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State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellant,

v.

Lantz Washington

Defendant-Appellee.

MSC No. 165296

COA No. 353052

St. Clair County Circuit Court
Case No. 19-002078-FH

Defendant-Appellee Lantz Washington's Supplemental Brief

Oral Argument Requested

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Table of Contents

Index of Authorities 5

Statement of Jurisdiction 9

Counter-Statement of the Questions Presented 10

Introduction 11

Counter-Statement of Facts 13

The prosecution violated Mr. Washington's Sixth Amendment and Michigan Constitutional Right to be Confronted by a witness. The error was not harmless beyond a reasonable doubt. 18

Issue Preservation & Standard of Review 18

Summary of Arguments 19

I. The trial court violated Lantz Washington's Sixth Amendment and Article 1, Section 20, right to be confronted with the witnesses against him when it allowed the prosecutor to elicit testimony that contained inferential evidence of a testimonial statement against Mr. Washington. 20

A. Testimony that contains inferential evidence of an out-of-court testimonial statement triggers an accused's right to confrontation. 21

B. The trial court violated Mr. Washington's right to confrontation by permitting the prosecutor to introduce Officer Lavers' out-of-court statement. 27

1. Officer Lavers' statement to Officer Stockwell, that Mr. Washington was wearing a bulletproof vest, was a "statement" under MRE 801(c). In arguing to the contrary, the Court of Appeals dissent and the prosecutor confused "inferential evidence of a testimonial statement" and an "implied assertion," which are categorically distinct. 28

2. Contrary to the prosecutor's argument, Officer Lavers' verbal statement to Officer Stockwell was testimonial. Officer Lavers reasonably believed that his statement to Officer Stockwell would be used against Mr. Washington at a later criminal proceeding. 33

3. Officer Lavers' statement to Officer Stockwell was introduced for the purpose of proving the truth of the matter asserted, that Mr. Washington was wearing a bulletproof vest. 40

II. The prosecutor cannot prove the constitutional violation harmless beyond a reasonable doubt. Absent evidence of the otherwise inadmissible bulletproof vest, the prosecutor failed to establish the occurrence of a specific injury, and Mr. Washington's statements were barred by the corpus delicti rule; furthermore, even if his statements were not barred, the error was still not harmless beyond a reasonable doubt. 44

A. Mr. Washington's incriminating statements were barred by the corpus delicti rule because the prosecutor failed to establish the occurrence of a specific injury. 45

B. The prosecution's arguments do not impact this analysis that Mr. Washington's statements were inadmissible. 49

1. Mr. Washington's statements amounted to confessions of guilt. 49

2. The admissibility of Mr. Washington's confession under MRE 804(b)(3) is irrelevant because the corpus delicti rule is an evidentiary-foundation principle. 53

3. There is no "public order" exception to the corpus delicti rule. 54

RECEIVED by MSC 12/21/2023 11:06:26 AM

4. This Court should not depart from stare decisis to modify or abolish Michigan's common-law corpus delicti rule. 55

C. Even if Mr. Washington's incriminating statements were admissible, the prosecutor could not prove that Mr. Washington was guilty beyond a reasonable doubt without the evidence offered by Officer Stockwell's testimony. 60

Conclusion and Relief Requested 62

Certificate of Compliance....63

RECEIVED by MSC 12/21/2023 11:06:26 AM

RECEIVED by MSC 12/21/2023 11:06:26 AM

Index of Authorities

Cases

Bullcoming v New Mexico, 564 US 647 (2011) 34

Chapman v California, 386 US 18 (1967) 11, 18, 44

Com. v Farris, 251 Pa Super 277 (1977) 19, 27

Crawford v Washington, 541 US 36 (2004) ..... passim

Davis v Washington, 547 US 813 (2006) 32, 33, 37

Favre v Henderson, 464 F 2d 359 (CA 5, 1972) 25, 26

Lee v Illinois, 476 US 530 (1986) 20

Mason v Scully, 16 F 3d 38 (CA 2, 1994) 19, 27, 38

McCormick v Carrier, 487 Mich 180 (2010) 56

Melendez-Diaz v Massachusetts, 557 US 305 (2009) 34

Ocampo v Vail, 649 F 3d 1098 (CA 9, 2011) 19, 21, 27

Opper v United States, 348 US 84 (1954) 57

People v Anderson, 446 Mich 392 (1994) 11, 18, 44

People v Brasic, 171 Mich App 222 (1988) 54

People v Burns, 250 Mich App 436 (2002) ..... passim

People v Chalmers, unpublished opinion of the Court of Appeals, issued February 22, 2005 (Docket No. 251974), 2005 WL 415282 55

People v Chambers, 277 Mich App 1 (2007) 41

People v Cotton, 191 Mich App 377 (1991) 46

People v Delong, unpublished opinion of the Court of Appeals, issued February 11, 2021 (Docket No. 353687), 2021 WL 527402 60

People v Emerson, unpublished opinion of the Court of Appeals, issued March 20, 2007 (Docket No. 266047), 2007 WL 839444 55

People v Fackelman, 489 Mich 515 (2011) ..... passim

People v Feezel, 486 Mich 184 (2010) 56

People v Felder, 108 AD 2d 869 (NY App Div 1985) 19, 27

People v Fontenot, 509 Mich 1073 (2022) 33, 34

People v Glinder, unpublished opinion of the Court of Appeals, issued April 22, 2021 (Docket No. 354288), 2021 WL 1588834 60

People v Hayden, 205 Mich App 412 (1994) 53

People v Hunt, unpublished opinion of the Court of Appeals, issued August 19, 2021 (Docket No. 352862), 2021 WL 3700351 59

People v Jemison, 505 Mich 352 (2020) 18, 55

People v Johnson, unpublished opinion of the Court of Appeals, issued September 2, 2021 (Docket No. 351606), 2021 WL 4000365 59

People v Jones, 228 Mich App 191 (1996) ..... passim

People v Kelsch, 16 Mich App 244 (1969) 55

People v Konrad, 449 Mich 263 (1995) ..... passim

People v Lambert, 5 Mich 349 (1858) 57

People v. McGraw, 484 Mich 120 (2009) 56

People v McMahan, 451 Mich 543 (1996) ..... passim

People v McPherson, 263 Mich App 124 (2004) 21, 40

People v Modelski, 164 Mich App 337 (1987) 54

People v Mumford, 171 Mich App 514 (1988) 46, 48, 49, 54

People v Phillips, unpublished opinion of the Court of Appeals, issued October 22, 2015 (Docket No. 326005), 2015 WL 6438333 51

People v Pinkney, unpublished opinion of the Court of Appeals, issued July 14, 2009 (Docket No. 282144), 2009 WL 2032030 32

People v Porter, 269 Mich 284 (1934) ..... passim

People v Propp, 340 Mich App 652 (2022) 28, 29, 30

People v Rios, 386 Mich 172 (1971) 55

RECEIVED by MSC 12/21/2023 11:06:26 AM

People v Sammons, 505 Mich 31 (2020) 18

People v Schumacher, 276 Mich App 165 (2007) 50, 51, 52

People v Walker, 504 Mich 267 (2019)..... 56

People v Washington, __ Mich App __; leave granted, 989 NW2d 813 (Mich, 2023) 17, 18, 19

People v Williams, 422 Mich 381 (1985).....45, 46, 55, 56

Robinson v. Detroit, 462 Mich 439 (2000) 56, 58, 60

Ryan v Miller, 303 F 3d 231 (CA 2, 2002).....19, 23, 27, 38

State v Roscoe, 198 A3d 1232 (RI, 2019) 11, 19, 23, 25

United States v Benitez-Avila, 570 F3d 364 (2009) 43

United States v Meises, 645 F 3d 5 (CA 1, 2011) 19, 27

United States v Reyes,18 F 3d 65 (CA 2, 1994) 26

United States v Silva, 380 F3d 1018 (CA 7, 2004)..... 41, 42

United States v. Shunk, 881 F 2d 917 (CA 10, 1989) 54

Unites States v Kizzee, 877 F 3d 650 (CA 5, 2017).....11, 19, 24, 25

Williams v Illinois, 567 US 50 (2012)..... 33, 34

Young v United States, 63 A 3d 1033 (DC, 2013) 19, 27

Constitutions, Statutes, and Court Rules

Const 1963, art 1 § 20 20

MCL 324.16902(1)..... 51

MCL 750.227g .....passim

MRE 801(a)..... 19, 21, 29

MRE 801(a)-(c) 28

MRE 801(c)..... 28, 29, 40

MRE 804(b)(3) 49, 53, 54

RECEIVED by MSC 12/21/2023 11:06:26 AM

United States Constitution, Article 1.....10, 18, 19, 39

Secondary Authorities

1 McCormick On Evid. § 145 (8th ed.) 54

2 McCormick on Evidence § 250 (7th ed. 2013) 28, 30

Hearsay Handbook § 1:10 (4th ed. 2020) 27, 31

"The Future Of Confession Law: Toward Rules For The Voluntariness Test", 114 Mich L Rev 1 ..... 57, 58

RECEIVED by MSC 12/21/2023 11:06:26 AM

Statement of Jurisdiction

Defendant-Appellee agrees with the jurisdictional statement in the plaintiff-appellant's brief.

RECEIVED by MSC 12/21/2023 11:06:26 AM

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Counter-Statement of the Questions Presented

Confrontation Clause

Did the prosecutor violate Mr. Washington's United States Sixth Amendment and Michigan Article 1, Section 20, constitutional rights to confrontation by introducing Officer Lavers' out-of-court, testimonial statement against Mr. Washington?

Mr. Washington answers: Yes.
The Court of Appeals answered: Yes.
The Prosecutor answers: No.

Corpus Delicti and Harmless Error

Were Mr. Washington's statements admissible under the corpus delicti rule? Was the constitutional error at Mr. Washington's trial harmless beyond a reasonable doubt?

Mr. Washington answers: No.
The Court of Appeals answered: No.
The Prosecutor answers: Yes.

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Introduction

On April 8, 2019, the Port Huron Police Department arrested Mr. Washington and charged him with wearing a bulletproof vest in violation of MCL 750.227g. 32a-35a. Prior to Mr. Washington's arrest, Officer Lavers of the Canadian Border Services Agency told Officer Paul Stockwell of U.S. Customs and Border Protection that he observed Mr. Washington wearing a bulletproof vest. 31a-32a; *US Customs and Border Protection Report*, Preliminary Exam Exhibit, Prosecutor's Brief at 23, n. 46. 202a-203a; *Officer Whitten Report*, Lower Court File, pp 22-23. 4b-5b.[1]

At trial, the prosecutor laid a foundation for the admission of the bulletproof vest through Officer Stockwell's testimony, which violated Mr. Washington's right to confront Officer Lavers pursuant to the Confrontation Clause of the United States Constitution, Article 1, Section 20, of the Michigan Constitution, *Crawford v Washington*, 541 US 36 (2004), and *People v Fackelman*, 489 Mich 515, 528 (2011). Officer Stockwell's testimony violated Mr. Washington's right to confrontation because it contained inferential evidence of a testimonial statement by Officer Lavers. *See State v Roscoe*, 198 A3d 1232, 1246 (RI, 2019); *see also Unites States v Kizzee*, 877 F 3d 650, 657 (CA 5, 2017).

As such, Officer Stockwell's testimony should have been excluded. This exclusion means Mr. Washington's incriminating statements were barred by the corpus delicti rule, which "is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v Konrad*, 449 Mich 263, 269-270 (1995).

Without Mr. Washington's statements, the prosecution could not have met its burden at trial. Consequently, the prosecutor cannot prove this constitutional error harmless beyond a reasonable doubt. *Chapman v California*, 386 US 18 (1967); *People v Anderson*, 446 Mich 392 (1994).

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[1] To distinguish Mr. Washington's appendix from the prosecutor's, citations to Mr. Washington's appendix will refer first to its page number then the letter "b."

Furthermore, even if Mr. Washington's statements were admissible, the constitutional error was not harmless. A new trial is required.

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Counter-Statement of Facts

On April 8, 2019, Officer Matt Lavers of the Canadian Border Services Agency told Officer Paul Stockwell, a U.S. Customs and Border Protection officer, that he caught Lantz Washington in Canada wearing a bulletproof vest. 31a-32a; *US Customs and Border Protection Report*, Preliminary Exam Exhibit, Prosecutor's Brief at 23, n. 46. 201a-203a.

Detention of Mr. Washington Based on Statements from Canadian Border Service Agency Officer Lavers

That day, Mr. Washington experienced a mental health crisis and feared for his life as he crossed the Blue Water Bridge from Port Huron, Michigan, toward Canada, without paying the toll. 22a, 43a, 49a. Mr. Washington passed underneath the toll booth draw-arm while it was still raised from the truck that paid ahead of him. 28b-36b. He continued across the bridge until Officer Lavers of the Canadian Border Service Agency stopped him at a Canadian checkpoint. 21a-22a, 30a-31a.

Officer Lavers then detained Mr. Washington, brought him back to the American side of the bridge and handed Mr. Washington, his truck, and a bulletproof vest to Officer Stockwell a supervisor with United States Customs and Border Protection. 35b, 38b-42b.

During this handover, Officer Lavers "***stated*** that [Mr.] Washington was wearing body armor under his tee shirt when apprehended." *US Customs and Border Protection Report (emphasis added).* 201a-203a. A report from Officer Whitten of the Port Huron Police Department verified that it "should be noted that Officer Lavers stated that the body armor was, in fact, on WASHINGTON'S person during his dealings with him." *Officer Whitten report*, Lower Court File, pp. 22-23, 3b-5b (emphasis in original).

Officer Lavers did not testify at Mr. Washington's trial. Instead, the prosecutor elicited testimony from Officer Stockwell, who had no personal knowledge that Mr. Washington wore a bulletproof vest, that Officer Lavers handed him a bulletproof vest, and based on communications with Officer Lavers, Stockwell took custody of Mr. Washington. 32a.

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Arrest and Jail Statement

Following the handover between Officer Lavers and Officer Stockwell, Officer Whitten of the Port Huron Police Department arrested Mr. Washington and booked him in the St. Clair County Jail. 32a-34a, 47b. Mr. Washington, who stipulated at trial that he had a prior conviction for a violent felony, was charged as a violent felon in possession of a bulletproof vest. 16a, 43b-47b.

As other PHPD officers were booking Mr. Washington, Officer Whitten stated that he overheard Mr. Washington say that he was wearing a bulletproof vest because he was afraid people were going to kill him. 43a. However, Mr. Washington testified at trial that what Officer Whitten heard was only his explanation to the booking officers of the reason for his arrest. 50a.

Pretrial: Mr. Washington's Phone Conversation Prior to a Finding of Incompetency

The District Court held a probable cause conference on April 23, 2019. His attorney noted her "concerns about [Mr. Washington's] criminal responsibility and also his competency" and the Court ordered a forensic examination. Probable Cause Hearing, 8b, 9b.

Four days later, Mr. Washington called his mother from the St. Clair County Jail. 45a-49a. Mr. Washington explained to his mother that the police charged him with "possession of body armor." 48a-49a. On that phone call to his mother, he explained that a friend gave him a bulletproof vest because he was "getting threats" and was "fear[ful] for [his] life." 48a-49a.

On May 31, 2019, the District Court held a review hearing on Mr. Washington's competency. Judge Cynthia Platzer adopted the report by the forensic center that Mr. Washington was not competent to stand trial. First Competency Hearing, 12b-13b. On August 27, 2019, Judge Platzer held a second competency hearing. Reviewing an updated forensic report, the judge determined that Mr. Washington's condition improved such that he was competent to stand trial. Second Competency Hearing 16b-17b.

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Trial – Officer Lavers Unavailable to Testify and No Witnesses Observe Mr. Washington in Possession of the Bulletproof Vest

On the eve of trial, the prosecution informed the court and trial counsel that Officer Lavers would be unavailable to testify at trial. January 27, 2020, Motion Hearing, 20b-21b. The Canadian government officially denied the request to produce Officer Lavers to testify. *Id*. at 8.

The trial began on January 28, 2020. Following jury selection, Mr. Washington made an emergency motion in limine to (1) exclude admission of the bulletproof vest into evidence; and (2) exclude Mr. Washington's jail phone call to his mother. 8a-12a.

First, Mr. Washington argued that without the testimony of CBSA Officer Lavers, who was unavailable, the prosecution had insufficient foundation to introduce the vest into evidence given that Officer Lavers was the only person who witnessed Mr. Washington in possession of the vest. 8a-9a. Citing *Crawford v Washington*, Mr. Washington argued that admitting the vest without Officer Lavers would violate his Sixth Amendment right to confrontation, because Officers Stockwell and Whitten only had secondhand knowledge that Mr. Washington was in possession of a bulletproof vest. 11a.

The prosecution argued that Officer Stockwell's anticipated testimony that he received Mr. Washington and a bulletproof vest from Officer Lavers combined with Mr. Washington's purported confessions in the Jail were sufficient to admit the vest into evidence. 24b-26b. The prosecution agreed that without Mr. Washington's statements, "we don't have a case." 26b.

Judge Elwood Brown denied the motion. 13a-15a. Judge Brown was clear, however, that Officer Stockwell could not testify to "what [Officer Lavers] told him because that's hearsay." 13a-14a. Judge Brown ruled that Officer Stockwell could "say factually" that he "received [the vest] from a Canadian Customs officer at the same time he received [Mr. Washington]." *Id*.

The prosecution discussed this evidence in opening argument to the jury:

RECEIVED by MSC 12/21/2023 11:06:26 AM

> [Y]ou're going to hear that the Defendant had [the body armor] in his possession when he's stopped in Canada. . . . you're going to hear that Officer Whitten from Port Huron Police Department was called by [Officer Stockwell] on the American side, the border agent to that they have an individual that was in possession of body armor.

27b (cleaned up).

The prosecution then elicited the following testimony from Officer Stockwell:

> Q: At some point, did Officer Lavers from the Canadian services hand you any other evidence?
>
> A: Yes, he did.
>
> Q: What did he hand you?
>
> A: He handed-
>
> Q: Just specifically related to any armor.
>
> A: A body armor.
>
> * * *
>
> Q: Now, without saying anything about what was said, the only question I have for you is, *were there communications between you and Officer Lavers*?
>
> A: There were.
>
> Q: Okay. And . . . *based on those communications you took custody of the Defendant*?
>
> A: Yes, we did.

32a (emphasis added). Trial counsel again objected when the prosecution offered the bulletproof vest into evidence, and the court admitted the evidence. 35a. Officer Stockwell testified that he did not observe Mr. Washington wearing the bulletproof vest Officer Lavers

handed to him and that he had "no direct knowledge of Mr. Washington having possession of [the vest] . . . in any of (sic) way, shape or form." 38a.

No other witness observed Mr. Washington in possession of the bulletproof vest. The Blue Water Bridge toll operator working the lane Mr. Washington passed through without paying, Denise Fenner, testified that she did not see Mr. Washington wearing a bulletproof vest as he passed under the toll-arm; in fact, she could not identify Mr. Washington at all. 37b. Officer Whitten also did not observe Mr. Washington in possession of a bulletproof vest. 49b.

Mr. Washington's Testimony

Mr. Washington, testifying in his own defense, denied ever disclosing to officers that he was in possession of a bulletproof vest on the Port Huron Bridge; he explained that he was merely informing the booking officers why he was taken into custody. 50a. Mr. Washington further testified about the call he made to his mother from the St. Clair County Jail. 51a. He said when he talked about wearing a bulletproof vest on the phone call with his mother, he was not referring to the Blue Water Bridge incident but rather an incident a few days prior. *Id*. When cross-examined, Mr. Washington testified that he did not remember much of what happened on the day of his arrest. 56a–57a.

Verdict, Sentencing, and Appellate Proceedings

The jury convicted Mr. Washington. 51b. On March 2, 2020, Judge Brown sentenced Mr. Washington to 365 days in jail, with credit for 329 days already served. 67a

Mr. Washington appealed by right. On March 4, 2021, Mr. Washington moved to vacate his conviction or, in the alternative, for a new trial or evidentiary hearing. Among other claims, Mr. Washington argued that the trial court violated Mr. Washington's due process and confrontation rights in denying his motions to exclude the body armor from evidence. Judge Daniel Damman denied the motion. 71a-84a

RECEIVED by MSC 12/21/2023 11:06:26 AM

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In a published decision, the Court of Appeals found that the inferable testimonial statement from Officer Lavers violated Mr. Washington's constitutional right to be confronted by a witness and reversed his conviction. *People v Washington*, __ Mich App __; slip op at 5-10; leave granted, 989 NW2d 813 (Mich, 2023). 86a-96a

This Court granted leave to appeal to the St. Clair prosecutor on May 24, 2023, to consider both the Confrontation Clause question and the admission of Mr. Washington's statements under the corpus delicti rule. 200a.

The prosecution violated Mr. Washington's Sixth Amendment and Michigan Constitutional Right to be Confronted by a witness. The error was not harmless beyond a reasonable doubt.

Issue Preservation & Standard of Review

Mr. Washington moved to exclude evidence of the bulletproof vest on Sixth Amendment Confrontation Clause grounds prior to Officer Stockwell's testimony. 11a-12a.

Whether the accused in a criminal trial was denied his right to confront a witness is a constitutional question, reviewed de novo. *See Crawford v Washington*, 541 US 36 (2004); *People v Jemison*, 505 Mich 352, 360 (2020). Mr. Washington is entitled to relief from a preserved constitutional error unless that error was harmless beyond a reasonable doubt as evaluated through the minds of an average jury. *People v Sammons* 505 Mich 31, 56 (2020). Reversal is required if the average jury would have found the prosecution's case significantly less persuasive without the erroneously admitted evidence. *Id.* The burden of proof to show that the error was harmless lies with the prosecution. *Chapman v California*, 386 US 18 (1967); *see also People v Anderson*, 446 Mich 392, 405-406 (1994).

RECEIVED by MSC 12/21/2023 11:06:26 AM

Summary of Arguments

At Mr. Washington's trial, Officer Stockwell testified to the jury that on April 8, 2019, Officer Lavers provided information that Mr. Washington was wearing a bulletproof vest when he detained Mr. Washington. Officer Stockwell's testimony contained inferential evidence of Officer Lavers' testimonial statement – the exact substance of Officer Lavers' testimonial statement was not explicitly stated by Officer Stockwell but was obvious to the jury.

Our Court of Appeals held that Officer Stockwell's testimony violated Mr. Washington's right to confrontation, guaranteed by the Sixth Amendment of the United States Constitution and Article 1, Section 20, of the Michigan Constitution. *People v Washington*, __ Mich App __; slip op at 5-10; leave granted, 989 NW2d 813 (Mich, 2023). 86a-96a

The Court of Appeals' decision is consistent with other jurisdictions' application of *Crawford*, as well as our State's Confrontation Clause jurisprudence. Indeed, federal courts of appeal in the First, Second, Fifth, and Ninth circuits, as well as state courts of appeal in Rhode Island, Washington, D.C., Pennsylvania, and New York, have held that testimony that contains inferential evidence of the testimonial statement of an out-of-court declarant is unconstitutional. *See State v Roscoe*, 198 A3d 1232, 1246 (RI, 2019); *see also Unites States v Kizzee*, 877 F 3d 650, 657 (CA 5, 2017); *United States v Meises*, 645 F 3d 5, 22 (CA 1, 2011); *Ocampo v Vail*, 649 F 3d 1098, 1108 (CA 9, 2011); *Ryan v Miller*, 303 F 3d 231, 248 (CA 2, 2002); *Mason v Scully*, 16 F 3d 38, 43 (CA 2, 1994); *Young v United States*, 63 A 3d 1033 (DC, 2013); *People v Felder*, 108 AD 2d 869 (NY App Div 1985); *Com. v Farris*, 251 Pa Super 277 (1977).

Officer Lavers' testimonial statement was a "statement" as defined by MRE 801(a) that was introduced to prove the truth of the matter asserted – that Mr. Washington wore a bulletproof vest – and Mr. Washington never had an opportunity to cross-examine Officer Lavers. Accordingly, the prosecutor violated Mr. Washington's Sixth Amendment right to be confronted by Officer Lavers, and as a result, circumvented the "truth-seeking function of the right to confrontation." Hampering Mr. Washington's right to confront Officer Lavers rendered

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unreliable the outcome of Mr. Washington's trial. *Crawford*, 541 US at 54; *People v Fackelman*, 489 Mich 515, 528 (2011) (identifying each element of a Confrontation Clause violation and citing *Lee v Illinois*, 476 US 530, 540 (1986)).

The trial court's error was not harmless. Without Officer Lavers' statement, the prosecutor could not have laid a proper foundation to admit the bulletproof vest into evidence, and in turn, could not establish by a preponderance of the evidence the corpus delicti of MCL 750.227g. *Konrad*, 449 Mich at 269; *People v Porter*, 269 Mich 284, 290 (1934); *People v Burns*, 250 Mich App 436 (2002). Accordingly, Mr. Washington's confessions were inadmissible, and without those confessions, the prosecutor could not have proven beyond a reasonable doubt that he was guilty of violating MCL 750.227g. Further, even if Mr. Washington's statements were admissible, the introduction of Officer Lavers' statement was still not harmless error beyond a reasonable doubt.

I. The trial court violated Lantz Washington's Sixth Amendment and Article 1, Section 20, right to be confronted with the witnesses against him when it allowed the prosecutor to elicit testimony that contained inferential evidence of a testimonial statement against Mr. Washington.

The Confrontation Clause provides that the accused in a criminal trial has the right to be confronted with the witnesses against him in court, face-to-face, subject to cross-examination. US Const, Amdt XI; Const 1963, art 1 § 20. In *Crawford v Washington*, the Supreme Court held that the Confrontation Clause bars the admission of testimonial statements of a declarant who does not appear at trial unless the declarant was unavailable to testify, and the accused had a prior opportunity to cross-examine the declarant. 541 US at 54.

Only testimonial statements trigger Confrontation Clause protections. An out-of-court statement introduced against the accused in a criminal trial is testimonial where the statement was made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Fackelman*, 489 Mich at 528. Further, only testimonial statements offered for their

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truth trigger Confrontation Clause protection. *People v McPherson*, 263 Mich App 124, 133 (2004) ("[T]he Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'") (quoting *Crawford*, 541 US at 59-60 n.9).

It is undisputed that Officer Lavers was unavailable to testify at Mr. Washington's trial, and that Mr. Washington did not have a prior opportunity to cross-examine Officer Lavers. It is also true that Officer Laver's conversation with Officer Stockwell (1) consisted of, "statements", *see, e.g., Ocampo*, 649 F 3d at 1098; *see also* MRE 801(a); (2) that were testimonial in nature; and (3) that were introduced to prove the truth of the matter asserted.

A. Testimony that contains inferential evidence of an out-of-court testimonial statement triggers an accused's right to confrontation.

A direct recitation of an out-of-court testimonial statement, and testimony that contains inferential evidence of a testimonial statement, are functionally indistinct. The latter is only different in that a testimonial statement is elicited and introduced by implication, such that the exact substance of a testimonial statement is not explicitly stated by the in-court witness. But the exact substance is readily inferable by a factfinder.

Whether inferential or explicit, in both instances the prosecutor elicits (1) a testimonial statement; (2) offered to prove the truth of the matter asserted; (3) by an unavailable witness who has not previously been subjected to cross-examination. *See Fackelman*, 489 Mich at 528.

In both cases, the Confrontation Clause applies. *Crawford*, 541 US at 54. To hold otherwise would undermine the sentiments expressed by this Court in *Fackelman*, that "our country's Sixth Amendment jurisprudence has never lost sight of the truth-seeking function of the right of confrontation . . . [which] promotes reliability in criminal trials." 489 Mich at 527-528 (internal citations omitted).

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Officer Stockwell testified to Officer Lavers' out-of-court testimonial statement. Although Officer Stockwell did not recite the words that were spoken to him by Officer Lavers when Officer Lavers handed over Mr. Washington and the bulletproof vest, his testimony contained inferential evidence of those exact words:

> Prosecutor: At some point, did Officer Lavers from the Canadian services hand you any other evidence?
>
> Stockwell: Yes, he did.
>
> Prosecutor: What did he hand you?
>
> Stockwell: He handed –
>
> Prosecutor: Just specifically related to any armor.
>
> Stockwell: A body armor.
>
> ***
>
> Prosecutor: Now, without saying anything about what was said, the only question I have for you is, *were there communications* between you and Officer Lavers?
>
> Stockwell: There were.
>
> Prosecutor: Okay. And . . . *based on those communications* you took custody of the Defendant?
>
> Stockwell: Yes, we did.

32a (emphasis added). Officer Stockwell did not say, "Officer Lavers told me that Mr. Washington had a bulletproof vest," however, that explicit statement was readily inferable by the jury, and the prosecutor's questioning was designed to lead the jurors to the inescapable inference that Officer Lavers reported Mr. Washington was, in fact, wearing a bulletproof vest. Indeed, the prosecution discussed Officer Lavers' statement in their opening argument to the jury, which underscores that the prosecution questions elicited the problematic testimony:

RECEIVED by MSC 12/21/2023 11:06:26 AM

> [Y]ou're going to hear that the Defendant had [the body armor] in his possession when he's stopped in Canada. . . . you're going to hear that Officer Whitten from Port Huron Police Department was called by [Officer Stockwell] on the American side, the border agent to that they have an individual that was in possession of body armor.

27b (cleaned up).

Neither this Court nor our Court of Appeals has addressed the distinction between testimony that explicitly informs the factfinder of a testimonial statement, and testimony that contains inferential evidence of a testimonial statement. However, several other jurisdictions have uniformly prohibited prosecutors from circumventing the Confrontation Clause by questioning witnesses in such a way that avoids explicit statements but elicits inferential evidence of a testimonial statement. *See*, *e.g.*, *Ryan v Miller*, 303 F 3d 231, 248 (CA 2, 2002) ('[L]awyers may not circumvent the Confrontation Clause by introducing the same substantive testimony in a different form.")

Most recently, in *State v Roscoe*, the Supreme Court of Rhode Island held that "the Confrontation Clause applies with full force when the jury can readily infer the contents of untested out-of-court testimonial statements." 198 A3d 1232, 1246 (RI, 2019) (internal citations omitted). The Court arrived at its holding by turning to the functional purpose of *Crawford*. *Id.* at 1247 (citing *Crawford*, 541 US at 67). "The Confrontation Clause ensures the right of [the accused] 'to tease out the truth' by questioning the reliability of the witnesses against them. Were we to hold otherwise, we would deprive [the accused] of this important truth-finding function." *Id.*

Roscoe involved a cold-case trial, one where the key witnesses had died and whose testimony was necessary to secure a conviction. The prosecutor questioned the lead detective who investigated the case in 1990 before the case turned cold. The prosecutor's questioning elicited testimonial statements from three witnesses who were deceased by the time of Mr. Roscoe's trial in 2015. *Id.* at 1245. The prosecutor asked the lead detective questions about the investigative steps he took to determine whether the victim in that case had any romantic

attachments that could provide an innocuous explanation for the presence of sperm in her vagina:

> Prosecutor: Did you re-interview [Witness 1]?
>
> Lead Detective: I did.
>
> ***
>
> Prosecutor: And in general terms, did you ask [Witness 1] if he knew if [Victim] was in a relationship?
>
> Lead Detective: I did.
>
> Prosecutor: Did you interview [Witness 2]?
>
> Lead Detective: Yes, sir.
>
> Prosecutor: And had you determined that [Witness 2] knew [Victim]?
>
> Lead Detective: Yes.
>
> ***
>
> Prosecutor: And did you ask [Witness 2] if she knew if [Victim] was in a relationship?
>
> Lead Detective: Yes.
>
> Prosecutor: Did you interview [Witness 3]?
>
> Lead Detective: Yes, sir.
>
> ***
>
> Prosecutor: Did you ask [Witness 3] if she knew whether [Victim] was in a relationship?
>
> Lead Detective: I did.

Id.

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As was the case in Mr. Washington's trial, "this line of questioning introduced testimonial evidence against [Mr. Roscoe]." *Id.* at 1245-1246. The Court in *Roscoe* reasoned that "[a]lthough the *actual words spoken* by the now-deceased witnesses were not themselves elicited at trial, the content of their statements – that [the victim] had not been involved in a relationship – was 'readily inferred.'" *Id.* at 1246 (emphasis added) (citing *Unites States v Kizzee*, 877 F 3d 650, 657 (CA 5, 2017)).

Roscoe found a *Crawford* violation where, when compared to Mr. Washington's case, the inferential step required of the jury was greater. *Id.* The prosecutor's direct examination of the lead detective, standing alone, was enough to "implicitly convey" to the jurors that the victim was not in a relationship at the time of her death, and that Mr. Roscoe did not have consensual sex with the victim. *Id.* at 1244. The fact that the prosecutor later referenced the lead detective's testimony, and the limitations of the rules against hearsay, during his closing argument, only reinforced the unavoidable and impermissible inferences the jury would draw from that testimony. *Id.* at 1246.

In Mr. Washington's case, the inference was more readily available and obvious to the factfinder because the prosecutor directly referenced the inculpatory evidence at issue and the "communications between" Officer Stockwell and Officer Lavers. 32a. The prosecutor did not ask Officer Stockwell if Officer Lavers told him that Mr. Washington was apprehended while wearing a bulletproof vest. 32a. However, the "unavoidable implication" contained within Officer Stockwell's testimony was that Officer Lavers told Officer Stockwell that Mr. Washington was detained while wearing a bulletproof vest, and that such statement caused Officer Stockwell to arrest Mr. Washington. 32a; *Roscoe*, 198 A3d at 1246.

Roscoe – and the Court of Appeals opinion below – correctly applied *Kizzee*, 877 F 3d at 657. There, the Fifth Circuit held that where "an officer's testimony leads to the 'clear and logical inference that out-of-court declarants believed and said that the [accused] was guilty of the crime charged,' Confrontation Clause protections are triggered." *Id.* (quoting *Favre v Henderson*, 464 F 2d 359, 362 (CA 5, 1972)). Such testimony is inadmissible and violates the Confrontation Clause where it allows a jury to reasonably infer the accused's guilt. *Id.*

RECEIVED by MSC 12/21/2023 11:06:26 AM

In *Kizzee*, the prosecutor examined a detective regarding the investigative steps he took to interview an informant who stated during a police station interrogation that he purchased drugs from Mr. Kizzee. *Id.* at 654. The informant did not testify at trial. On direct examination, the prosecutor asked the detective whether the detective asked the informant questions about Mr. Kizzee, and whether it was based on the informant's answers to those questions that the detective obtained a search warrant for Mr. Kizzee's property:

> Prosecutor: Based on your . . . subsequent interview of [the informant], what did you do?
>
> Detective: I was able to obtain a search warrant for [the property].

Id. at 655. *Kizzee* found that the detective's testimony contained inferential evidence of a testimonial statement. *Id.* at 657. Although the detective did not explicitly testify as to what the informant told him, – that Mr. Kizzee sold drugs to the informant – the detective's testimony conveyed to the jury the substance of the informant's testimonial statements, and enabled the prosecutor to "'establish identification, guilt, or both.'" *Id.* at 657-658 (quoting *Favre*, 464 F 2d at 362)[2]. The Court remanded for a new trial. *Id.* at 663.

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[2] Another example: In *United States v Reyes*, a drug case, a U.S. Customs agent testified about her conversations with the accused's co-conspirators who did not testify at trial. 18 F 3d 65 (CA 2, 1994). The customs agent testified that her discussions with the co-conspirators caused her to conclude that other individuals (i.e., the accused) were involved in the drug enterprise at issue. *Id.* In reversing the convictions, the Second Circuit held that "although the jury was not told exactly what words [the co-conspirators] had spoken, [the custom agent's] testimony clearly conveyed the substance of what they had said. The clear message conveyed to the jury . . . was that [the co-conspirators] had admitted their role in a conspiracy to import the cocaine and had implicated . . . the [accused]." *Id.* at 69.

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The conclusion of our Court of Appeals, that the prosecutor circumvented Mr. Washington's right to confrontation by eliciting testimony from Officer Stockwell that contained inferential evidence of Officer Lavers' testimonial statement is consistent with the rationale adopted by *Roscoe*, *Kizzee*, and many other jurisdictions. 86a-96a**.** *See also United States v Meises*, 645 F 3d 5, 22 (CA 1, 2011) ('If what the jury hears is, in substance, an untested, out-of-court accusation[,]" then Sixth Amendment rights are triggered); *see also Ocampo v Vail*, 649 F 3d 1098, 1108 (CA 9, 2011) ("[I]n-court descriptions of out-of-court statements . . . *are 'statements'* and can violate the Confrontation Clause.") (emphasis added); *Ryan*, 303 F 3d at 1108 ("If the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible."); *Mason v Scully*, 16 F 3d 38, 43 (CA 2, 1994) ("The fact that the content of [the co-conspirator's] statement to [the detective] was not revealed in detail was immaterial, for the plain implication that the prosecutor sought to elicit . . . was that the conversation . . . led the police to focus on [the accused]."); *Young v United States*, 63 A 3d 1033 (DC, 2013); *People v Felder*, 108 AD 2d 869 (NY App Div 1985); *Comm v Farris*, 251 Pa Super 277 (1977); *see also* David F. Binder, Hearsay Handbook § 1:10 (4th ed. 2020) (collecting cases).

The right to confrontation prohibits direct testimony that contains inferential evidence of an out-of-court testimonial statement. Any other approach would allow the factfinder in a criminal trial to readily infer the substance of otherwise inadmissible testimonial statements. *Washington*, __ Mich App __ at *5. 90a

This Court should affirm the holding of our Court of Appeals.

B. The trial court violated Mr. Washington's right to confrontation by permitting the prosecutor to introduce Officer Lavers' out-of-court statement.

Officer Stockwell's testimony contained inferential evidence of Officer Lavers' out-of-court testimonial statement, thus triggering Mr. Washington's right to confront Officer Lavers. As a result, this Court must find that Mr. Washington's right to confrontation was violated if Officer Stockwell's testimony contained (1) a statement; (2) that was

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testimonial; (3) made out-of-court; (4) and introduced as proof of the matter asserted; (5) by a non-testifying declarant; (6) who was unavailable; (7) and not subjected to prior cross-examination. *Crawford*, 541 US at 54; *Fackelman*, 489 Mich at 527-529; MRE 801(a)-(c).

It is undisputed that Officer Lavers' statement to Officer Stockwell was made out-of-court, that Officer Lavers was unavailable and did not testify at Mr. Washington's trial or at any other proceeding, and that and Mr. Washington never had an opportunity to cross-examine Officer Lavers. Moreover, Officer Lavers' statement to Officer Stockwell was, in fact, a "statement", rather than an implied assertion, and that statement was testimonial in nature and introduced by the prosecutor as proof that Mr. Washington was wearing a bulletproof vest when he was detained in Canada.

1. Officer Lavers' statement to Officer Stockwell, that Mr. Washington was wearing a bulletproof vest, was a "statement" under MRE 801(c). In arguing to the contrary, the Court of Appeals dissent and the prosecutor confused "inferential evidence of a testimonial statement" and an "implied assertion," which are categorically distinct.

Officer Lavers made a statement to Officer Stockwell when he told Officer Stockwell that Mr. Washington was caught wearing a bulletproof vest in Canada. 31a-32a. Indeed, according to the U.S. Customs and Border Protection Report, a preliminary examination exhibit cited by the prosecution, Officer Lavers "***stated*** that [Mr.] Washington was wearing body armor under his tee shirt when apprehended." (emphasis added). 202a-203a.

It is true that in Michigan, implied assertions are not considered hearsay. *People v Jones*, 228 Mich App 191, 205 (1996), *decision modified in part and remanded*, 458 Mich 862 (1998); *accord* 2 McCormick on Evidence § 250 (7th ed. 2013); *see also People v Propp*, 340 Mich App 652, 667 (2022) ("[M]ichigan does not recognized the 'implied assertion' theory that has been adopted in some other jurisdictions." (internal citations omitted)).

RECEIVED by MSC 12/21/2023 11:06:26 AM

However, an *inferable statement* is categorically distinct from an *implied assertion*. A statement can be hearsay and, even if that statement falls under an exception to hearsay under the rules of evidence, it must be excluded if it offends the right to be confronted by a witness. An implied assertion is conduct that does not actually assert a proposition, but instead reveals the actor's belief. *Jones*, 228 Mich App at 207-208. Implied assertions need not be excluded.

Indeed, the Prosecuting Attorneys Association of Michigan's amicus brief in support of the prosecution in this case highlights this distinction:

> 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 constituted an exclamation, command, question, or the like, and is not intended as an assertion, but arguably contains an "implied" assertion. . . . 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.

PAAM Amicus Brief in Support of Prosecution, 9.

Any argument to the contrary is an attempt to "decline to apply the rules [of evidence] as they are written." *Jones*, 228 Mich App at 225-226. The Michigan Rules of Evidence define "hearsay" as a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). The right to be confronted by a witness, like hearsay, depends on a statement introduced for the truth of what it asserts. A "Statement" is (1) an oral or written assertion; or (2) nonverbal conduct of a person if it is *intended by the person as an assertion*. MRE 801(a) (emphasis added). Officer Lavers made an oral statement to Officer Stockwell that he intended as an assertion.

The dissenting opinion below, and the prosecutor in the argument for reversal, committed a category error. Both mistook inferential

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evidence of testimonial statements for implied assertions. *Washington*, __ Mich App __; slip op at 11; 96a; *Prosecutor's Brief* at 24. In so doing, the Court of Appeals and the prosecutor relied on a pre-*Crawford* decision in which our Court of Appeals held that *nonassertive* utterances or conduct – or implied assertions – do not constitute hearsay. *Jones*, 228 Mich App at 205 (1996); *accord* 2 McCormick on Evidence § 250 (7th ed. 2013); *Propp*, 340 Mich App at 667.

Jones and *Propp* are inapposite. In both cases, there was no Confrontation Clause violation because there were no actual statements introduced at trial, only implied assertions.

For example, in *Jones*, the court of appeals held that Mr. Jones's co-defendant's statement to a person other than the victim was not hearsay. 228 Mich at 204-205. The Court reasoned that "Bitch, come out" did not contain an assertion because "it is incapable of being true or false. It is a command, not an assertion, and cannot be hearsay because it doesn't qualify as a statement." 228 Mich App at 204-205. The implied assertion in *Jones* and Officer Lavers' direct, unambiguous statement, are incomparable. Here, we do not have a command, but a statement of fact that can be proven true or false: Mr. Washington was wearing a bulletproof vest.

Propp is also inapplicable to this case. There, the court found that several "statements" that were admitted at trial were not really statements at all, rather, they were implied assertions, and therefore did not violate the rule against hearsay:

> [S]everal of the alleged hearsay "statements" are either questions—e.g., "[S]ee how easy it would be for me to shut you up[?]"—or are seemingly in-court testimony about various events given by eyewitnesses with firsthand knowledge—e.g., [the witness's] testimony about seeing bruises on the victim's arm in the past. . . . Questions are not assertions of fact, and Michigan does not recognize the "implied assertion" theory that has been adopted in some other jurisdictions.

RECEIVED by MSC 12/21/2023 11:06:26 AM

Propp, 340 Mich at 666-667 (internal citations omitted). In so holding, the Court of Appeals wrote that "for spoken words to qualify as an assertive 'statement' under the hearsay rules, those words must contain an assertion of fact that is – when made – '[]capable of being true or false." Again, here, we have a statement of fact that can be proven true or false. We do not have a question, and nothing was implied by Officer Lavers.

Indeed, *Jones* defined an "implied assertion" in such a way that forecloses any application of its definition to the type of evidence at issue in Mr. Washington's case, which directly implies the substance of an out-of-court testimonial statement:

> The use of the term "implied assertion" to denote hearsay has occurred in situations where out-of-court conduct of a person, sometimes verbal and sometimes nonverbal, is offered in evidence to demonstrate that person's belief, from which the inference is offered that the belief is true, when it was *not the actor's intent to communicate the matter to be proved in court*. And so, to use a famous example, if the issue were the seaworthiness of a ship, evidence that the ship captain sailed away with his family aboard after making a thorough inspection of the ship would be considered hearsay as being the captain's implied assertion that the ship was seaworthy.

Id. at 208 (emphasis added).

Jones, and our courts' implied assertion decisions, are about the seaworthiness of a ship. On the contrary, the inferential evidence of a testimonial statement at issue in Mr. Washington's case, is about fish in a lake: Witness A testifies that before visiting the lake, he called Z on the phone and asked whether there were fish in the lake. If A testifies at trial "Z told me that there were fish in his lake," that testimony would be hearsay. If Z testifies "As a result of Z's answer, I brought my fishing gear to his lake" the testimony is also hearsay because it implied that Z told A that there were fish in his lake. *See David F. Binder, Hearsay Handbook* § 1:10 (4th ed. 2020).

RECEIVED by MSC 12/21/2023 11:06:26 AM

The utterances in *Jones* and *Propp* – a nonassertive command and a question – are so far afield from the statement in this case that it is difficult to discern any persuasive effect of those cases. However, there are other cases in Michigan that more plainly illustrate implied assertions in action.

Consider, for example, *People v Pinkney*, unpublished opinion of the Court of Appeals, issued July 14, 2009 (Docket No. 282144), 2009 WL 2032030. Mr. Pinkney was accused and convicted of paying people five dollars to vote for him in a recall election for the position of city commissioner. *Id.* at *1. On appeal, Mr. Pinkney claimed that the trial court erred in admitting the utterances of out-of-court individuals who appeared at the city clerk's office asking, "where do I get my $5," and "is this where I get paid?" *Id.* at *13, *14. *Pinkney* held that these questions did not violate the rule against hearsay because they were questions, not statements, and that any "implied" assertion contained therein – that voters were being paid by Mr. Pinkney to vote for him in the recall – could not be presumed to invoke the rule against hearsay.

Pinkney was a case about seaworthy ships. Unlike Mr. Washington's case, *Pinkney* was not a case about fish in a lake. Officer Stockwell's testimony embedded a statement, not an implied assertion; that is, Officer Lavers *told* Officer Stockwell that Mr. Washington was in possession of body armor. 31a-32a; *US Customs and Border Protection Report*, 202a-203a; *Prosecutor's Brief* at 23, n. 46; *Officer Whitten report*, 4b-5b.

Jones does not apply to Mr. Washington's case, but the decision provides helpful analysis for understanding the difference between an implied assertion, which need not be excluded, and inferential evidence of a testimonial statement, which must be excluded. "[A] 'statement,' the first element of hearsay, is defined as an oral or written assertion, or conduct intended as an assertion, a definition which by its own terms appears to leave no room for an 'implied' assertion." 228 Mich at 215.

Put another way, to call something an "implied assertion" means to perceive a declarant's nonassertive conduct to imply a fact that was not intended by the declarant. Because the assertion was not intended by the speaker, or the commander, or the questioner, or the gesturer, that

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assertion is not a statement at all. Indeed, our courts' rejection of the implied assertion theory, just as the right to be confronted by a witness, protects the integrity of the trial process. Our courts' decisions prevent the invocation of the theory "to classify out-of-court behavior as hearsay by what we consider a 'back-door' approach[.]" *Id.* at 207.

Against that backdrop, what matters for the testimony at issue in Mr. Washington's case is *not that Officer Lavers implied his assertion*, but that *the prosecutor implied* Officer Lavers' *statement* through Officer Stockwell's testimony. Our courts' pre-*Crawford*, "implied assertion" hearsay cases are inapt. To broaden our courts' holdings on implied assertions to apply to evidence that directly implies the substance of a testimonial, out-of-court statement, would eviscerate the rights to confrontation afforded by the United States and Michigan constitutions.

2. Contrary to the prosecutor's argument, Officer Lavers' verbal statement to Officer Stockwell was testimonial. Officer Lavers reasonably believed that his statement to Officer Stockwell would be used against Mr. Washington at a later criminal proceeding.

The Confrontation Clause applies only to statements that are testimonial. *Fackelman*, 489 Mich at 528. In Michigan, for a statement to be testimonial, that statement must be produced by a witness who bears testimony against the accused. *Id.* To "bear testimony" means to make a statement – not limited to an accusation – under circumstances which would "lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *Id.* at 556-557 (citing *Crawford*, 541 US at 51-52).

Contrary to PAAM's brief in support of the prosecution in this case, Michigan's Confrontation Clause jurisprudence takes a broader approach than the "primary purpose" test in determining whether a statement is testimonial. *Amicus Brief in Support of Prosecution* 3, 8. In *Davis v Washington*, 547 US 813, 822 (2006), the United States Supreme Court held that an out-of-court statement introduced against the accused in a criminal trial is testimonial where its "*primary purpose* . . .

RECEIVED by MSC 12/21/2023 11:06:26 AM

is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* (emphasis added).

Davis informed this Court's decision in *Fackelman* but does not capture the test adopted by this Court. Instead, this Court adopted an approach consistent with the United States Supreme Court's post-*Davis* holdings, because Michigan's approach "more accurately synthesizes the [United States Supreme Court's] various [Confrontation Clause] holdings and . . . adheres more closely to the actual language of the Confrontation Clause." *Fackelman*, 489 Mich at 556; *see also Melendez-Diaz v Massachusetts*, 557 US 305, 310 (2009) (primary-purpose test not applied); *Bullcoming v New Mexico*, 564 US 647, 659 (2011) (primary-purpose test cursorily mentioned); *People v Fontenot*, 509 Mich 1073 (2022) (McCormack, C.J., concurring with denial of leave on Confrontation Clause issue) (unlike in emergency situations where statements are nontestimonial under *Davis*, *Fackelman* characterized the primary-purpose test "as 'largely irrelevant' in more mundane circumstances, where it is difficult to imagine a statement taking on alternative purposes.") (citing *Fackelman*, 489 Mich at 559).

A statement does not need to be accusatory to be testimonial. Notarized certificates signed by forensic analysts indicating that material seized by police was cocaine, were testimonial. *Melendez-Diaz*, 557 US at 310-311. And even a laboratory report certifying the accused's blood alcohol levels above the legal threshold qualifies as testimonial *Bullcoming*, 564 US at 663-665; *see also Fontenot*, 509 Mich at 1073 (McCormack, C.J., concurring) ("Sometimes, [a] statement comes from the cold remove of a scientific forensic report or, as in this case, the banal entries of a technician's log.").[3]

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[3]In *Williams v Illinois*, 567 US 50 (2012), a plurality of the United States Supreme Court held that a DNA report that connected Mr. Williams' DNA to the victim was not testimonial because its primary purpose was "to catch a dangerous rapist who was still at large, not to obtain evidence for use against [Mr. Williams], who was neither in custody nor under suspicion at that time." *Id.* at 84. In *People v Fontenot*, 509 Mich 1073 (2022), this Court denied leave on the question of whether a technician's

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Fackelman offers the clearest example of a statement that is testimonial but not accusatory. There, this Court found the trial court violated Mr. Fackelman's right to confrontation when it permitted an expert witness to testify that Mr. Fackelman was not insane at the time of the alleged crime in that case. 489 Mich at 532. The expert witness' opinion was based entirely on the written report of a psychiatrist who initially examined Mr. Fackelman. *Id.* at 529-530. The examining psychiatrist was not available at trial and had never been cross-examined. *Id.* at 521, 528.

The examining psychiatrist was a witness against Mr. Fackelman, and the statements in his report were testimonial as to Mr. Fackelman's mental condition because they were the examining psychiatrist's "solemn declaration or affirmation made for the purpose of establishing *some fact*." *Id.* at 532 (emphasis added). Importantly, the examining psychiatrist's report "was made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial[.]" *Id.* at 532.

The same is true here. As the Court articulated below, "[W]hen Lavers handed over [Mr.] Washington and the vest to Stockwell, Lavers made a statement that he intended as accusatory. . . . Lavers meant to 'bear testimony' against Mr. Washington, thereby situating the statement squarely within the definition of unconfronted hearsay." *Washington*, __ Mich App __ ; slip op at 6 (internal citation omitted). 91a

Indeed, police officers' statements that bear testimony against the accused are a classic example of the "core class of 'testimonial' statements[,]" which include 'material such as affidavits, custodial examinations, prior testimony that the [accused] was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used [for the purpose of prosecution], [as well

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log is testimonial. *Id.* In a concurring opinion, Justice McCormack wrote that while "the proper formulation of the primary-purpose test is unclear . . . I don't think [Justice Alito's formulation in *Williams*] should be applied here." *Id.*

as] extra judicial statements . . . contained in formalized testimonial materials." *Crawford*, 541 US at 51-52 (cleaned up).

The fact that Officer Lavers' statement falls within this "core class" is bolstered by the U.S. Customs and Border Protection Report, a preliminary examination exhibit cited by the prosecution. According to that report, Officer Lavers "***stated*** that [Mr.] Washington was wearing body armor under his tee shirt when apprehended." (emphasis added). 202a-203a. This report refutes any fiction that Officer Lavers' statement was neither a statement nor testimonial in nature, and the court should have excluded the evidence based on the report alone. *See also* Officer Whitten's report from the trial court file: "It should be noted that Officer Lavers stated that the body armor was, in fact, on WASHINGTON'S person during his dealings with him." 4b-5b.

The prosecutor also argues that because Officer Lavers was acting in a "ministerial capacity," his statement to Officer Stockwell was not testimonial. However, whether or not Officer Lavers was acting in a "ministerial capacity" is immaterial. The prosecutor's characterization of Officer Lavers' actions and duties on the day he arrested Mr. Washington does not alter the ultimate conclusion: An objective law enforcement official in Officer Lavers' position would have reasonably believed that his statement to Officer Stockwell, that Mr. Washington was wearing a bulletproof vest, would be available for later use at trial. *Id.* (citing *Crawford*, 541 US at 51).

Moreover, even if the distinction were relevant, Officer Lavers *was not acting in a ministerial capacity*. Instead, Officer Lavers was acting *as a law enforcement officer* in the *process of enforcing the law*. Officer Lavers detained Mr. Washington after he jumped a toll. 31a. Officer Lavers continued to detain Mr. Washington until Officer Lavers turned Mr. Washington, Mr. Washington's truck, and a bulletproof vest over to Officer Stockwell. 31a. In the process of turning Mr. Washington over to Officer Stockwell, Officer Lavers "***stated*** that [Mr.] Washington was wearing body armor under his tee shirt when apprehended." 202a. Then, in a follow-up interview between Officer Stockwell, Officer Whitten, and Officer Lavers, Officer Lavers again stated that he observed Mr. Washington wearing a bulletproof vest: "It should be noted that Officer

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Lavers stated that the body armor was, in fact, on WASHINGTON'S person during his dealings with him." 5b.

The Court of Appeals dissent and the prosecutor concede the purpose of Officer Lavers' statement while inexplicably concluding that his statement was non-testimonial:

> [T]he purpose of the communication was simply to provide Officer Stockwell with *the information necessary for Officer Stockwell to formally take [Mr. Washington] into custody* from Canadian authorities and proceed with the charging process under Michigan law.

Washington, __ Mich App at __ (MARKEY, J., dissenting) 97a-104a; slip op at 5 (emphasis added). 102a

Put another way, the purpose of Officer Lavers' statement to Officer Stockwell was to facilitate Mr. Washington's arrest after he committed crimes in Canada. It is irrelevant whether Officer Lavers knew that Mr. Washington was breaking the law in the United States by wearing a bulletproof vest. Mr. Washington's status as a person convicted of a violent felony was a condition precedent to his conviction in the present case, but had no bearing on the testimonial nature of Officer Lavers' statement to Officer Stockwell.

Under Michigan law, these facts make plain that when Officer Lavers made statements to Officer Stockwell, he reasonably believed those statements would eventually be used against Mr. Washington in criminal proceedings. *Fackelman*, 489 Mich at 556-557. Indeed, even under the "primary-purpose" rule articulated by *Davis*, Mr. Washington prevails. 547 US 813, 822. It is clear that Officer Lavers – in response to Mr. Washington committing a crime and jumping a toll – made statements to Officer Stockwell for the primary purpose of curtailing, deterring, and punishing conduct for which Mr. Washington could be prosecuted.

Neither test requires Officer Lavers' to have known that Mr. Washington was breaking the law as a result of his felony history in the United States.

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The Second Circuit confronted a similar situation in *Ryan v Miller*, 303 F 3d 231 (CA 2, 2002). There, during the investigation of the murder of a child, three detectives interrogated four suspects. *Id.* at 234-235. The prosecutor elicited the following testimony from the sergeant who oversaw the investigation:

> Prosecutor: And did something happen at 4:30?
>
> Sergeant: Yes, there did.
>
> Prosecutor: What?
>
> Sergeant: I received a phone call from [Other Detective].
>
> Prosecutor: Did you then have a conversation with [Other Detective] on the telephone at about 4:30?
>
> Sergeant: Yes, I did.
>
> Prosecutor: Now, as a result of talking with [Other Detective] at 4:30, did you do something with respect to [Officers 2 & 3]?
>
> Detective: Yes . . . I directed [Officers 2 & 3] to advise [Mr. Ryan] of [his] rights . . . as to murder.

Id. at 241-244.

Miller characterized the content of the sergeant's testimony as "accusatory assertions introduced without the testimony of the accuser" in violation of the Confrontation Clause. *Id.* at 241-244. Similar to *Miller*, Officer Lavers' statement to Officer Stockwell was accusatory.

Courts do not require out-of-court statements that are inferable through the in-court testimony of a non-declarant to be accusatory to be testimonial. *Mason v Scully*, 16 F 3d 38 (CA 2, 1994), illustrates this point. In *Scully*, the prosecutor questioned a detective about a conversation the detective had with an armed robbery suspect, who was unavailable to testify at Mr. Mason's trial:

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> Prosecutor: And, after the lineup . . . was a conversation had with [Armed Robbery Suspect]? This is a yes or no question.
>
> Detective: Yes.
>
> Prosecutor: And, after this conversation with [Armed Robbery Suspect], were you looking for somebody?
>
> Detective: Yes, I was.
>
> Prosecutor: And who were you looking for?
>
> Detective: [Mr. Mason].

Id. at 40.

The Second Circuit held that the detective conveyed inferential evidence of a testimonial statement. *Id.* at 42-43. The statement was testimonial even though, unlike in Mr. Washington's case, it was not explicitly accusatory, because it caused police to focus on Mr. Mason. *Id.*

Officer Lavers' statements to Officer Stockwell caused Officer Stockwell to initiate the process of arresting and criminally charging Mr. Washington. Nevertheless, in an attempt to minimize the testimonial nature of Officer Lavers' statements to Officer Stockwell, PAAM writes in their amicus brief in support of the prosecution that "the most likely inference from [the exchange between Officer Lavers and Officer Stockwell] is that it was communicated that [Mr. Washington] was the one who had blown by the toll booth, not that [Mr. Washington] was "wearing" body armor." *Amicus Brief in Support of Prosecution* 6. This theory is belied by both the U.S. Customs and Border Protection Report and Officer Whitten's Report. 202a-203a; 4b-5b

If the jury could infer that Mr. Washington jumped the toll, it could also infer that Mr. Washington wore the bulletproof vest. Indeed, Officer Lavers made *many* statements to Officer Stockwell when he handed over Mr. Washington, any number of which he reasonably believed would be used against Mr. Washington at a later criminal prosecution. And as made clear by opening argument, the prosecutor *intended* that

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the jury infer from Officer Stockwell's testimony that Mr. Washington wore a bulletproof vest:

> [Y]ou're going to hear that the Defendant had in his [the body armor] in his possession when he's stopped in Canada. . . . you're going to hear that Officer Whitten from Port Huron Police Department was called by [Officer Stockwell] on the American side, the border agent to that they have an individual that was in possession of body armor.

27b.

The Court of Appeals opinion was correct. It squares with *Ryan* and *Scully*, which are each consistent with our Confrontation Clause jurisprudence. And the opinion below, as well as the federal law, dovetail with the holding in *Fackelman*. A statement, even an inferential one, is testimonial if it is reasonably foreseeable that a prosecutor will use that statement as substantive evidence at trial. 489 Mich at 556-557 (citing *Crawford*, 541 US at 51-52). Because Officer Lavers' statement was testimonial, it should have been excluded.

3. Officer Lavers' statement to Officer Stockwell was introduced for the purpose of proving the truth of the matter asserted, that Mr. Washington was wearing a bulletproof vest.

The prosecutor maintains that even if Officer Stockwell's testimony triggered Confrontation Clause protection, it was still admissible because it was not presented for the truth of what it asserted. This is not so.

The Sixth Amendment of the United States Constitution and Article 1, Section 20, of the State Constitution of Michigan, bar the introduction of an out-of-court, testimonial statement only if that statement is introduced for the purpose of proving the truth of the matter asserted. *People v McPherson*, 263 Mich App 124, 133 (citing *Crawford*, 541 US at 59-60 n.9); *see also* MRE 801(c). In certain situations, and where such evidence is relevant, a statement offered to explain a police officer's

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actions is not hearsay and does not trigger Confrontation Clause protections. *People v Chambers*, 277 Mich App 1, 10-11 (2007).

Officer Lavers' statement was not introduced to the jury to establish chain-of-custody, but as proof that Mr. Washington was wearing a bulletproof vest on April 8, 2019, in violation of MCL 750.227g. Officer Lavers told Officer Stockwell that Mr. Washington was wearing a bulletproof vest in Canada. The jury was tasked with deciding whether Mr. Washington wore a bulletproof vest in Canda. If Officer Lavers' statement was not introduced for its truth, then for what? Apart from proving Mr. Washington's guilt, there is no other discernable, relevant purpose for Lavers' statement.

Regardless, the prosecution's chain-of-custody argument still requires us to rely on Lavers for the proposition that the bulletproof vest came from Mr. Washington, rather than assume that Officer Lavers simply tossed the bulletproof vest into the car. If we don't rely on Officer Lavers as a truthteller, all we know is that the bulletproof vest that was presented in court was the same bulletproof vest that Officer Lavers gave to Officer Stockwell.

The prosecutor leans on *Chambers*, but *Chambers* is distinguishable. In *Chambers*, investigators obtained still photographs of a robbery suspect, which were aired on the news. 277 Mich App at 4. An FBI agent saw the photographs and contacted investigators to tell them that one of his confidential informants had identified the person in the photographs as Mr. Chambers. This tip prompted investigators to set up surveillance of Mr. Chambers' home. The purpose of the testimony in *Chambers* was not to prove that Mr. Chambers committed the robbery, but to explain why investigators set up surveillance, which eventually produced evidence that helped prove Mr. Chambers' guilt. *Id.*

The causal connections between the out-of-court statement in *Chambers* and Officer Lavers' statement to Officer Stockwell are substantively different in that the *Chambers* statement leaves room to infer that the statement was introduced for a purpose other than its truth:

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Chambers: Still Photographs → Surveillance → Additional Evidence → Guilt

The out-of-court, testimonial statement in Mr. Washington's case is distinguishable because Officer Lavers' statements *caused* Officer Stockwell to arrest Mr. Washington and those statements were introduced to the jury to prove that Mr. Washington was guilty.

Washington: Officer Lavers' Statement → Mr. Washington's Arrest → Guilt

The structure of the trial prosecutor's questions, coupled with the content of Officer Stockwell's answers, evince this purpose. Had the prosecutor's purpose been to explain Officer Lavers' involvement in the case and establish the chain of custody, the prosecutor would not have specifically asked Officer Stockwell (1) whether he communicated with Officer Lavers; and (2) whether those communications caused Officer Stockwell to arrest Mr. Washington. The purpose of Officer Stockwell's testimony is also clear because there was no other evidence introduced at trial that Mr. Washington was *seen, and subsequently detained*, while wearing a bulletproof vest in Canada.

Prosecutors may not muddle the causal connection between out-of-court, testimonial statements, arrest, and the probative quality of such statements, by framing the evidentiary purpose of those statements in such a way that allows them to circumvent the right to confrontation.

And other jurisdictions agree.

In *United States v Silva*, 380 F3d 1018 (CA 7, 2004), the Seventh Circuit held that several out-of-court statements were inadmissible. *Id.* at 1019. One of the offending statements was introduced through a Drug Enforcement Agency (DEA) agent's testimony as to conversations between a non-testifying DEA informant and a drug supplier during which Mr. Silva's first name was mentioned. *Id.* The prosecutor, and the district court, maintained that those statements were not introduced for the truth of the matter asserted. *Id.* at 1019-1020. The Seventh Circuit responded to that argument by asking, "So to what issue *other than* truth might the testimony have been relevant?" *Id.* at 1020. The district

court also permitted an officer to testify that a substance found in a car in which Mr. Silva was a passenger tested positive for cannabis. *Id.* The testifying officer had no first-hand knowledge of the test, and the crime scene technician did not testify at trial. *Id.* Importantly, the officer had conducted the traffic stop without any knowledge that the passenger, Mr. Silva, was being investigated by the DEA. *Id.* The Seventh Circuit was perplexed by the district court's conclusion that the officer's statements were not offered for the truth of the matter, but only to describe the actions taken by the police officer. *Id.*

Accordingly, the Seventh Circuit reversed Mr. Silva's convictions, holding that both statements were introduced in violation of his right to confrontation, and opining that "[a]llowing agents to narrate the court of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the [S]ixth [A]mendment and the hearsay rule." *Id.*

A First Circuit decision is also illustrative. In *United States v Benitez-Avila*, 570 F3d 364 (2009), the First Circuit addressed the admission of an out-of-court statement from an informant identifying the robbery suspect as a "twin." *Id.* at 367-368. The Court rejected the government's claim that the evidence was admissible for the purpose of explaining the investigation: "A prosecutor cannot justify the receipt of prejudicial, inadmissible evidence simply by calling it 'background' or 'context' evidence, or by asserting that it has a [non-hearsay] relevance to *an issue that is itself not relevant*." *Id.* at 369 (emphasis added).

Likewise, "background" and "context" are not relevant in Mr. Washington's case. This Court should not find that Officer Lavers' statements were introduced for a purpose other than to prove that Mr. Washington was wearing a bulletproof vest in Canada on April 8, 2019. A holding to the contrary would result in a change to the law that would render meaningless the right to confrontation.

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II. The prosecutor cannot prove the constitutional violation harmless beyond a reasonable doubt. Absent evidence of the otherwise inadmissible bulletproof vest, the prosecutor failed to establish the occurrence of a specific injury, and Mr. Washington's statements were barred by the corpus delicti rule; furthermore, even if his statements were not barred, the error was still not harmless beyond a reasonable doubt.

Officer Stockwell's testimony violated Mr. Washington's right to confrontation. As a result, Mr. Washington is entitled to a new trial unless the prosecutor can prove that the introduction of Officer Lavers' statements was harmless beyond a reasonable doubt. *Chapman v California*, 386 US 18 (1967); *see also People v Anderson*, 446 Mich 392 (1994).

The prosecutor cannot meet this burden because Mr. Washington's incriminating statements were barred by the corpus delicti rule, which "is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur. Specifically, the rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury (for example, death in cases of homicide) and (2) some criminal agency as the source of the injury." *See People v Konrad*, 449 Mich 263, 269-270 (1995) (internal citations omitted); *see also People v Burns*, 250 Mich App 436 (2002).

The trial prosecutor admitted the bulletproof vest into evidence through the inferential evidence of Officer Lavers' testimonial statement contained within Officer Stockwell's in-court testimony, even though Officer Stockwell had no personal knowledge that the vest was previously in Mr. Washington's – *or anyone's* – possession. Indeed, Officer Stockwell confirmed his lack of personal knowledge at trial during cross-examination:

> Defense: Officer, when you had contact with the CBSA was that bulletproof vest on Mr. Washington?

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> Stockwell: It was not on Mr. Washington.
>
> Defense: Did you ever observe that bulletproof vest being taken off by anyone from your department or from the CBSA?
>
> Stockwell: I did not observe it.

37a.

Without Officer Stockwell's testimony that he (1) took custody of the bulletproof vest from Officer Lavers; and (2) that based on his communications with Officer Lavers, he took Mr. Washington into custody, the prosecutor lacked sufficient foundation to admit the bulletproof vest into evidence to prove a crime had been committed. Had this testimony been excluded, the jury would thus have never heard evidence of Mr. Washington's inculpatory statements. *See Konrad*, 449 Mich at 269-270; *see also Burns*, 250 Mich App at 438.

Furthermore, even if this Court finds that Mr. Washington's statements were admissible, the prosecutor cannot prove beyond a reasonable doubt that the introduction of Officer Lavers' statements was harmless.

A. Mr. Washington's incriminating statements were barred by the corpus delicti rule because the prosecutor failed to establish the occurrence of a specific injury.

A confession, or a statement that necessarily amounts to a confession, is inadmissible if the prosecutor does not first establish the corpus delicti of the alleged crime. *Konrad*, 449 Mich at 269-270; *People v Porter*, 269 Mich 284, 290 (1934). To establish the corpus delicti, the prosecutor must introduce independent proof to demonstrate by a preponderance of direct or circumstantial evidence the occurrence of (1) a specific injury; and (2) criminal agency as the source of the injury. *Id.*; *Burns*, 250 Mich App at 438.

To satisfy the first element of the corpus delicti rule, the prosecutor need not first prove each element of the "specific injury" beyond a

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reasonable doubt; instead, courts may draw reasonable inferences and weigh the probabilities. *People v Mumford*, 171 Mich App 514, 517 (1988). Moreover, it is not necessary to present independent evidence of all of the elements of a crime before a confession can be admitted. *People v Williams*, 422 Mich 381, 391 (1985).

Absent the inferential evidence of Officer Lavers' testimonial statement contained within Officer Stockwell's testimony, the trial prosecutor here did not introduce independent evidence of a specific injury. Put another way, the prosecutor did not introduce independent evidence that that Mr. Washington – or anyone, for that matter – wore a bulletproof vest on April 8, 2019.

To secure a conviction against Mr. Washington pursuant to MCL 750.227g, the prosecutor needed to prove beyond a reasonable doubt that (1) a person, i.e., Mr. Washington; (2) owned, possessed, or used body armor; and that (3) that person had been previously convicted of a violent felony.

The prosecutor established the third element of MCL 750.227g and satisfied the "criminal agency" requirement of Michigan's corpus delicti rule, because Mr. Washington stipulated at trial that he was a "violent felon" within the meaning of MCL 750.227g. *See, e.g., People v Cotton*, 191 Mich App 377, 386 (1991) (defining criminal agency as "some person's criminality as the cause of the [specific injury]"). As a result, the prosecutor was tasked with proving to the jury (1) that someone owned, possessed, or used body armor; and that (2) Mr. Washington was that person. And in his opening statement, the prosecutor acknowledged this task:

> [Y]ou're going to hear that the Defendant had in his [the body armor] in his possession when he's stopped in Canada. . . . you're going to hear that Officer Whitten from Port Huron Police Department was called by [Officer Stockwell] on the American side, the border agent to that they have an individual that was in possession of body armor.

27b.

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The prosecutor is correct that while the trial prosecutor was required to prove beyond a reasonable doubt that Mr. Washington wore a bulletproof vest, the trial prosecutor was not required to establish independent proof of every element of MCL 750.227g to satisfy the corpus delicti rule. *Prosecutor's Brief* 36-37 (citing *Williams*, 422 Mich at 390-391). Indeed, "[p]roof 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*." *Konrad*, 449 Mich at 270 (internal citations and quotations omitted).

To this end, to secure the admission of Mr. Washington's confessions, the trial prosecutor only needed to "show (1) that the body armor existed and (2) was possessed *by someone*." *Prosecutor's Brief* 36 (emphasis added). The trial prosecutor did not do so. Instead, without Officer Stockwell's testimony, which implied to the jury that Officer Lavers told him that Mr. Washington wore a bulletproof vest, the prosecutor could only establish the following facts independent of Mr. Washington's confession:

1. A pickup truck crossed the Blue Water Bridge into Canada on April 8, 2019, at 5:00 p.m.

2. That pickup truck was a blue Ford F-250.

3. The blue Ford F-250 crossed the bridge without paying the toll.

4. Bridge Safety Officer Denise Fenner observed a red object in the seat of the Ford F-250.

5. Officer Fenner identified the red object as red clothing.

6. An hour after the Ford F-250 jumped the toll, CBSA officers returned Mr. Washington, a Ford pickup truck, and body armor to United States CBP Officer Stockwell.

7. There were no places for motorists to stop and obtain body armor between the United States toll booth and Canadian Customs – including on the Blue Water Bridge.

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8. Mr. Washington was wearing a red T-shirt when he was handed over to Officer Stockwell.

9. Mr. Washington had been previously convicted of a violent felony.

29a-30a; 31a-32a; 36a; 38a-39a; *Prosecutor's Brief* 36.

None of these facts directly or circumstantially established that *someone* wore a bulletproof vest. As a result, neither the trial court nor the jury could draw a reasonable inference that a specific injury occurred, and Mr. Washington's confessions were inadmissible. *Compare Mumford*, 171 Mich App at 517.

Contrast Mr. Washington's case with the circumstantial evidence in *Mumford*. Ms. Mumford was accused of stealing a pair of boots from a shoe store. Ms. Mumford entered the store with a large handbag. As Ms. Mumford left the store, the checkpoint censor activated the security alarm. The cashier at the shoe store asked Ms. Mumford to come back into the store and walk back through the security checkpoint. Ms. Mumford refused. In response, the cashier followed Ms. Mumford outside, and Ms. Mumford continued to refuse to return to the store. Ms. Mumford then got into the passenger side of a vehicle in the parking lot, pulled out a pair of boots, hung them from the car window, told the cashier to come and get the boots, and then threw them on the ground. Ms. Mumford was arrested and subsequently confessed to stealing the boots. At a preliminary examination, Ms. Mumford's attorney objected to the admission of her confession, arguing that the prosecution failed to show that the boots belonged to the store, and therefore corpus delicti had not been established. The district court agreed and the charges against Ms. Mumford were dismissed. The circuit court affirmed. *Id.*, 171 Mich App at 515-517.

In reversing the circuit and district courts, the Court of Appeals relied on the abundance of circumstantial evidence to draw the reasonable inference that the pair of boots at issue belonged to the shoe store. That evidence included the fact that Ms. Mumford entered the store carrying only a large handbag; that she made no purchases; that she left the store and activated the alarm; that she deliberately left the store against the cashier's requests that she return; that she pulled a

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pair of boots out of her bag when she entered the vehicle; that she taunted the cashier with those boots and told the cashier to come and get them; and that the boots were embellished with a "Shoe Town" sticker. *Id.*, 171 Mich App at 518-519.

In *Mumford*, the circumstantial evidence indicated that Ms. Mumford was in possession of a pair of shoes and that those shoes belonged to the shoe store. No such evidence supported the admission of Mr. Washington's confessions at his trial. Further, unlike in *Mumford*, where the cashier had personal knowledge of the circumstantial evidence that established the corpus delicti, Officer Stockwell had no personal knowledge that someone wore a bulletproof vest on April 8, 2019, and Officer Fenner only had personal knowledge that a blue Ford F-250 jumped the toll that day.

Accordingly, the prosecutor here could not have established by a preponderance of the evidence that a specific injury occurred without Officer Lavers' statement. Consequently, Mr. Washington's confessions would have been inadmissible at his trial under the corpus delicti rule. *Konrad*, 449 Mich at 269-270; *Burns*, 250 Mich App at 438.

Because the prosecutor cannot prove harmless beyond a reasonable doubt the trial court's error in admitting Officer Lavers' out-of-court testimonial statement, Mr. Washington is entitled to a new trial. The prosecutor's argument that Mr. Washington's statements were admissions of fact rather than confessions, that his confessions were admissible under MRE 804(b)(3), and that this Court should revisit the corpus delicti rule, should not lead this Court to hold otherwise.

B. The prosecution's arguments do not impact this analysis that Mr. Washington's statements were inadmissible.

1. Mr. Washington's statements amounted to confessions of guilt.

A statement is a confession if "*the fact admitted* necessarily amounts to a confession of guilt[.]" *People v Porter*, 269 Mich 284, 290 (1934) (emphasis added). An admission does not amount to a confession of guilt

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where "[t]he 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." *People v Schumacher*, 276 Mich App 165, 181 (2007) (citing *Porter*, 269 Mich at 290).

Here, the prosecutor had to prove one fact: that Mr. Washington wore a bulletproof vest. Mr. Washington's two inculpatory statements necessarily amounted to confessions of guilt because in those statements, he admitted this fact, and that fact alone had "convicting force." *Porter*, 269 Mich at 290-291.

As such, the statement Mr. Washington made to officers at the jail, that "he was wearing the body armor because he was afraid people were going to kill him," 43a, 44a, and his statement to his mother on the jail phone, that he "put the bulletproof vest" on, and acknowledging that he was charged with possession of body armor, 46a-49a, are both distinguishable to the admissions of fact that this Court and the Court of Appeals have held do not violate the corpus delicti rule if they are admitted absent evidence of a specific injury.

Start with *Porter*, 269 Mich at 286. There, Ms. Porter was convicted of arson. At trial, an officer testified to Ms. Porter's explanation about how the fire started:

> [S]he had been cleaning house; had lighted papers which had accumulated in the stove in the front room; when she came back from the store she discovered a fire in the attic and got excited, went out to the road, stopped a car, and told the driver there was a fire at the home, but no attention was paid to her; so she walked to her mother's house; she thought the fire was caused from the stove; it was first in the attic around the chimney; everything had been destroyed; she had saved no clothing; she did not know how the things got into the garage, nor what had become of them. . . . she did not seek help at the nearby business places because of trouble between her dog and others.

RECEIVED by MSC 12/21/2023 11:06:26 AM

Id., 269 Mich at 289.

This Court held that Ms. Porter's statements did not amount to confessions of guilt because her statements did not of themselves show guilt, and instead required proof of other facts to give those facts "convicting force." *Id.* at 290-291. This Court's holding in *Porter* makes sense because Ms. Porter denied responsibility for any criminal conduct. Additionally, none of the facts admitted by Ms. Porter were sufficient to secure a conviction on their own.

Unlike in *Porter*, Mr. Washington's statements to the corrections deputies and to his mother confirm that he committed criminal conduct and do not require proof of other facts to give those statements convicting force. In other words, Mr. Washington's statements amount to more than "admissions of 'subordinate facts' which circumstantially establish" that Mr. Washington wore a bulletproof vest. *People v Phillips*, unpublished opinion of the Court of Appeals, issued October 22, 2015 (Docket No. 326005), 2015 WL 6438333 at *7 (holding accused's statements that he threw victim's car seat out of the car but that he did not know victim was inside the car seat did not amount to confession because additional evidence would be needed to show he intentionally murdered victim).

Schumacher is also distinguishable. Mr. Schumacher was convicted for disposing of scrap tires in violation of MCL 324.16902(1). *Schumacher*, 276 Mich at 166. At the time of the offense, § 16902(1), MCL 324.16902(1), provided:

> A person shall deliver a scrap tire only to a collection site registered under section 16904, a disposal area licensed under part 115, an end-user, a scrap tire processor, a tire retailer, or a scrap tire recycler, that is in compliance with this part.

Id. at 167.

In analyzing the statute, the Court of Appeals wrote that the "plain language of § 16902(1) places the burden on the person delivering scrap tires to determine that the recipient site is one of the enumerated lawful

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places to dispose of scrap tires." *Id.* at 175. The Court also concluded that "even if the Legislature did not intend to create true strict liability, § 16902(1) at most requires only that the prosecution prove that defendant "purposefully or voluntarily performed the wrongful act[.]" *Id.* at 171 (internal citations omitted). Mr. Schumacher's conduct was wrongful because he could have taken steps to discover that the noncompliant disposal area was indeed noncompliant. *Id.* at 174.

Following an investigation into whether Mr. Schumacher was delivering scrap tires to a noncompliant disposal area, Mr. Schumacher made inculpatory statements:

> [Witness] testified that he went to the office of Alternative Fuels and introduced himself to [Mr. Schumacher]. [Witness] asked [Mr. Schumacher] why he was delivering scrap tires to the [noncompliant disposal area]. According to [Witness], [Mr. Schumacher] stated that he was under a contract to take the tires to the property for the purpose of building a road and that there had been 9 or 10 loads of tires delivered to the site.

Id. at 181.

Mr. Washington maintains that Mr. Schumacher's inculpatory statements were, in fact, confessions, and that *Schumacher* was wrongly decided. However, to the extent this Court agrees with the Court of Appeals in *Schumacher*, Mr. Schumacher's statements are different from Mr. Washington's statements, because in *Schumacher*, the prosecutor needed to prove that Mr. Schumacher "purposefully or voluntarily" delivered the tires to the noncompliant disposal area. *Id.* at 171. Put another way, the evidence needed to be sufficient for "a rational fact-finder to conclude that [Mr. Schumacher] knowingly and voluntarily caused more than 500 scrap tires to be delivered to [the noncompliant disposal area]."

Here, however, the prosecutor was not required to prove a *mens rea* element to secure a conviction under MCL 750.227g. Instead, the fact that Mr. Washington had been previously convicted of a violent felony was a condition precedent to the crime of wearing a bulletproof vest; a

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condition to which Mr. Washington stipulated at trial. Accordingly, the fact contained within Mr. Washington's confession – that he wore a bulletproof vest – did not require other facts to give his statement convicting force. On the contrary, it was the *only fact* the prosecutor needed to prove at trial.

Contrary to the prosecutor's and PAAM's arguments, the corpus delicti rule is not so strenuous as to require a person to confess to each element of a crime for an inculpatory statement to amount to a confession. Rather, an inculpatory statement amounts to a confession if *the fact admitted* gives the statement convicting force. *Porter*, 269 Mich at 290-291. Nor does the rule require that an inculpatory statement be the result of interrogation.

Finally, consider *People v Hayden*, 205 Mich App 412 (1994). Mr. Hayden was charged with criminal sexual conduct. *Id.* Before trial, Mr. Hayden told a friend about the accusations. *Id.* at 415. He explained, "It was an accident. [Victim] and I were playing around and he got an erection and I sucked him." *Id.* at 416. Mr. Hayden's friend testified to Mr. Hayden's confession at trial. *Id.* at 415. The Court held that "the preliminary examination testimony established the corpus delicti of the offense and the defendant's *confession* was then properly admitted[.]" *Id.* at 414 (emphasis added). Mr. Hayden's statement to his friend was a confession even though he did not admit to the intent element of second-degree criminal sexual conduct, did not make the statement in response to interrogation, and did not admit wrongfulness when he made the statement.

Mr. Washington's inculpatory statements were confessions, and as a result, the prosecutor was required to establish the corpus delicti before Mr. Washington's confessions were admitted at his trial.

2. The admissibility of Mr. Washington's confession under MRE 804(b)(3) is irrelevant because the corpus delicti rule is an evidentiary-foundation principle.

RECEIVED by MSC 12/21/2023 11:06:26 AM

In Michigan, "it has long been the rule that proof of the corpus delicti is required *before* the prosecution is allowed to introduce the inculpatory statements of an accused." *People v McMahan*, 451 Mich 543, 548 (1996). In other words, the corpus delicti rule is an evidentiary-foundation principle that requires corroborative evidence to support a confession before it is admitted at trial. *See* § 145. Corpus delicti or corroboration requirement: (a) In general, 1 McCormick On Evid. § 145 (8th ed.); *see also People v Brasic*, 171 Mich App 222, 226-227 (1988) ("The prosecutor must present evidence of the corpus delicti independently of [the accused's] confessions. . . . it may be established by a preponderance of direct or circumstantial evidence and reasonable inferences." (internal citations omitted)); *People v Modelski*, 164 Mich App 337, 341 (1987) ("The common law in Michigan, and many other jurisdictions, is that [the accused's] confession is inadmissible unless the corpus delicti of the offense is *first established*." (emphasis added)).

Accordingly, even if Mr. Washington's confession were admissible pursuant to MRE 804(b)(3), the trial court was first required to find that the prosecutor had established a proper evidentiary foundation; in this case, that the corpus delicti had been established by a preponderance of the evidence. Without Officer Lavers' implied statement, the prosecutor could not have established this foundation, and Mr. Washington's statements would have been inadmissible.

3. There is no "public order" exception to the corpus delicti rule.

In their amicus brief in support of the prosecution, PAAM addresses the specific injury requirement of the corpus delicti rule, arguing that the corpus delicti rule should not apply to offenses that are "committed without any specific kind of tangible injury or loss[.]" *Amicus Brief in Support of Prosecution*, 14. PAAM goes on to suggest that MCL 750.227g is a "public-order" offense, and that there is no tangible harm. *Id.* at 15. In support of this argument, PAAM relies *United States v. Shunk*, 881 F 2d 917 (CA 10, 1989).

RECEIVED by MSC 12/21/2023 11:06:26 AM

However, the rule articulated by *Shunk* is not the law in Michigan, and this court has never elected to adopt such rule, even in "public-order" cases. For example, in *People v Kelsch*, 16 Mich App 244 (1969), Mr. Kelsch was jury convicted of carrying a concealed pistol without a license. *Id.* at 244. Mr. Kelsch appealed, and our Court of Appeals reversed, holding that Mr. Kelsch's extrajudicial statements alone could not establish the corpus delicti of the crime for which he was accused and convicted. *Id.* This Court approved the reasoning of *Kelsch* and the line of cases that followed that decision in *People v Rios*, 386 Mich 172, 177 (1971).

There is no binding case law in Michigan after 1985 that specifically addresses the "public-order" exception offered by PAAM, but this Court's binding decision in *Konrad*, 449 Mich at 270, which addressed the application of the corpus delicti rule to a case involving the constructive possession of cocaine, demonstrates that no such exception exists in our state. *Id.* Moreover, a number of unpublished opinions by our Court of Appeals, surrounding what PAAM would define as "offenses without tangible injury," illustrate that the corpus delicti rule applies to Mr. Washington's case. *See, e.g., People v Chalmers*, unpublished opinion of the Court of Appeals, issued February 22, 2005 (Docket No. 251974), 2005 WL 415282 at *5 (corpus delicti established in possession with intent to deliver case with no mention of "public-order" exception); *People v Emerson*, unpublished opinion of the Court of Appeals, issued March 20, 2007 (Docket No. 266047), 2007 WL 839444 (corpus delicti satisfied in carrying a concealed weapon case without mention of "public-order" exception). This Court should not now elect to carve out a new exception to the corpus delicti rule.

4. This Court should not depart from stare decisis to modify or abolish Michigan's common-law corpus delicti rule.

The prosecutor asks this Court to depart from stare decisis and revisit the corpus delicti rule. *Prosecutor's Brief* 39-41. However, this is the first time the prosecutor has raised this argument. As a result, this Court should not reach the merits of this request. *See, e.g., People v Jemison*, 505 Mich 352, 359 n. 4 ("Merits aside, because the prosecution

RECEIVED by MSC 12/21/2023 11:06:26 AM

did not raise this argument before the Court of Appeals, we decline to address it." (citing *People v Walker*, 504 Mich 267, 276 n.3 (2019) and *People v. McGraw*, 484 Mich 120, 131 n. 36 (2009)).

Nonetheless, the Court should not modify or abolish the corpus delicti rule.

There is a presumption in favor of upholding precedent. *McCormick v Carrier*, 487 Mich 180, 210-211 (2010). Because of this presumption, "deciding to overrule precedent is not a decision [the Supreme Court of Michigan] takes lightly." *People v Feezel*, 486 Mich 184, 212 (2010). Instead, this Court will "respect precedent and not overrule or modify [precedent] unless there is a substantial justification for doing so. While stare decisis is essential to the respect accorded to judgments of the Court and to the stability of the law, it is not a mechanical formula of adherence to the latest decision." *Id.* (internal citations and quotations omitted).

Accordingly, in *Robinson v. Detroit*, 462 Mich 439 (2000), this Court established a test to determine whether and when it is appropriate to depart from stare decisis. *Id.* at 464. To begin with, this Court must first consider whether the previous decision was wrongly decided. *Id.* Following that preliminary determination, this Court must apply a three-part test to determine whether the doctrine of stare decisis nonetheless supports upholding precedent: (1) whether the decision defies practical workability; (2) whether reliance interest would work an undue hardship if the precedent were overturned; and (3) whether changes in the law or facts no longer justify the decision. *Id.*

The prosecutor, and PAAM in their amicus brief argue that this court should depart from stare decisis and either abolish or modify the corpus delicti rule. This Court shot not do so.

To begin, neither *McMahan*, 451 Mich at 547-548, nor this Court's long line of precedential holdings, adopting and affirming the corpus delicti rule in Michigan, were wrongly decided. *See Konrad*, 449 Mich at 269; *see also People v Williams*, 422 Mich 381, 391 (1985); *Burn*, 250 Mich App at 438.

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The prosecutor is correct that "the origins of the corpus delicti rule are traced back to seventeenth century English common law." *Prosecutors Brief* at 39. After all, the concerns that underpin the role of the corpus delicti rule in Michigan date back to 1858. In *People v Lambert*, 5 Mich 349 (1858), this Court held that Mr. Lambert could not be convicted of polygamy upon his own confession merely of his first marriage, rather, the principle of corpus delicti required further evidence to prove affirmatively the first marriage and its legality. *Id.*, 5 Mich at 350-353.

Indeed, the sentiments of *Lambert* and of Lord Hale, cited by the prosecutor, that he "would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead[,]" mirror and endure within our state's corpus delicti jurisprudence. *Prosecutors Brief* at 39 (citing 2 Matthew Hale: The History of the Pleas of the Crown 290 (S. Emlyn ed., 1763)). For example, in *Konrad,* 449 Mich at 269, this Court wrote that "the corpus delicti rule is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur[,]" and in *Williams*, 422 Mich at 388, this Court confirmed that "the 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."

This Court's precedential holdings, recognizing the importance of the corpus delicti rule, and confirming its persistent relevance in our state, were not wrongly decided, and should not be overruled.

Similarly, *McMahan* was not wrongly decided. The prosecutor and PAAM urge this Court to overrule its decision in *McMahan*, 451 Mich at 547-548, in which this Court declined "the invitation to replace [Michigan's] common-law corpus delicti requirement" with the "trustworthiness doctrine" articulated by the United States Supreme Court in 1954, and subsequently adopted by "the federal judiciary, ten states, and the District of Columbia." *See Id.*; *see also Opper v United States*, 348 US 84 (1954); *Prosecutor's Brief* 39-41.

However, the prosecutor ignores the important principles articulated by *McMahan* in arriving at its holding that "the common law corpus

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delicti requirement remains the rule of law in this state." *Id.*, 451 Mich at 548. This Court's decision was well-reasoned and rooted in the underlying principles of the corpus delicti rule:

> We do not believe that [the trustworthiness doctrine] comports with the underlying purpose of the corpus delicti doctrine. The underlying purposes of the corpus delicti requirement are (1) to guard against, indeed to preclude, conviction for a criminal homicide when none was committed, . . . and (2) to minimize the weight of a confession and require collateral evidence to support a conviction. . . . There can be no criminal without a crime in fact committed. []
>
> This Court remains unconvinced that the protection afforded an accused by the common-law corpus delicti standard is no longer needed. . . . We favor the common-law approach, because we continue to believe that an accused deserves the benefit of independent proof of the crime, particularly in those situations in which no body is recovered. Furthermore, the prosecution has not persuaded this Court that the common-law corpus delicti doctrine should be changed.[]

Id. at 547 n. 7 (internal citations omitted). This Court's reasoning and conclusion were not incorrect. In fact, in spite of *Opper*, many states continue to apply the common-law version of the corpus delicti rule. Eve Brensike Primus, THE FUTURE OF CONFESSION LAW: TOWARD RULES FOR THE VOLUNTARINESS TEST, 114 Mich L Rev 1, 56 n 285 (2015) ("Many states have corpus delicti rules that require independent corroboration … before they will admit a confession. . . . *Some* jurisdictions have adopted a trustworthiness rule . . . [which has] been impotent in practice." (emphasis added))

This Court need not proceed to the three-factor test articulated by *Robinson*, because the precedential decisions at issue were not wrongly decided. 462 Mich at 464. However, in an abundance of caution, Mr. Washington asserts that an exploration of each of these factors leads to

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the unavoidable conclusion that this Court should not depart from stare decisis.

First, our state's corpus delicti rule does not defy practical workability. *Id.* As previously discussed, many states continue to adhere to the common-law corpus delicti rule. Primus, 114 Mich L Rev 1, 56, n 285.

The prosecutor contends to the contrary, suggesting that the lower court's "overly expansive *misapplication*" of Michigan's corpus delicti rule in Mr. Washington's case should prompt this Court to depart from stare decisis. *Prosecutor's Brief* 41. In essence, the prosecutor hints at the unworkability of the rule. However, if the lower court misapplied the corpus delicti rule – and Mr. Washington maintains the lower court did not do so – then the rule itself is not the issue, rather, the court's understanding of the rule in this particular case is the concern. As such, the prosecutor's incorrect argument is not dispositive, and does not give cause for this Court to depart from stare decisis.

Contrary to the prosecutor's argument, the courts in this state have effectively applied the common-law corpus delicti rule in such a way that protects the accused without imposing an unreasonably arduous burden on prosecutors.

For example, in the majority of cases in Michigan that address whether corpus delicti was established, this Court and the Court of Appeals have found that the corpus delicti *was established*. Specifically, in the last three years, there have been only two cases – one being Mr. Washington's – where the corpus delicti rule prevented admission of an accused's confession.[4]

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[4] *See generally*, *People v Impens*, unpublished opinion of the Court of Appeals, issued December 14, 2023, p *3-7; *People v Johnson*, unpublished opinion of the Court of Appeals, issued September 2, 2021 (Docket No. 351606), 2021 WL 4000365, p *10; *People v Hunt*, unpublished opinion of the Court of Appeals, issued August 19, 2021 (Docket No. 352862), 2021 WL 3700351, p *9; *People v Glinder*, unpublished opinion of the Court of Appeals, issued April 22, 2021

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Second, reliance interests would work an undue hardship if this court modified or abolished Michigan's corpus delicti rule. *Robinson*, 462 Mich at 466. As the prosecutor and PAAM essentially concede through their exploration of the history of the rule, corpus delicti "has become so embedded, so accepted, so fundamental, to everyone's expectations[,]" that to depart from the rule would have significant consequences for the rights of the accused. *Id.* at 466-467. As this Court explained in *McMahan*, "an accused deserves the benefit of independent proof of the crime[.]" 451 Mich at 547, n. 7.

Finally, there are no changes to the law or the facts that would justify the modification or abolishment of the corpus delicti rule. Again, the corpus delicti rule in Michigan dates back to 1858, and the common-law formulation of that rule was affirmed by this Court more than a century later in *McMahan*, 451 Mich at 458.

For these reasons, the common-law corpus delicti requirement should remain the rule of law in Michigan, and this Court should hold that Mr. Washington's confessions were inadmissible under the corpus delicti rule.

C. Even if Mr. Washington's incriminating statements were admissible, the prosecutor could not prove that Mr. Washington was guilty beyond a reasonable doubt without the evidence offered by Officer Stockwell's testimony.

Despite their "convicting force," *Porter*, 269 Mich at 290-291, Mr. Washington's confessions were inconsistent and unreliable, and he rebutted those confessions at trial. As a result, even if this Court finds that Mr. Washington's confessions were admissible, the prosecutor could not have proven Mr. Washington's guilt beyond a reasonable doubt without Officer Stockwell's testimony.

(Docket No. 354288), 2021 WL 1588834, p *4; *People v Delong*, unpublished opinion of the Court of Appeals, issued February 11, 2021 (Docket No. 353687), 2021 WL 527402, p *2.

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As discussed in Section II, Subsection A, *supra*, without Officer Stockwell's testimony that Officer Lavers' told him that Mr. Washington wore a bulletproof vest, the prosecutor could only establish the following facts independent of Mr. Washington's confession: A pickup truck crossed the Blue Water Bridge into Canada on April 8, 2019, at 5:00 p.m.; that pickup truck was a blue Ford F-250; the blue Ford F-250 crossed the bridge without paying the toll; Bridge Safety Officer Denise Fenner observed a red object in the seat of the Ford F-250; Officer Fenner identified the red object as red clothing; an hour after the Ford F-250 jumped the toll, CBSA officers returned Mr. Washington, a Ford pickup truck, and body armor to United States CBP Officer Stockwell; there were no places for motorists to stop and obtain body armor between the United States toll booth and Canadian Customs – including on the Blue Water Bridge; Mr. Washington was wearing a red T-shirt when he was handed over to Officer Stockwell; and Mr. Washington had been previously convicted of a violent felony. 29a-30a; 31a-32a; 36a; 38a-39a; *Prosecutor's Brief* 36.

None of these facts directly or circumstantially established that *someone* wore a bulletproof vest, and Mr. Washington's confessions were insufficient to enable the prosecutor to meet his burden of proof at trial.

Officer Whitten testified that he heard Mr. Washington admit that he was in possession of body armor while Mr. Washington was booked at the St. Clair County Jail. Mr. Washington countered this evidence by testifying in his own defense that what Officer Whitten heard was Mr. Washington explaining to the booking officers why he was arrested. 50a-51a. Mr. Washington also rebutted the evidence of his jail call to his mother by explaining that his statements to his mother concerned a different incident during which he wore a bulletproof vest. 51a.

Without admission of the bulletproof vest into evidence through Officer Lavers, Officer Whitten's testimony, and the recording of the jail call, would have been of limited probative value.

The prosecutor cannot prove the error in Mr. Washington's case harmless beyond a reasonable doubt. A new trial is required for Mr. Washington.

Conclusion and Relief Requested

For the reasons stated above, Lantz Washington respectfully requests that this Honorable Court affirm the Court of Appeals, reverse Mr. Washington's conviction, and remand for a new trial.

Respectfully submitted,

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Respectfully submitted,

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