No. ________

OCTOBER TERM, 2026

IN THE SUPREME COURT OF THE UNITED STATES

LARRY A. MCDANIEL & SILVIANE WHITMORE, Petitioners,

v.

UNITED STATES OF AMERICA, Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Counsel for Petitioner **MCDANIEL**

Petitioners McDaniel and Whitmore ask for leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner McDaniel has been granted leave to so proceed in the United States Court of Appeals for the Ninth Circuit which appointed counsel for McDaniel under the Criminal Justice Act. See Appendix C. Mr. McDaniel remains indigent at this time. Granting leave to proceed in forma pauperis is authorized by Supreme Court Rule 39.1.

Because there the core issue presented in this Petition is the same for each Petitioner, Ms. Whitmore, who is represented by private counsel at this time, respectfully requests to be joined to Mr. McDaniel's Petition.

Dated this 14th of May, 2026.

HOFLAND & TOMSHECK

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Counsel for Petitioner **McDaniel**

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

SHOULD THIS COURT FURTHER CLARIFY AND ADDRESS WHEN, AND UNDER WHAT CONDITIONS, THE FEDERAL RULES MUST GIVE WAY TO THE CONSTITUTIONAL PROTECTIONS AFFORED CRIMINAL DEFENDANT INCLUDING THE RIGHT TO DUE PROCESS AND TO PRESENT A COMPLETE DEFENSE?

LIST OF PARTIES

The parties to the proceedings below in the Ninth Circuit Court of Appeals are as follows:

Petitioner/Appellant/Defendant:	Larry McDaniel Represented by: Jason F. Carr, Esq. **Hofland & Tomsheck** 228 S. Fourth St., Suite 100 Las Vegas, NV 89101 (702) 695-6760 JasonC@Hoflandlaw.com
Petitioner/Appellant/Defendant:	Sylviane Whitmore Represented by: Lisa A. Rasmussen, Esq. McLetchie Law 602 S. Tenth St. Las Vegas, NV 89101 (702) 728-5300 Lisa@nvlitigation.com
Respondent/Appellee/Plaintiff:	United States of America Represented by: Mina Chang, AUSA District of Nevada 501 S. Las Vegas Blvd. 11th Floor Las Vegas, NV 89101 (702) 388-6336 Mina.Chang@usdoj.gov

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This Petition concerns a United States Court of Appeals for the Ninth Circuit unpublished opinion denying both Petitioners' request for a new trial based on newly discovered exculpatory evidence. *See United States v. McDaniel,* CA Nos. 24-1824, 24-2299 (December 19, 2026) (attached as Appendix (App.) A). The direct appeal challenged federal convictions related to thefts of a private vault entered after a jury trial.

Both Petitioners moved the Ninth Circuit to rehear the appeal and for en banc review. On February 13, 2026, the Ninth Circuit denied that request. (*See* App. B.)

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its unpublished consolidated memorandum decision on February 13, 2026. (*See* App. A.) That court denied the Petitioners request for rehearing and rehearing en banc on February 13, 2026. (*See* App. B.) McDaniel mails and electronically files this petition within ninety days of the entry of that order. *See* Sup. Ct. R. 13(1); *see also* Sup. Ct. R. 13(3) (providing that the ninety-day period runs for the date of denial of a petition for rehearing). Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition implicates Federal Rule of Criminal Procedure 33 which states:

> Rule 33. New Trial
>
> (a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.
> (b) Time to File.
> (1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an

> appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.
> (2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

Federal Rule of Evidence 804(b)(3), which defines a statement against interest as:

> (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 any evidence that supports or undermines it.

The Fifth Amendment to the United States Constitution states:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution reads:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This appeal concerns an aged criminal case involving a 2012 robbery and a 2014 burglary of a now bankrupt Las Vegas, Nevada, private security vault, 24/7 Private Vaults, that allowed people to store "valuable" items anonymously. As the trial testimony would reveal, those items included human remains, firearms, illegal drugs, large cash amounts, and assorted other items found in the criminal underworld.

The Ninth Circuit focused on the newly discovered evidence and whether the district court abused its discretion in denying the Petitioners' Motion for a New Trial. To understand the significance of the exculpatory materials, it is necessary to delve into the facts of the case.

A. History of the Case

The case began on April 11, 2017, when the United States Attorney for the District of Nevada [hereinafter government] filed a sealed Indictment against McDaniel and co-defendants Sylviane Della Whitmore and Phillip Hurbace.
The Indictment remained sealed for quite some time as the case progressed. At a hearing conducted on January 9, 2020, the district court ordered the then operative Superseding Indictment, which the parties had previously agreed could be redacted, unsealed.

The redacted Superseding Indictment names Appellant McDaniel in Count 8, which concerns the fraudulent transfer of property in bankruptcy proceedings in violation of 18 U.S.C. § 152(7), Counts 9 and 10, which allege the interstate transportation of stolen property in violation of 18 U.S.C. § 2314, Counts 13 through 27, which allege money laundering in violation of 18 U.S.C. § 1957, and Count 33, which alleges the transportation of stolen property under the same statute designated in Counts 9-10.

The case proceeded to an approximately five-day jury trial in June, 2021. The jury found McDaniel guilty of Counts 8-10, 13-21, and 26-27.

On December 22, 2022, in response to two separate motions for a new trial by Petitioners McDaniel and Whitmore, the lower court denied the Petitioner's request for a new trial.[1]

The new trial issues related to this Petition second motion is based on the discovery of startling new evidence.

Shortly after the jury verdict, a letter from an anonymous person with the moniker "Toda Raba" arrived at the District of Nevada court by mail. That letter exonerated Mr. McDaniel.

Not a typical occurrence to be sure.

The letter contained an alleged confession from Elliot Shaikin, the former owner of 24/7 Private Vaults. Mr. Shaikin admits he committed both thefts with codefendant Hurbace with the intent to frame store employees.[2] The motion for a new trial is also based on a newly acquired taped conversation in which Shaikin makes self-inculpatory statements to Mr. McDaniel.

The district court held that, even if admissible, the letter would not have impacted the jury's verdict because of other evidence of guilt including suspicious

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[1] The federal district court found in McDaniel's favor on other, unrelated, issues. This left McDaniel convicted only of Counts 9 and 10 which pertain to the intestate transport of stolen property, violations of 18 U.S.C. § 2314.

[2] The letter said:

> On my death bed, I confess I robbed the vaults with Phil Hurbace in 2012 & 2014 because I lost too much money there. The customers were scum! Elliot Shaikin."
>
> What can they do to me now? Phil wants to call crime tip line and blame employees. They were not involved. Police are stupid! Before I die – Elliot.
>
> "I hid $ from 2012 in L units, we broke in to bankrupt business to get $ out. Fuck 24/7 and Shapiro.

deposits of large amounts of cash. Neither the confession letter, nor any of the other evidence provided by McDaniel, warrants a new trial on his remaining counts of conviction.

The Ninth Circuit joint appeal focused on the newly discovered evidence and whether the district court abused its discretion in denying the Petitioners' Motion for a New Trial.

B. The Ninth Circuit Opinion

On direct appeal, Petitioners argued that the district court erred in denying the motion for new trial and that preventing a defense by disallowing potent exculpatory evidence such as the confession letter violates the petitioners' Fifth and Sixth Amendment rights. They also argued that the confession letter is admissible under both Federal Rule of Evidence 804(b)(3), particularly in light of its amended application notes enacted on December 31, 2024 and that would also be admissible under Federal Rule of Evidence 807, the residual exception.

The Ninth Circuit's Memorandum concludes that the confession is inadmissible under FRE 804(b)(3) and 807, does not address FRE's amended application notes to FRE 804(b)(3), nor does it address the constitutional arguments. (*See* App. A.) The Ninth Circuit summarily denied the request for rehearing.[3] (*See* App. B.)

This Petition follows.

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[3] Petitioners also pointed out in their Petition for Rehearing/Rehearing En Banc that the Panel misapprehends the audio tape evidence because the government has never disputed that it is Mr. Shaikin's voice on the audio tape.

REASONS FOR GRANTING THE PETITION

THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO CLARIFY WHEN, AND UNDER WHAT CONDITIONS, EXCULPATORY MATERIAL IN A CRIMINAL CASE MUST BE ADMITTED UNDER CONSTITUTIONAL STANDARDS EVEN IF THE MATERIAL IS INADMISSIABLE UNDER THE FEDERAL RULES OF EVIDENCE

A. Summary of Argument

This case involves a deathbed confession that exonerates the defendants. Elliot Shaikin, the dead owner of 24/7 Vaults, cleared his conscious by confessing to having framed the Petitioners for the burglary and robbery of his own business. Further, post-trial, McDaniel found a taped conversation he had with Shaiken that corroborates and substantiates Mr. Shaiken's death-bed confession.

In contrast, the evidence against the Petitioners is circumstantial. No forensic evidence connects Mr. McDaniel to the 2014 burglary. There are no fingerprints, video footage, eyewitness accounts, or any other physical evidence of any kind linking McDaniel to the 2014 burglary. Mr. McDaniel did not confess and, in fact, steadfastly maintains his innocence. The government was unable to trace any of the proceeds of the burglary to Mr. McDaniel because the trial evidence revealed the government could not establish 24/7 Vaults suffered any loss from that break-in.

The district court and the Ninth Circuit went astray in denying the Petitioner's request for a new trial. Both courts focused on technical application of hearsay rules to determine that the letter was inadmissible. Both courts failed to grapple with the constitutional dimension of the issue. In circumstances where a defendant seeks to admit potent evidence of actual innocence, the federal Rules of Evidence cannot be meticulously applied to deny a defendant his overriding constitutional right to present a defense and to receive a fair trial.

The bottom line is that the Petitioners may well be actually innocent of the crimes of conviction. What is clear is that the jury did not have evidence that cast serious doubts on the state of the evidence and the prosecutor's theory of the case.

The Petitioners submits that this Court should clarify when and if a defendant has the right to submit substantial evidence of actual innocence despite the fact the evidence may not fit squarely within the Rules of Evidence framework.

B. Courts Struggle with Applying the Rules of Evidence to the Introduction of Exculpatory Material Powerful Enough to Trigger the Constitutional Right to Present a Defense

This case exposes the tension that occurs when unusual evidence, such as the sudden appearance of a death-bed confession, does not fit well within a Federal Rules of Evidence exception.

The underlying question is whether the death-bed and audio tape confessions of Shaiken met the standards for seeking a new trial under Federal Rule of Criminal Procedure 33. The basis for finding the Petitioners did not meet this standard is that material would not have been admissible at trial.

The Ninth Circuit looked to two potential avenues for admissibility regarding Shaiken's confession letter. (*See* App. A at 3.) The first, is whether under Federal Rule of Evidence (FRE) 804(b)(2) the confession counts as a statement against interest. Second, is the letter admissible under FRE 807's residual exception. (*See id.* at 3-4.)

The analysis provided by the Ninth Circuit reveals that the very unusual and powerful exculpatory aspects of the contested materials are also what rendered the letter and tapes inadmissible under the Federal Rules of Evidence. The death-bed letter, for example, suffers from corroboration problems because it is not possible to determine that exact conditions under which the letter was created.[4]

The tension with the rules of evidence and constitutional standards is potent in situations such as this because this Court has recognized that even the lawful exclusion of exculpatory evidence during trial can trigger a constitutional violation.

1. The Ends of Justice Exception

The newly discovered evidence in question establishes that McDaniel is actually innocent of the of stolen property offenses enumerated in Counts 9 and 10. The material has strong exculpatory value to Petitioner Whitmore as well. The law applies special considerations, even to the extent that normally dispositive procedural bars no longer apply, in the actual innocence context. *See Schlup v. Delo*, 513 U.S. 298, 315 (1995). The evidence at issue in the case at bar raises a question of actual innocence and hence invites a thorough investigation and scrutiny.

It is rare that evidence of this sort emerges. Experienced defense practitioners would be hard pressed to name a case where a death-bed letter emerges post-trial that exonerates a defendant. There is other evidence, both newly discovered and not, in particular the audio evidence, which supports and substantiates the assertions of the letter in question. There is a real chance that McDaniel is actually innocent. At any rate, it is reasonable to posit that the evidence could lead to an acquittal should the case be retried.

Further, both Petitioners stressed on appeal that, even if the Rules of Evidence do not allow for admission of the newly discovered material, constitutional protections trump evidentiary standards. The law regarding this issue is complex and relatively

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[4] The Ninth Circuit opinion does not address the fact that a handwriting expert employed by the defense determined that Mr. Shaiken did write the letter in question. The court is also incorrect in stating that the defense did not offer assurances that audio recording was an original recording. An audio expert determined that the recording had not been altered or otherwise contaminated.

undeveloped. This doctrine flows from the more well-established principle that a defendant enjoys the constitutional right to present a thorough and complete defense.

Further, the court's focus on questionable technicalities misses the mark when the evidence in question raises a real doubt as to whether the defendant in question is innocent. Hence, even the Federal Rules of Evidence must give way when evidence this potent is at issue.

The Ninth Circuit only nod to the constitutional issue was its observation that this was not a case where the district court applied the rules of evidence mechanistically to defeat justice. (App. A 3-4 (quoting a Ninth Circuit case that, in turn, quotes *Chambers v. Mississippi*, 410 U.S. 284, 302(1973)).)

In this, the Ninth Circuit erred because the question involves further analysis.

This is so because, whether grounded in the Sixth Amendment's guarantee of compulsory process, or in the more general Fifth Amendment guarantee of due process, "the Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense" which includes, at a minimum, the right to present evidence that might influence the determination of guilt. *United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010) (citations omitted). "Of course, the right to cross-examine includes the opportunity to show that a witness is biased or that the testimony is exaggerated or unbelievable." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52 (1987). "Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Id.* at 56 (citing, inter alia, *Cool v. United States*, 409 U.S. 100 (1972) (per curiam)).

The right to confront and cross-examine witnesses, and to otherwise present exculpatory evidence, is grounded in these constitutional values. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *see also Taylor v. Illinois*, 484 U.S. 400, 408

(1988) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense . . . Indeed, this right is an essential attribute of the adversary system itself." (internal citation to *Chambers*, 410 U.S. at 284, omitted)).

Precluding a defendant from presenting a defense by disallowing the presentation of potent exculpatory material, such as a letter exonerating that defendant, implicates both Fifth Amendment's Due Process Clause as well as the Sixth Amendment's right to a jury trial. *See Webb v. Texas*, 409 U.S. 95, 98 (1972) (prefacing the right of a defendant to present evidence on due process grounds); *cf. Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause . . . or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaning opportunity to present a complete defense'" (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)); *see also Perry v. Rushin*, 713 F.2d 1447, 1450 (9th Cir. 1983) (discussing the Fifth and Sixth Amendment implication of excluding evidence at trial crucial to a defendant's case).

These constitutional guarantees are of such weighty import that, in certain situations, evidentiary rules must give way to the right to present a defense. *See Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (noting the right to present testimony "may, in appropriate cases, bow to accommodate other legitimate interests in a criminal trial") (citations omitted); *cf. Green v. Georgia*, 442 U.S. 95, 97 (1979) ("the hearsay rule may not be applied mechanistically to defeat the ends of justice") (quoting *Chambers*, 410 U.S. at 302); *see also Crawford v. Washington*, 541 U.S. 36, 60-65 (2004) (holding that Washington State evidentiary rules could not trump Sixth Amendment Confrontation Clause protection).

It is true that the Constitution permits trial judges to exclude defense evidence that is repetitive, only marginally relevant, or unduly harassing, prejudicial, or confuses the issues. The proffered evidence's probative value, however, must be outweighed by these factors. *See Holmes v. South Carolina*, 547 U.S. 319, 326-27 (2006). While the right to present evidence is not boundless and must bow to accommodate other legitimate interests in the criminal trial process, its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined. *Cf. Chambers*, 410 U.S. at 295.

Thus, precedent "has made clear that the erroneous exclusion of critical, corroborative evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense." *DePetris v. Kuykendall*, 239 F.3d 1057, 1062 (9th Cir. 2001).

A claim of actual innocence has great legal significance. Even the highly arcane and strictly applied procedural rules that govern federal habeas cases must give way when a claim of actual innocence is established. *See, e.g., McQuiggin v. Perkins*, 569 U.S. 383, 391-96 (2013) (finding that a claim of actual innocence will overcome any procedural default in habeas actions including time bars). In this case, however, both the district and appellate courts looked at the evidence of actual innocence through a technical, admissible evidence lens. There is little focus on the fact that the materials in question constitute strong evidence of innocence.

The Petitioners assert that this is because this Court's pronouncements on the question of whether and when constitutional standards trump the rules of evidence are unclear. Courts struggle with this question and have developed various tests for gauging the admissibility of exculpatory evidence under the rules of evidence framework.

The Petitioners submit the various standards employed by the circuit courts of appeal are evidence of the struggle between rules of evidence standards and the constitutional imperative to allow a defendant the right to defend himself.

C. The Eruptions of Circuit Splits are Evidence of this Tension

Federal Rule of Evidence 804(b)(3) defines a statement against interest as:

> (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 any evidence that supports or undermines it.

To get a statement against interest into evidence under Rule 804(b)(3) , the proponent must show that: 1) the declarant is unavailable as a witness; 2) the statement so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement. *See United States v. Paguio*, 114 F.3d 928, 932 (9th Cir. 1997).

Self-inculpatory statements "have long been recognized as bearing strong indicia of reliability." *Chia v. Cambra*, 360 F.3d 997, 1005 (9th Cir. 2004).

In the case at bar, the Ninth Circuit found that the death-bed confession letter did not satisfy Rule 804(b)(4) "because the note purported to be a deathbed confession and expressed that Shaikin feared no consequence in writing it." (App. A at 3.) The court applied a subjective standard to the element of whether "the statement so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true."

The majority of circuits, however, apply the objective "reasonable person" standard. The Fifth Circuit requires that the statement "must clearly indicate trustworthiness" based on objective circumstances, not the declarant's subjective beliefs. *United States v. Alvarez*, 584 F.2d 694, 701-702 (5th Cir. 1978). The Sixth Circuit directs courts to ask whether a reasonable person in the declarant's position would not have made the statement unless believing it to be true. *See United States v. Price*, 134 F.3d 340, 346 (6th Cir. 1998). The Eighth Circuit applies the same objective test as an explicit element of its four-part admissibility standard. *See United States v. Riley*, 657 F.2d 1377, 1386 (8th Cir. 1981). The Eleventh Circuit applies a three-part test but looks at whether evidence adduced at trial corroborates the proposed statement to be admitted in making its analysis. *See United States v. Gossett*, 877 F.2d 901, 907 (11th Cir. 1989).

The Ninth Circuit's "fear no consequences" test stands alone. No other circuit would have disqualified Shaikin's confession at the threshold "against interest" stage. The resulting inequality is stark: a defendant in the Fifth, Sixth, or Eighth Circuit who offered an identical deathbed confession from the perpetrator of the charged crimes would not face the Ninth Circuit's categorical bar.

1. The Circuits are also Divided on the Corroboration Element

Independent of the "against interest" question, the courts of appeals are divided on the nature of corroboration required under Federal Rule of Evidence 804(b)(3)(B). The Ninth Circuit's ruling that Petitioners failed because they could not produce "a witness to corroborate the veracity of the note or its contents" conflicts with the established rule in multiple other circuits. (*See* App. A 3-4.)

The Second Circuit requires only that the "inference of trustworthiness from the proffered corroborating circumstances must be strong, not merely allowable," but it looks to ‘corroborating circumstances,’ not to witness testimony about the statement's contents. *United States v. Mill*er, 954 F.3d 551, 558 (2d Cir. 2020).

The Tenth Circuit applies the identical standard, with the additional observation that "the determination of the sufficiency of such corroborating evidence lies within the sound discretion of the trial court." *United States v. Porter*, 881 F.2d 878, 882-883 (10th Cir. 1989).

The Sixth Circuit holds that the corroboration inquiry focuses on the trustworthiness of the statement itself, rather than on whether other evidence in the case corroborates what the statement asserts. *See United States v. Franklin*, 415 F.3d 537, 547-48 (6th Cir. 2005).

The First Circuit holds that meaningful corroboration is required, "though it is not necessary that the corroboration consist of independent evidence supporting the truth of the matter asserted by the hearsay statements, but evidence that clearly indicates that the statements were worthy of belief." *United States v. Pelletier*, 666 F.3d 1, 8 (1st Cir. 2011) (citing *Unites States v. Barone*, 114 F.2d 1284, 1300 (1st Cir. 1997)).

Additionally, *United States v. Taylor*, 848 F.3d 476 (1st Cir. 2017), focuses on whether the statements were made to law enforcement in an attempt to curry favor, or whether they were made to family members or close associates. *See Taylor*, 848 F.3d at 487. The context, notably, is the reverse of what presents in this case. The declarant is not blame shifting, he is confessing blame and the context is someone he trusted with his written confession prior to his death.

This Court itself recognized in *Williamson v. United States,* 512 U.S. 594, 600 (1994), that the corroboration requirement focuses on the reliability of the declarant's out-of-court statement overall, not external witness testimony corroborating the statement's truth. Yet the Ninth Circuit demanded precisely that: witnesses corroborating the veracity of the note's contents. This ruling stands in direct conflict with *Williamson* and with the corroboration standards applied in the First, Second, Sixth, and Tenth Circuits.

The practical consequences of this conflict are substantial. The Fourth Circuit applies a five factors to consider to determine whether there is sufficient corroboration: (1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement, (2) the declarant's motive in making the statement and whether there was any reason for the declarant to lie, (3) whether the declarant repeated the statement and did so consistently, (4) the party or parties to whom the statement was made, (5) the relationship of the declarant to the accused, and (6) the nature and strength of independent evidence relevant to the conduct in question. *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995) (citing to *United States v. Brainard*. 690 F.2d 1117, 1124 (4th Cir. 1982)).

The Second Circuit uniquely requires a demanding corroboration standard of both the declarant's trustworthiness and the statement's trustworthiness. *See United States v. Doyle*, 130 F.3d 523, 544 (2d Cir. 1997). The Third Circuit requires only that the circumstances surrounding the making of the statement be "alone sufficient to render [the statement] trustworthy," independent of external evidence. *United States v. Moses*, 148 F.3d 277, 280 (3d Cir. 1998).

These divergent standards have never been harmonized, notwithstanding the Amendments to the Rule that were enacted on December 31, 2024. Only one published Circuit decision to date addresses the Amendment FRE 804(b)(3), but it does not make any meaningful analysis beyond a reference to the Amendment. *See United States v. Pepper*, 138 F.4th 1299, 1307-10 & n.9 (10th Cir. 2025). The result is that the admissibility of functionally identical statements turns entirely on the circuit in which a prosecution happens to be tried, a state of affairs incompatible with the uniform application of a single federal rule of evidence.

D. The Circuit Splits are the Product of Constitutional Tension

The purpose of this Petition is not to seek certiorari on the question of the existence of a circuit split alone. The Petitioners posit that the existence of this split is the product of the constitutional tension these situations impart.

For, as the instant matter demonstrates, objective standards of decency, due process, and fair play resile from a jury verdict that is the product of incomplete information. The owner of the 24/7 Vaults business wrote a confession letter, on his death-bed, explaining that he framed the Petitioners in order to extract money from a failing business. The defendants then found a lost tape from that same person which also implicated the owner as the true criminal culprit. Any reasonable juror would want to be apprised of that information before finding an individual guilty. Yet a jury will never see the exonerating evidence because technical aspects of the Rules of Evidence arguably rendered even this potent evidence inadmissible.

Circuit splits exist on this issue because the prescriptions of rules of evidence, reasonable and sound in most instances, fail to incorporate constitutional standards. It is natural for courts to apply the strictures of the rules of evidence to the question of admissibility. What is missing from the analysis is the fundamental due process and fairness questions that the Constitution demands be addressed. As evidence by the divergent law on this matter and this Ninth Circuit's decision regarding the Petitioners, the law requires this Court's further guidance on how to balance and weigh competing concerns when the Constitution demands entry of evidence that the federal Rules of Evidence finds admissible.

CONCLUSION

For the aforementioned reasons, and in the interests of justice and fair play and to address an issue of constitutional import that has vexed the circuit court of appeals, Petitioners McDaniel and Whitmore respectfully requests that the Court grant this Petition for a Writ of Certiorari and take up the question of when rules of evidence must give way to constitutional concerns.

DATED this 14th Day of May, 2026.

HOFLAND & TOMSHECK

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APPENDIX A

NOT FOR PUBLICATION

FILED

DEC 19 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. LARRY ANTHONY MCDANIEL; SYLVIANE DELLA WHITMORE, AKA Sylviane Cordova, Defendants - Appellants.	Nos. 24-1824; 24-2299 D.C. Nos. 2:17-cr-00110-APG-DJA-2 2:17-cr-00110-APG-DJA-3 MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Argued and Submitted December 1, 2025
San Francisco, California

Before: RAWLINSON and SANCHEZ, Circuit Judges, and ZIPPS, Chief District Judge.**

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jennifer G. Zipps, United States Chief District Judge for the District of Arizona, sitting by designation.

Appellants Sylviane Whitmore and Larry McDaniel and non-appellant Phillip Hurbace were tried together as codefendants and convicted of offenses related to two thefts of private safe company, 24/7 Private Vaults (hereinafter "24/7"), where they were employed. Subsequent to their convictions, the district court received an anonymous letter containing a purported deathbed confession from 24/7's owner Elliot Shaikin, which asserted that Shaikin and Hurbace were solely responsible for the thefts. Whitmore and McDaniel now appeal the district court's denial of their motion for a new trial based on newly discovered evidence. Whitmore also raises several other challenges to her conviction and restitution order. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not err in denying Whitmore's and McDaniel's joint motion for a new trial.[1] "To prevail on a Rule 33 motion for a new trial based on newly discovered evidence, a defendant must satisfy a five-part test: '(1) the evidence must be newly discovered; (2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new

[1] The parties dispute whether the district court's order should be reviewed for an abuse of discretion or de novo. We need not resolve their disagreement because, under either standard of review, the district court did not err in denying Appellants' motion for a new trial.

trial would probably result in acquittal.'" *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005) (internal citation omitted).

The district court did not err in concluding that Shaikin's note was inadmissible hearsay. The court correctly concluded that Shaikin's handwritten note did not satisfy the hearsay exception for statements against interest, Fed. R. Evid. 804(b)(3), because the note purported to be a deathbed confession and expressed that Shaikin feared no consequences by writing it. *See United States v. Fowlie*, 24 F.3d 1059, 1068 (9th Cir. 1994). Second, the district court properly determined that the note did not bear sufficient guarantees of trustworthiness to be admissible under the residual hearsay exception, Fed. R. Evid. 807. Appellants present almost no evidence concerning the anonymous mailing, the circumstances under which the confession was made, or any witness to corroborate the veracity of the note or its contents.

Other new evidence presented by Appellants in support of their new trial motion is similarly unreliable. McDaniel points to an alleged audio-taped recording of a phone call between Shaikin and McDaniel which he purportedly discovered in his garage after his trial. But McDaniel offered no expert evidence authenticating Shaikin's voice on the recording or that it is an original recording. Under these circumstances, this is not a case where the district court "applied [the rules of evidence] mechanistically to defeat the ends of justice." *Chia v. Cambra*, 360 F.3d 997, 1007 (9th Cir. 2004) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)). Rather, the district court properly determined that the newly discovered evidence was inadmissible, lacked sufficient guarantees of trustworthiness, and was unlikely to result in Appellants' probable acquittal.

2. Whitmore waived her challenge to the district court's denial of her motion to sever her trial from codefendant Hurbace when she did not renew the motion at the end of trial nor join Hurbace's renewed motion. *See United States v. Kaplan*, 554 F.2d 958, 965–66 (9th Cir. 1977).

3. Whitmore's Sixth Amendment right to present a complete defense was not violated when she was prevented from calling a mitigating witness to impeach Hurbace's witness. The district court did not abuse its discretion by excluding Whitmore's witness because the testimony was not directly impeaching and the mitigating witness's testimony was peripheral to Whitmore's case. Indeed, Whitmore's counsel chose not to cross-examine Hurbace's witness. Finally, Whitmore was able to present her defense—that she had no involvement in the charged offenses—throughout the trial.

4. The district court did not abuse its discretion in admitting evidence of Whitmore's participation in prior thefts at 24/7 pursuant to Federal Rule of Evidence 404(b). *See United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993). At trial, Whitmore asserted that the evidence should not be admitted

because the prior thefts were dissimilar to the charged offenses, a contention she renews on appeal. After trial, Whitmore pursued a new theory—that an officer fabricated her *Mirandized* statements about the prior thefts. To the extent she relies on this unpreserved challenge to the evidence, we review it for plain error. *See United States v. Khan*, 993 F.2d 1368, 1376 (9th Cir. 1993).

Evidence may be admitted under Rule 404(b) if "(1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged." *United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012) (quotation omitted). The district court did not abuse its discretion in admitting evidence of Whitmore's prior thefts. As the district court found, the evidence was offered to prove Whitmore's knowledge and intent to commit the charged offenses. The prior thefts were committed only two to three years before the 2012 theft. Whitmore's own statements to the officer admitting to the thefts were sufficient to support the finding that she committed the acts. *See United States v. Dhingra*, 371 F.3d 557, 566 (9th Cir. 2004). And the thefts were sufficiently similar to the 2012 charged offense, as each of the thefts occurred at 24/7 while Whitmore was employed there and they were committed using inside knowledge of the business.

5. The district court did not err in finding that sufficient evidence supports the interstate commerce element of Whitmore's two Hobbs Act convictions. Because Whitmore did not raise this argument before the district court, we review her claim for plain error. *See United States v. Morgan*, 238 F.3d 1180, 1186 (9th Cir. 2001). To establish the jurisdictional element, the government relied on evidence that a watch stolen from 24/7 during the 2012 theft in Nevada was subsequently brought by Hurbace to California and then mailed to Georgia to be sold. Under plain error review, this evidence is sufficient to establish that Whitmore's acts "had a *de minimis* effect on interstate commerce." *United States v. Lynch*, 437 F.3d 902, 908 (9th Cir. 2006), *overruled in part on other grounds by, United States v. Lucas*, 101 F.4th 1158 (9th Cir. 2024).

6. We affirm the district court's restitution order. We review de novo the legality of a restitution order, and for an abuse of discretion when within the bounds of the statutory framework. *United States v. Grice*, 319 F.3d 1174, 1176 (9th Cir. 2003). Contrary to Whitmore's argument, this Court has established that there is no jury right for restitution determinations. *See United States v. George*, 949 F.3d 1181, 1188 (9th Cir. 2020). And the district court properly parsed and denied restitution for truly illegal proceeds, while awarding restitution to victims that had legitimate losses.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 13 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. LARRY ANTHONY MCDANIEL; SYLVIANE DELLA WHITMORE, AKA Sylviane Cordova, Defendants - Appellants.	Nos. 24-1824; 24-2299 D.C. Nos. 2:17-cr-00110-APG-DJA-2 2:17-cr-00110-APG-DJA-3 District of Nevada, Las Vegas ORDER

Before: RAWLINSON and SANCHEZ, Circuit Judges, and ZIPPS, Chief District Judge.*

The panel votes to deny Appellants' joint petition for panel rehearing. Judge Rawlinson and Judge Sanchez vote to deny the joint petition for rehearing en banc, and Judge Zipps so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40. The joint petition for panel rehearing or rehearing en banc (Dkt. 66) is DENIED.

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* The Honorable Jennifer G. Zipps, United States Chief District Judge for the District of Arizona, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LARRY MCDANIEL, Defendant-Appellant.	Case No. 2:17-CR-00110-APG-DJA USCA Case No. 24-1824 **ORDER APPOINTING COUNSEL**

Pursuant to the April 10, 2024 Order directing the appointment of substitute counsel for Appellant, IT IS HEREBY ORDERED THAT **Jason Carr** is appointed to represent Larry McDaniel for his appeal. Contact information for Mr. Carr appears below:

Jason F. Carr
Hofland and Tomsheck
238 S. 4th Street, First Floor
Las Vegas, NV 89101
702-895-6760
Email: Jasonc@hoflandlaw.com

Former counsel, Jacqueline Tirinnanzi, is directed to forward the case file to Mr. Carr forthwith. The clerk is directed to forward a copy of this order to the Clerk of the 9th Circuit Court of Appeals at counselappointments@ca9.uscourts.gov.

DATED this 16th day of April 2024.
Nunc Pro Tunc: April 11, 2024

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE