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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Gleicher, C.J., Markey, and Patel, JJ

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

LANTZ HOWARD WASHINGTON, **No. 165296**
Defendant-Appellee.

L.C. No. 19-002078-FH
COA No. 353052

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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C. The corpus delicti rule is a judicially created evidentiary-foundation rule that requires that a specific kind of tangible injury or loss along with someone's criminality first be shown before the admission of a voluntary and reliable confession, and without consideration of the confession. The rule should at least be modified to require under MRE 104(a) (concerning preliminary questions of the admissibility of evidence) that a confession be admissible if it is shown to be trustworthy or reliable, the rules of evidence not applying to the inquiry, or abolished . . . . . -10-

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Statement of the Question

I.

Testimonial hearsay is a statement the primary purpose of which at its making was to create an out-of-court substitute for trial testimony. Was the exchange between the prosecutor and supervisor Stockwell concerning his conversation with the Canadian supervisor leading to defendant's arrest not for that primary purpose, and was the fair inference from it that defendant was the one who blew through the toll booth, not that he possessed body armor, which was fairly inferable from the circumstances in any event?

Amicus answers: YES

Defendant answers: NO

II.

Are defendant's admissions not excludable under the corpus delicti rule?

A.

Was the corpus delicti—such as it is, in a crime such as the one here—shown independent of the defendant's admissions?

Amicus answers: YES

B.

Is the corpus delicti rule inapplicable here because 1) defendant's statements are admissions, not confessions, as they need proof of facts not admitted in order to show guilt; further, 2) should the rule be inapplicable where the crime charged involves no specific kind of tangible injury or loss, or it is impossible to show that a crime occurred without also implicating a specific defendant?

Amicus answers: YES

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C.

The corpus delicti rule is a judicially created evidentiary-foundation rule that requires that a specific kind of tangible injury or loss along with someone's criminality first be shown before the admission of a voluntary and reliable confession, and without consideration of the confession. Should the rule at least be modified to require under MRE 104(a) (concerning preliminary questions of the admissibility of evidence) that a confession be admissible if it is shown to be trustworthy or reliable, the rules of evidence not applying to the inquiry, or abolished?

Amicus answers: YES

Statement of Facts

Amicus joins the statement of facts supplied by the People.

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Argument

I.

Testimonial hearsay is a statement the primary purpose of which at its making was to create an out-of-court substitute for trial testimony. The exchange between the prosecutor and supervisor Stockwell concerning his conversation with the Canadian supervisor leading to defendant's arrest was not for that primary purpose, and the fair inference from it was that defendant was the one who blew through the toll booth, not that he possessed body armor, which was fairly inferable from the circumstances in any event.

Introduction

In its order granting leave to appeal, this Court delineated two issues to be briefed, the first being:

- whether evidence directly implying the substance of a testimonial, out-of-court statement made by an unavailable witness and offered to prove its truth, i.e., "implied testimonial hearsay," is inadmissible because it violates the Sixth Amendment of the United States Constitution and Article 1, § 20 of Michigan's Constitution.[1]

Amicus concurs with the argument of the People, focusing on the second issue, that of the corpus delicti,[2] but with a few remarks here.

Discussion

Denise Fenner was the bridge safety officer at the toll both on the American side of the Blue Water Bridge. A vehicle, a truck, "blew through" her lane without stopping or paying the toll,

[1] *People v. Washington*, —Mich.—, 2023 WL 3641183 (No. 165256, May 24, 2023).

[2] Indeed, it is the view of amicus that, as will be argued, defendant's statements are admissible and render any error here harmless under any standard, so that it is not necessary for this Court to resolve this issue.

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following the vehicle in front of it when the gate opened for that vehicle.[3] Fenner could not identify the driver of the truck, but there was a surveillance video of the truck going through the gate, and from a still from the video Fenner was able to say the driver was wearing red.[4] Paul Stockwell, the supervisor who Fenner contacted when the vehicle blew through the checkpoint, said he was contacted by supervisor Lavers from the Canadian side to let him know they were coming with someone. They came with a cruiser with defendant in the back seat, a followup car, and then a Ford pickup truck.[5] The individual being transported and turned over was wearing a red shirt and blue jeans.[6] The Canadian supervisor also gave Stockwell body armor.[7] The prosecutor asked "Now, without saying anything about what was said, the only question I have for you is were there

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[3] A. We had a vehicle that actually blew through my lane.
Q. Okay. And explain what you mean by blew through your lane?
A. Blew through without stopping or paying the toll or acknowledging anything.
T, 130.

Q. ... there is what appears to be a truck waiting to pay; is that correct?
A. Yes.
Q .And that's the truck that blows through the toll?
A. Correct.
T,. 138.

[4] Q. And again, this is the driver's side window; is that correct?
A. Yes.
Q . Are you able to make out any colors in that window based on your, your view?
A. Just red clothing.
Q. Okay. There is red clothing or what appears to be red clothing in that window there?
A. Yes, sir.
T, 140.

[5] T, 148.

[6] Q. When you took custody of the Defendant, holding him for the Port Huron Police Department, do you recall any clothing that the Defendant would have been wearing at the time?
A. He had a red shirt on, and I believe blue jeans.
T, 157.

[7] T, 152.

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communications between you and [the Canadian supervisor] Officer Lavers?" and on receiving an affirmative answer asked "And, and, and based on those communications you took custody of the Defendant?" and Stockwell answered that they did, and also took possession of the body armor.[8]

The Court of Appeals majority took from this exchange that the Canadian supervisor, Lavers, had "affirmed" that defendant was "wearing body armor," and the "affirmation" was communicated to the jury through Stockwell's testimony that after a communication from Lavers defendant had been taken into custody (and that Lavers had turned over the body armor), a communication that was testimonial hearsay in violation of the confrontation clause because, the majority said, Stockwell "had no reason to know, or even to suspect, that Washington was wearing body armor until he spoke to Lavers."[9] But review the facts.

Someone driving a pickup truck had blown through the American-side toll booth when another vehicle had paid and the gate lifted for that vehicle. That person was dressed in red. The Canadian authorities then brought to the American authorities a pickup truck, and a man in custody, wearing a red shirt. The Canadian official also handed over to Stockwell body armor (though defendant appears to have been wearing the body armor, there was no hint, by word or deed, that defendant had been wearing it, and from where the majority drew this conclusion is rather mysterious). Again, the majority said that Stockwell "had no reason to know, or even to suspect, that Washington was wearing body armor until he spoke to Lavers." There is no hint in the facts that anyone suggested defendant was wearing the body armor; taking the majority to mean that Stockwell had no reason to know or suspect defendant had been in *possession* of the body armor "until he spoke to Lavers," this is not true. The facts described above—the pickup truck driven by someone in red blowing through the toll booth, and the Canadian official then bringing to the American authorities a pickup truck and its driver in custody and wearing a red shirt, and giving the American authorities body armor—allow the inference that defendant possessed the body armor. Why was Lavers giving body armor to the American officials in conjunction with turning over defendant and

[8] T, 157.

[9] *People v. Washington*, —Mich. App—, 2022 WL 17364766 at 3 (2022).

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the pickup truck other than that defendant possessed it? One would hardly conclude that the body armor was a birthday gift from Lavers to Stockwell. Lady Justice is depicted as wearing a blindfold "not because justice is blind, but because justice does not and should not turn on the identity of the parties before her."[10] And though "justice is proverbially blind" as between the parties, "a court cannot, and ought not to, fail to see the patent facts which a record discloses."[11] Further, that the prosecutor asked Stockwell "Now, without saying anything about what was said, the only question I have for you is were there communications between you and [the Canadian supervisor] Officer Lavers?" and "and based on those communications you took custody of the Defendant?" (Stockwell answering that they did) not only adds nothing to the inference already fairly drawable from the facts that defendant possessed the body armor (which, without the further fact that he had been convicted of a violent felony, was not illegal), but the most likely inference from this exchange is that it was communicated that defendant was the one who had blown by the toll booth, not that defendant was "wearing" body armor.

Whatever was conveyed by the question and answer "were there communications between you and [the Canadian supervisor] Officer Lavers?" and "and based on those communications you took custody of the Defendant?" (the answer being yes)—and amicus believes that if anything was inferable it was that defendant was the one who had blown by the toll booth—it was not admitted for the truth, but to show why defendant was arrested. In closing, the prosecutor did not argue that Lavers told Stockwell that defendant possessed the body armor. Indeed, he said that

> I would agree with Mr. Politano [defense counsel] that if the only evidence that the People had to present was the Defendant being turned over by border services from Canada not wearing body armor at the time, and that was it, nothing else, then you would not have enough to convict the Defendant beyond a reasonable doubt, because there is just no factual connection.
>
> However, that's not the only evidence the People presented. The People also presented two statements from the Defendant. If you

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[10] Glynn S. Lunney, Jr., "Two-Tiered Trademarks," 56 Hous. L. Rev. 295, 304 (2018).

[11] *Boatmen's Bank of St. Louis v. Fritzlen*, 135 F. 650, 657 (CA 8, 1905).

These facts also demonstrate the corpus delicti—that *someone* possessed the body armor, and its illegal possession proven by the stipulated fact that defendant had a conviction for a violent felony.

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> recall which ones they were, there was one statement made by the Defendant at the jail processing center on April the 8th which Officer Whitten from Port Huron testified to hearing the defendant saying I was wearing body armor and that was because I was afraid....But don't just take Officer Whitten's word for it. You can also take the Defendant's word for it because what did you hear from the Defendant? You heard the Defendant talking to his mother in the jail on April the 27th on a recorded phone call....The Defendant said "What happened is I was getting threats, right, and James gave me a bullet proof vest. I put on the bulletproof vest....And I went to the police with it on. I was in fear, I was fear for my life, they was threatening me."
>
> *****
>
> So the Defendant, Defendant admits to what we know circumstantially. We know he's brought back with the body armor and he admits to it. That's all that you need. When you have that admission you don't need the Canadian Border Service Agency anymore.[12]

And even assuming that the jury could infer from the referenced communication between Lavers and Stockwell that Lavers had told Stockwell that defendant possessed the body armor—again, an inference amicus disputes, and that was, as argued, readily drawable from the facts absent this testimony—the majority's conclusion that any statement made by Lavers to Stockwell that defendant possessed the body armor was testimonial hearsay because "[a] testimonial statement is one made for an evidentiary purpose"[13] sweeps too broadly, though "the course of true law" pertaining to hearsay and the confrontation clause "has not—to put it mildly—run smooth."[14] Even assuming the majority's unlikely jury inference that Lavers told Stockwell that defendant possessed the body armor, such a statement would not have been "for an evidentiary purpose." Lavers had no way of knowing that possession of the body armor by defendant was criminal, nor did Stockwell likely know so at this time. Lavers could not have reasonably expected either that such a statement

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[12] T, 198-199.

[13] *Washington*, supra, 2022 WL 17364766 at 3.

[14] *Chapman v. United States*, 365 U.S. 610, 618, 81 S. Ct. 776, 780, 5 L. Ed. 2d 828 (1961) (Frankfurter, J., concurring).

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had any evidentiary use, then, nor that even if it did that it would be used in court rather than his own testimony, as he could not know then that the Canadian authorities would deny him permission to testify in a case that he could not know at that time was even possible under American criminal law. The conclusion of the majority that Lavers' supposed "affirmation" that defendant was "wearing the body armor" was done "to establish or prove past events potentially relevant to later criminal prosecution" is fanciful.[15]

More recent cases repeatedly describe a testimonial statement as one "procured with a *primary purpose of creating an out-of-court substitute for trial testimony*," and "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause."[16] This test was stated not only in the *Bryant* case, but, referring to *Bryant*, also in *Williams v. Illinois*, the Court there saying that in *Bryant* "We emphasized that if a statement is not made for 'the primary purpose of creating an out-of-court substitute for trial testimony,' its admissibility is the concern of state and federal rules of evidence, not the Confrontation Clause.'"[17] And recently in *Ohio v. Clark* the Court again said that "In the end, the question is whether, in light of all the circumstances, viewed objectively, the '*primary purpose*' of the conversation was to *create an out-of-court substitute for trial testimony*,'" and that "we have never suggested . . . that the Confrontation Clause bars the introduction of all out-of-court statements that support the prosecution's case. Instead, we ask whether a statement was given with the 'primary purpose of creating an out-of-court substitute for trial testimony.'"[18] In light of all the circumstances

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[15] *Washington*, supra.

[16] *Michigan v. Bryant*, 562 U.S. 344, 358–359, 131 S. Ct. 1143, 1155, 179 L. Ed. 2d 93 (2011) (emphasis added).

[17] *Williams v. Illinois*, 567 U.S. 50, 83–84, 132 S. Ct. 2221, 2243, 183 L. Ed. 2d 89 (2012).

[18] *Ohio v. Clark*, 576 U.S. 237, 250–251, 135 S. Ct. 2173, 2183, 192 L. Ed. 2d 306 (2015) (cleaned up) (emphasis added).

And the approach of Justice Thomas has much to commend it.

> I would use the same test for statements to private persons that I have employed for statements to agents of law enforcement, assessing whether those statements bear sufficient indicia of solemnity to qualify as testimonial. . . .I have identified several categories of extrajudicial

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viewed objectively here it can hardly be said that Lavers primary purpose was to create an out-of-court substitute for trial testimony, even if it can be said that the most probable inference is that Lavers told Stockwell that defendant was in possession of the body armor (and amicus argues this is not true; the drawable inference from the exchange between the prosecutor and Stockwell was that defendant was the one who blew through the toll booth).

Amicus would add only that it is important to distinguish, as is sometimes not done, between implied hearsay—the claim here—and implied assertions. The latter concerns a statement that was admitted at trial that constitutes an exclamation, command, question, or the like, and is not intended as an assertion, but arguably contains an "implied" assertion. Federally, the hearsay rule does not admit of implied assertions,[19] and Michigan has proceeded in like fashion.[20] Implied hearsay, on the other hand, is where no statement is admitted, but the circumstances surrounding its making are presented in a manner making clear that it was made and what its content was, and that it *was* an assertion.[21] As argued, that did not happen here, and for the reasons stated, it is not necessary for this Court to delve into the matter.

> statements that bear sufficient indicia of solemnity to fall within the original meaning of testimony. Statements 'contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions' easily qualify. . . . And statements not contained in such materials may still qualify if they were obtained in 'a formalized dialogue' after the issuance of the warnings required by *Miranda v. Arizona* . . .; while in police custody; or in an attempt to evade confrontation."Id., 135 S. Ct. at 2186 (Thomas, J., concurring).

[19] *See e.g. United* States v. Lewis, 902 F.2d 1176, 1179 (CA 5, 1990); *United States v. Groce*, 682 F.2d 1359, 1364 (CA 11, 1982). And see Advisory Committee Note to FRE 801: "The definition of 'statement assumes importance because the term is used in the definition of hearsay in subdivision ©. The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that *nothing is an assertion unless intended to be one*." (emphasis added).

[20] *People v. Propp*, 340 Mich. App. 652, 667 (2022); *People v. Jones* (*On Rehearing After Remand*), 228 Mich.App. 191, 205, mod in part on other grounds 458 Mich. 862 (1998).

[21] See e.g. *United States v Kizzee*, 877 F.3d 650, 653 (CA 5, 2017).

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II.

Defendant's admissions are not excludable under the corpus delicti rule because:

A.

The corpus delicti—such as it is, in a crime such as the one here—was shown independent of the defendant's admissions.

B.

The corpus delicti rule is inapplicable here because defendant's statements are admissions, not confessions, as they need proof of facts not admitted in order to show guilt; further. the rule should not apply where the crime charged involves no specific kind of tangible injury or loss, or it is impossible to show that a crime occurred without also implicating a specific defendant.

C.

The corpus delicti rule is a judicially created evidentiary-foundation rule that requires that a specific kind of tangible injury or loss along with someone's criminality first be shown before the admission of a voluntary and reliable confession, and without consideration of the confession. The rule should at least be modified to require under MRE 104(a) (concerning preliminary questions of the admissibility of evidence) that a confession be admissible if it is shown to be trustworthy or reliable, the rules of evidence not applying to the inquiry, or abolished.

Introduction

If this Court concludes that "implied hearsay" was improperly admitted, then this Court asks "if so, whether the defendant's incriminating statements were inadmissible under the corpus delicti rule." Amicus answers that they *were* admissible, as, first, the corpus delicti, such as it is here, was shown independent of defendant's admissions; second, the corpus delicti rule is inapplicable in Michigan to admissions that are not confessions, and is, or should be, inapplicable to crimes that involve no specific kind of tangible injury or loss, or where it is impossible to show a crime occurred

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without at the same time implicating a specific defendant; and third, if the rule is found applicable, the statements were admissible under a proper understanding of the rule, which amicus urges the Court to revisit and modify or abolish, and overrule the unfortunate decision in *People v McMahan*.[22]

A. The corpus delicti—such as it is, in a crime such as the one here—was shown independent of the defendant's admissions

The Court of Appeals majority's view of the corpus delicti rule is mistaken; the rule is not a one-trick pony designed to free the patently guilty, but, such is it is, has the purpose of protecting against conviction where no crime was actually committed. The crime here is a possessory one, coupled with the history of the defendant; that is, that he has been convicted of a violent felony, the predicate to illegal possession of body armor, and proven here outside of his admissions (by stipulation). The Court of Appeals' holding is inconsistent with authority from this Court regarding a possessory crime:

> [T]he corpus delicti was satisfied by evidence independent of defendant's confession that (1) the cocaine *existed* and (2) was *possessed by someone*. . . . The defendant's contention that proof of the corpus delicti requires evidence *that the cocaine was constructively possessed by the defendant is incorrect*. Proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti. . . . It is sufficient to show that the crime was committed by someone. . . . In the words of a noted authority, the position that *the corpus delicti of a crime includes the identity of the perpetrator is "too absurd indeed to be argued with*," because it would require that the entire crime be proved before a confession could ever be admitted.[23]

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[22] *People v McMahan*, 451 Mich. 543 (1996).

While Carolyn Kenyon never received justice, because, as Justice Boyle put it in dissent, "[t]oday, the conviction of a person who every justice on this Court, along with twelve jurors, believe has killed his victim, is reversed because of the efficiency of garbage collection and disposal" so that her body was never found after McMahan dumped it, id., at 563, though terribly sad for the victims and their families, at least it can be said that McMahan is in prison for the rest of his life (as well as two concurrent sentences of 50-100 years). https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=217636. It remains true, however, as Justice Boyle said, that "the fact that [McMahan] stands convicted of two other charges of murder [then], provides neither a future level of comfort for this Court, nor redress for the family of this victim." Id., at 566, n.16.

[23] *People v. Konrad*, 449 Mich. 263, 270 (1995) (numbering and emphasis supplied).

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Here, then, the view that the People were required to establish the corpus delicti by showing that defendant possessed the body armor by direct or circumstantial evidence independent of his statements, which were not to the police, and do not constitute confessions,[24] is incorrect. To paraphrase *Konrad*, the People were required to show (1) that the body armor existed and (2) was possessed by someone—and here, also that defendant was convicted of a violent felony, which he did not include in his admissions, and was proven by his stipulation to the undeniable fact. The People showed that the body armor existed, that it was possessed by someone, and that defendant had been convicted of a violent felony, all independent of his statements admitting he possessed the body armor. His statements were then admissible to prove that *he* possessed the body armor.

B. The corpus delicti rule is inapplicable to admissions rather than confessions, and defendant's statements were admissions; further, the rule should not apply where the crime charged involves no specific kind of tangible injury or loss, or it is impossible to show that a crime occurred without also implicating a specific defendant

1. Defendant's statements were admissions not confessions, and not within the corpus delicti rule

Defendant here did not "confess." When being booked he remarked—not in response to questioning—that he was wearing body armor because people were going to kill him. Further, in a monitored telephone call to his mother he told her that "What happened is I was getting threats, right, and James gave me a bulletproof vest. I put on the bulletproof vest." These are not "confessions" but admissions of fact. Possession of or wearing body armor is not itself a crime; it is only criminal when possessed by one with a conviction for a violent felony,[25] and defendant had such a conviction, but did not mention it in his statements at booking or to his mother. The fact that he admitted—possession of body armor—was not, without more, a crime, the "more" being proof of a conviction for a violent felony.

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[24] See B., infra.

[25] "Except as otherwise provided in this section [no exceptions apply in the present case], a person who has been convicted of a violent felony shall not purchase, own, possess, or use body armor." MCL § 750.227g(1).

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It has been the rule for decades in Michigan that the corpus delicti rule is "limited . . . to admissions which are confessions, and not to admissions of fact which do not amount to confessions of guilt."[26] In the *Porter* case almost nine decades ago this Court rejected defendant's argument based on the corpus delicti rule because "[t]he rule is confined to confessions. . . . Defendant does not distinguish between confessions and admissions of fact. If the fact admitted necessarily amounts to a confession of guilt, it is a confession. *If, however, the fact admitted does not of itself show guilt, but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession, but an admission, and, therefore, is not within*" the rule.[27] Because in the case before it the defendant's statements were "admissions, which needed other facts to give them convicting force," they "therefore were admissible on the corpus delicti."[28] So here; the fact admitted by the defendant—possession of body armor—did not of itself show guilt, but needed "proof of other facts" which were not admitted by him "in order to show guilt," and was thus "not a confession, but an admission" and therefore "not within" the corpus delicti rule.

Any harm by the supposed "implied hearsay," if it is so found, is harmless by any standard, even beyond a reasonable doubt, given the incontrovertible proof of defendant's conviction for a violent felony (he stipulated to it) and his statements of possession of the body armor,[29] which were plainly admissible under the law of hearsay and the Fifth Amendment, and not within the corpus delicti rule for the reasons stated.

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[26] *People v. Rockwell*, 188 Mich. App. 405, 407 (1991); *People v. Porter*, 269 Mich. 284, 289–291 (1934).

[27] *Porter*, at 290-291 (emphasis supplied).

[28] Id, at 291. See also *People v. Drielick*, 56 Mich. App. 664, 667-668 (1974); *People v. Johnson*, 93 Mich. App. 667, 673 (1979) ; *People v. Losey*, 98 Mich. App. 189, 196-197 (1980) (rev'd on other grounds, 413 Mich. 346 (1982)); *People v. Oliver*, 111 Mich. App. 734, 742 (1981); *People v. Schumacher*, 276 Mich. App. 165, 180–181 (2007) ("the corpus delicti rule does not bar admissions of fact that do not amount to a confession of guilt"). See also *People v. Mitchell*, 478 Mich. 905, 906 (2007) ("Where the defendant makes admissions of fact that do not amount to confessions of guilt, those admissions may be admitted to prove the corpus delicti of the crime." (Young, J., concurring in the denial of leave to appeal).

[29] See further C., infra on this point on the corroboration of the trustworthiness of defendant's admissions.

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2. The corpus delicti rule should not apply to offenses with no specific tangible loss or injury, or where it is impossible to show that a crime occurred without also implicating a specific defendant

The corpus delicti is understood as a "specific kind of injury or loss" as well as someone's criminality. But what if the offense is committed *without* any specific kind of tangible injury or loss, or is one where it is impossible to show that a crime occurred without also implicating a specific defendant, such as in the present case, where the defendant's prior conviction for a violent felony was a necessary part of the proof that a crime occurred? In these cases, the corpus delicti rule should not apply.

In *United States v. Shunk*[30] the offense—felon in possession of a firearm—was very similar to the offense here. Discussing defendant's corpus delicti argument with respect to admission of his statements, the court said that "the corpus delicti concept is not relevant to a crime such as the present one where there is no tangible injury or loss and the crime cannot be found to have been committed without reference to a specific defendant," and thus "has no practical application to the crime of which the defendant was convicted."[31] At most, "it is sufficient if the government's independent evidence tends to establish the trustworthiness of the confession or admission. Of course, the whole body of the evidence, including the statement in question, must be sufficient to convict."[32]

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[30] *United States v. Shunk*, 881 F.2d 917 (CA 10, 1989).

[31] Id, at 919, 920.

One unpublished federal district case says that "the corpus delicti rule is inapplicable to possession or distribution offenses," citing *Strunk*. *United States v. Pohlable*, 2008 WL 11355441, at 4 (CD Cal., 2008).

And see *State v. Dern*, 362 P.3d 566, 583 (Kan., 2015) (taking this approach where the offense was indecent liberties with a child, saying the trustworthiness approach is applicable "to crimes that do not naturally or obviously produce a tangible injury easily susceptible to physical proof"); *State v. Kukert*, 965 N.W.2d 849, 854–855 (N.D., 2021) ("Analyzing a defendant's statements or confession under the trustworthiness approach appears to be the majority view").

[32] *United States v. Wolf*, 535 F.2d 476, 478 (CA8, 1976); *Opper v. United States*, 348 U.S. 84, 93, 75 S. Ct. 158, 164, 99 L. Ed. 101, 45 A.L.R.2d 1308 (1954). If the corpus delicti is viewed as applicable here, and survives, this should be the rule in all cases. See infra. And amicus urges the rule be abolished.

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Here, the offense is a public-order one, and there is no tangible harm, no specific loss or injury, and so the corpus delicti rule makes little sense; it is also impossible to prove a crime occurred at all without reference to a specific person—the defendant—as it had to be shown that *he* had a prior conviction for a violent felony. The "formal" corpus delicti rule is dangerous to truth-finding particularly with these crimes, and this is why the federal trustworthiness approach is preferred "for crimes involving inappropriate sexual contact where no physical or forensic evidence is available, and crimes involving the most vulnerable victims, such as infants, young children, and the mentally infirm."[33] The corpus delicti rule should not apply here, and to those sorts of cases.

C. If viewed as within the rule, defendant's statements are admissible as the rule should be understood

1. The history and mission of the corpus delicti rule

The corpus delicti rule was born from homicide cases, largely the result of the "shocking effect of the reappearance of a missing person, hale and sound, after his supposed murder has resulted in the execution of the alleged killer."[34] In *Perrys' Case*[35] in 1661 John Perry, a servant, was sent to look for Harrison, who had been sent to collect certain rents. When neither returned, searchers discovered Perry along with clothing belonging to Harrison, including his hat and comb which were "hackt and cut, and the band bloody." No body was ever found, but Perry gave a number of inconsistent statements, concluding with an admission that his brother had killed Harrison under circumstances which implicated Perry as well as his mother. Perry's mother and brother insisted they were innocent, but Perry stood by his story. After all three were executed, Harrison reappeared, and it became apparent that he had disappeared for reasons of his own. A similar American example

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[33] *State v. Kukert*, supra.

[34] Perkins *Criminal Law*, Chap. 2, sec. 1(G), p.98-100.

As Bishop's old treatise rather mildly puts it, "[i]f, after a man has been convicted of murder and hung, and those who clamored for his blood have found chronic happiness in contemplating the justice of the law, the infallibility of the tribunals, and the unswerving precision of judicial evidence, the supposed murdered person appears, *the situation is not pleasant*." 2 Joel Prentiss Bishop, *New Criminal Procedure* (2nd Ed., 1913), § 1056(3), p. 910 (emphasis supplied).

[35] *Perrys' Case*, 14 How. St. Tr. 1312 (1661).

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ended more happily, in the *Trial of Stephen and Jesse Boorn*.[36] The Boorn brothers were accused in the murder of one Russel Colvin, and Stephen Boorn gave a full confession. Fortunately, Colvin reappeared in time to stop the scheduled execution of the Boorns.

Thus, to avoid murder convictions—and particularly executions—where no homicide had occurred, the rule developed that no person could be convicted of murder based on his or her "naked" or "uncorroborated" confession; there must be other evidence tending to establish the corpus delicti; that is, "[t]he historic office of the corpus delicti rule in homicide cases is to guard against, indeed to preclude, conviction for a criminal homicide when none was committed."[37] And the corpus delicti is understood as the "specific kind of injury or loss," as well as someone's criminality.[38] Wigmore said that in England and Irish courts the rule was "apparently restricted to the case of homicide," and concluded that "any rule of the sort is questionable," and "often a positive obstruction to the course of justice."[39] In the United States, "once the rule had been established by a few courts in this country, other courts followed," and "[w]hile the English rule had been restricted to murder and bigamy, the American versions extended to almost all crimes,"[40] though without a consistent rationale.

2. The rule in Michigan: the evidentiary-foundation principle

There are two understandings of the corpus delicti rule. One is that it "defines the evidentiary foundation needed to support introduction of the defendant's confession, so that the decision is to

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[36] *Trial of Stephen and Jesse Boorn*, 6 Am. St. Tr. 73 (1819); Rollin M. Perkins, "The Corpus Delicti of Murder," 48 Va. L. Rev. 173, 175–76 (1962).

[37] *People v. Williams*, 422 Mich. 381, 388 (1985).

[38] Id., at 391; 7 Wigmore, *Evidence (Chadbourn Revision)* (1978), § 2072; *People v. Konrad*, 449 Mich. 263, 270 (1995); *People v. Ranney*, 153 Mich. 293, 296 (1908).

[39] 7 Wigmore,§ 2072.

[40] Note, "Proof of the Corpus Delicti Aliunde the Defendant's Confession, "103 U. Pa. L. Rev. 638, 641 (1955); *State v. Weisser*, 150 P.3d 1043, 1047 (N.M. Ct. App., 2006) ("While the corpus delicti rule only applied to homicide crimes in England, its application was expanded in the United States to cover most crimes").

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be made by the trial judge before the case is submitted to the jury," and the other is that the rule "establishes an implicit element of the government's proof, so that the trial judge's evidentiary ruling would be merely preliminary to the jury's later determination of corpus delicti."[41] As Professor LaFave has noted, "[i]t has been cogently argued . . . that the 'implicit element' approach to corpus delicti is difficult to reconcile with our law's normal view concerning a jury's ability to dispassionately assess a confession."[42] Though not entirely consistent, Michigan decisions appear to take the evidentiary foundation approach to the corpus delicti rule, no case apparently ever having suggested that the existence of the corpus delicti as a predicate to the admission of a confession be decided by the jury *after* a preliminary decision of admissibility by the court, and no jury is so instructed today.[43] The rule requires that the corpus delicti be shown independent of the defendant's confession as a predicate—an evidentiary foundation—for the jury's consideration of the confession, and to the satisfaction of the court by a preponderance of the evidence, not the jury.[44] The jury then considers the confession as to proof of any element of the crime as it does any other evidence.[45]

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[41] 1 LaFave, *Substantive Criminal Law* (3d ed) § 1.4(b).

[42] Id.; 1 *McCormick On Evidence* (8th ed) § 145.

[43] There is no Model Criminal Jury Instruction on corpus delicti as a predicate to the consideration of a confession.

[44] *People v.Brasic*, 171 Mich. App. 222 (1988); *People v. Modelski*, 164 Mich. App. 337 (1987). And see e.g. *People v. Swetland*, 77 Mich. 53, 63 (1889) ("the evidence to establish the corpus delicti must first be given, before acts or admissions of the accused can be put in evidence"); *People v. Kirby*, 223 Mich. 440, 447–448 (1923) ("the evidence to establish the corpus delicti must first be given, before acts or admissions of the accused can be put in evidence"); *People v. Terlisner*, 96 Mich. App. 423, 427–428 (1980) ("the long established rule [is] that the corpus delicti must first be established before admissions or confessions of the accused may be put in evidence"); *People v. Tunnacliff*, 375 Mich. 298, 302 (1965) ("The prosecution utilized the testimony in establishing the corpus delicti of the breaking and entering by Mahar so as to lay the foundation for later alleged admissions by Tunnacliff as to his guilt of aiding and abetting") (O'Hara, J., concurring).

[45] Of course, the rule necessarily carries with it a sort of "sufficiency of the evidence component," for when a trial court excludes a confession for failure to establish the corpus delicti independent of it, the remaining evidence—given the court's finding of an insufficient showing of the corpus delicti—standing alone will almost certainly be unable to establish the charged offense beyond a reasonable doubt, leading to a directed verdict and discharge, or continuation of the trial on a lesser offense. And so some courts have referred to the rule as a "hybrid rule," but even in these jurisdictions the jury is not instructed that it must first find the corpus delicti before considering the confession, and so the corpus delicti independent of the

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Indeed, many Michigan cases are "order of proof" cases,[46] and it is clear that "it is now generally accepted that a trial judge has the discretion to vary the order of proof, meaning that the government may introduce the defendant's confession before it has introduced the additional evidence that will establish the corpus delicti, so long as the corpus delicti is proved before the government rests."[47]

3. If the corpus delicti rule is retained, the trustworthiness rule should be followed, and admissibility determined by application of MRE 104(a) on preliminary questions of admissibility

Why have formal rules of evidence if principles that fall directly within a rule are instead considered an ad hoc rule outside of these rules?[48] If as a predicate to the admission of a confession (the order of proof being not consequential) it must be shown not simply that it was, if the result of police questioning of an in-custody person (which is *not* the case here), subject to proper warnings and a voluntary and intelligent waiver of rights, and voluntary, but also that a "specific loss or injury" was occasioned, where one exists[49] (and one does not here), along with someone's criminality

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confession is in no sense an element, implicit or otherwise, of the crime, else a jury instruction and a finding beyond a reasonable doubt by the jury would be required. See e.g., *United States v. Dickerson*, 163 F.3d 639, 642 (CA DC, 1999) ("We think it telling that in each of the Supreme Court's principal corroboration cases, the Court resolved the corroboration question on its own without any mention at all of the necessity of jury reconsideration"); *United States v. McDowell*, 687 F.3d 904, 912 (CA 7, 2012) ("we have held that the district court is not obligated to instruct the jury on the requirement of corroboration"); *United States v. Singleterry*, 29 F.3d 733, 738 (CA 1, 1994); *State v. Leniart*, 215 A.3d 1104, 1117-1119 (Conn., 2019) ("the corpus delicti rule . . . requires only that the trial court make the threshold determination that there are some corroborating facts that tend to produce a confidence in the truth of the confession" (cleaned up)); 1 *McCormick On Evidence* (8th ed) § 145 ("the jury should be properly instructed on the prosecutor's burden of proof and the corroboration rule should be applied by judges").

[46] See e.g. *People v. Hall*, 48 Mich. 482, 485 (1882); *People v. Coapman*, 326 Mich. 321, 329 (1949) ("the commission of the crime charged should be established before a confession by the accused is received in evidence"); *People v. Anglin*, 111 Mich. App. 268, 275 (1981) ("evidence of the confession is inadmissible until the corpus delicti is thus shown").

[47] LaFave, supra.

[48] This is different from evidentiary principles that fall *without* the rules of evidence. No one doubts that impeachment by proof of bias is permissible, but there is no impeachment-by-bias rule in the Michigan Rules of Evidence. See *People v. Layher*, 464 Mich. 756, 762 (2001).

[49] See section B., supra.

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in that loss or injury, then MRE 104(a) is directly applicable for resolving this preliminary question of admissibility.

The rule concerns foundational requirements for the admission of evidence; that is, "preliminary questions of admissibility," and provides, in pertinent part, that "[p]reliminary questions concerning the . . . the admissibility of evidence shall be determined by the court," and "[i]n making its determination it is not bound by the Rules of Evidence except those with respect to privileges." As this Court held with regard to the foundation for the admission of an excited utterance under MRE 803(2), "a trial court may consider *any* evidence regardless of that evidence's admissibility at trial, as long as the evidence is not privileged, in determining whether the evidence proffered for admission at trial is admissible. In the context of an excited utterance, then, this means that even though an out-of-court statement may not be admitted at trial without adequate indicia of reliability, i.e., the existence of a startling event or condition, the trial court *can consider the statement when determining whether the indicia of reliability have been met*, i.e., that the startling event or condition has been established."[50]

With regard to the corpus delicti, the confession itself, then, should be a consideration—a part of the evidence—of the corpus delicti, at most so long as trustworthy, taking the approach rejected by this Court in *McMahan. McMahan* was a "no body" case where defendant confessed to the murder of the disappeared victim. This Court agreed that it was clear that the victim was dead, but because it found no evidence apart from the defendant's confession that her death was caused by criminal conduct it found the corpus delicti not to be demonstrated, and the confession thus inadmissible. The Court specifically "decline[d] the invitation to replace our common-law corpus delicti standard with the trustworthiness doctrine adopted by the federal judiciary."[51] It is past time that the Court do so.

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[50] *People v. Barrett*, 480 Mich. 125, 134 (2008) (first emphasis in the original, second emphasis supplied).

[51] *McMahan*, at 547.

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Justice Boyle's dissent, for herself and two other justices, is persuasive on the point. As the Seventh Circuit has said, the rule was "never well adapted to its purpose."[52] Justice Boyle pointed out that as the purpose of the corpus delicti rule is avoiding convictions where proof that a crime occurred is based on an unreliable confession—ordinarily because involuntary or made by someone delusional—"its utility has been met and surpassed by protections afforded under the constitutionalization of criminal procedure and other statutory guarantees."[53] And so the federal rule that "it is sufficient if the corroboration merely fortifies the truth of the confession, *without independently establishing the crime charged*"[54] should be adopted.[55] As the United States Supreme Court has said, "one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused."[56]

Agreeing that the protection provided by the common-law rule can be provided by careful scrutiny of the evidence by a conscientious judge,[57] the McCormick treatise takes the position that "the trustworthiness approach is most likely easier to apply than the corpus delicti rule, as effective in accomplishing the modest traditional objectives of the corroboration requirement, more helpful in protecting against false confessions to actual crimes, and less likely to lead to occasionally unreasonable results."[58] And so, in addition to *Miranda* compliance and voluntariness where those are at issue as preliminary questions of fact to be resolved by the court as predicates to the admissibility of a confession under MRE 104(a), is, if it is applicable here, the corpus delicti, demonstration of which may be established without regard to the rules of evidence. Further, it is sufficient if the truth of the confession is fortified, without independently establishing the crime

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[52] *United States v. Kerley*, 838 F.2d 932, 939 (CA 7, 1988) (Posner, J.).

[53] *McMahan*, at 554–555 (Boyle, J., dissenting).

[54] *Smith v. United States*, 348 U.S. 147, 156, 75 S. Ct. 194, 199, 99 L. Ed. 192 (1954).

[55] *McMahan*, at 558-559 (Boyle, J., dissenting).

[56] *Smith v. United States*, 75 S. Ct. at 199; *Opper v. United States*, supra.

[57] 1 *McCormick On Evidence* (8th ed) § 148.

[58] Id., § 147.

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charged, with one mode of corroboration being evidence that bolster the confession itself and thereby proves the offense "through" a defendant's statements.

Other jurisdictions take this approach. For example, the North Carolina Supreme Court has said that "[w]hether a defendant's confession satisfies the corpus delicti rule is a preliminary question of admissibility" governed by Rule 104(a), and that a trial court "is not bound by the rules of evidence except those with respect to privileges."[59] Alaska is another example of application of Rule 104(a),[60] as is Maine,[61] among others.[62] And an increasing number of jurisdictions have adopted the federal trustworthiness approach.[63] Utah, for example, in adopting the trustworthiness approach,[64] said that because "the rule's weaknesses were present from its inception, we conclude the rule was ill-conceived and originally erroneous," and that the court thus was not bound to retain it, nor precluded from replacing it with a rule—the federal trustworthiness rule—that is more sound.[65]

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[59] *State v. Sweat*, 727 S.E.2d 691, 697 (N.C., 2012).

[60] *Dodds v. State*, 997 P.2d 536, 540 (Alaska Ct. App., 2000); *Leggett v. State*, 320 P.3d 311, 315 (Alaska Ct. App., 2014).

[61] *State v. Hagar*, 210 A.3d 827, 832 (Me., 2019).

[62] See e.g. *In re W.B. II*, 2009 WL 961500 (Ohio Ct. App., 2009) (unpublished) ("the corpus delicti rule is a foundational requirement for the admissibility of the confession. See *State v. Van Hook* (1988), 39 Ohio St.3d 256, 261, 530 N.E.2d 883 (the purpose of requiring the evidence of the corpus delicti as a foundation for admitting a confession). Evid.R. 104(A) provides that preliminary questions of admissibility, i.e., foundational requirements, are determined by the [trial] court, which is not bound by the rules of evidence, except for privilege, in making its decision").

[63] See e.g. *Jacinth v. State*, 593 P.2d 263, 266 (Alaska, 1979); *People v. LaRosa*, 293 P.3d 567 (Colo., 2013); *State v. Hafford*, 746 A.2d 150, 173 (Conn., 2000) ("We conclude that the most reasonable approach is that stated in *Opper v. United States* . . . wherein the court said: '[W]e think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is [only] necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish *the trustworthiness of the [defendant's] statement*' " (Emphasis supplied by the court)); *State v. Kukert*, supra, at 855 ("Analyzing a defendant's statements or confession under the trustworthiness approach appears to be the majority view); LaFave, § 1.4(b) (fn 21) ("it now appears that only 'a minority of [state] courts * * * has declined to adopt a more relaxed rule used by federal courts'").

[64] *State v. Mauchley*, 67 P.3d 477, 490 (Utah, 2003).

[65] Id., at 485.

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Here, defendant's statements as to his possession of the body armor are trustworthy and reliable. They were plainly voluntary, one being an unprompted remark, the other being to a telephone call to his mother, and both being attempts, while admitting possession of the body armor, to "explain it away."[66] The body armor *exists*. Even laying aside the supposed "implied hearsay," that Officer Stockwell took possession of both the body armor and defendant from the Canadian authorities is corroborative of the trustworthiness of defendant's statement that *he* possessed the body armor; there is really no question that defendant possessed it.

4. The corpus delicti rule should be abolished

If a confession—or here, admissions, and admissions not made to the police so not implicating the Fifth Amendment in any way—is shown to meet the ordinary factual preliminary questions of admissibility (*Miranda* compliance, where required, and voluntariness), it should be admissible to prove anything relevant in the case, with a judicial determination, in the end, as to whether *all* the evidence, taken in the light most favorable to the verdict, is sufficient to support a finding of guilt by a reasonable jury.[67] The additional foundational requirement of establishment of the corpus delicti, even under the trustworthiness approach, should be abolished.

It should not be a form of pious perjury when juries are told that "If you find that the defendant did make the statement, you may give the statement whatever weight you think it deserves. In deciding this, you should think about how and when the statement was made, and about all the other evidence in the case. You may consider the statement in deciding the facts of the case."[68] The "safety valve," as it were, is appellate review for sufficiency of the evidence, which was strengthened in 1979, long after judicial creation or adoption of the corpus delicti rule, from the "any evidence"

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[66] See *People v. Johnson*, 65 Mich. App. 290, 293 (1975) ("the exculpatory nature of the statement lends credence to its voluntariness").

[67] *Leniart*, supra, at 1125.

[68] M Crim JI 4.1. See also M Crim JI 2.8 ("Part of your job in deciding what the facts of this case are is to decide which witnesses you believe and how important you think their testimony is"); *People v. Wolfe*, 440 Mich. 508, 514–515 (1992) ("It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact").

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or "scintilla of evidence"[69] test to a review for whether "there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt,"[70] which counsels against any limitation on the use as proof of a voluntary confession. As argued by some commentators, a confession or admission determined to be admissible (and here defendant's statements were admissions, see supra, and there is no argument at all against their admissibility) should be considered by the jury for whatever weight the jury wishes to give it, and as proof of any fact to which it is relevant.[71]

Conclusion

McCormick has expressed the view that if the rule is maintained, the federal trustworthiness approach is best. The Seventh Circuit has said that the corpus delicti rule was "never well adopted to its purpose." Wigmore said that "any rule of the sort is questionable," and "often a positive obstruction to the course of justice," and other commentators have urged its complete extinction.

The corpus delicti here, such as it is, if it exists, was shown independent of defendant's admissions—someone possessed the body armor, and defendant's admissions show that *he* did. And that he had been convicted of a dangerous felony was shown by stipulation at trial. Further, the Michigan rule does not apply to admissions that are not confessions, and that could end the inquiry

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[69] *People v. Buchanan*, 107 Mich. App. 648, 649 (1981); *People v. Eaton*, 59 Mich. 559, 562 (1886) ("The sufficiency of the evidence was exclusively for the jury. It is only where there is no evidence upon a material point that the court can take the case from the jury"); *People v. Abernathy*, 253 Mich. 583, 587 (1931) (same).

[70] *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *People v. Hampton*, 407 Mich. 354, 366 (1979).

[71] See Thomas A. Mullen, "Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession," 27 U.S.F. L. Rev. 385, 418 (1993) ("All forms of the corpus delicti rule should be abolished, including the corroboration requirement. The law properly trusts triers of fact to weigh disputed evidence. If there ever were a basis for qualifying that trust when the evidence was an extrajudicial confession, such a basis no longer exists"); Artem M. Joukov & Samantha M. Caspar, "Wherefore Is Fortunato? How the Corpus Delicti Rule Excludes Reliable Confessions, Helps the Guilty Avoid Responsibility, and Proves Inconsistent with Basic Evidence Principles," 41 Am. J. Trial Advoc. 459, 494 (2018) ("This Article joins its predecessors in urging for the retirement of the corpus delicti requirement"); Wigmore, supra.

here, for that which defendant admitted—possession of body armor—does not show guilt without proof of the conviction for a violent felony. But if these points do not end the inquiry, at the least the current rule should not apply to crimes that produce no tangible harm or injury, or where it is impossible to show that a crime occurred without also implicating a specific defendant, both of which are true here; rather, at most the trustworthiness rule of the federal system (and many states) should apply. Further, the trustworthiness approach should apply to *all* crimes, if it is maintained at all, and, indeed, "*all* forms of the corpus delicti rule should be abolished, *including* the corroboration requirement." It is enough to examine the evidence and determine whether on the evidence a reasonable juror could find guilt proven beyond a reasonable doubt.

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Relief

Wherefore, the People request that this Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing contains 8710 countable words.

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