman*, 695 P.2d 189, 205 (Cal. 1985), the Supreme Court of California reversed a murder conviction in similar circumstances. The court cited both the *Shepard* standard and *Talley* to hold "statements from the grave" are "inherently prejudicial…even if possibly admissible for a limited purpose." *Id.* at 198.

Similarly, in *United States v. Brown*, 490 F.2d 758, 766-67 (D.C. Cir. 1973), the United States Court of Appeals for the District of Columbia Circuit reversed a murder conviction in which the district court allowed the prosecution to admit the victim's statement expressing fear of the defendant. In reversing, the court cited the "oft repeated words of Justice Cardozo" in the *Shepard* standard to hold that "the limiting instruction" given regarding the statements "undoubtedly would have been entirely futile." *Id.* at 766.

Other courts similarly cited the *Shepard* standard to hold that a limiting instruction would be insufficient to overcome the risk of confusion and upsetting of the balance of advantage that comes with admitting a victim's statements that they feared the defendant. For example, in *People v. Madison*, 638 P.2d 18, 30-31 (Colo. 1981), the Supreme Court of Colorado reversed a murder conviction because the trial court allowed the prosecution to admit the victim's statement that she feared the defendant. In doing so, the court held that the limiting instruction given in connection with the statement likely lacked efficacy

because "[a]n analysis of the victim's assertions discloses that any reference therein to the victim's state of fear is significantly overshadowed by references to other matters not encompassed by the state of mind exception." *Id.* at 30. And, in *United States v. Layton*, 549 F.Supp. 903, 909-10 (N.D. Cal. 1982), the court reached a similar conclusion, noting that the *Shepard* Court "strongly suggested that not even a limiting instruction would have rendered the statement admissible as evidence of Mrs. Shepards state of mind."

Perhaps the best example of a court noting how the *Shepard* standard differs from typical balancing conducted under Federal Rule of Evidence 403 can be found in the opinion of the United States Army Court of Military Review in *United States v. Salisbury*, 50 C.M.R. 175 (A.C.M.R. 1975). In *Salisbury*, the defendant appealed his conviction for murder, claiming that statements that the victim feared him were improperly admitted. *Id.* at 177-78. In agreeing with him, the court cited to the Manual for Courts-Martial, which contained a section stating that "evidence of a statement by a person other than the accused may not be admitted when the statement would amount to an accusation that the accused committed the act charged even though the statement incidentally disclosed a relevant motive, intent, or state of mind." *Id.* at 179-80.

According to the court, the Legal and Legislative Basis for the Manual for Courts-Martial stated that this language was "lifted verbatim from *Shepard*" and specifically the *Shepard* standard. *Id.* at 180. The court then explained its understanding of the *Shepard* standard. *Id.* According to the court, "[i]n essence, Justice Cardozo

would admit proper declarations of state of mind but not those in the accusatory form." *Id.* This is because "[t]he accusation from the grave meets the necessity test but fails to overcome the objection to the absence of an oath, the awareness of importance or possible perjurious nature of a false statement, lack of confrontation and cross-examination, or any indication of spontaniety or inclusion in the *res gestae*." *Id.* The court concluded by noting that the statement "represent[ed] nothing more than the facade of rhetoric shielding the true reason the evidence was offered." *Id.*

D. This Court reaffirmed the *Shepard* standard in *United States v. Hale* and used it to create the *Bruton* doctrine.

As noted, between 1940-1999, courts used the *Shepard* standard to find that the accusatory use of post-arrest silence was inadmissible. *See, e.g., Edwards v. State*, 502 So.2d 846, 850-52 (Ala. Crim. App. 1986); *People v. Conyers*, 420 N.E.2d 933, 936 (N.Y. 1981). These opinions came on the heels of this Court reaffirming the *Shepard* standard in *United States v. Hale*, 422 U.S. 171 (1975), and applying it in this context. In *Hale*, the prosecutor asked the defendant during cross-examination why he had not told the police about his alibi when questioned after his arrest. *Id.* at 172. The trial court then advised the jurors to disregard this exchange but did not declare a mistrial. *Id.*

In finding that the defendant was entitled to a new trial, this Court noted the significant danger that "the jury is likely to assign much more weight to the defendant's previous silence than is warranted." *Id.* at 180. This Court then added that, even if the defendant had been allowed

to explain his silence, this explanation would be "unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest." *Id.* This was then followed by a citation to the *Shepard* standard and the conclusion that any reference to the defendant's silence during post-arrest interrogation "carried with it an intolerably prejudicial impact." *Id.*

This Court also cited the *Shepard* standard in creating the *Bruton* doctrine. In *Bruton v. United States*, 391 U.S. 123, 136-37 (1968), this Court held that the admission of a non-testifying defendant's confession at a joint jury trial violates the Confrontation Clause if it implicates other co-defendants. In finding that the jury would not adhere to a limiting instruction in such circumstances, the *Bruton* Court cited to several opinions by Justice Hand as well as the *Shepard* standard. *Id.* at 132 & n.8. According to the Court, "[d]espite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." *Id.* at 137. Instead, "[t]he effect is the same as if there had been no instruction at all." *Id.*

In the wake of *Bruton*, courts cited it in connection with the *Shepard* standard to find that accusatory statements offered under the state of mind exception were improperly admitted. For example, in *State v. Parr*, 606 P.2d 263, 265-67 (Wash. 1980), the Supreme Court of Washington cited *Shepard* and *Bruton* together to find that a victim's accusatory statement was improperly admitted and not cured by a limiting instruction.

In *United States v. Brown*, 490 F.2d 758, 777-78 (D.C. Cir. 1973), the United States Court of Appeals for the District of Columbia Circuit reached the same conclusion. It observed that "[w]hile to a certain extent this is a policy question and a matter of opinion, the United States Supreme Court in such cases as *Shepard* and *Bruton* has clearly indicated it believes that there are sharp limits to the capabilities of the jury to comply with special instructions as to highly incriminating evidence of this type." *Id.* As a result, "in extreme cases such evidence must be excluded in spite of the limiting instruction." *Id.* at 778.

E. Courts have only cited the *Shepard* standard three times since 1999, creating a split.

Despite this Court establishing the *Shepard* standard in 1933 and re-affirming it in 1975, courts have rarely cited it since 1999. In fact, the standard has only been cited three times over the last twenty-five years, with one citation being in a dissenting opinion. In *United States v. Stout*, 509 F.3d 796, 801 (6th Cir. 2007), the United States Court of Appeals for the Sixth Circuit cited the *Shepard* standard to affirm the district court's grant of the defendant's motion *in limine* to exclude character evidence. Five years later, the *Shepard* standard was cited by a dissenting judge of the Colorado Court of Appeals in another character evidence case. *See People v. Casias*, 312 P.3d 208, 225 (Colo. App. 2012) (Fox, J. dissenting).

Finally, nine years later, in 2021, the Supreme Court of Pennsylvania cited the *Shepard* standard in *Commonwealth v. Fitzpatrick*, 255 A.3d 452 (Pa. 2021). *Fitzpatrick* is similar to several cases decided between

1940-1999, with the court reversing a murder conviction based upon the trial court improperly allowing the prosecution to admit the victim's statement that he feared the defendant. *See id.* at 482-85. According to the court, because the statement accused the defendant of other bad acts, it had to be excluded because even a limiting instruction could not cure the possible prejudice. *See id.*

While some courts have reached similar conclusions, *see, e.g., State v. Gomez*, 460 P.3d 926, 940-41 (Mont. 2020), many other courts now routinely ignore the *Shepard* standard and allow for the admission of accusatory statements offered to prove a victim's state of mind. A representative list of such opinions reveals this trend. *See, e.g., United States v. Brown*, 122 F.4th 290, 295-96 (8th Cir. 2024) (finding that the victim's statement that he feared "people [were] trying to kill him" was properly admitted); *Neal v. State*, 682 S.W.3d 672, 680 (Ark. 2024) (finding that the victim's statement, "Mimi, come get me. This man is trying to kill me" was admissible); *Martin v. Commonwealth*, 686 S.W.3d 77, 88-92 (Ky. 2023) (finding that the victim's statement that the defendant was going to kill him was properly admitted); *State v. Thompson*, 982 N.W.2d 116, 119 (Iowa 2022) (finding that the victim's statement that she was afraid of the defendant because he was abusive was admissible); *State v. Vickerman*, 981 N.W.2d 881, 886-87 (N.D. 2022) (finding that the victim's statement that she was concerned about what the defendant might do to her because their relationship had deteriorated was admissible); *People v. Propp*, 987 N.W.2d 888, 897 (Mich. App. 2022) (finding that the victim's statement that she was afraid of the defendant because of his pattern of stalking, threats, and domestic violence, was admissible).

Furthermore, other courts have found that (1) jurors are likely to respect limiting instructions telling them to ignore the accusatory portion of a statement offered under the state of mind exception, *see, e.g., Forrest v. State*, 721 A.2d 1271, 1276-77 (Del. 1999); and (2) the erroneous admission of accusatory statements offered under the state of mind exception was harmless error due to the issuance of limiting instructions, *see, e.g., Capano v. State*, 781 A.2d 556, 622 (Del. 2021) ("Finally, we note that the limiting instructions issued by the trial court reduced the risk that any of this testimony would be a basis for inferring Capano's guilt.").

This treatment is particularly stark when comparing more recent opinions to the same Court's application of *Shepard*. For example, as noted, in *State v. Hardy*, 451 S.E.2d 600, 614 (N.C. 1994), the Supreme Court of North Carolina cited the *Shepard* standard to conclude that the victim's diary entries accusing the defendant of crimes were inadmissible because of "the danger that the jury would misuse the diary entry."

In more recent cases, however, North Carolina courts have not cited the *Shepard* standard and having moved away from addressing the danger of confusion created when the jury hears hearsay statements with an accusatory component. For instance, in *State v. Thomas*, 867 S.E.2d 377, 397 (N.C. App. 2021), the Court of Appeals of North Carolina found no error with the admission of a witness's statement that "Kenneth [the victim] told me that when he [Defendant] seen them [the victim and Warren] together that he told them if he see them again that he was going to kill them." In doing so, the court distinguished *Hardy* on the ground that the victim's diary entries were

not connected to any emotion while the victim's statement in *Thomas* was tied to the victim's fear of the defendant. *Id*. At no point in the *Thomas* opinion did the court address the danger that the jury might misuse the victim's statement as substantive evidence of the defendant's guilt.

F. This Court should grant certiorari to reaffirm the *Shepard* standard.

The recent trend of opinions in this context has created a sharp split among courts. First, while courts categorically continue to apply the *Bruton* doctrine which was partially derived from the *Shepard* standard, most courts no longer cite *Shepard* when confronted with hearsay statements with an accusatory component. Second, though some courts still exclude accusatory hearsay statements, most courts now freely admit accusatory hearsay statements, with some citing specifically to limiting instructions as playing an important role in assessing admissibility or prejudice. And, notably, with rare exceptions, courts on both sides of this divide routinely ignore the *Shepard* standard, making their decisions without addressing Justice Cardozo's words about evidence needing to be excluded when it contains a risk of confusion so great as to upset the balance of advantage.

This case is an ideal vehicle to resolve this split and reaffirm the *Shepard* standard.

First, there was no limiting instruction in this case, so this Court can focus solely on the risk of confusion created by the text messages, without having to assess any specific limiting instruction that was given.

Second, the risk of confusion was clear in this case. The text messages directly accused the defendant of bad acts, the court even excluded a similar text message because it accused the defendant of bad acts, and the prosecutor himself not only confused the permissible purpose for which the text messages were offered during closing argument, but hammered on it, implying to the jury that the hearsay statements specifically proved the defendant's bad acts, quoting the hearsay, then declaring "he was right." *Id.* Transcript of Closing Argument at 20, ECF No. 532. How could "[t]he reverberating clang of those accusatory words" do anything but "drown all weaker sounds"? *Shepard*, 290 U.S. at 97.

Third, unlike in *Shepard* and some similar cases, this was not a case in which the defense claimed that the victim was suicidal, meaning that the defense had not injected the issue of the victim's state of mind into the trial.

If the extensive body of cases applying *Shepard*—which this Court has never overturned—is still good law, then the lower court was wrong, and this Court should step in to make clear *Shepard* was never overturned. However, if the modern opinions silently departing from *Shepard* are right, then this Court should step in as well, since only it can overturn *Shepard*.

CONCLUSION

In *Shepard v. United States*, 290 U.S. 96, 104 (1933), this Court laid out a clear rule regarding the exclusion of evidence with an accusatory component that could confuse jurors. For decades, courts across the country, including this Court, applied this clear precedent to exclude evidence that could confuse jurors and unfairly prejudice parties. Since the turn of the century, however, a clear split has developed, with many courts now allowing for the admission of accusatory evidence without conducting the inquiry required by *Shepard*. This Court should thus grant certiorari in this case to reaffirm the *Shepard* standard.

Respectfully submitted,

J. Remy Green
Counsel of Record
Cohen&Green P.L.L.C.
1639 Centre Street,
Suite 216
Ridgewood, NY 11385
(929) 888-9480
remy@femmelaw.com

Colin Miller
Professor of Law &
Thomas H. Pope
Professorship in
Trial Advocacy
University of
South Carolina
Joseph F. Rice
School of Law
1525 Senate Street
Columbia, SC 29208

Counsel for Amici Curiae

APPENDIX

TABLE OF APPENDICES

APPENDIX — LIST OF *AMICI*

Dr. Jason Chin
Senior Lecturer
ANU Law School
5 Fellows Road
Acton ACT 2601, Australia

Donna Kay Coker
Professor of Law
University of Miami School of Law
1311 Miller Drive
Coral Gables, FL 33146

Professor Jules Epstein
Edward D. Ohlbaum Endowed Term Professor
Director of Advocacy Programs
Temple Beasley School of Law
1719 North Broad Street
Philadelphia, PA 19122

Professor Victor J. Gold
William H. Hannon Professor of Law
Dean Emeritus
Loyola Law School, Los Angeles
919 Albany Street
Los Angeles, CA 90015

Michael J. Hutter
Professor of Law
Albany Law School
80 New Scotland Avenue
Albany, NY 12208

Appendix

Professor Kenneth S. Klein
Louis and Hermione Brown Professor of Law
California Western School of Law
225 Cedar Street
San Diego, CA 92101

Jon J. Lee
Associate Professor of Law
Associate Dean for Faculty Development and Research
University of Oklahoma College of Law
300 Timberdell Road
Norman, OK 73019

Laurie L. Levenson
Professor of Law
Loyola Law School, Los Angeles
919 Albany Street
Los Angeles, CA 90015

Cynara Hermes McQuillan
Associate Professor of Law
Touro University Jacob D. Fuchsberg Law Center
225 Eastview Drive
Central Islip, NY 11722

Ann M. Murphy
Professor
Gonzaga University School of Law
721 North Cincinnati Street
P.O Box 3528
Spokane, WA 99220

Appendix

Christopher Ogolla
Associate Professor of Law
School of Law
Barry University
6441 East Colonial Drive
Orlando, FL 32807

Professor Paul F. Rothstein
Carmack-Waterhouse Professor of Law
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001

Professor Peter W. Tague
Professor Emeritus
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001

Martin Tankleff
Adjunct Professor
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001