No. _____

In the Supreme Court of the United States

DEANDRE WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

JAMESA J. DRAKE
Counsel of Record
DRAKE LAW LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105
jdrake@drakelawllc.com

QUESTION PRESENTED

Are the divided federal appellate courts applying too stringent a standard when evaluating the admissibility of evidence under Federal Rule of Evidence 804 (b)(3), such that it undermines criminal defendants' constitutional right to present a complete defense?

RELATED PROCEEDINGS

United States v. Deandre Wilson, 1:19-cr-155-EAW (W.D.N.Y.)

United States v. Deandre Wilson, 23-6307-cr, 2025 U.S. App. LEXIS 14890, 2025 WL 1692915 (2d Cir. June 17, 2025).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

PETITION FOR A WRIT OF CERTIORARI

Mr. Wilson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The summary order (Pet. App. 1a) is unpublished, but can be found at *United States v. Wilson*, 2025 U.S. App. LEXIS 14890, 2025 WL 1692915 (2d Cir. June 17, 2025).

JUDGMENT

The judgment of the Court of Appeals was entered on June 17, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT LAW

Rule 804. Hearsay Exceptions; Declarant Unavailable

(b) **The Exceptions**. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(3) **Statement Against Interest**. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary

or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness after considering the totality of circumstances under which it was made and evidence that supports or undermines it.

INTRODUCTION

Mr. Wilson asks this Court to clarify the meaning of the hearsay exception for statements against penal interest. Fed. R. Evid. 804(b)(3). Guidance is needed because the federal appellate courts routinely, albeit utilizing different tests and standards, apply Rule 804(b)(3) in such a stringent and mechanistic way as to undermine a defendant's constitutional right to present a complete defense. The better practice, and one more aligned with the Rule's purpose, is to admit statements plainly against penal interest which expose the declarant to criminal or civil liability and allow the jurors to decide for themselves what weight to give the evidence.

STATEMENT OF THE CASE

I. Procedural history

Following a trial lasting six weeks with over 50 testifying witnesses, a jury found Wilson guilty of multiple charges relating to the murders of three people and drug trafficking.[1] The district court principally sentenced Wilson to an aggregate total of three life sentences plus 30 years.

---

[1] Count 1: narcotics conspiracy, 21 U.S.C. § 846, involving five kilograms or more of cocaine, one kilogram or more of heroin, and 100 kilograms or more of marijuana; Count 3: Hobbs Act robbery, 18 U.S.C. §§ 1951(a) and (2); Count 4: Murder while engaged in a narcotics conspiracy, 21 U.S.C §§ 848(e)(1)(A), and 18 U.S.C. § 2; Count 5: Discharge of a firearm in furtherance of a crime of violence and drug trafficking crimes, 18 U.S.C. § 924(c)(1)(A)(iii) and 2; Counts 6 and 7: Discharge of a firearm causing death in furtherance of a crime of violence and drug trafficking crimes, 18 U.S.C. § 924(c)(1)(A)(iii), 924(j)(1), and 2; Count 8: Conspiracy to obstruct justice, 18 U.S.C. 1512(k); Counts 9 and 10: Obstruction of justice, 18 U.S.C. § 1512(c)(1) and 2; Count 11: Conspiracy to use fire to commit a felony, 18 U.S.C. § 844(m); Counts 12 and 13: Use of fire to commit a felony, 18 U.S.C. § 844(h) and 2; Count 14: Conspiracy to damage and destroy a vehicle used in interstate commerce by fire, 18 U.S.C. § 844(n); Count 15: Damaging and destroying a vehicle used in interstate commerce by fire, 18 U.S.C. § 844(i) and 2; Count 17: Possession with intent to distribute marijuana, 21 U.S.C. §§ 841(a)(1), (b)(1)(D), and 18 U.S.C. § 2. The jury acquitted Wilson of Count 2 (Hobbs Act conspiracy) and Count 16 (maintaining a drug-involved premises), and the district court granted the government's motion to dismiss Count 5 (discharge of a firearm in furtherance of a crime of violence and drug trafficking crimes). (Tr. 3861, 3864, Dkt. 634).

II. Historical facts

Jariel and his brother James were well-known drug dealers in the Buffalo, New York area, and over many years, they sold a staggering amount of marijuana and cocaine. (*See e.g.* Tr. 1600-1608; 2317-2350). During much of this time, Wilson was incarcerated. (Tr. 2379). When Wilson was released from prison in February 2019, the men agreed that Wilson would work with them to sell drugs. (*See e.g.* Tr. 2380, 2391, 2406-8, 2451).

Two of the victims in this case, Dhamyl and Miguel, were Jariel's cocaine suppliers. (Tr. 2421-23). On September 15, 2019, Dhamyl and Miguel came to Buffalo to sell drugs to Jariel; Miguel's wife Nicole, and their young son, came, too. (Tr. 2454). Jariel arranged for Wilson to participate in the deal. (*See e.g.* Tr. 2454-2457).

While Miguel, Nicole, and the boy waited in their minivan, Dhamyl went into Jariel's house and the two exchanged drugs and money. (*See e.g.* Tr. 2488-97). Dhamyl quickly discovered that the stack Wilson contributed was short on cash. (Tr. 2497). In response, Wilson hit Dhamyl in the head and he struck her two more times when she fell to

the floor. (Tr. 2491-92). Wilson then went outside and fired gunshots into the van, killing Miguel and Nicole. (Tr. 2495-96).

James and Jariel spent the remainder of the day dismembering Dhamyl's body and burning it in a fire pit. (Tr. 2577-2605). Wilson moved the minivan, with the boy inside, to a remote location. (Tr. 1721, 1751, 2498-99). He left it there and went to a music concert at an amusement park. (Tr. 1732, 2607-8). Early the next morning, Wilson returned to Jariel's house and observed the firepit with Dhamyl's remains. (Tr. 1764, 2614).

At about two o'clock in the morning, Wilson and Jariel retrieved the minivan with Miguel's and Nicole's bodies inside, moved it to a new location, removed the boy from the van, doused the van with gasolene, and set it alight. (Tr. 2630-2654). The men stripped the boy of his clothes, washed him with dishwashing liquid (to remove DNA evidence), and left the boy on a stranger's front porch. (Tr. 2657). The homeowner discovered him many hours later. (Tr. 147, 2659). Meanwhile, Wilson returned to the firepit and burned some of the clothing he was wearing, and then eventually left for good to go to work. (Tr. 1791-96).

III. Additional facts relevant to the question presented

Richard Brady entered into a proffer agreement with the government and testified before the grand jury in this case. The proffer agreement afforded Brady limited immunity regarding the information disclosed, but only if Brady testified truthfully. The government ultimately determined that Brady's grand jury testimony was not credible, and so the agreement gave him no protection from prosecution at all. When he was called to testify by the defense, Wilson invoked his privilege against self-incrimination.

This prompted Wilson to seek the admission of portions of Brady's testimony to the grand jury. Wilson's primary defense was that he was innocent of the murders; that James and Jariel were the true culprits; and that the brothers incriminated Wilson to save themselves. Brady's grand jury testimony cast doubt on James's testimony that he was a bystander to the murders, and it undermined James's credibility because it suggested he took valuables belonging to the victims and wanted to profit from their deaths.

Among other things, Brady told the grand jurors that he would sometimes store drugs or weapons for James at a house that Brady

rented. Brady testified that in September 2019, James gave him, *inter alia*, a kilogram of cocaine, a ring, a necklace with either an "M" or "N" pendant, and two debit cards with female names, one of which had the name "Nicole" on it. Brady said that the kilogram of cocaine was wrapped in a newspaper that appeared to be in a language other than English, and that it might have been in Spanish, but he could not be sure.

Brady's grand jury testimony was at least partially corroborated by other aspects of the government's case. For example, law enforcement agents who searched the hotel room that the decedents rented discovered two kilograms of cocaine wrapped in "Spanish newspaper, the writing, the language was all in Spanish." (Tr. 529, 594). And, Nicole had a penchant for wearing an "N" pendant. The medical examiner who autopsied Nicole discovered "a yellow metal chain necklace around [Nicole's] neck with a pendant in the shape of the letter N and [it] had numerous tiny clear stones." (Tr. 911). The boy's name began with the letter "N."

IV. The district court's decision

The district court refused to admit Brady's grand jury testimony under the statement-against-interest exception to the hearsay rule. Fed.

R. Evid. 804(b)(3). Pet. App. 25a. The court reasoned that Brady's statements about possessing a kilogram of cocaine were not against his penal interest because "[t]he circumstances taken as a whole strongly indicate that Brady's statements implicating [James] as his drug supplier were not self-inculpatory, but were instead an attempt by Brady to gain a benefit for himself by providing the government with information regarding a crime of far more interest than Brady's own offenses. In other words, a reasonable person in Brady's position would have had ample motivation to make the statements at issue even if they were not true." *Id.* at 22a.

The district court added: "As to Brady's statements that [James] gave him jewelry and two debit cards…there is nothing to suggest that Brady knew at the time he allegedly received these items that they were stolen property. There is nothing illegal, without more, about holding two debit cards and some jewelry for an associate, and so the Court cannot conclude that these statements were self-inculpatory." *Id.*

The court found corroboration lacking for several reasons: (1) Brady testified pursuant to a proffer agreement that prevented the direct use of any of his statements against him in a subsequent criminal prosecution;

(2) portions of Brady's statement that the defense did not seek to admit were inconsistent with the evidence of record; and (3) there were "many aspects" of Brady's statement that were wholly uncorroborated with the evidence of record. *Id.* a 22a-24a. The court explained:

> Defense counsel pointed to the fact that Brady said the kilogram of cocaine he received from [James] was wrapped in newspaper that was in a different language (possibly Spanish). Defense counsel further pointed out that there were two kilograms of cocaine obtained from the hotel where the victims were staying that were wrapped in Spanish-language newspaper and that [Jariel] testified at trial that he never bought fewer than three kilograms of cocaine at a time from the victims. Thus, the argument goes, the kilogram already given to Brady by [James] is the "third" kilogram that was supplied by the victims. However, there is no evidence in the record that the cocaine the victims brought [to the drug deal] on the night of their murders was wrapped in newspaper, nor that this was a unique or distinctive manner of packing drugs.
>
> * * * * *
>
> There was no evidence that any debit cards were taken from the victims. The only evidence of record regarding a necklace was that a necklace with an "N" pendant had been recovered with Nicole's body – and notably, a picture of Nicole that had been widely circulated in the media showed her

> wearing that necklace. There was also no evidence of a missing ring. For all these reasons, the Court concluded that Brady's statements regarding his alleged receipt from [James] in September 2019 of a cooler containing cocaine, debit cards, and jewelry, were neither against Brady's penal interest nor accompanied by the necessary corroborating circumstances.

Id. at 24a-25a.

V. The Second Circuit's decision

The Second Circuit affirmed the district court's ruling. It agreed with the district court that "substantial portions" of Brady's grand jury testimony were either false, not corroborated, or otherwise unreliable. *Id.* at 4a. None of the evidence that the Second Circuit cited as examples, however, was evidence that Wilson sought to admit. *Id.* (discussing Brady's misinformation about a rape and text messages). The remainder of the court's reasoning is set out in full:

> The District Court also explained that Brady, who sought credit for cooperating with the Government, made the statements in an attempt to gain a benefit for himself by providing the government with information regarding a crime of far more interest than his own offenses. We see no error in the District Court's decision to exclude Brady's statements. Nor are we persuaded that the exclusion of Brady's testimony deprived [Wilson] of a meaningful opportunity to present a

> complete defense. The right to mount a defense may be limited by evidentiary and procedural rules designed to assure both fairness and reliability so long as the application of those rules is not arbitrary or disproportionate to the purposes they are designed to serve. The District Court's exclusion of Brady's statements satisfied this requirement.

Id. at 4a-5a. (Internal citations and quotations omitted).

Reasons for Granting the Writ

Judges are "gatekeepers" of evidence, imbued with the authority to prevent the jury from learning certain information.[2] This authority is circumscribed by the rules of evidence and by constitutional principles, and when the two are in tension, constitutional principles win out. Utilizing disparate tests and measures, judges routinely abuse their gatekeeper role by applying the rule in a way that is at odds with its intended purpose, and by applying the rule in a way that undermines the right of criminal defendants to present a complete defense. This case illustrates both types of transgressions making it a good vehicle for this Court's review. Intercession now is necessary to properly reorient the lower courts.

I. The legal framework

Rule 804(b)(3) was intended as a repudiation of the common law rule that prohibited the admission of statements against penal interest. Today, however, statements offered by the defense which exculpate the accused face an uphill battle to admissibility more in line with the

---

[2] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

common law tradition than with Congress's intent to jettison that tradition.

Hearsay evidence is generally inadmissible because it is not subject to in-court procedures designed to guarantee reliability.[3] However, hearsay statements that display indicia of reliability are an exception.[4] Statements against interest are considered one such example.

A. Common law

Common law courts, both in England and America, recognized an exception for declarations that directly affected the declarant's pecuniary or propriety interest, but not statements against penal interest.[5] Citing

---

[3] Fed R. Evid. 802 (hearsay evidence is not admissible unless the Rules provide otherwise); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (observing that "hearsay rules and the Confrontation Clause are generally designed to protect similar values, and stem from the same roots") (cleaned up).

[4] Fed. R. Evid. 803, 804; *see also see also* David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 Sup. Ct. Rev. 1, 16 (2009) (The various risks attributed to hearsay evidence include: "a *narration* risk (that the declarant did not mean what he or she seemed to say); a *sincerity* risk (the risk that the declarant intentionally fabricated); a *memory* risk (the risk that the declarant misrecalled what happened); and a *perception* risk (the risk that the declarant misperceived things to begin with)."

[5] Emily F. Duck*, Supreme Court Review: The Williamson Standard for the Exception to the Rule Against Hearsay for Statements Against Penal Interest*, 85 J. Crim. L. & Criminology 1084, 1086 (1995).

to cases in the House of Lords, and to the "great and practically unanimous weight of authority in the state courts against admitting evidence of confessions of third parties made out of court and tending to exonerating the accused," this Court definitively held in *Donnelly v. United States*, that to be admissible, a hearsay statement must be against "an interest of pecuniary character" and a declaration that "would probably subject the declarant to a criminal liability is…not sufficient to constitute it an exception to the rule against hearsay evidence."[6]

Common law courts considered statements against penal interest to be unreliable for three broad reasons. "First, the psychological premise that a reasonable person will not make a statement against penal interest, though perhaps true as a generalization, may well break down when applied to an individual."[7] "Second, most statements inculpating a defendant are only collateral to the portion of the declarant's statement

---

[6] *Donnelly v. United States*, 228 U.S. 243, 273-76 (1913) (citing, *inter alia*, *Berkeley Peerage Case* (1811), 4 Camp. 401; Sussex Peerage Case (1844), 11 Cl. & Fin. 85, 103, 109; 8 Eng. Reprint, 1034, 1042).

[7] Andrew R. Keller, Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 Colum. L. Rev. 159, 163 (1983).

that is against his own penal interest."[8] This Court remedied that problem in *Williamson v. United States*, when it held that non-self-inculpatory statements are not admissible even if they are made within a broader narrative that is generally self-inculpatory; only statements that are "individually self-inculpatory" are admissible.[9] And, "[t]hird, the declarant often has motives to falsify. For example, a defendant who is in custody while making his statement may very well desire to curry favor with the authorities by implicating another, whether or not leniency has been expressly promised."[10]

Nevertheless, over time, exceptions to the hearsay rule began to develop in the common law when statements displayed sufficient indicia of reliability.[11] And this rationale required closer examination of the statement-against-interest exception. The restriction on statements against penal interest, but not statements against pecuniary interests began to chafe. In his dissent in *Donnelly*, Justice Holmes attacked the

---

8 *Id.*

9 *Williamson v. United States*, 512 U.S. 594, 600-01, 606 (1994).

10 Keller, *supra*, at 163-65.

11 *State v. Paredes*, 775 N.W.2d 554, 562-63 (Iowa 2009) (discussing the history of Rule 804(b)(3)).

prohibition on admitting statements against penal interest, noting that "no other statement is so much against interest as a confession of murder."[12] Others observed that the prohibition swept too broadly and excluded evidence that was highly probative.[13] The failure to admit at least some statements against penal interest seemed misguided.[14]

B. The adoption of Rule 804(b)(3)

In 1969, the Advisory Committee to the Standing Committee on Rules of Practice and Procedure suggested a departure from *Donnelly* and proposed the admission of some statements against penal interest.[15] The unmistakable intent, both regarding the Rule's initial draft and the version in effect today, is a rejection of common law limitations and the admission of statements against penal interest.

Without departing from the core principle that against-penal-interest statements are admissible, the corroboration requirement has

---

12 *Donnelly*, 228 U.S. at 278 (Holmes, J., dissenting); *see also Paredes*, 775 N.W.2d at 563 (collecting scholarly critiques that the common law statement-against-interest rule lacked rational consistency).

13 *Paredes*, 775 N.W.2d at 563 (collecting support).

14 *Id.*

15 Duck, *supra*, at 1086-87.

always been hotly contested.[16] For some time, the corroboration requirement applied only to exculpatory evidence offered by the accused.[17] But this "created an apparent asymmetry" between exculpatory and inculpatory evidence, and it gave an advantage to the prosecution.[18] Courts responded by giving "a judicial gloss" to the rule, requiring corroboration for both prosecution and defense hearsay.[19] In 2010, the 804(b)(3) was amended to provide that the corroborating circumstances requirement applies to all declarations against penal interests offered in criminal cases.[20] In 2024, 804(b)(3) was amended to require that in assessing whether a statement is supported by "corroborating circumstances that clearly indicate its trustworthiness," the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or

---

16 *See generally* Edward Imwinkelried, *Rethinking the Limits of the Interpretive Maxim of Constitutional Avoidance: The Case Study of the Corroboration Requirement for Inculpatory Declarations Against Penal Interest (Federal Rule of Evidence 804(b)(3))*, 44 Gonz. L. Rev. 187 (2009) (tracing much of this history).

17 *See Paredes*, 775 N.W.2d at 564.

18 *Id.*

19 Imwinkelried, *supra* at 200-01 (collecting cases).

20 Fed. R. 804(b)(3), advisory committee's note (2010).

undermining it.[21] The advisory committee's note states that "the existence or absence of independent evidence supporting the statement is relevant to, but not necessarily dispositive of, whether a statement that tends to expose the declarant to criminal liability should be admissible under this exception when offered in a criminal case."[22] Rule 804(b)(3)(B) now reads:

> [I]f offered in a criminal case as one that ends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness after considering the totality of circumstances under which it was made an any evidence that supports or undermines it.

Despite the amendment's attempt to level the playing field, as one scholar has observed of 804(d)(3)'s corroboration requirement:

> The prosecution does not have to contend with such a difficult requirement when the prosecution offers prior bad acts under Rule 404(b), co-conspirator statements under Rule 801(d)(2), or various categories of hearsay under Rule 803 and Rule 804.... [A] better approach would be…to eliminate the corroboration requirement altogether. Assuming the statements against interest bear some indicia of reliability – which is the premise that 804(b)(3) accepts uncritically in other contexts – there is no reason to assume self-inculpatory

---

21 Fed. R. 804(b)(3), advisory committee's note (2024).

22 *Id.*

statements exposing the declarant to criminal liability would be any less reliable.[23]

C. Due Process protections must prevail

This Court's due process jurisprudence developed in conjunction with the adoption and codification of Rule 804(d)(3). Over the same time period, and in case where the Court ruled that it was a denial of due process to refuse to allow a defendant to use evidence of a confession made by another on hearsay grounds, this Court recognized that criminal defendants enjoy a constitutional right to present a defense that may permit the admission of information otherwise bared by the rules of evidence.[24] Moreover, this Court admonished that the exclusion of evidence at a criminal trial that had "pervasive assurances of trustworthiness" and was "critical" to the defense offends both the Due Process Clause and the Sixth Amendment's Compulsory Process

---

[23] Tom Lininger, *Prioritizing Proof of Innocence*, 75 Rutgers U. L. Rev. 1281, 1295-96 (2023).

[24] *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1971); *see also* Daniel S. Medwed, *Secrets of Chambers: The Constitutional Right to Present a Defense at Middle Age*, 66 Ariz. L. Rev. 571, 575 (2024) (The right to present a defense "offers a shield when evidentiary rules thwart their attempts to protect themselves at trial.").

Clause.[25] Above all, this Court has made plain that the rules of evidence "may not be applied mechanistically to defeat the ends of justice."[26] "At a minimum,…criminal defendants have the right to put before a jury evidence that might influence the determination of guilt."[27]

D. Rule 804(d)(3) in practice

The various elements of Rule 804(d)(3) are treated differently among the federal courts of appeals. Although the myriad tests and measures are different, the result is the same regarding exculpatory evidence offered by the defendant: application of the rule in an overly mechanistic way that undermines the right to present a complete defense.

1. The statement must be sufficiently inculpatory.

To be admissible in a criminal case, *inter alia*, a statement against interest must be "one that tends to expose the declarant to criminal liability."[28] This requirement implicitly demands that the person knew

---

25 *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

26 *Chambers*, 410 U.S. at 302.

27 *Taylor v. Illiois*, 484 U.S. 404, 408 (1988) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987)).

28 Fed. R. Evid. 804(d)(3)(B).

or at least believed that the statement was against penal interest at the time it was made.[29] This "poses a question of degree."[30]

Despite the plain language of the rule, which speaks of a statement that "*tends to expose* the declarant to criminal liability," the Third and Seventh Circuits have indicated that a statement does not come within the rule unless the statement squarely and unequivocally implicates the declarant in criminal activity or is tantamount to a confession.[31] The First, Fifth and Ninth Circuits suggest a different, less stringent standard, emphasizing that the "so far tended" language in the rule

---

[29] *See* 4 Christopher B. Muller & Laird C. Kirkpatrick, *Federal Evidence* § 496, at 813-14 (2d ed. 1994); Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 17 (1944) ("It is not the fact that the declaration is against interest but the awareness of that fact by the declarant which gives the statement significance."); *see also e.g. United States v. Lozado*, 776 F.3d 1119 (10th Cir. 2015) ("The declarant's actual knowledge that a statement is self-incriminating tends to meet the Rule's rationale for circumstantial assurance of truth.").

[30] *Paredes*, 775 N.W.2d at 565.

[31] *See e.g. United States v. Palumbo*, 639 F.2d 123, 128 (3d Cir. 1981) ("While technically her statement could have been used to support a conspiracy conviction, or as evidence to show her possession [of narcotics] was knowing," the statement was not of the type that "so far tended to subject [her] to criminal liability" to make it admissible); *United States v. Butler*, 71 F.3d 243, 253 (7th Cir. 1995) (An admission to some facts that "possibly could" lead to criminal liability is not enough; to be inculpatory the declarant must admit to criminal behavior.).

admits incriminating statements which amount to less than a full confession.[32] The Tenth Circuit has imposed a different rubric altogether. There, even if a statement unambiguously subjects the declarant to criminal liability, if such charges are only rarely brought, then the statement is not sufficiently against the declarant's interest.[33]

2. The statement must be sufficiently corroborated

As discussed *supra*, although the corroboration requirement is new for the prosecution, it is not new for exculpatory evidence offered by the defense. In this context, courts likewise impose different standards regarding the corroboration requirement. The advisory committee's note

---

[32] *See United States v. Barrett*, 539 F.2d 244, 251 (1st Cir. 1976) ("Although the remarks did not amount ot a clear confession to a crime…we do not understand the hearsay exception to be limited to direct confessions. … Though by no means conclusive, the statements would be important evidence against [the declarant] were he himself on trial…."); *United States v. Hyde*, 574 F.2d 856, 863 (5th Cir. 1978) ("The defendants argue that the statements supposedly made against penal interest here did not *establish* the criminal liability of the speakers, but the penal interest rule is not so circumscribed."); *United States v. Candoli*, 870 F.2d 469, 509 (9th Cir. 1989) ("[T]he against interest requirement is not limited to confessions of criminal responsibility.").

[33] *See United States v. Lozado*, 776 F.3d 1119, 1123, 1132-32 (10th Cir. 2015) (Although the declarant's statements plainly triggered liability under 18 U.S.C. § 922(g)(3), because such charges are a "rarity," the statement was not sufficiently against the declarant's penal interests.).

ambiguously instructs that "[t]he requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication."[34]

The Seventh Circuit has held both that "[t]o base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role," and that a judge "need not be 'completely convinced' of the truth of the statement for the statement to be admissible" and that "corroboration of testimony just means that there is some evidence besides the testimony itself to indicate that the testimony is trustworthy – not that it is necessary true, but (when it is a hearsay statement) that it is sufficiently worthy of belief to have value as evidence despite the impossibility of subjecting the declarant to the fires of cross examination."[35] In contrast, the Second Circuit requires "corroboration of both the *declarant's* trustworthiness as well as the *statement's* trustworthiness."[36]

---

[34] Fed. R. Evid. 804 advisory committee's note (1972).

[35] *United States v. Henderson*, 736 F.3d 1128, 1131 (7th Cir. 2013) (internal citations omitted).

[36] *United States v. Bahadar*, 954 F.2d 821, 829 (2d Cir. 1992) (emphasis in original); *see also United States v. Salvador*, 820 F.2d 558,

II. The Second Circuit's decision illustrates perfectly how the overly stringent application of Rule 804(b)(3) infringes on the constitutional right to present a defense.

Brady's grand jury testimony about the incident in September 2019 in which he received from James a kilogram of cocaine wrapped in (non-English, possibly Spanish-language newspaper), a debit card for "Nicole" and a pendant of the letter "M" (or "N") qualifies for admission under Rule 804(b)(3).

These statements were plainly inculpatory. Brady admitted possessing a kilogram of cocaine, and that's not permitted by law. Brady also acknowledged receiving things from James that any reasonable person would have understood did not belong to him. There is no rational explanation as to why James might possess debit cards issued to other people.[37] The government understood that Brady's testimony to this

---

561 (2d Cir. 1987) (The "inference of trustworthiness from the proffered 'corroborating circumtances' must be strong, not merely allowable.").

[37] Respectfully, the district court's conclusion to the contrary sanitizes the facts. According to the district court, "[t]here is nothing illegal, without more, about holding two debit cards and some jewelry for an associate." (Pet. App. 22a). But of course, there is something *highly* suspect about holding debit cards made out to unknown third parties with no obvious relationship to the giver. *See e.g. United States v. Rosario*, 7 F.3d 319, 320 (2d Cir. 1993) (the police found it suspicious that

effect was going to inculpate him, which is why they offered him a proffer agreement. Pet. App. 10a. The district court understood these admissions were inculpatory, which is why it permitted Brady's Fifth Amendment invocation. *Id.* at 9a, 14a.

Moreover, the plainly inculpatory nature of Brady's statements was never mitigated. The government refused to immunize Brady, and the proffer agreement provided Brady with no protection because the government determined that it did not find Brady's testimony before the grand jury credible. *Id.* at 12a, 14a. Brady received no benefit from the agreement. Of course, the government's view of credibility by itself is of no bar to admission because credibility determinations are reserved for the jury. For the same reason, Brady's imagined motivation – "to curry favor with the authorities" – for making his statements is not relevant, either. *Id.* at 22a. Rule 804(b)(3)(A) embodies an objective measure – whether "a reasonable person in the declarant's position would have made [the statement] only if the person believed it to be true"[38] – and

---

the defendant possessed seven credit cards each bearing a different name). Other similar examples are too numerous to cite.

[38] Respectfully, the district court's supposition that a reasonable person in Brady's situation might fabricate grand jury testimony is

anyways, even if Brady's statements were *exclusively* motivated by a desire to curry favor with the prosecution, he failed, completely, in that regard. Brady's motivations, to the extent that they are relevant at all, are only relevant to whatever weight the factfinder might opt to give his inculpatory statements.

The notion that Brady may have had mixed motivations when testifying is a red herring. Who knows if Brady was attempting to curry favor? Isn't nearly everyone who speaks with law enforcement trying to "curry favor" in some way? Instead of trying to read Brady's mind, the legal test should ground the analysis. The test is whether the statement was sufficiently against the declarant's penal interest that a *reasonable person* would not have made the statement unless it were true. Among other things, Brady admitted to receiving debit cards that plainly did not belong to James, and to possessing a kilogram of cocaine. Since when do reasonable people falsely admit to possessing *a kilogram* of cocaine? Plainly, the possession of, *inter alia*, a kilogram of cocaine was against Brady's penal interest.

---

untenable and inconsistent with the rule of law. Pet. App. 22a. The law does not presume that witnesses commit perjury.

Finally, Brady's statements were sufficiently corroborated. Brady's statement that he took possession of a kilogram of cocaine (obviously inculpatory), which was wrapped in a unique style of newspaper, along with a debit card belonging to "Nicole" and a necklace with an "M" or "N" pendant, is fully consistent with other evidence the government adduced at trial. It tracks with what law enforcement agents discovered when they searched the decedents' hotel room, *i.e.* kilograms of cocaine wrapped in Spanish-language newspaper; and it comports with the medical examiner's testimony that Nicole fancies such jewelry because at the time of her death, she was wearing an "N" pendant around her neck. The boy's name began with "N." Miguel's name obviously begins with "M." What's the likelihood that James or Jariel (who couldn't read English, much less Spanish), purchased a newspaper in a language that they did not speak or read? This, like the remainder of the district court's arguments about corroboration are just that – arguments, for the jury. The weight to give Brady's grand jury testimony was a question for the jury to decide.

The district court's decision, which the Second Circuit affirmed, that reliability was lacking because, *inter alia,* Wilson failed to establish

that the cocaine delivered to the crime scene was *also* wrapped in similar newspaper is precisely the sort of stringency that *Chambers* and *Holmes* prohibit. Contrary to the district court's reasoning, the fact that Brady made his statements under oath to the grand jury is not, as the district court reasoned, the only indication of reliability. Nor does it matter that other statements made by Brady lack similar corroboration because Wilson never sought to admit those statements.

The exclusion of key portions of Brady's grand jury testimony was inconsonant with both Rule 804(b)(3) and Wilson's constitutional right to present a defense. The identity of the shooter was a central issue in the case. The government's proof that Wilson was the killer rested entirely on the testimony of two self-interested brothers who were far more involved in the drug trade thanWilson ever was.

Wilson's overarching theory was that James and Jariel murdered the victims and falsely pointed the finger at him. The first thing Wilson argued in summation was that James and Jariel framed Wilson for the victims' deaths:

> [N]ot surprisingly, I disagree with [the prosecutor] on who was the creator of all this tragedy. James Reed and Jariel Cobb. They create a false scenario. They turned to [Wilson] and played him for these events. You know, they are the

> foundation of the government's case. All of the other evidence, the cell phone records, the video, everything else, all of that is brought in to support what they said. What did they say? What is the most critical thing that they said? [Wilson] killed three people. And the government goes out and gets the video and Google data and cell data, they do all of that. But all of that is based upon the fact that [Jariel] and [James] say [Wilson] killed those people and that he killed them right there at 4 Roebling.

(Tr. 3756). Wilson returned to the point in summation repeatedly. For example, he argued:

> I think the government…when they started the case, they were trying to figure out what happened here, who was responsible. But once [Jariel] and [James] decided to blame [Wilson] for the murders and they committed the murders, and I'll tell you why they committed the murders, the government's case goes bad. Why did they blame [Wilson]? He was easy. … And they fabricated the story and the government unfortunately accepted it. And then, and then the government said, we're going to give you a plea agreement and the government began to focus on [Wilson] because they were willing to do that.

(Tr. 3758-59). And again:

> Count 6 and 7, the murders. We talked about it, but I have to bring it up again. They are not credible. They are not credible. These guys. Are we surprised? If you think about it yourself, you are in a jam, you're in a jam, I've killed somebody, you've killed three people, you're in a jam. And

> you go, I got to get out of this. I'm going to blame somebody else. I'm going to blame [Wilson].

(Tr. 3783).

The government had corroborating evidence about what happened after the victims were killed, but it had no proof, aside from the self-serving testimony of James and Jariel that Wilson murdered all three of the decedents. Undermining James' credibility was essential to Wilson's cause.

The jurors were told that James did not want to sell drugs anymore, Tr. 2597; he did not want to come to the trap house on September 15, 2019, and the only reason he went was to count money, Tr. 1660, 2493; when he got there, he stayed out of the kitchen and did not witness Dhamyl's killing, Tr. 1680, 1715, 2485; James stayed behind and "lit a blunt," while others moved the white minivan, Tr. 1723; and he played no role in Dhamyl's dismemberment, Tr. 1731. Such testimony created the impression that James was an about-to-be-retired drug dealer who happened to be in the wrong place at the wrong time, and who was motivated to help his brother but not otherwise morally depraved. This false notion augmented his believability.

Brady's grand jury testimony told a drastically different story about James' involvement, revealing different notions of his true character. Brady's testimony suggested that James not only supervised the firepit and the destruction of some of the incriminating evidence, but he also preserved evidence for his own benefit, *e.g.* jewelry, debit cards, and a kilogram of cocaine. *See e.g.* Tr. 3416 (Court: Brady's grand jury testimony incriminates James); Tr. 3416-17 (Court: "I know you're making the argument that this was stolen property, that [James] had stolen property, that he gave Mr. Brady, and this was the decedent's property that – he that [James] gave Mr. Brady.").

Whether James was truthful that Wilson alone killed the victims was not an ancillary matter, and Brady's grand jury testimony did not contradict James' story in minor ways; rather, it called his credibility into question.[39] After listening to the government's case for weeks on end, it was manifestly unfair and highly detrimental to Wilson's case for the district court to deny him the opportunity to add excerpts of Brady's

[39] *See e.g. United States v. Abel*, 469 U.S. 45, 52 (1984) (Evidence of "bias is almost always relevant").

grand jury transcript to the record – and make the forceful arguments supported by it.

For these reasons, this case provides an excellent vehicle for reminding lower courts about the paramount importance of a defendant's constitutional right to present a defense, and to cohere the various different tests and measures for evaluating against-penal-interest statements.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jamesa J. Drake
Counsel of Record
Drake Law LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105
jdrake@drakelawllc.com

23-6307-cr
United States v. Wilson

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of June, two thousand twenty-five.

PRESENT: AMALYA L. KEARSE,
DENNIS JACOBS,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 23-6307-cr

DEANDRE WILSON, AKA D.,

Defendant-Appellant.*

FOR DEFENDANT-APPELLANT: JAMESA J. DRAKE, Drake Law, LLC, Auburn, ME

* The Clerk of Court is directed to amend the caption as set forth above.

FOR APPELLEE:	KATHERINE A. GREGORY, Assistant United States Attorney, *for* Joel Louis Violanti, Acting United States Attorney for the Western District of New York, Buffalo, NY

Appeal from a judgment of the United States District Court for the Western District of New York (Elizabeth A. Wolford, *Chief Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the District Court's judgment is AFFIRMED.

Deandre Wilson appeals from a judgment of the United States District Court for the Western District of New York (Wolford, *C.J.*) convicting him after a jury trial of multiple counts including, as relevant to this appeal: (1) one count of conspiracy to distribute cocaine, heroin, and marijuana in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846; (2) one count of murder while engaged in a narcotics conspiracy in violation of 18 U.S.C. § 2 and 21 U.S.C. § 848(e)(1)(A); (3) one count of conspiracy to obstruct justice in violation of 18 U.S.C. §§ 1512(c)(1) and 1512(k); (4) two counts of obstruction of justice in violation of 18 U.S.C. §§ 2 and 1512(c)(1); (5) one count of conspiracy to use fire to commit a felony in violation of 18 U.S.C. §§ 2, 844(h), 844(m); and (6) two counts of use of fire to

commit a felony in violation of 18 U.S.C. §§ 2 and 844(h). We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

Wilson first challenges the District Court's exclusion of the grand jury testimony of an unavailable witness, Richard Brady, which Wilson contended was admissible under Federal Rule of Evidence 804(b)(3). "We review a district court's evidentiary rulings for abuse of discretion and will disturb an evidentiary ruling only where the decision to admit or exclude evidence was manifestly erroneous." *United States v. DiMassa*, 117 F.4th 477, 486 (2d Cir. 2024) (quotation marks omitted). Under Rule 804(b)(3), "the hearsay rule does not exclude evidence of a statement against an unavailable declarant's penal interest" if (1) "a reasonable person in the declarant's position would have made [the statement] only if the person believed it to be true because, when made, it had so great a tendency to expose the declarant to criminal liability" and (2) the statement "is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case." *United States v. Ojudun*, 915 F.3d 875, 885 (2d Cir. 2019) (cleaned up) (quoting Fed. R. Evid. 804(b)(3)). "[T]he inference of trustworthiness from the proffered corroborating circumstances

must be strong, not merely allowable." *United States v. Salvador*, 820 F.2d 558, 561 (2d Cir. 1987) (quotation marks omitted).

The District Court determined that substantial portions of Brady's grand jury testimony were either false, not corroborated, or otherwise unreliable. For example, the District Court noted, Brady misidentified the location of the murders; claimed that Jariel Cobb had raped one of the murder victims even though there was no evidence that a rape took place; and claimed that he communicated with James Reed via text message even though phone records obtained by the Government did not support the claim. The District Court also explained that Brady, who sought credit for cooperating with the Government, made the statements in "an attempt . . . to gain a benefit for himself by providing the government with information regarding a crime of far more interest than [his] own offenses." App'x 85. We see no error in the District Court's decision to exclude Brady's statements. *See DiMassa*, 117 F.4th at 486. Nor are we persuaded that the exclusion of Brady's testimony deprived Wilson of a "meaningful opportunity to present a complete defense." *See Wade v. Mantello*, 333 F.3d 51, 57 (2d Cir. 2003). The right to mount a defense "may be limited by evidentiary and procedural rules designed to assure both fairness and reliability" so long as the

application of those rules is not "arbitrary or disproportionate to the purposes they are designed to serve." *Scrimo v. Lee*, 935 F.3d 103, 112 (2d Cir. 2019) (quotation marks omitted). The District Court's exclusion of Brady's statements satisfied this requirement.

Wilson next challenges the sufficiency of the evidence supporting his convictions for conspiracy to obstruct justice through evidence tampering, obstruction of justice through evidence tampering, conspiracy to use fire to obstruct justice, and use of fire to obstruct justice. The trial evidence in support of each of these convictions was, in our view, overwhelming. At trial, the Government introduced evidence that Wilson, with help from Cobb, poured gasoline on a car that contained the bodies of victims Miguel Anthony Valentin-Colon and Nicole Marie Merced-Plaud and set the car on fire. The jury also heard evidence that Wilson spent an hour with Cobb and Reed tending to a separate fire that was lit to destroy the body of victim Dhamyl Roman-Audiffred, as well as evidence that this fire was still consuming her body as Wilson tended to it. And the jury heard evidence that Wilson, expressing regret that he had not killed another witness, told Cobb, "I'm not going . . . back to jail. I told you we should have got rid of that kid." Gov't App'x 662. This evidence is more than

sufficient to permit a rational juror to find that Wilson used fire to intentionally destroy evidence that might be used against him in a criminal proceeding. *See* 18 U.S.C. §§ 844(h)(1), 1512(c)(1); *see also id.* § 1512(f)(1) ("[A]n official proceeding need not be pending or about to be instituted at the time of the offense."). The same evidence was also sufficient to support a finding that Wilson conspired with Reed and Cobb to commit these crimes. *See United States v. Khalupsky*, 5 F.4th 279, 288 (2d Cir. 2021); *United States v. Santos*, 541 F.3d 63, 71 (2d Cir. 2008). We thus reject Wilson's argument that his convictions on these counts are not supported by sufficient evidence.

Finally, Wilson challenges the sufficiency of the evidence in support of the jury's finding that he conspired to possess and distribute at least five kilograms of cocaine under 21 U.S.C. §§ 841(b)(1)(A)(ii) and 846. "[A] conviction of a Section 841(b)(1)(A) conspiracy . . . requires that a jury find, or the defendant himself admit to, the drug-quantity element." *United States v. Barret*, 848 F.3d 524, 534 (2d Cir. 2017) (cleaned up). "The drug quantity attributable to a defendant knowingly participating in a drug distribution conspiracy" includes not only the specific narcotics acquired in "transactions in which he participated directly," but also those acquired in "transactions in which he did not personally

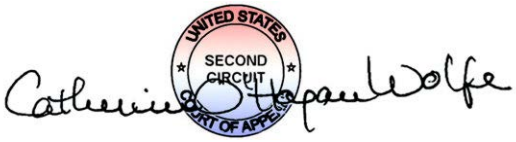
participate, but where he knew of the transactions or they were reasonably foreseeable to him." *United States v. Pauling*, 924 F.3d 649, 657 (2d Cir. 2019).

The trial record includes evidence that Wilson and Cobb agreed that Cobb would acquire cocaine from his suppliers and that Wilson would work as a middleman to sell a portion of that cocaine to Wilson's cousins. Cobb testified that he would thereafter purchase "[a]t least three kilos [of cocaine] every time" he met with his suppliers, Gov't App'x 414, and that Wilson knew about and planned on attending two of these purchases but missed them due to his work schedule. Drawing all reasonable inferences in the Government's favor, *see United States v. Tran*, 519 F.3d 98, 105 (2d Cir. 2008), we conclude that this was sufficient to support the jury's finding that Wilson knew or could reasonably foresee that the transactions involved at least five kilograms of cocaine acquired over the course of the narcotics conspiracy, *see Pauling*, 924 F.3d at 657.[1]

[1] Wilson also contends that there was insufficient evidence to support the jury's findings as to the quantity of heroin and marijuana acquired over the course of the narcotics conspiracy. Because Wilson raises these arguments only conclusorily in footnotes in his brief on appeal, we decline to consider them. *See United States v. Botti*, 711 F.3d 299, 313 (2d Cir. 2013).

We have considered Wilson's remaining arguments and conclude that they are without merit. For the foregoing reasons, the District Court's judgment of conviction is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

DEANDRE WILSON,

Defendant.

DECISION AND ORDER

1:19-CR-00155 EAW

INTRODUCTION

During the course of the trial of defendant Deandre Wilson ("Wilson"), defense counsel sought to call as a witness Richard Brady ("Brady"), an individual currently in the custody of the New York State Department of Corrections and Community Supervision who testified before the grand jury on December 18, 2019. Pursuant to an Order issued by the Court (Dkt. 563),[1] Brady was brought to Court on October 27, 2022, but after consultation with assigned counsel he refused to testify or answer any questions, invoking his Fifth Amendment right against self-incrimination. As a result, Wilson sought to introduce portions of Brady's grand jury testimony pursuant to Federal Rules of Evidence 613(b), 804(b)(1), and 804(b)(3). The Court denied Wilson's request. This Decision and Order memorializes the Court's reasons for that denial.

---

[1] The Court issued writs of habeas corpus ad prosequendum to procure Brady's attendance (Dkt. 540; Dkt. 541), but he refused transport. The Court subsequently issued orders directing the use of reasonable force to procure Brady's attendance. Brady was produced on October 27, 2022, pursuant to the Order issued on October 26, 2022. (Dkt. 563).

BACKGROUND

Familiarity with the factual and procedural background of this matter, including the evidence presented at trial, is assumed for purposes of this Decision and Order. The Court briefly summarizes certain salient information below.

On September 25, 2019, co-defendant James Reed a/k/a Fatts ("Reed") was charged by way of a superseding indictment with one count of a narcotics conspiracy in violation of 21 U.S.C. § 846 and one count of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) and 18 U.S.C. § 2. (Dkt. 14). Wilson was not named in the superseding indictment.

Brady, who was on state parole and had fled the state, was apprehended in Cleveland, Ohio, on October 23, 2019. (*See* Dkt. 539 at 1). It is undisputed that Brady and Reed encountered one another while detained at the Niagara County Jail. On December 17, 2019, Brady entered into a proffer agreement with the government, and the following day he testified before the grand jury. Brady testified that he had been involved in drug trafficking in the past. (GJ Tr. at 5).[2] He then testified that he had known Reed since they were children and that they both lived in Riverside and went to the Boys and Girls Club together. (Dkt. 561-1 at 6).[3] Brady stated that he had purchased drugs from

[2] The grand jury transcript of Brady's testimony was provided to the Court and defense counsel, but other than the specific portions that Wilson sought to admit pursuant to Federal Rules of Evidence 804(b)(3) and 613(b) (*see* Dkt. 561-1), the entirety of the transcript is not on the docket. Accordingly, the Court will reference those portions of the grand jury transcript that are not filed on the docket as "GJ Tr.".

[3] When referencing the portions of Brady's grand jury testimony that is filed on the docket, the Court will use the transcript pages as opposed to the CM/ECF pagination.

Reed on and off since 1999, that the last time he had purchased drugs from Reed was in September of 2019, and that at that time he had been continuously purchasing drugs from Reed since approximately 2016. (Dkt. 561-1 at 7; GJ Tr. at 7-8). Brady detailed how his dealings with Reed worked, including that he would use text messages to arrange meetings. (GJ Tr. at 8-14).

Brady further testified that he would sometimes store drugs or weapons for Reed at a house that Brady rented on Royal Street during the summer of 2019. (*Id*. at 17-18). According to Brady, Reed would give Brady money for rent and Brady provided Reed with a key to the house. (*Id*. at 20). Brady testified that in September of 2019, Reed gave him a small cooler containing a kilogram of cocaine, a "[Chevrolet] HHR booklet with a manual in it," a ring, a necklace with an "M" pendant,[4] and two debit cards with female names, one of which had the name "Nicole" on it. (Dkt. 561-1 at 24-26; GJ Tr. at 24-27). Brady stated that the kilogram of cocaine was wrapped in newspaper that appeared to be in a language other than English, and that it might have been Spanish, but he could not be sure. (Dkt. 561-1 at 25).

Brady further testified that he encountered Reed at the Niagara County Jail after his apprehension in October of 2019. (*Id*. at 30-31). According to Brady, he was sitting at a poker table with some other people from his neighborhood when Reed came up, put his hands on the table, looked at Brady, and said, "you're late, man." (*Id*. at 31). Brady

[4] The government maintains that there is an error in the grand jury transcript and that Brady actually referenced an "N" pendant. (Dkt. 539 at 4 n.3).

testified that Reed then asked, "where is my bread at, bro?", after which they both started laughing and walked away to talk. (*Id.*).

The government determined that it did not find Brady's testimony before the grand jury credible and that it would not pursue his cooperation any further. Brady did not ultimately receive any benefit from his proffer agreement.

Approximately eight months after Brady's grand jury testimony, by second superseding indictment returned on August 26, 2020, Wilson was charged with: narcotics conspiracy in violation of 21 U.S.C. § 846 (Count 1); Hobbs Act conspiracy in violation of 18 U.S.C. § 1951(a) (Count 8); Hobbs Act robbery in violation of 18 U.S.C. §§ 1951(a) and 2 (Count 9); murder while engaged in a narcotics conspiracy in violation of 21 U.S.C. § 848(e)(1)(A) and 18 U.S.C. § 2 (Count 10); discharge of a firearm in furtherance of a crime of violence and drug trafficking crimes in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and 2 (Count 11); discharge of a firearm causing death in furtherance of a crime of violence and drug trafficking crimes in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii), 924(j)(1) and 2 (Count 12 and Count 13); conspiracy to obstruct justice in violation of 18 U.S.C. § 1512(k) (Count 14); obstruction of justice in violation of 18 U.S.C. §§ 1512(c)(1) and 2 (Count 15 and Count 16); conspiracy to use fire to commit a felony in violation of 18 U.S.C. §§ 844(m) (Count 17); use of fire to commit a felony in violation of 18 U.S.C. §§ 844(h) and 2 (Count 18 and Count 19); conspiracy to damage and destroy a vehicle used in interstate commerce by fire in violation of 18 U.S.C. § 844(n) (Count 20); damaging and destroying a vehicle used in interstate commerce by fire in violation of 18 U.S.C. §§ 844(i) and 2 (Count 21); maintaining a drug-involved premises in violation of 21 U.S.C.

§ 856(a)(1) and 18 U.S.C. § 2 (Count 23); and possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(D), and 18 U.S.C. § 2 (Count 24). (Dkt. 106). Several of these counts involved the murders of Miguel Anthony Valentin-Colon ("Miguel"), Nicole Marie Merced-Plaud ("Nicole"), and Dhamyl Roman-Audiffred ("Dhamyl").

Wilson's trial began with jury selection commencing on September 21, 2022, and the presentation of proof commencing on September 27, 2022. (Dkt. 488; Dkt. 499). Reed was a cooperating witness on the government's behalf at Wilson's trial. Reed testified that on September 15, 2019, his brother and co-defendant Jariel Cobb ("Cobb") asked him to come with him to count drug money. (Dkt. 536 at 108).[5] According to Reed, he, Cobb, and Wilson went to a house at 4 Roebling Avenue owned by an individual named Brandy to do a drug deal. (*Id*. at 122-26). Reed gave testimony implicating Wilson in the murders of Miguel, Nicole, and Dhamyl during that drug deal. (*See generally* Dkt. 536; Dkt. 537).

On cross-examination, defense counsel asked Reed if he had met Brady at the Boys and Girls Club in Riverside. (Dkt. 537 at 71). Reed replied that he had never met Brady except in jail. (*Id*.). Reed denied ever having sold drugs to Brady. (*Id*. at 71-72). According to Reed, he met Brady at the Niagara County Jail, where they played poker together, and they never discussed anything about this case apart from what had been on the news. (*Id*. at 72). Defense counsel initially indicated that they intended to ask Reed additional questions about Brady's grand jury testimony, but ultimately opted not to pursue

[5] The page references to Reed's trial testimony are to the CM/ECF generated page numbers, not the transcript pagination.

the matter. Defense counsel further represented that they did not intend to call Brady as a witness.

Defense counsel later reversed course with respect to calling Brady as a witness. The government noted that Brady's grand jury testimony implicated himself in criminal conduct, and that the government also believed he had committed perjury. The government stated that it would not immunize Brady from prosecution were he to take the stand. The Court accordingly determined that counsel should be appointed to Brady. The Court further heard argument and the parties submitted briefing (Dkt. 539; Dkt. 560; Dkt. 561) regarding whether any portion of Brady's grand jury testimony should be admitted into evidence in the event he invoked his Fifth Amendment right against self-incrimination.

On October 27, 2022, Brady was brought before the Court. The Court appointed counsel to Brady and afforded him an opportunity to speak with his attorney. After consulting with his attorney, Brady invoked the Fifth Amendment and declined to answer any questions. The parties agreed that there was no basis to challenge Brady's invocation of the Fifth Amendment. The Court accordingly heard additional argument on whether any portion of Brady's grand jury testimony was admissible under any of Federal Rules of Evidence 613(b), 804(b)(1), or 804(b)(3). The Court ultimately determined that it was not, and no portion of Brady's grand jury testimony was presented to the jury.

DISCUSSION

I. Due Process and the Availability of Brady as a Witness

As an initial matter, defense counsel argued on the record on October 27, 2022, that the government might have violated Wilson's right to due process by raising the possibility that Brady could open himself up to criminal prosecution by testifying and declining to immunize him. In support of this contention, defense counsel cited *United States v. Foster*, 128 F.3d 949 (6th Cir. 1997), wherein the Sixth Circuit observed that "government conduct which amounts to substantial interference with a witness' free and unhampered determination to testify will violate due process." *Id*. at 953. In particular, in *Foster*, the government had threatened to revoke a witness's immunity and prosecute him if he testified at the defendant's trial. *Id*. at 954.

Foster is inapposite here. *Foster* involved a witness who consistently provided exculpatory evidence in favor of the defendant, who was represented by counsel, and whose attorney was contacted by the prosecution just days before the defendant's trial and advised that immunity would be revoked if the witness testified at the trial. *Id*. at 953-54. Unlike the witness in *Foster*, Brady was not represented by counsel at the time the defense indicated their intention to call him to testify, nor had he been advised by the government during the grand jury proceeding that it believed he was committing perjury. *See Foster*, 128 F.3d at 954 ("[The witness] had already given testimony before a grand jury in which he denied [the defendant's] involvement in dealing drugs. At that grand jury hearing, the government repeatedly made it clear to [the witness] that it believed he was lying and that his testimony could subject him to perjury charges. Nonetheless, [the witness] continued

to deny any knowledge of [the defendant's] involvement in distributing drugs. Given this exchange and the fact that [the witness] had his own counsel, it would seem clear that he had an understanding of the consequences that would accompany false testimony."). Accordingly, some discussion of the potential criminal consequences to Brady was unavoidable, in order to alert the Court to the necessity of appointing counsel. This initial conversation, notably, did not occur in either the presence of Brady or his subsequently appointed lawyer, and there is no indication that the kind of direct threats at issue in *Foster* occurred here.

Moreover, the Second Circuit has made clear that "[t]he government is under no general obligation to grant use immunity to witnesses the defense designates as potentially helpful to its cause but who will invoke the Fifth Amendment if not immunized." *United States v. Ebbers*, 458 F.3d 110, 118 (2d Cir. 2006). The government is required to grant immunity only under "extraordinary circumstances," and the burden is on the defendant to show that: (1) "the government has used immunity in a discriminatory way, has forced a potential witness to invoke the Fifth Amendment through overreaching, or has deliberately denied immunity for the purpose of withholding exculpatory evidence and gaining tactical advantage through such manipulation"; and (2) "that the evidence to be given by an immunized witness will be material, exculpatory and not cumulative and is not obtainable from any other source." *United States v. Stewart*, 907 F.3d 677, 685 (2d Cir. 2018) (citations omitted). "[T]he situations in which conferring immunity would be required are so few and exceptional that [the Second Circuit has] yet to reverse a failure to immunize."

United States v. Melendez, No. 20-3876-CR, 2022 WL 3640449, at *4 (2d Cir. Aug. 24, 2022) (quoting *Stewart*, 907 F.3d at 685).

Wilson did not even attempt to demonstrate that this standard was satisfied here, nor could he have done so successfully. The record is devoid of any evidence that the government engaged in discriminatory use of immunity or that it engaged in overreaching—which the Second Circuit has noted "can be shown through the use of threats, harassment, or other forms of intimidation," *Stewart*, 907 F.3d at 686 (quotation omitted)—or tactical manipulation.

For all these reasons, the Court rejected defense counsel's due process argument.

II. Rule 804(b)(1)—Former Testimony

The Court turns next to the defense's contention that Brady's grand jury testimony was admissible under Rule 804(b)(1), which provides:

> **(b) The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
>
> > **(1) Former Testimony.** Testimony that:
> >
> > > **(A)** was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
> >
> > > **(B)** is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Fed. R. Evid. 804(b)(1). "The proponent of a hearsay statement bears the burden of demonstrating its admissibility." *United States v. Mendlowitz*, No. S2 17 CR. 248 (VSB), 2019 WL 6977120, at *9 (S.D.N.Y. Dec. 20, 2019).

An individual who has properly invoked the Fifth Amendment is unavailable within the meaning of Rule 804. *See United States v. Miller,* 954 F.3d 551, 561 (2d Cir. 2020) ("When a witness properly invokes his Fifth Amendment right against self-incrimination, he is unavailable for the purposes of Rule 804(a)."), *cert. denied sub nom. Mack v. United States*, 141 S. Ct. 2806 (2021). Further, the testimony at issue was given when Brady was a witness before the grand jury, thus satisfying the requirements of subparagraph (A) of Rule 804(b)(1). Accordingly, the question before the Court was whether subparagraph (B) was satisfied—in other words, whether the government had "an opportunity and similar motive" to develop Brady's testimony during the grand jury proceeding as it did during trial.

"[T]he inquiry as to similar motive must be fact specific, and the grand jury context will sometimes, but not invariably, present circumstances that demonstrate the prosecutor's lack of a similar motive." *United States v. DiNapoli*, 8 F.3d 909, 914 (2d Cir. 1993). In assessing the similarity of the motives:

> [The Court considers] whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive.

Id. at 914-15. The Second Circuit has observed that a prosecutor's motives at the grand jury and the trial may be dissimilar for multiple reasons:

> [B]ecause of the low burden of proof at the grand jury stage, even the prosecutor's status as an "opponent" of the testimony does not necessarily

> create a motive to challenge the testimony that is *similar* to the motive at trial. . . . Moreover, the grand jury context will sometimes present additional circumstances that render the prosecutor's motive to challenge the exonerating testimony markedly dissimilar to what the prosecutor's motive would be at trial. Frequently the grand jury inquiry will be conducted at a time when an investigation is ongoing.

Id. at 913; *see also United States v. Whitman*, 555 F. App'x 98, 103 (2d Cir. 2014) ("In *DiNapoli*, we held that a prosecutor does not have the same motive when questioning a witness before a grand jury as when cross-examining a witness at a later trial, because a prosecutor uses the grand jury to investigate possible crimes and identify possible criminals, and thus, unlike at trial, has little incentive to undermine an unhelpful witness's credibility." (quotation and alteration omitted)).

Here, at the time Brady testified before the grand jury, the investigation into the murders of Miguel, Nicole, and Dhamyl was ongoing, and no one had been charged in connection therewith. In other words, the prosecutor was "using the grand jury to investigate possible crimes and identify possible criminals," and thus cannot be said to have been an "opponent" of Brady's version of events. *DiNapoli*, 8 F.3d at 913. Simply put, the government did not have "a motive to show the falsity of the testimony" similar to its motive at trial, where an indictment had been returned charging Cobb and Wilson with the murders and Reed, Cobb, and Wilson with its coverup, especially where Brady's testimony was going to be "presented by a defendant to rebut the prosecutor's evidence of guilt." *Id*. The lack of similar motive is amply demonstrated by the fact that before the grand jury, the prosecutor did not press Brady on his version of events nor engage in any questioning remotely akin to cross-examination. The Court notes in particular that there

had been widespread media coverage related to the murders, and yet Brady was not pressed as to what information he might have gleaned from those news reports.

On this record, the Court concluded that the similar motive requirement under Rule 804(b)(1) was not satisfied. Accordingly, Brady's grand jury testimony was not admissible on this basis. *See United States v. Salerno*, 505 U.S. 317, 322 (1992) ("We see no way to interpret the text of Rule 804(b)(1) to mean that defendants sometimes do not have to show 'similar motive.'").

III. Rule 804(b)(3)—Statement Against Penal Interest

The Court turns next to the defense's contention that portions of Brady's grand jury testimony were admissible under Rule 804(b)(3) as statements against his penal interest. The Court notes as an initial matter that because the Rule 804(b)(3) analysis is done on a statement-by-statement basis, *see United States v. Ojudun,* 915 F.3d 875, 886 (2d Cir. 2019) (explaining that a court must "focus on each of [the] statements individually to determine which of them would reasonably have been viewed as so exposing [the declarant] to criminal liability as to fall within Rule 804(b)(3)(A)"), it required defense counsel to identify by page and line number the specific sections of Brady's grand jury testimony it was seeking to admit. Defense counsel identified the following: page 6, lines 17-25; page 7, lines 17-20; page 24, lines 4-25; page 25, lines 1-16; page 26, lines 3-16; page 30, lines 19-25; and page 31, lines 1-25. (Dkt. 561-1).

> Rule 804(b)(3) permits the admission of:
>
> A statement that:
>
> **(A)** a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
>
> **(B)** is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Fed. R. Evid. 804(b)(3). "The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true, and this question can only be answered in light of all the surrounding circumstances." *Williamson v. United States*, 512 U.S. 594, 603-04 (1994).

Here, the Court considered whether each individual statement identified by the defense was against Brady's penal interest. As to page 6, lines 17-25, defense counsel conceded during oral argument on October 27, 2022, that these statements about Brady having met Reed when they were children were not against Brady's penal interest.

Turning next to page 7, lines 17-20; page 24, lines 4-25; page 25, lines 1-16; and page 26, lines 3-16, these statements all discuss the incident in September of 2019, in which Brady allegedly received from Reed a cooler containing a kilogram of cocaine, debit cards, and jewelry. Defense counsel argued that these statements were against Brady's penal interest because they implicated him in acquiring cocaine and possessing stolen property. The Court disagrees.

As to the kilogram of cocaine, Brady had already stated earlier in his grand jury testimony that he was involved in drug trafficking. His subsequent statement that he had received cocaine from Reed was far more inculpatory of Reed than it was of himself. "[A] statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest[.]" *United States v. Tropeano*, 252 F.3d 653, 658 (2d Cir. 2001) (quoting *Williamson*, 512 U.S. at 603). It is relevant to this analysis that Brady was testifying pursuant to a proffer agreement, under which with some exceptions, none of his statements could be directly used against him in a subsequent criminal prosecution. The circumstances taken as a whole strongly indicate that Brady's statements implicating Reed as his drug supplier were not self-inculpatory, but were instead an attempt by Brady to gain a benefit for himself by providing the government with information regarding a crime of far more interest than Brady's own offenses. In other words, a reasonable person in Brady's position would have had ample motivation to make the statements at issue even if they were not true. *See Williamson*, 512 U.S. at 604 ("A reasonable person in [the declarant's] position might even think that implicating someone else would decrease his practical exposure to criminal liability[.]").

As to Brady's statements that Reed gave him jewelry and two debit cards, in addition to the reasons already discussed, there is nothing to suggest that Brady knew at the time he allegedly received these items that they were stolen property. There is nothing illegal, without more, about holding two debit cards and some jewelry for an associate, and so the Court cannot conclude that these statements were self-inculpatory.

Brady's statements about his alleged receipt of these items from Reed also were not accompanied by the necessary corroborating circumstances. The Second Circuit has made clear that the corroborating circumstances must "clearly indicate both the declarant's trustworthiness and the truth of the statement." *Ojudun*, 915 F.3d at 887 (quotations and citations omitted). "For those conditions to be satisfied, 'the inference of trustworthiness from the proffered "corroborating circumstances" must be strong, not merely allowable.'" *Id*. (quoting *United States v. Salvador*, 820 F.2d 558, 561 (2d Cir. 1987)). Here, as to Brady's trustworthiness, the sole fact relied upon by the defense was that Brady was under oath before the grand jury. While that is certainly a factor in the Court's analysis, it does not, when considered in light of all the circumstances, create a strong inference of trustworthiness. In particular, the Court notes again that Brady was testifying pursuant to a proffer agreement that generally prevented the direct use of any of his statements against him in a subsequent criminal prosecution. Moreover, Brady has a long criminal history that includes multiple crimes of dishonesty (including possession of a forged instrument, scheme to defraud, and identity theft). (*See* Dkt. 539 at 14-15).

There are also portions of Brady's statement that the defense did not seek to admit that are entirely inconsistent with the evidence of record, thus severely undercutting any inference of trustworthiness on Brady's part. For example, Brady claimed that Reed had told him Cobb had hogtied Miguel and raped Nicole in front of him (GJ Tr. at 33), but the medical examiners and forensic experts did not testify to any corresponding injuries. Brady also claimed Reed had told him the murders had occurred at a "weed house" on "Box and Kehr" (*id*.), but that is not where the murders took place. Brady further testified that Nicole

was the niece of an individual whom Reed had met in federal prison and for whom Reed was "plugging coke" (*id*. at 34-35), and that Reed and Cobb had staged it to appear as though Dhamyl had robbed Miguel and Nicole (*id*. at 37), but none of these statements were consistent with the evidence at trial. Brady's claim that he communicated with Reed via text message was also not borne out by the phone records obtained by the government. In other words, the circumstances as a whole do not support the conclusion that Brady was trustworthy.

There were also not corroborating circumstances to clearly indicate the truth of the particular statements sought to be admitted. Defense counsel pointed to the fact that Brady said the kilogram of cocaine he received from Reed was wrapped in newspaper that was in a different language (possibly Spanish). (Dkt. 561 at 5). Defense counsel further pointed out that there were two kilograms of cocaine obtained from the hotel where the victims were staying that were wrapped in Spanish-language newspaper and that Cobb testified at trial that he never bought fewer than three kilograms of cocaine at a time from the victims. (*Id*.). Thus, the argument goes, the kilogram allegedly given to Brady by Reed is the "third" kilogram that was supplied by the victims. However, there was no evidence in the record that the cocaine the victims brought to 4 Roebling Avenue on the night of their murders was wrapped in newspaper, nor that this was a unique or distinctive manner of packaging drugs.

Moreover, there were many aspects of Brady's statement that were wholly uncorroborated with the evidence of record. There was no evidence that the victims delivered cocaine to 4 Roebling Avenue in a cooler. There was no evidence that any debit

cards were taken from the victims. The only evidence of record regarding a necklace was that a necklace with an "N" pendant had been recovered with Nicole's body—and notably, a picture of Nicole that had been widely circulated in the media showed her wearing that necklace. There was also no evidence of a missing ring. For all these reasons, the Court concluded that Brady's statements regarding his alleged receipt from Reed in September 2019 of a cooler containing cocaine, debit cards, and jewelry, were neither against Brady's penal interest nor accompanied by the necessary corroborating circumstances.

The Court turns finally to the statements found on page 30, lines 19-25, and page 31, lines 1-25. Defense counsel conceded at oral argument that these statements—which recount an interaction between Brady and Reed at the Niagara County Jail—were not against Brady's penal interest.

In sum, none of the statements identified by the defense in Brady's grand jury testimony were admissible under Rule 804(b)(3).

IV. Rule 613(b)—Extrinsic Evidence of a Prior Inconsistent Statement

Rule 613(b) permits the admission of extrinsic evidence of a witness's prior inconsistent statement for impeachment purposes, "if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." Fed. R. Evid. 613(b). Importantly, "the rule does not apply to impeachment by evidence of prior inconsistent conduct." Fed. R. Evid. 613, Advisory Committee Notes; *see also United States v. Praetorius*, 622 F.2d 1054, 1065 (2d Cir. 1979) ("The advisory committee note to the rule provides that the rule does not apply to evidence of prior inconsistent conduct.").

The defense contended that portions of Brady's grand jury testimony were admissible under Rule 613(b) in order to impeach Reed. However, as the Court explained on the record on October 27, 2022, Rule 613(b) applies to a witnesses' prior inconsistent statements—not testimony by an entirely different witness that conflicts with the witnesses' version of events. The portions of Brady's grand jury testimony identified by the defense contained only two alleged prior statements by Reed: "you're late, man," and "where is my bread at, bro?" (*See* Dkt. 561-1 at 31). Initially, the Court notes that while Wilson sought to introduce Reed's statements to Brady for impeachment purposes under Rule 613(b) and not for their truth, Wilson was seeking to introduce the statements by Brady to the grand jury for their truth, and yet Wilson identified no basis under the hearsay rules for the admissibility of Brady's statements to the grand jury. *See United States v. Cruz*, 894 F.2d 41, 44 (2d Cir. 1990) ("Each hearsay statement within multiple hearsay statements must have a hearsay exception in order to be admissible."). In other words, even if Reed's statements to Brady were admissible under Rule 613(b), there would need to be a hearsay exception applicable to Brady's statements to the grand jury. There is not.

In any event, the identified statements are not inconsistent on their face with Reed's trial testimony. *See United States v. Agajanian*, 852 F.2d 56, 58 (2d Cir. 1988) ("[T]he determination of whether statements are in fact inconsistent is committed to the sound discretion of the district court[.]"). Reed testified that he spoke to Brady in the Niagara County Jail and that he played poker with Brady. Brady's testimony that Reed said to him,

"you're late, man" and "where is my bread at, bro?" is not, on its face, inconsistent with Reed's testimony.[6]

Additionally, "a trial court's broad discretion in controlling the mode and order of interrogating witnesses and presenting evidence, permits it to exclude extrinsic impeachment evidence that was not revealed while the witness was on the stand, or at least before the witness was permitted to leave the court[.]" *United States v. Surdow*, 121 F. App'x 898, 899 (2d Cir. 2005) (quotation and citations omitted). Here, defense counsel did not question Reed about these particular prior statements to Brady while he was on the witness stand, nor raise any request to do so. Accordingly, the Court would have been obliged to recall Reed to the stand to allow him the requisite "opportunity to explain or deny the statement," Fed. R. Evid. 613(b), which it did not find would be appropriate under the circumstances.

For all these reasons, the Court found that the identified portions of Brady's grand jury testimony were not admissible to impeach Reed pursuant to Fed. R. Evid. 613(b).

V. Federal Rule of Evidence 403—Probative Value Substantially Outweighed

Finally, the Court notes that even had any portion of Brady's grand jury testimony been admissible under one of the identified rules set forth above, the Court nevertheless found its probative value outweighed by the danger of confusing the issues, misleading the

---

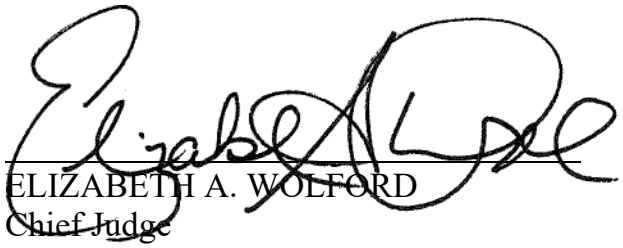
[6] It is true that Brady was asked, "[w]hat do you think he meant by where is my bread at?" and replied that he thought Reed was referring to money that Brady owed him for the kilogram of cocaine from September of 2019. However, defense counsel conceded at oral argument that this question and answer could not come in even if Brady were on the stand. Accordingly, this aspect of Brady's grand jury testimony cannot be relied upon to transform this statement into one contrary to Reed's trial testimony.

jury, and unduly delaying the trial. As the government noted in its submission to the Court, Brady has an extensive criminal history. (*See* Dkt. 539 at 14-15). And Federal Rules of Evidence 609 and 806, read in tandem, would have permitted the government to impeach Brady—as an unavailable declarant—through evidence of his prior convictions. Further, the government would have sought to introduce the underlying facts of many of Brady's prior criminal offenses pursuant to Rule 608. (*Id*. at 15). This would have been extremely confusing for the jury, and would have run the risk of creating a trial within a trial over the credibility of a witness who never even appeared before them.

CONCLUSION

For the foregoing reasons, the Court denied at trial Wilson's request to admit any portion of Brady's grand jury testimony into evidence.

SO ORDERED.



ELIZABETH A. WOLFORD
Chief Judge
United States District Court

Dated: November 21, 2022
Rochester, New York