APP NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES TIMOTHY NORMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Application for an Extension of Time to File Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONER'S APPLICATION TO EXTEND TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

To the Honorable Brett Kavanaugh, as Circuit Justice for the United States Court of Appeals for the Eighth Circuit:

Pursuant to this Court's Rules 13.5, 22, 30.2, and 30.3, Petitioner James Timothy Norman ("Mr. Norman" or "Petitioner") respectfully requests that the time to file his Petition for Writ of Certiorari in this matter be extended for 60 days up to and including February 24, 2025. The Court of Appeals issued its opinion on July 9, 2024 (Appendix A); a petition for rehearing en banc was timely filed, and the Court of Appeals denied the petition for rehearing en banc on September 27, 2024 (Appendix B). Absent an extension of time, the Petition for Writ of Certiorari would be due on December 26, 2024. Petitioners are filing this Application more than ten days before that date. See S. Ct. R. 13.5. This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1).

Background

This was a federal murder-for-hire prosecution, in which the Government charged Petitioner, whose family owned a successful restaurant chain called Sweetie Pie's, with orchestrating the murder of his nephew, Andre Montgomery. Petitioner was convicted, and the Eighth Circuit, in a published opinion, *United States v. Norman*, 107 F.4th 805 (8th Cir. 2024), affirmed the conviction.

The Government's case was not open-and-shut. Mr. Montgomery was Petitioner's nephew. Mr. Montgomery had been involved in numerous illegal activities and had made a lot of enemies, and was heading down the wrong path. In 2014, to try to straighten his life out and save him from a life of crime, Petitioner and the family invited him to St. Louis and gave him a job in the family restaurant business. In 2016, he was shot and killed in St. Louis by a man named Travell Hill. The Government charged Petitioner with orchestrating the murder.

One of the linchpins in the Government's theory was the fact that in 2014, when Mr. Montgomery came to St. Louis, Petitioner took out life insurance policies on Mr. Montgomery. The prosecution argued that these policies were circumstantial evidence of Mr. Norman's motive to kill Mr. Montgomery. The defense argued that the policies were a reasonable business decision, given Mr. Montgomery's history of gang activity, crime, and violence.

The person who shot Mr. Montgomery was, as noted, a man named Travell Hill. Mr. Hill, seeking (and receiving) leniency for himself, testified that he acted upon what he believed to be Mr. Norman's wishes. He testified that one of Sweetie Pie's restaurant managers, Chris Carroll, had told him that Mr. Norman wanted Mr. Montgomery dead.

Mr. Carroll, for his part, adamantly denied that any such conversation ever took place—but the jury never heard his denial because he invoked his Fifth Amendment rights and refused to testify when the defense called him. Mr. Carroll had previously waived his Fifth Amendment rights, met with the FBI and the prosecutors, and told them that Mr. Hill was lying and this alleged conversation never took place. And it appears that the prosecution believed Mr. Carroll, because Mr. Carroll was not charged. But when the defense tried to call him to the stand to elicit that same statement—namely, "Mr. Hill is lying; I never told him Mr. Norman wanted Mr. Montgomery dead"— he refused to testify, and invoked his Fifth Amendment rights.

As to the insurance policies, the Government claimed that they were purchased without Mr. Montgomery's knowledge. Here, too, there was an exculpatory witness who contradicted that contention: Waiel Yaghnam, the insurance agent who wrote the policies. He too waived his Fifth Amendment rights, met with the FBI and the prosecutors, and told them that Mr. Montgomery *did* know about the policies, and that he had had a meeting with Mr. Montgomery about them. But once again, when the defense tried to call him to the stand to elicit that same statement, he refused to testify, and invoked his Fifth Amendment rights.

The District Court denied Petitioner's motions to compel the testimony of Mr. Carroll and Mr. Yaghnam, rejecting Petitioner's arguments that (a)

they expressly waived their Fifth Amendment rights when they made their statements to the FBI and the prosecution; and (b) their testimony would not incriminate them, because they denied involvement in any criminal activity.

The final piece of evidence was two text messages from Mr. Montgomery:

- been out of town cuz yu don't believe me n I'm not bout to get hurt from nobody for sum shit I didn't do… I'm tell yu know TIM IS AFTER ME
- I'm not just bout to be sitting in STL wen I know Tim got people looking for me.

These messages were both admitted over Petitioner's hearsay objections. The District Court admitted them under FRE 803(3), and the Eighth Circuit affirmed their admission under Rule 803(3). Petitioner contends that the Eighth Circuit's interpretation of Rule 803(3), which dates to 1979, and holds that hearsay statements about *why* a hearsay declarant has a particular mental state are admissible, is both erroneous, and in conflict with the long-settled caselaw of every other Circuit. In other words, there is an 11-1 circuit split on the application of FRE 803(3), and the Eighth Circuit is alone on the minority (and wrong) side of the split.

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for 60 days for the following reasons:

1. Undersigned counsel of record Mr. Mason, a member of this Court's bar, was retained on October 23, 2024. Undersigned counsel was not involved in the litigation below. Review of the record confirms that this case raises two important issues that are appropriate for this Court's consideration and intervention. It will take considerable time for the counsel to familiarize himself with the substantial trial and appellate record and prepare a concise petition of maximum helpfulness to the Court. Mr. Mason has numerous upcoming litigation deadlines; and in addition, the current deadline is the day after Christmas. Mr. Mason's most pressing upcoming deadlines are as follows:

- Jury trial, *Black Swan Advisors, LLC v. Bush Management, Inc*., December 17, 2024. *Black Swan Advisors LLC v. Bush Management Company*, No.: 30-2020-01168000-CU-BT-CJC (Orange Cty Sup. Ct.).

- Jury trial, *Dominguez v. City of Covina et al*., No.: 21-cv-6369-FRO (C.D. Cal.). Pretrial filings and Motions in Limine are due December 13, 2024; trial date is January 21, 2025.

- Reply Brief, Ninth Circuit appeal, *United States of America, v. Alexander Declan Bell Wilson*, Case No.: 23-3956 (9th Cir.) due December 24, 2024.

- Oral Argument, Ninth Circuit, *United States of America v. Mohammad Jawad Ansari*, Case No.: 23-2703 (9th Cir., December 5, 2024.

- Reply Brief, Motion to Dismiss, *United States of America v. Shray Goel, and Shaunik Raheja*, Central District Court of California, Case No.: 23-cr-0623-WLH (C.D. Cal.), due November 8, 2024.

- Pretrial preparation and motions in limine for the retrial of Commonwealth v. Karen Read, *Commonwealth of Massachusetts v. Karen Read*, Case No.: 2282-cr-0117. Motions in limine due January 1, 2025.

2. This case presents significant issues appropriate for this Court's review. The two primary issues are these:

a. The Eighth Circuit's Application of an Erroneous and Overbroad Interpretation of FRE 803(3), on Which the Circuits Are Split 11-1, with the Eighth Circuit in a One-Member Minority Position

This issue is ripe and appropriate for this Court's review, and this Court's intervention is necessary, because there is an 11-1 circuit split on this issue, with the Eighth Circuit is in a minority by itself. And the Eighth Circuit's position is wrong, and creates enormous prejudice to criminal defendants.

In every other circuit, it is black-letter law that a statement of then-existing mental state is admissible under FRE 803(3)—but a statement about the *reason why* the declarant has that particular mental state is not

admissible. Every circuit recognizes the very clear distinction between these two categories of hearsay utterances. But the Eighth Circuit, alone among the circuits, expressly allows that latter category of statements—statements about the reason *why* the declarant had a particular mental state—to also be admitted under 803(3).

The Eighth Circuit applied that interpretation of 803(3) in this case, to allow in hearsay statements of a non-testifying declarant stating not just *that* the declarant felt afraid, but also statements about the declarant's *reason* for feeling afraid. Here are the text messages:

- I been out of town cuz yu don't believe me n I'm not bout to get hurt from nobody for sum shit I didn't do… I'm tell yu know TIM IS AFTER ME
- I'm not just bout to be sitting in STL wen I know Tim got people looking for me.

These texts were admitted in full, including the "TIM IS AFTER ME" and "Tim got people looking for me" portions. And those statements formed the centerpiece of the prosecution's case that Petitioner in fact solicited the declarant's murder. In every other circuit they would have been plainly inadmissible, because they are statements of the declarant's belief about external facts (viz., that Petitioner was "after" the declarant and had "people looking for" him). But under the Eighth Circuit's idiosyncratic caselaw on

Rule 803(3), they were admissible to explain why the declarant had that mental state.

This erroneous interpretation of Rule 803(3) appears, on preliminary review, to go back in the Eighth Circuit caselaw to 1979, shortly after the adoption of the FREs. In *United States v. Adcock*, 588 F.2d 397 (8th Cir. 1977), in what appears to be the first Eighth Circuit case construing Rule 803(3), the Eighth Circuit affirmed the admission under 803(3) of hearsay testimony purportedly to show the then-existing mental state of fear in alleged victims of business extortion. But the testimony admitted went far beyond state of mind: the statements admitted (by non-testifying declarants) also included their recollections of what others had told them were the standard payoffs necessary to sell liquor in the state of Iowa, and about what others had told them that they (the other dealers) had paid. The Eighth Circuit rejected the defendant's arguments that this testimony was barred by FRE 803(3), and affirmed admission of all of it, lumping it all under "state of mind" evidence: "[T]he state of mind of the victim is crucial and evidence thereof is admissible. Fed. R. Evid. 803(3)." That erroneous beginning spawned a line of caselaw stretching to the instant case, in which the Eighth Circuit admits as one District Court put it, "the 'why' part… the part after the because," of state-mind-statements under 803(3). *Duren v. E.I. DuPont De Nemours & Co.*, No. 4:09-CV-713-DPM, 2011 WL 13234053, at *4–5 (E.D.

Ark. June 9, 2011); *see also*, *e.g.*, *United States v. DeMarce*, 564 F.3d 989, 996 (8th Cir. 2009) (affirming admission under 803(3) of non-testifying declarant's hearsay statements that defendant had assaulted her, explaining that the rule allowed admission of hearsay statements not just about the declarant's then-existing mental and physical condition, but also statements about the reason *why* the declarant was in that condition: "D.D.'s statements concerning her physical state—she was bleeding because Joseph DeMarce hit and tried to rape her… were properly admitted.").

The Eighth Circuit applied this line of cases in the instant case, affirming admission of the hearsay declarant's "Tim is after me" and "Tim has people looking for me" under 803(3) as evidence that "Andre's then-existing state of mind was fear of Norman."

In every other Circuit, a hearsay statement describing a present state of mind is admissible, but a hearsay statement explaining *why* the declarant has that state of mind is *not* admissible. In every other Circuit, these text messages would not have been admitted. *See*, *e.g.*, *United States v. Alzanki*, 54 F.3d 994, 1008 (1st Cir. 1995); *United States v. Dawkins*, 999 F.3d 767, 789–90 (2d Cir. 2021); *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1274–75 (3d Cir. 1995); *United States v. Liu*, 654 Fed.Appx. 149, 154 (4th Cir. 2016); *United States v. Cohen*, 631 F.2d 1223, 1225 (5th Cir. 1980); *Apanovitch v. Houk*, 466 F.3d 460, 487 (6th Cir. 2006); *United States v.*

Binder, 794 F.2d 1195, 1202 (7th Cir. 1986); *United States v. Fontenot*, 14 F.3d 1364, 1366–67, 1371 (9th Cir. 1994); *United States v. Ledford*, 443 F.3d 702, 709 (10th Cir. 2005); *United States v. Duran Samaniego*, 345 F.3d 1280, 1282-1283 (11th Cir. 2003); *United States v. Brown*, 490 F.2d 758, 762–64 (D.C. Cir. 1973).

b. The Eighth Circuit's Erroneous and Overbroad Interpretation of a Witness's Fifth Amendment Right to Refuse to Testify

The Eighth Circuit affirmed the District Court's denial of motions to compel the testimony of two exculpatory witnesses, both of whom would have directly contradicted the Government's theory of the case. The Eighth Circuit's Fifth Amendment analysis allows for a vastly overbroad invocation of the right, which is contrary to this Court's case law, and which will have the effect of denying exculpatory testimony to numerous criminal defendants.

i. Waiel Yaghnam

The Government's theory was that Petitioner had secretly taken out life insurance on Mr. Montgomery, without Mr. Montgomery's knowledge. However, the insurance salesman who wrote the policies, Mr. Yaghnam, had directly contradicted that theory in his statements to the Government. Mr. Yaghnam had spoken to the Government, waived his Fifth Amendment rights, and told the Government that Mr. Montgomery *did* indeed know about the policy, and that he (Mr. Yaghnam), Petitioner, and Mr.

Montgomery, had had a meeting about the policy. The Government put Mr. Yaghnam on its witness list, but never called him. Instead, the Government told the jury in opening statement that there was no such meeting, and then, when Petitioner tried to call Mr. Yaghnam, Mr. Yaghnam asserted his Fifth Amendment privilege and refused to testify.

The Government knew—because Mr. Yaghnam had told them—that Mr. Montgomery *did* know about the policies. The Government obtained a Fifth Amendment waiver from Mr. Yaghnam, and took his statement. The Government then negotiated a plea agreement with him in which he admitted to putting false height, weight, and income information on the policies, but which carefully omitted any mention of whether Mr. Montgomery knew about them. Mr. Yaghnam was never charged with anything in connection to the murder.

The Government then put on a case that directly contradicted Mr. Yaghnam's statement that Mr. Montgomery *did* know about them, secure in the knowledge that the AUSA could assert that he did not, and that the jury would never hear Mr. Yaghnam's exculpatory evidence, because he would plead the Fifth and refuse to testify.

The District Court denied Petitioner's motion to compel his testimony, and the Eighth Circuit affirmed the denial, even writing in the factual summary section of its opinion that Yaghnam and Petitioner obtained the

policies "without his nephew's involvement or knowledge," despite knowing that Mr. Yaghnam would have given directly opposite testimony, the exclusion of which the Eighth Circuit upheld in the same opinion.

ii. Chris Carroll

The Eighth Circuit opinion describes Carroll as follows: "Enter Travell Hill, the hired gun, and Chris Carroll, Norman's man on the ground in St. Louis. Weeks before the murder, Hill and Carroll met to discuss Hill's fee, and Carroll told him that he was asking too much money to kill Andre." *United States v. Norman*, 107 F.4th 805, 808 (8th Cir. 2024)

In fact, Carroll was a longtime restaurant manager at Sweetie Pie's. And he too waived his Fifth Amendment rights, and gave a lengthy statement to the police. He denied any involvement in the murder, and denied having any such meeting as described above, or making any such statement as described above. And the Government must have believed him—because he was never charged with anything in connection with the murder.

But once again, as with Mr. Yaghnam, the Government put on a case that directly contradicted Mr. Carroll's statements, secure in the knowledge that the jury would never hear his exculpatory evidence, because he would plead the Fifth and refuse to testify.

The Eighth Circuit affirmed the District Court's denial of the defense's motion to compel Mr. Carroll's testimony. As noted: (1) Mr. Caroll had voluntarily waived his Fifth Amendment rights and given a lengthy statement to the FBI; (2) Mr. Carroll had consistently denied any involvement with the crime; and (3) Mr. Carroll was never charged with anything in connection with the crime.

Despite this, the Eighth Circuit affirmed the denial of the motion to compel his testimony, with the following passage:

> Carroll faced real danger by testifying. If forced to tell his story under oath, it might differ from the one he gave the FBI. And the truth could "furnish a link int he chain of evidence needed to prosecute" him. Hoffman, 341 U.S. at 486. Even an answer consistent with his previous interview could land Carroll in hot water, as the "mere repetition on oath of the same facts would of itself, as corroborative evidence, tend to criminate." *Cullen v. Commonwealth*, 65 Va. (24 Gratt.) 624, 637 (1873). And his compelled testimony could have "independent incriminating value" if he were prosecuted and successfully suppressed the statements to the FBI. Burch, 490 F.2d at 1303.

App. A, *United States v. Norman*, 107 F.4th 805, 809–10 (8th Cir. 2024).

None of this is consistent with this Court's caselaw on the Fifth Amendment privilege of witnesses. Mr. Carroll had denied any involvement in the crime, and was not charged with any involvement in the crime. There was not the slightest suggestion from anyone—

neither Mr. Carroll, nor his attorney, [1] nor the Government, nor the Court—that Mr. Carroll's testimony would "differ from the [statement] he gave to the FBI." And since what he said to the FBI was to deny any involvement in the crime, "repetition of the same facts" could not possibly incriminate him, no matter how many times he repeated them.

As with Yaghnam, the Government identified a witness, persuaded him to waive his Fifth Amendment rights and give a statement, and then, when that statement turned out to be exculpatory, simply contradicted it at trial, knowing that the witness would plead the Fifth if the defense tried to call him.

The doctrinal issue that cries out for this Court's intervention is the substantive scope of the privilege: It simply cannot be the case—and it is not the case, under this Court's case law—that a witness who has previously given a statement to police and prosecutors that does not incriminate himself, and who was not charged, can refuse to give that same statement when a criminal defendant seeks it at trial. To sustain an invocation, there must be a real and non-speculative danger

[1] Indeed, his attorney expressly argued that he should be able to invoke and avoid testifying *even though* nothing he would say would be self-incriminating: "First of all, as to argument of jeopardy, it doesn't matter what Mr. Carroll would say. It is what others have said that clearly makes him in jeopardy; and therefore, he has the right to exercise his 5th Amendment right." 9/12/22 Transcript, 14:9-15. And this argument—that a witness can invoke and avoid testifying despite the undisputed fact that his testimony *would not incriminate him*—prevailed in the District Court and the Eighth Circuit.

that testimony would lead to prosecution. When the testimony in question is a *denial* of an alleged inculpatory fact, is not self-incriminating in any way, and the witness gave that testimony voluntarily to the prosecution and was not charged, the witness does not have a Fifth Amendment right to refuse to provide that testimony when the defense calls him at trial.

3. A significant prospect exists that this Court will grant certiorari and reverse the Eighth Circuit. The Eighth Circuit's interpretation of FRE 803(3) is in conflict with every other circuit. It is also wrong. This Court regularly takes cases involving interpretation of the Rules of Evidence in order to maintain harmony and uniformity among the Circuits. *See, e.g.*, *Diaz v. United States*, 144 S. Ct. 1727 (2024); *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017); *Warger v. Shauers*, 574 U.S. 40 (2014). The FRE 803(3) issue here is cleanly presented and preserved, and admission of the statements cannot under any stretch of the imagination be considered harmless. Accordingly, there is no risk that this petition, if granted, would end up being later dismissed as improvidently granted. This is the type of issue that this Court needs to regularly examine in order to maintain uniformity among the circuits; the issue has fully percolated; and the split among the Circuits is clear.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that the time to file the Petition for a Writ of Certiorari in this matter be extended for 60 days, up to and including February 24, 2025.

DATED: Nov. 4, 2024

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CERTIFICATE OF SERVICE

A copy of this application was served by email and U.S. mail to the counsel listed below in accordance with Supreme Court Rule 22.2 and 29.3:

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DATED: Nov. 4, 2024

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APPENDIX A

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
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July 09, 2024

Jennifer Ann Bonjean
BONJEAN LAW GROUP
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RE: 23-1473 United States v. James Norman

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. Except as provided by Rule 25(a)(2)(iii) of the Federal Rules of Appellate Procedure, no grace period for mailing is allowed. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Maureen W. Gornik
Acting Clerk of Court

CRJ

Enclosure(s)

cc: Honorable Nannette Baker
Gwendolyn E. Carroll
Stephen R. Casey
Clerk, U.S. District Court, Eastern District of Missouri
Angie E Danis
Colleen Lang
James Timothy Norman
Gloria V. Rodriguez
Honorable John A. Ross

District Court/Agency Case Number(s): 4:20-cr-00418-JAR-1

United States Court of Appeals
For The Eighth Circuit
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July 09, 2024

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RE: 23-1473 United States v. James Norman

Dear Sir or Madam:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant and appeared on the appellant's brief, was Jennifer Ann Bonjean, of Brooklyn, NY.

Counsel who presented argument on behalf of the appellee and appeared on the appellee's brief, was Angie E. Danis, AUSA, of Saint Louis, MO. The following attorney(s) also appeared on the appellee's brief; Gwendolyn E. Carroll, AUSA, of Saint Louis, MO.

The judges who heard the case in the district court were Honorable John A. Ross and Honorable Nannette Baker.

If you have any questions concerning this case, please call this office.

Maureen W. Gornik
Acting Clerk of Court

CRJ

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 4:20-cr-00418-JAR-1

United States Court of Appeals
For the Eighth Circuit

No. 23-1473

United States of America

Plaintiff - Appellee

v.

James Timothy Norman

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: January 10, 2024
Filed: July 9, 2024

Before BENTON, ERICKSON, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

James "Tim" Norman orchestrated the murder of his nephew and then tried to cash in on a fraudulent insurance policy on his life. A jury convicted Norman of conspiring to commit murder for hire and murder for hire, 18 U.S.C. § 1958, and of

conspiring to commit mail and wire fraud, §§ 1349, 1341, 1343. He appeals, challenging several of the district court's[1] trial rulings. We affirm.

I.

Andre Montgomery was going nowhere fast in Texas when his uncle invited him back to St. Louis to "teach him how to be a man." Norman set Andre up in a nice apartment, put him in music school, and got him a job at the family restaurant, Sweetie Pie's—the subject of a reality TV show. But his goals were not altogether noble. Norman also worked with insurance agent Waiel Yaghnam to apply for several life insurance policies on Andre. He wanted them quickly and without his nephew's involvement or knowledge. Only one went through, and it set Norman up for a $450,000 payout on Andre's death.

It soon became clear that Norman's lessons in manhood weren't going to plan. Andre dropped out of school, stopped showing up to work, and left his apartment. Things came to a head in June 2015 when someone broke into the home of Robbie Montgomery, matriarch and owner of Sweetie Pie's. Robbie suspected her grandson Andre and wanted him to take a polygraph to prove his innocence. But fearing that Norman was after him, he had skipped town.

In September, Yaghnam peddled a new life insurance policy with one catch: Norman had to wait six months before he could be listed as the policyowner. Norman was not interested because Andre "might not make it six months." Yaghnam kept pestering him to call the insurance companies for recorded interviews, but Norman didn't want to be on tape. "[S]hit has changed," he wrote, and Andre "ain't gonna be around much longer."

[1]The Honorable John A. Ross, United States District Judge for the Eastern District of Missouri.

When Andre resurfaced the next spring in St. Louis, it was time for Norman to cash in on the life insurance policy. But by this point, Norman was living in Los Angeles. Enter Travell Hill, the hired gun, and Chris Carroll, Norman's man on the ground in St. Louis. Weeks before the murder, Hill and Carroll met to discuss Hill's fee, and Carroll told him that he was asking for too much money to kill Andre. When Andre showed up at Sweetie Pie's, Carroll and a security guard texted Norman about his return. Norman flew to St. Louis a week later. He met with Hill the next day and asked if he had talked to Carroll—a question Hill interpreted as confirmation that Norman wanted him to kill Andre.

Hill bought a gun. That same day, Norman invited Terica Ellis to his hotel. He told her that he was looking for Andre, and she agreed to find him. Norman gave her $10,000. Communications then volleyed between Ellis and Andre and among Ellis, Hill, and Norman. Ellis pinned Andre down after a few hours and, on Hill's orders, got him in her car. He left a few moments later, and Ellis saw a text from Hill: "Move." Shots rang out as she sped off, and Andre was dead.

II.

Norman first challenges the denial of his motions to compel Carroll and Yaghnam's testimony at trial. The Sixth Amendment guarantees an accused's right to compulsory process of favorable witnesses. That right meets its limit in another: the witness's Fifth Amendment privilege against compelled self-incrimination. Both Carroll and Yaghnam asserted their privilege and refused to testify, but Norman argues that they both waived the Fifth Amendment privilege and that in any case, neither risked further incrimination.

The district court found that Carroll and Yaghnam's claims of the privilege were valid. We review these "highly fact-intensive" decisions for abuse of discretion. *United States v. Allmon*, 594 F.3d 981, 984–85 (8th Cir. 2010). The court's discretion is bolstered by common sense given "this necessarily difficult subject." *Mason v. United States*, 244 U.S. 362, 366 (1917).

A.

Norman insists that Carroll "clearly waived his Fifth Amendment rights" by submitting to hours of FBI questioning about the murder. True, "a witness, *in a single proceeding*, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." *Mitchell v. United States*, 526 U.S. 314, 321 (1999) (emphasis added). But testimonial waiver does not stretch from one proceeding to another. *Allmon*, 594 F.3d at 985; *United States v. Burch*, 490 F.2d 1300, 1303 (8th Cir. 1974). And Carroll did not even testify in another "proceeding." His unsworn, out-of-court statements to police did not waive his Fifth Amendment privilege. *Burch*, 490 F.2d at 1303.

So the privilege was still Carroll's to claim. But it was for the district court to decide whether he faced jeopardy. To sustain the privilege under these circumstances, the court only needed to consider whether the witness had "reasonable cause to apprehend danger from a direct answer." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). But the risk of prosecution must be real—the Fifth Amendment's protections do not extend to "remote and speculative possibilities," unsubstantial danger, or "merely trifling or imaginary[] hazards of incrimination." *In re Grand Jury Proc.: Samuelson*, 763 F.2d 321, 323–24 (8th Cir. 1985) (first quoting *Zicarelli v. N.J. State Comm'n of Investigation*, 406 U.S. 472, 478 (1972); and then quoting *Marchetti v. United States*, 390 U.S. 39, 53 (1968)).

Carroll faced real danger by testifying. If forced to tell his story under oath, it might differ from the one he gave the FBI. And the truth could "furnish a link in the chain of evidence needed to prosecute" him. *Hoffman*, 341 U.S. at 486. Even an answer consistent with his previous interview could land Carroll in hot water, as the "mere repetition on oath of the same facts would of itself, as corroborative evidence, tend to criminate." *Cullen v. Commonwealth*, 65 Va. (24 Gratt.) 624, 637 (1873). And his compelled testimony could have "independent incriminating value" if he were prosecuted and successfully suppressed the statements to the FBI. *Burch*, 490 F.2d at 1303.

Still, Norman criticizes the court's process. He says it failed to "scrutinize" Carroll's "good faith basis" for asserting the privilege. We disagree. "[I]t need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman*, 341 U.S. at 486–87. And courts must sustain the privilege unless it is "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken" and his answers "'*cannot possibly* have such a tendency' to incriminate." *Id.* at 488 (quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1881)); *see also United States v. Campbell*, 410 F.3d 456, 463 (8th Cir. 2005). If an answer "may or may not criminate the witness," and the witness says "upon his oath that his answer would criminate himself," then "the court can demand no other testimony of the fact." *United States v. Burr*, 25 F. Cas. 38, 40 (C.C.D. Va. 1807) (Marshall, C.J.).

Carroll took the stand outside the presence of the jury and refused to answer questions about his association with Sweetie Pie's and the major players in this case: Norman, Robbie, Hill, and Andre. He confirmed that he would not testify about any related issues. Based on the questions and the trial testimony up to that point, the court found that Carroll faced jeopardy and denied the motion to compel. Its considered decision was proper and far from the "blind[] accept[ance]" of a "blanket invocation" Norman portrays it to be.

B.

Yaghnam's challenge is easier to resolve. He never took the stand—instead, his lawyer told the court that Yaghnam had not been subpoenaed and that regardless, he intended to assert his privilege if called. Norman argues that the district court abused its discretion by refusing to compel Yaghnam to appear and assert his Fifth Amendment privilege in person.

It is "beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony *whenever he is properly summoned*." *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (emphasis added). That duty is in turn "measured by the subpoena, the only process under which [one] could be required to appear and testify at all." *Loubriel v. United States*, 9 F.2d 807, 809 (2d Cir. 1926). Norman does not dispute that he failed to serve a subpoena. *See* Fed. R. Crim. P. 17. Without a properly served subpoena, Yaghnam had no duty to appear in court, and Norman's Sixth Amendment argument fails. *See Taylor v. Illinois*, 484 U.S. 400, 415 (1988) (requiring "affirmative conduct" like "the serving of subpoenas" to invoke the right to compulsory process).

III.

Norman next faults the district court for admitting hearsay texts from Andre and an out-of-court statement from Carroll. We review for a "clear and prejudicial abuse of discretion." *United States v. Hyles*, 479 F.3d 958, 970 (8th Cir. 2007) (citation omitted).

A.

After the break-in, Andre texted Robbie to explain that he could not take a polygraph to clear his name because he'd left town: "I been out of town cuz yu don't believe me n I'm not bout to get hurt from nobody for sum shit I didn't do . . . I'm telling yu know TIM IS AFTER ME," and later, "I'm not just bout to be sitting in STL wen I know Tim got people looking for me." The district court admitted the messages into evidence, reasoning that they showed that Andre's then-existing state of mind was fear of Norman. *See* Fed. R. Evid. 803(3).[2]

[2]Norman complains that the Government exceeded the narrow Rule 803(3) purpose by arguing at closing that Andre feared Norman had people after him "and he was right." He did not object to the statement and does not now argue that it was

Norman counters that the messages were irrelevant and prejudicial. We disagree. The messages helped explain why Norman could not act sooner and had to enlist others in his plot—Andre was steering clear of St. Louis and needed to be flushed out. They also rebutted Norman's defense that Andre knew about the insurance applications he submitted after the break-in—the two were not likely to have discussed the policies while Andre was afraid of Norman and avoiding him. And in any case, Norman has not shown that a danger of *unfair* prejudice substantially outweighed this probative value. *See* Fed. R. Evid. 403; *United States v. Medearis*, 65 F.4th 981, 986 (8th Cir. 2023) ("Unfair prejudice means an undue tendency to decide a case on an improper basis." (cleaned up) (citation omitted)).

Norman also argues that the messages lacked proper foundation. He points to Federal Rule of Evidence 602's requirement that a witness have "personal knowledge of the matter" to which he testifies. But the "matter" under Rule 803(3) is not whether Norman was in fact after Andre such that his fears were justified; it is Andre's "then-existing state of mind." Surely Andre had personal knowledge of his own mind. Norman does not suggest that the messages lacked authenticity or the "circumstantial guarantee of trustworthiness" governing admissibility under this hearsay exception: "substantial contemporaneity of event and statement." *See United States v. Dierks*, 978 F.3d 585, 593 (8th Cir. 2020) (cleaned up) (citation omitted).

B.

We reach the same result with Carroll's statement, elicited during Hill's testimony, that Hill "was charging Tim too much . . . to murder Andre." The court found that Carroll was a member of the murder-for-hire conspiracy and that he made the statement in furtherance of the conspiracy, so it admitted the statement as non-

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"plainly unwarranted and clearly injurious." *United States v. Oslund*, 453 F.3d 1048, 1059 (8th Cir. 2006). So there is no reversible error.

hearsay under Rule 801(d)(2)(E).[3] *See United States v. Bell*, 573 F.2d 1040, 1043 (8th Cir. 1978) (discussing admissibility). Norman argues that it was inadmissible because the only proof of Carroll's membership was the disputed statement itself, which could not alone establish his participation in the conspiracy.

Norman gets the rule right but the record wrong. There was ample evidence of Carroll's involvement in the conspiracy. Hill testified that he met with Carroll and said that Norman could give him anything he wanted to for the task. On the day of the murder, Carroll picked Norman up from the airport, and Norman sent him photos from Andre's Instagram. Norman saw Hill and asked if he had talked to Carroll, which gave Hill the impression that Norman wanted him "to go kill Andre." He then bought the gun he used hours later to do just that.

IV.

Norman also argues that the district court should not have allowed FBI agents to use two demonstrative exhibits, or pedagogic devices, that summarized evidence while they testified at trial. There are two paths for presenting summary material: as evidence to prove its content, *see* Fed. R. Evid. 1006, or as an illustrative aid to organize evidence for the jury, *see United States v. King*, 616 F.2d 1034, 1041 (8th Cir. 1980); *United States v. Fechner*, 952 F.3d 954, 959–60 (8th Cir. 2020). The Government took the second route. Our review of the court's decision to receive the illustrative aids is limited to whether they were "so unfair and misleading as to require a reversal." *Fechner*, 952 F.3d at 960 (citation omitted).

[3]Norman claims that the statement was "particularly prejudicial" and should have been struck because the court refused to compel Carroll's testimony. But the ruling is on no shakier ground by virtue of Carroll's absence. *See United States v. Reyes*, 362 F.3d 536, 542 (8th Cir. 2004) ("[W]hen a statement is admissible as a co-conspirator statement, the Constitution gives the defendant, *at most*, the right to confront the witness who recounts the statement." (emphasis added)).

One contested set of slides summarized inconsistencies in the insurance policy applications and put them in context with Norman and Yaghnam's texts. Another synthesized phone and bank records to help jurors understand the timeline of the murder. Neither was offered as evidence, the court instructed the jury to that effect, and the slides were not provided to the jury during deliberations. *See United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988). The exhibits "merely provided a visual aid during [the agents'] testimony," *Fechner*, 952 F.3d at 960, and they were "straightforward and accurate," *Possick*, 849 F.2d at 339; *cf. United States v. Hawkins*, 796 F.3d 843, 866 & n.18 (8th Cir. 2015). Because there was nothing unfair or misleading about the illustrative slides, the district court did not abuse its discretion.

V.

Only Norman's challenges to the final and supplemental jury instructions remain. But he has waived the former by jointly proposing the instructions and failing to object. *United States v. Tillman*, 765 F.3d 831, 836 (8th Cir. 2014). And we see no abuse of the court's "substantial discretion" in the latter. *United States v. Stevenson*, 979 F.3d 618, 625 (8th Cir. 2020).

During deliberations, the jury requested clarification on Instruction No. 22, which told the jury that Hill and Ellis were cooperating witnesses who "participated in the crime charged" and hoped to receive sentence reductions. It further charged the jury with deciding the weight of their testimony in light of their cooperation. The jury asked about a third witness, who was not named in the instruction. Norman wanted a supplemental instruction that identified the witness as a cooperator, but the Government resisted, arguing that he was unlike Hill and Ellis—he was not charged, and whatever the nature of his cooperation agreement, it did not promise leniency at sentencing.

As is "often a proper response," the court referred the jury back to the final instructions. *Stevenson*, 979 F.3d at 625. There was no evidence indicating that the

Government agreed to seek a reduced sentence in exchange for the witness's cooperation, so Norman's preferred instruction would have been inaccurate. *Cf. United States v. Tremusini*, 688 F.3d 547, 557 (8th Cir. 2012) (finding that the district court "properly declined" to give a similar instruction absent an agreement for leniency). Plus, another instruction covered the substance of Norman's complaint by advising the jury to consider "any motives [a] witness may have for testifying a certain way." The court's supplemental jury instruction offers Norman no reprieve. *See United States v. Maupin*, 3 F.4th 1009, 1014–15 (8th Cir. 2021).

VI.

We affirm the district court's judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1473

United States of America

Appellee

v.

James Timothy Norman

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:20-cr-00418-JAR-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 27, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik