

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

CHRISTOPHER SWANN,

Defendant-Appellee.

Case No. 2007-1046

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case Nos. 06AP-870
06AP-899

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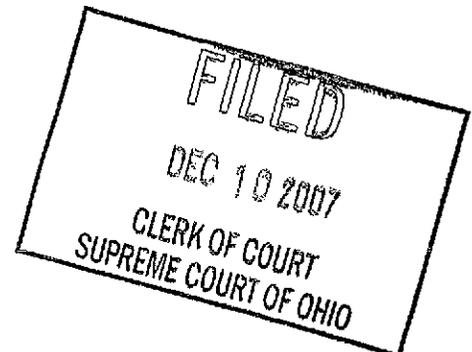


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INTRODUCTION

The lead opinion below wrongly concluded that Evid.R. 804(B)(3) could not be construed so as to exclude evidence offered by a criminal defendant. The United States Supreme Court has repeatedly stated that a defendant's right to present a defense is subject to reasonable evidentiary restrictions. Evid.R. 804(B)(3)—particularly the rule's corroboration requirement—is one such restriction. The rule serves a legitimate purpose: to ensure that hearsay evidence is sufficiently reliable. Specifically, the rule recognizes that statements against penal interests offered to exculpate the accused are inherently suspicious; they come with the risk that a declarant who is unavailable for cross-examination will fabricate a “confession” to exonerate the defendant on trial. Furthermore, the rule reasonably advances this purpose. This Court has stated that Evid.R. 804(B)(3) “strikes a balance” by excluding statements that are insufficiently reliable, while allowing the trier of fact to consider those statements that are trustworthy enough to be admissible as a matter of due process.

Holmes v. South Carolina (2006), 547 U.S. 319, 126 S.Ct. 1727, does nothing to undermine the constitutionality of Evid.R. 804(B)(3). Even after *Holmes*, evidentiary rules may legitimately restrict a defendant's use of unreliable evidence. Plus, unlike the evidentiary restriction at issue in *Holmes*, which did not rationally serve its purported objective of excluding evidence of third-party guilt that had only a weak connection to the case, Evid.R. 804(B)(3) reasonably advances its purpose of excluding unreliable evidence.

Because the out-of-court statements at issue in this case were untrustworthy, the exclusion of the statements did not violate defendant's right to present a defense. Accordingly, the Tenth District's judgment should be reversed.

STATEMENT OF THE FACTS

I. Trial Evidence

Defendant Christopher Swann was indicted for felonious assault and having a weapon while under disability. (Trial Court Rec. 1) The case proceeded to trial and the following evidence was adduced.

A. Defendant Shoots John Stith—Kavar Thompson Sees the Shooting

On the evening of June 25, 2005, John Stith and his friend James Davis were in Stith's bedroom when they heard gunshots coming from outside. (Tr., 147-48, 315-18) It was common for Stith to hear gunshots; but on this particular occasion, he developed a "little quick attitude," apparently because his dog was outside at the time. (Id., 148)

Stith looked out his bedroom window, and although he could not actually see the shooters, he surmised that defendant (also known as "Kurt" or "C") and his associates were responsible for the gunfire, given that the shots were coming from defendant's yard. (Id., 154, 223, 240-41) According to Stith, defendant shoots from this yard "all the time." (Id., 154) Stith yelled out the window, ordering that the gunfire stop. (Id., 154, 158, 319) Still angry, Stith then went outside to again admonish defendant about the gunfire. (Id., 148, 154-55)

Meanwhile, Kavar Thompson was in the area and saw defendant and Andre Sharp (also known as "Dre") shooting guns in the air. (Id., 352) Thompson saw Stith come outside, and the two spoke briefly about who was causing the gunfire. (Id., 239-41, 355-56) Although Stith had already surmised that defendant and his associates were the shooters, Stith confirmed with Thompson that defendant was in fact the source of the gunfire. (Id., 239-41, 356) After speaking with Stith, Thompson went down the street to talk to another friend. (Id., 356)

At this point, Stith—who was standing in the street—started “hooting and hollering” at defendant to stop the gunfire. (Id., 148, 154-55) Defendant then shot Stith in the neck:

But as I run out there, hooting and hollering, I looked towards Parsons. And as I went to go back towards my grandmother’s yard, I heard—excuse my language—I heard a fuck you. I looked straight up and I seen Mr. Christopher Swann, I could not exactly see what he was holding in his hand. But I seen the fire come from him. He told me fuck me and shot me in the neck. (Id., 155)

While on the ground, Stith saw “sparks” flying up around him. (Id., 156) According to Stith, “[t]hat’s when I was shot in my leg and it came out the back of my knee.” (Id.)

Although he did not see the gun in defendant’s hand, Stith emphasized that he was looking at defendant when he heard defendant’s voice and that he saw the “fire” (also described as the “flash”) come from defendant immediately before the bullet hit his neck. (Id., 173, 230, 245, 250, 271-72) No one was near defendant at this time. (Id., 174) Having known defendant several years, Stith was familiar with defendant’s voice. (Id., 145-46, 174)

Thompson also saw defendant shoot Stith. (Id., 356) According to Thompson, neither Sharp nor anyone else was near defendant when he fired. (Id., 363) A few minutes after the shooting, Thompson saw Sharp in the area; because Sharp was carrying a grocery bag, Thompson surmised that he was returning from the store. (Id., 359-60, 398-99, 419) Thompson did not see Sharp carrying a gun at this point. (Id., 360)

After Stith yelled for help, Davis came outside and carried Stith to his porch. (Id., 156-57, 321-23) There, Stith told Davis that “Kurty-Kurt and them” shot him. (Id., 323) Davis and Stith’s grandmother tended to Stith and called the police. (Id., 157, 323) A

police officer eventually arrived at the scene and asked Stith who shot him; Stith answered “Kurt” and gave a clothing description. (Id., 175, 304-05)

Stith was eventually transported to Grant Hospital, where he stayed for eight days and underwent two surgeries for gunshot wounds to his neck and leg. (Id., 175-76, 182-84) Both wounds had corresponding exit wounds, and both left scars. (Id., 182-84) The gunshot wound to Stith’s neck caused nerve damage, leaving him with “no left hand”—Stith is unable to even tie his shoes. (Id., 183-84) The wound to Stith’s leg causes weakness in his leg. (Id., 184)

B. Detectives Interview Stith and Thompson

Former Detective Brian Carney, who testified for the defense, interviewed Stith at the hospital a couple days after the shooting. (Id., 176-81, 600-01) According to Carney, Stith said that Sharp and Delmar Carlisle (also known as “Marty”) were with defendant at the time of the shooting and that Stith saw Carlisle with a gun but did not see him fire it. (Id., 604-05, 617-18) Carney testified that Stith said that “Kurt” was the one who shot him. (Id., 603, 618) At trial, Stith adamantly denied telling Carney that he saw Carlisle or Sharp with defendant and reiterated that defendant was the shooter. (Id., 205-16)

Carney showed Stith a photo array during the interview and asked Stith whether the shooter was depicted in the array; Stith identified defendant. (Id., 179-80, 625-29; State’s Exh. H-1) Carney showed Stith another photo array two days later, and Stith again identified defendant. (Tr., 180-81, 629-30; State’s Exh. H-2)

After Stith returned home from the hospital, Carney spoke to Thompson on the telephone. (Tr., 242, 366-67, 607) According to Carney, Thompson stated that Carlisle and Sharp were with defendant at the time of the shooting. (Id., 608) Carney testified,

however, that Thompson was certain that defendant was the one who shot Stith. (Id., 632) Thompson denied telling Carney that Carlisle was with defendant. (Id., 377-80)

A few months later, while incarcerated on an unrelated charge, Thompson spoke to Detective John Weis, who by that point had taken over the investigation from Carney. (Id., 368-69, 538-40) Testifying for the defense, Weis stated that Thompson referenced only defendant and Sharp as being outside shooting that night and denied that Thompson ever mentioned Carlisle being present. (Id., 540-41, 573-74) Thompson himself denied telling Weis that Carlisle was with defendant. (Id., 401-02) Weis showed Thompson a photo array and asked him to identify the person who shot Stith; Thompson identified defendant. (Id., 585-88; State's Exh. K-1)

C. Defendant Presents Alibi Witnesses

Faye Glenn and her husband Tony McGraph both testified that defendant (whom they called "Jay" and to whom they referred as their "nephew") was at their house at the time of the shooting. (Tr., 696-97, 744) Although Glenn considered defendant family, she admitted that when she learned that defendant was accused of shooting Stith, she did not call the police. (Id., 703-05) Glenn said that she believed defendant would "take care of it" and figured that "it will go away." (Id., 705, 710-11) McGraph also knew that defendant was accused of the shooting, and when asked why he did not call the police, McGraph said that he "didn't think [he] needed to." (Id., 750-52)

Kenny Green testified that defendant was his "nephew" and that he and defendant were at Glenn's house the night of the shooting. (Id., 714-15) Green learned that defendant was charged with the shooting about two or three months after the incident but did not call the police. (Id., 720-22) A couple days before Green testified at trial, a

detective went to Green's house to inquire about the shooting; Green, however, refused to talk and ordered the detective to leave. (Id., 723-24) When asked why he refused to talk to the detective, Green stated that he had already spoken to defendant's attorneys and that talking to the police would have been a "total redundant conversation." (Id., 724)

Tia Holland—with whom defendant has a child—also testified that defendant was at Glenn's house at the time of the shooting. (Id., 729-31, 733) Although Holland initially spoke to the police several times about the shooting, following the advice of defendant's attorney, she later refused to speak to Detective Weis. (Id., 737-39)

II. Exclusion of Delmar Carlisle's Out-of-Court Statements

A. Carlisle Invokes His Fifth Amendment Privilege

Prior to the trial, the defense indicated that it intended to call Carlisle as a witness and that Carlisle would possibly testify that he shot Stith. (Id., 82-83) In response to the State's motion in limine, the trial court and the attorneys extensively discussed the nature of Carlisle's potential testimony—including whether Carlisle was going to invoke his Fifth Amendment privilege—and the extent to which the defense could mention Carlisle's potential testimony during the trial without first voir diring him. (Id., 83-89, 95-105) Discussions regarding Carlisle's potential testimony continued throughout the trial. (Id., 189-90, 464-68)

It was not until during the defense's case that the defense voir dired Carlisle to determine the extent to which he was willing to testify. At the outset of the voir dire, Carlisle, who was represented by counsel, denied knowing defendant. (Id., 651) Carlisle admitted that he has two prior convictions for carrying a concealed weapon. (Id., 656)

Carlisle, however, invoked his Fifth Amendment privilege in response to all other questions by the defense, including questions pertaining to the shooting. (Id., 652-58)

Given Carlisle's invocation of his Fifth Amendment privilege on all pertinent questions, the trial court declared him unavailable and refused to allow him to testify. (Id., 663, 672-73) The same day as the voir dire hearing, the defense filed a motion seeking to admit Carlisle's out-of-court statements pursuant to Evid.R. 804(B)(3). (Trial Court Rec. 185) The trial court denied this request as well, finding that the defense failed to show the necessary corroboration. (Tr., 673-74)

B. The Defense Proffers Carlisle's Out-of-Court Statements

While the jury was deliberating, the defense proffered witnesses who would have testified to Carlisle's out-of-court statements. The first witness was Lisa Hughes, who testified that, while at her house, Carlisle offered to buy her a gun for protection. (Id., 844) After Hughes declined the offer, Carlisle "got to bragging" that he shot somebody. (Id., 844-45) Carlisle told Hughes he shot "Cash," which is Stith's nickname. (Id., 845) Carlisle was "laughing" about the shooting. (Id.)

Hughes knew Carlisle through Holland, who is Hughes's cousin. (Id., 847) Carlisle formerly lived with Holland and defendant and considered them to be parental figures. (Id., 848-50) Holland and defendant took care of Carlisle, and Carlisle treated the two like parents. (Id., 854-55) Hughes told Holland about Carlisle's statements a couple days later. (Id., 853)

Hughes's daughters Cierra and Tiffany both testified that they heard Carlisle's conversation with Hughes. (Id., 858-59, 873) According to Cierra, "He was bragging, I shot the dude." (Id., 860) Similarly, Tiffany testified, "He was bagging [sic] about it,

like he was happy that he shot him.” (Id., 875) Cierra testified that Carlisle said that he was with Sharp at the time of the shooting. (Id., 865) According to Tiffany, Carlisle said that he was with his “brother” (referring to Sharp) at the time of the shooting and that “they was in a bush hiding and they shot him * * *.” (Id., 880, 881-82) Cierra and Tiffany both testified regarding Carlisle’s close relationship to Holland and defendant. (Id., 863-64, 879)

Holland testified that Carlisle admitted to shooting Stith in retaliation for Stith propositioning Carlisle’s pregnant girlfriend for sex. (Id., 885) Carlisle told Holland that he was alone when he shot Stith. (Id., 895) Holland said that “[e]very conversation” she has had with Carlisle about the shooting pertained to her urging him to “man up” so that defendant would not “hold the bag” for the crime. (Id., 886) Holland repeatedly asked Carlisle “what [were] his plans as far as confessing and turning himself in.” (Id., 884) Every time Holland has spoken to Carlisle since the shooting, she urged him to “do something because this is getting out of control.” (Id., 896)

Holland and defendant have been together for seven years and the two have a child together. (Id., 884) Ever since Holland has known defendant, he has been caring for Carlisle. (Id., 889) Defendant made sure that Carlisle was properly fed and clothed and assumed responsibility for Carlisle’s education. (Id.)

III. Conviction and Appeal

The jury found defendant guilty of felonious assault and an accompanying three-year firearm specification. (Id., 903-04; Trial Court Rec. 191) The WUD count was tried to the trial court, which concluded that the State failed to prove “constructive possession”

of the weapon and thus found defendant not guilty.¹ (Tr., 907) The trial court sentenced defendant to a total of nine years in prison. (Trial Court Rec. 207, 210, 212-14)

Defendant appealed to the Tenth District Court of Appeals, challenging, inter alia, the trial court's exclusion of Carlisle's out-of-court statements. The issue sharply divided the Tenth District panel, with each judge writing an opinion. Judge Tyack wrote the lead opinion and, relying solely on constitutional grounds, found that *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, required the admission of the evidence. *State v. Swann*, 171 Ohio App.3d 304, 2007-Ohio-2010, ¶¶7-12. Claiming that "the similarities between this case and *Holmes* are striking," id. at ¶8, Judge Tyack concluded that, after *Holmes*, "Evid.R. 804(B)(3) cannot be construed in a way that denies an accused a meaningful opportunity to present a complete defense," id. at ¶12, citing *Holmes*, 126 S.Ct. at 1733. According to Judge Tyack, because Carlisle's out-of-court statements were crucial to defendant's "third-party guilt" defense, the trial court should have admitted the statements into evidence. Id. at ¶12. Absent from Judge Tyack's opinion was any conclusion that Carlisle's out-of-court statements were reliable.

Concurring separately, Judge Brown disagreed with Judge Tyack's analysis under *Holmes* but concluded that she "would find corroborating circumstances indicate the trustworthiness of the statements Carlisle made to the four witnesses."² Id. at ¶36.

¹ Given its reference to "constructive possession," the trial court apparently believed that the WUD count was not based on the firearm used to shoot Stith, but rather the revolver and rifle found inside defendant's home. Evidence regarding these two firearms was presented to the trial court outside the jury's presence. (Tr., 499-504)

² By basing her decision on what she "would find," Judge Brown improperly substituted her judgment for the trial court's. Moreover, Judge Brown's application of Evid.R. 804(B)(3) ignored a key word in the rule. It is not enough that corroborating circumstances "indicate" that the statements are trustworthy; rather, Evid.R. 804(B)(3)

Judge Sadler voted to affirm the trial court’s exclusion of Carlisle’s out-of-court statements. *Id.* at ¶¶38-49. Judge Sadler first observed that, “[a]lthough *Holmes* and this case involve a defendant attempting to introduce evidence that a third party confessed to the crime of which the defendant was accused, the similarities end there.” *Id.* at ¶38. Judge Sadler noted that the issue of whether the corroboration requirement in Evid.R. 804(B)(3) violates defendant’s right to present a complete defense was not raised either at the trial court or on appeal. *Id.*

Judge Sadler further noted that, even after *Holmes*, “some evidentiary rules may properly limit evidence regarding third party guilt * * *.” *Id.* at ¶39. Judge Sadler explained:

Since Evid.R. 804(B)(3) requires the trial court to engage in an analysis of the evidence indicating the third party’s guilt, it is not a rule of the sort that suffers from the constitutional infirmity discussed in *Holmes*. Furthermore, it is clear that in this case, the issue is not whether the trial court properly *construed* Evid.R. 804(B)(3), which was the issue with the evidentiary rule in *Holmes*. The issue is whether the trial court properly *applied* the rule.

Id. at ¶40 (emphasis sic).

Having rejected Judge Tyack’s analysis under *Holmes*, Judge Sadler next addressed the trial court’s application of Evid.R. 804(B)(3). Judge Sadler concluded that the corroborating circumstances do not clearly demonstrate the trustworthiness of Carlisle’s confessions and that the trial court therefore did not abuse its discretion in excluding the evidence under Evid.R. 804(B)(3). *Id.* at ¶¶45-49.

requires that corroborating circumstances “*clearly* indicate the truthworthiness of the statement.” (Emphasis added)

The State appealed the Tenth District's judgment to this Court, raising two propositions of law. The first proposition of law challenged Judge Tyack's opinion finding that the exclusion of Carlisle's statements was unconstitutional. The second challenged Judge Brown's application of Evid.R. 804(B)(3). By a five-to-two vote, this Court accepted the State's appeal on the first proposition of law, with Justices Pfeifer and Cupp dissenting; Justices Lundberg Stratton and O'Donnell voted to accept both propositions of law. *10/03/2007 Case Announcements, 2007-Ohio-5056.*

ARGUMENT

Proposition of Law: The Federal Constitution does not prohibit a trial court from applying the "corroboration" requirement in Evid.R. 804(B)(3) to exclude hearsay testimony offered by a criminal defendant. [*Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, distinguished.]

Evid.R. 804(B)(3) establishes a hearsay exception for statements against penal interest if the declarant is unavailable. The rule states: "A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement." Judge Tyack's lead opinion essentially concluded that the corroboration requirement in Evid.R. 804(B)(3) is facially unconstitutional to the extent it excludes evidence offered by a criminal defendant.

This conclusion is wrong. The corroboration requirement reasonably advances a legitimate purpose, which is to ensure that hearsay evidence is sufficiently reliable. Because the exclusion of Carlisle's out-of-court statements was constitutional, and

because the Tenth District’s judgment is dependent on Judge Tyack’s flawed constitutional analysis, the Tenth District’s judgment should be reversed.

I. The Beyond-Reasonable-Doubt Standard Applies

It is well-settled that “a statute is presumed constitutional and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.” *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, ¶7, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus.

Although not a “statute,” Evid.R. 804(B)(3) should enjoy the same beyond-reasonable-doubt standard in determining its constitutionality. Just as the General Assembly is entitled to a presumption that the statutes it enacts are constitutional, this Court should be entitled to the same presumption with respect to the rules it prescribes. *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, ¶38 (in as-applied challenges to Civ.R. 40 and Sup.R. 13(B), acknowledging the rules’ “presumed constitutionality”); *State ex rel. Thompson v. Spon* (1998), 83 Ohio St.3d 551, 555 (noting Court’s duty to give Rules of Civil Procedure a constitutional construction). That the General Assembly had the opportunity to disapprove of Evid.R. 804(B)(3) before the rule become effective, OHIO CONST., Art. IV, § 5(B), further buttresses the presumption that the rule is constitutional.

II. The Corroboration Requirement in Evid.R 804(B)(3) Is Constitutional

A. The Corroboration Requirement Serves the Legitimate Purpose of Ensuring that Hearsay Evidence Is Sufficiently Reliable

“A defendant’s right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions.” *United States v. Scheffer* (1998), 523 U.S. 303, 308,

citing *Taylor v. Illinois* (1988), 484 U.S. 400, 410, *Rock v. Arkansas* (1987), 484 U.S. 44, 55, and *Chambers v. Mississippi* (1973), 410 U.S. 284, 295. “The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” *Taylor*, 484 U.S. at 410. “As a result, state and federal rule makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused’s right to present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Scheffer*, 523 U.S. at 308, quoting *Rock*, 484 U.S. at 56. An evidentiary rule is “unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.” *Scheffer*, 523 U.S. at 308.

The corroboration requirement in Evid.R. 804(B)(3) reasonably restricts a criminal defendant’s ability to present hearsay evidence. To start, the corroboration requirement serves a legitimate purpose: “to exclude statements of dubious reliability that cannot be tested by cross-examination.” *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶70. “The requirement of corroborating circumstances was designed to protect against the possibility that a statement would be fabricated to exculpate the accused.” *United States v. Bumpass* (C.A. 4, 1995), 60 F.3d 1099, 1102, quoting *United States v. Brainard* (C.A. 4, 1982), 690 F.2d 1117, 1124; see, also, *United States v. Jackson* (C.A. 2, 2003), 335 F.3d 170, 178 (“The purpose of this corroboration requirement is to ‘circumvent[] fabrication’ by the declarant.”). Put differently, “the underlying concern of Evid.R. 804(B)(3) is that one individual can make statements exculpating another ‘and then rather easily claim the privilege when the government seeks to cross-examine him to discredit the statement.’” *State v. Mengistu*, 10th Dist. No.

02AP-497, 2003-Ohio-1452, ¶54, quoting *United States v. Mackey* (C.A. 1, 1997), 117 F.3d 24, 29.

The United States Supreme Court has identified the exclusion of unreliable evidence as a legitimate purpose of evidentiary restrictions. “State and federal governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principle objective of many evidentiary rules.” *Scheffer*, 523 U.S. at 309. Particularly pertinent to Evid.R. 804(B)(3), the Court has specifically endorsed the exclusion of unreliable hearsay, calling such exclusions “familiar and unquestionably constitutional evidentiary rules * * *.” *Montana v. Egelhoff* (1996), 518 U.S. 37, 42.

B. The Corroboration Requirement Advances Its Reliability-Based Purpose in Accord with *Chambers v. Mississippi*

Not only does the corroboration requirement in Evid.R. 804(B)(3) serve a legitimate reliability-based purpose, but it is also consistent with *Chambers v. Mississippi*, 410 U.S. 284, the leading case on the constitutionality of excluding statements against penal interest. In *Chambers*, the trial court excluded out-of-court statements offered by the defendant in which the declarant admitted to the crime. *Id.* at 292-93. At the time, Mississippi recognized a hearsay exception for statements against pecuniary interests but not for statements against penal interests. *Id.* at 299.

The United States Supreme Court found that the exclusion of the evidence violated due process. The Court held that “[t]he hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability.” *Id.* at 300. According to the Court, four factors supported the reliability of the statements: (1) the statements were made

spontaneously to a close acquaintance shortly after the murder; (2) other evidence corroborated the statements; (3) the statements were against the declarant's interest, and (4) the declarant was available for cross-examination. *Id.* at 300-01. The Court limited its holding to the "facts and circumstances" of the case. *Id.* at 303; see, also, *Egelhoff*, 518 U.S. at 52 ("*Chambers* was an exercise in highly case-specific error correction.>").

Evid.R. 804(B)(3)'s exclusion of unreliable hearsay comports with *Chambers*. Throughout *Chambers*, the Court emphasized that the reliability of the statements was central to its holding. For example, the Court observed that an accused must "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302. The Court further noted that "[t]he testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest." *Id.*; see, also, *Green v. Georgia* (1979) 442 U.S. 95, 97 (statement admissible under *Chambers* because "substantial reasons existed to assume [the statement's] reliability"). "[U]nder other circumstances, [the rationale that statements against penal interests are unreliable] might serve some valid state purpose by excluding untrustworthy testimony." *Chambers*, 410 U.S. at 300.

"*Chambers* therefore does not stand for the proposition that the accused is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." *Scheffer*, 523 U.S. at 316. If anything, *Chambers* actually reinforces a trial court's ability to exclude evidence "through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." *Crane v. Kentucky* (1986), 476 U.S. 683, 690,

citing *Chambers*, 410 U.S. at 302. “*Chambers* did not do away with the hearsay rule. The Supreme Court contemplated that the judge would be a gatekeeper, that unreliable statements could be excluded.” *Lee v. McCaughtry* (C.A. 7, 1991), 933 F.2d 536, 538.

Moreover, Evid.R. 804(B)(3) advances its reliability-based purpose in accord with *Chambers*. As this Court has explained, the corroboration requirement in Evid.R. 804(B)(3) excludes unreliable hearsay, while allowing the trier of fact to consider those statements that are trustworthy enough to be admissible as a matter of due process:

Through Evid.R. 804(B)(3), Ohio has addressed one of the principle concerns of cases such as *Chambers*, which is that a criminal defendant’s reliable evidence should not be excluded through application of hearsay rules that do not adequately protect due process rights. Evid.R. 804(B)(3) strikes a balance between hearsay statements against penal interest which are sufficiently trustworthy to be admissible and those which are not.

State v. Sumlin (1994), 69 Ohio St.3d 105, 111; see, also, *State v. Patterson* (1996), 110 Ohio App.3d 264, 274 (citing *Sumlin* and noting that Evid.R. 804(B)(3) “protects an accused’s constitutional rights”).

The following passage from the First Circuit is also instructive in this regard:

* * * Rule 804(b)(3) reflects Congress’ attempt to strike a fair balance between exclusion of trustworthy evidence, as in *Chambers* and *Donnelly [v. United States* (1912), 228 U.S. 243], and indiscriminate admission of less trustworthy evidence which, because of the lack of opportunity for cross-examination and the absence of the declarant, is open to easy fabrication. Clearly the federal rule is no more restrictive than the Constitution permits, and may in some situations be more inclusive.

United States v. Barrett (C.A. 1, 1976), 539 F.2d 244, 253. Notably, there is not a single mention of *Chambers* in Judge Tyack’s opinion.

C. The Corroboration Requirement Is Reasonable Because It Applies to Both Defendants and the State

Further bolstering the reasonableness of the corroboration requirement is its evenhandedness—it applies whether the evidence is offered to inculcate or exculpate the accused. Thus, when the State offers a statement against penal interest to prove a defendant’s guilt, it too must satisfy the corroboration requirement (the statement must also not be “testimonial” under the Confrontation Clause, *Crawford v. Washington* (2004), 541 U.S. 36). In this respect, the Ohio rule differs from Fed.R.Evid. 804(b)(3), which requires corroboration only when the evidence is offered to exculpate the accused.

Judge Tyack’s remark that Fed.R.Evid. 804(b)(3) imposes no corroboration requirement when the defense offers statements against penal interest, *Swann*, at ¶8, citing Weissenberger, *Ohio Evidence* (2005) 421, is the result of a misreading of the federal rule and is just plain wrong. Indeed, Weissenberger, *Ohio Evidence* (2005), cited by Judge Tyack, actually makes this point perfectly clear. Page 421 of that treatise states: “Ohio Rule 804(B)(3) differs from the Federal Rule by imposing a corroboration requirement where a statement against interest is offered to expose the declarant to criminal liability, regardless of whether it is offered to exculpate or inculcate the accused. Under the express language of Federal Rule 804(b)(3) the corroboration requirement is imposed only where the statement is offered to exculpate the accused.”

III. *Holmes v. South Carolina* Does Not Render the Corroboration Requirement Unconstitutional

Judge Tyack’s heavy reliance on *Holmes v. South Carolina*, 126 S.Ct. 1727, is misplaced. In *Holmes*, the State presented forensic evidence pointing to the defendant as the victim’s killer. *Id.* at 1730. The defendant sought to introduce evidence that another

individual named Jimmy McCaw White had committed the crimes. *Id.* at 1730. Specifically, the defendant proffered evidence that White was in the victim's neighborhood the morning of the assault and that White either had acknowledged that the defendant was innocent or had actually admitted to committing the crimes. *Id.* White testified at a pre-trial hearing and denied making the incriminating statements; White also provided an alibi, although the alibi was refuted by another witness. *Id.* at 1731 (citing lower court opinion).

Affirming the trial court's exclusion of the defendant's proffered evidence, the South Carolina Supreme Court held that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." *Id.* (quoting lower court opinion). Applying this standard, the Court concluded that the defendant could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence." *Id.* (quoting lower court opinion). Put differently, the South Carolina Supreme Court affirmed the exclusion of the evidence solely on relevancy grounds—i.e., the evidence proffered by the defendant had minimal probative value light of the State's forensic evidence.

The United States Supreme Court reversed. The Court first acknowledged that "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Id.* at 1732. Thus, evidence of third-party guilt may be excluded if it is speculative or remote, or if it does not tend to prove or disprove a

material fact in issue at the trial. *Id.* at 1733, quoting C.J.S., Homicide § 216, pp 56-58 (1991) and 40A Am. Jur.2d, Homicide § 286, pp 136-128 (1999).

The South Carolina Supreme Court, however, “radically changed and extended” this relevancy-based rule. *Holmes*, 126 S.Ct. at 1733-34. Under South Carolina’s interpretation of the rule, “the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution’s case.” *Id.* at 1734. Moreover, South Carolina’s version of the rule called for “little, if any, examination of the credibility of the prosecution’s witnesses or the reliability of its evidence.” *Id.*

For these reasons, the South Carolina rule did not rationally serve its purported objective, i.e., to “exclud[e] evidence that has only a very weak logical connection to the central issues.” *Id.* The Court explained:

* * * Just because the prosecution’s evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution’s witnesses or the reliability of its evidence is not conceded, the strength of the prosecution’s case cannot be assessed without making the sort of factual finding that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

Id. (emphasis sic). “The point is that, by evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.” *Id.* at 1735. The South Carolina rule was therefore unconstitutionally arbitrary. *Id.*

The corroboration requirement in Evid.R. 804(B)(3) is markedly different from the relevancy-based rule invalidated in *Holmes*. *Pavatt v. State* (Okla. Crim. App., 2007),

159 P.3d 272, 289 (Oklahoma’s version of Evid.R. 804(B)(3) “is nothing like the rule invalidated in *Holmes*”). Whereas the South Carolina rule excluded a defendant’s evidence based solely on the strength of the prosecution’s case, the corroboration requirement excludes a defendant’s evidence because the evidence itself is unreliable. Nothing in *Holmes* changes the well-settled rule that “[s]tate and federal governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial.” *Scheffer*, 523 U.S. at 309. Instead, *Holmes* stands for the proposition that the reliability of the State’s evidence cannot be the deciding factor in determining the relevance of a defendant’s evidence—especially when the reliability of the State’s evidence is assumed.

Moreover, while the South Carolina rule did not rationally serve its purported objective of excluding minimally probative evidence, the corroboration requirement reasonably advances its reliability-based purpose. As noted above, the corroboration requirement “strikes a balance” between preserving a defendant’s right to present a defense and the need to exclude unreliable evidence. *Sumlin*, 69 Ohio St.3d at 111.

In short, “nothing in *Holmes*, or for that matter, *Chambers* [], requires the admission of *untrustworthy* hearsay in the interest of justice.” *United States v. Phillips* (C.A. 7, 2006), 198 Fed. Appx. 558, 561, 2006 U.S. App. Lexis 27106 (emphasis sic).

IV. The Trial Court’s Exclusion of Carlisle’s Unreliable Statements Was Constitutional

Judge Tyack never concluded that Carlisle’s out-of-court statements were reliable. Rather, Judge Tyack based his constitutional holding on the mere fact that Carlisle’s statements were relevant to defendant’s third-party-guilt defense. *Swann*, at ¶12. But, as explained above, the Federal Constitution does not give a criminal defendant the right to

present evidence merely because it is relevant. *Scheffer*, 523 U.S. at 308; *Egelhoff*, 518 U.S. at 42. A trial court may exclude unreliable evidence, even if the defendant would prefer that the evidence be admitted. *Crane*, 476 U.S. at 690. Applying the proper constitutional standard—i.e., the standard set forth in *Chambers*—the exclusion of Carlisle’s unreliable statements was constitutional.

A. Cases Interpreting Evid.R. 804(B)(3) Are Instructive in Addressing Whether Statements Were Reliable for Constitutional Purposes

As an initial matter, because the corroboration requirement in Evid.R. 804(B)(3) substantially overlaps with *Chambers*, cases interpreting the rule are instructive in addressing whether evidence is sufficiently trustworthy so as to be admissible under *Chambers*. *Sumlin*, 69 Ohio St.3d at 111 (because reliability of statements not established under Evid.R. 804(B)(3), refusal to admit statements into evidence was constitutional); *State v. Caulley*, 10th Dist. No. 97AP-1590, 2002-Ohio-7039, ¶44 (“if the trial court’s ruling complies with Evid.R. 804(B)(3), it presumably complies with *Chambers*”); *United States v. MacDonald* (C.A. 4, 1982), 688 F.2d 224, 232, n. 13 (other than the element of unavailability, “*Chambers* and Fed.R.Evid. 804(b)(3) impose the same standard.”).

B. Carlisle’s Out-of-Court Statements Were Unreliable

Carlisle’s out-of-court statements are a classic example of why statements against penal interests exculpating the accused are viewed so suspiciously. To begin, defendant was a father-figure to Carlisle. Defendant fed and clothed Carlisle and assumed responsibility for Carlisle’s education. This close relationship between Carlisle and defendant undermines the reliability of Carlisle’s statements. *Mengistu*, at ¶54 (declarant’s friendship with the defendant undermined a finding of trustworthiness); *State*

v. Branham (1995), 104 Ohio App.3d 355, 359 (declarant was in an intimate relationship with defendant and thus had a motive to fabricate); *United States v. Bobo* (C.A. 8, 1993), 994 F.2d 524, 528 (certain “close relationships” between the declarant and the defendant diminish the trustworthiness of hearsay statements against the declarant’s penal interest); *United States v. Noel* (C.A. 6, 1991), 938 F.2d 685, 689 (“Persons will lie despite the consequences to themselves to exculpate those they love or fear * * *.”), quoting Weinstein’s Evidence, Vol. 4 at § 804(b)(3)[01] (1990).

The night of the shooting, Stith told both Davis and the responding officer that defendant was the shooter. Also, the police obtained a warrant to search defendant’s home the night of the shooting. Thus, Carlisle likely knew that defendant would be the primary suspect in the shooting. Unlike the declarant in *Chambers*, who “stood to benefit nothing by disclosing his role in the shooting,” *Chambers*, 410 U.S. at 301, by confessing to the shooting, Carlisle had much to gain—the exoneration of the man he considered his father.

The relationship between defendant and the persons to whom Carlisle allegedly confessed—Lisa Hughes and Tia Holland—also casts doubt on the reliability of Carlisle’s out-of-court statements. Holland is the mother of defendant’s child, and Hughes is Holland’s cousin. That Carlisle confessed to persons so closely aligned with defendant suggests that Carlisle strategically chose an audience who would inform defendant of the statements. By confessing to Hughes and Holland, Carlisle all but guaranteed that defendant would learn of the statements and would be able to use them to his advantage. *Sumlin*, 69 Ohio St.3d at 109 (declarant’s writing the notes only in the

presence of persons interested in the defendant's acquittal gave reason to doubt the trustworthiness of the statements).

Further undermining the reliability of Carlisle's statements is the fact that he bragged to Hughes about the shooting. By bragging about the shooting, Carlisle apparently felt that admitting to the shooting was not "against" his interest, but rather *served* his interest by enhancing his reputation. *United States v. Seabolt* (C.A. 8, 1992), 958 F.2d 231, 233 (a jail inmate's statement to another inmate that the first inmate committed a crime "is more apt to be jailhouse braggadocio than a statement against his criminal interest"); *United States v. Harty* (C.A. 7, 1991), 930 F.2d 1257, 1264 (distinguishing between a declarant having a "strong motivation to recount the events accurately" and a declarant "bragging to enhance his reputation"). If there is ever a time to doubt the veracity of a statement, it is when the declarant is visibly bragging.

Moreover, Carlisle's statements contradicted each other. According to Hughes's daughter Tiffany, Carlisle said that he was with his "brother" (referring to Andre Sharp) when he shot Stith. But Carlisle told Holland that he was alone at the time of the shooting. While inconsistencies alone may not in some cases prevent admission of statements, *State v. Landrum* (1990), 53 Ohio St.3d 107, 114-15, these inconsistencies "would properly make any [trial court] judge suspicious of the statement[s'] reliability," *United States v. Bahadar* (C.A. 2, 1992), 954 F.2d 821, 829.

To be sure, Carlisle had a personal relationship with Hughes and Holland, and this Court has previously noted that the fact that a statement is made to family or friends is a corroborating factor. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶97. But even if the "confess to friends" factor weighs in favor of defendant, it does not weigh so heavily

so as require the admission of Carlisle's out-of-court statements under the Federal Constitution. This Court has minimized the importance of this factor, finding that confessing to friends, without more, is insufficient corroboration. *State v. Spirko* (1991), 59 Ohio St.3d 1, 28. This Court has also recognized that, even if there is some corroboration, the statement is properly excluded when the corroboration is counterbalanced by compelling reasons to doubt the statement's trustworthiness. *Sumlin*, 69 Ohio St.3d at 109. Here, Carlisle's motive to fabricate a confession in order to exonerate defendant was more probative than any motive to be truthful to Hughes or Holland.

Additionally, that Carlisle spoke to Holland about the shooting on multiple occasions is insignificant. Hughes testified that she told Holland about Carlisle's statements, and Holland testified that "every" conversation she had with Carlisle about the shooting pertained to her urging him to "man up" so that defendant would not "hold the bag" for the crime. Thus, Carlisle apparently spoke to Holland about the shooting only because Holland already knew of Carlisle's statement to Hughes and repeatedly confronted Carlisle to turn himself in. These circumstances exacerbate the risk that Carlisle fabricated his confession in order to exonerate defendant.

The detectives' "Informational Summaries" of their interviews of Stith and Thompson have no corroborative value. Although the summaries indicate that Carlisle was with defendant at the time of the shooting, those same summaries leave no doubt that defendant—not Carlisle—was the one who shot Stith. (Def. Exhs. C, F, G) Thus, the summaries corroborate Carlisle's out-of-court statements only to the extent that Carlisle admitted to being present at the scene, but offer no corroboration to the most important

part of Carlisle's statements—i.e., his claim that he shot Stith. For a statement to be admissible, "there must be indicia of trustworthiness of the specific, 'essential' assertions, not merely of other facts contained in the statement." *Mackey*, 117 F.3d at 29, quoting *Untied States v. Zirpolo* (C.A. 1, 1983), 704 F.2d 23, 27, n. 4.

Also negating the corroborative value of these summaries are (1) Stith's and Thompson's testimony that they did not see Carlisle at the scene, and (2) Detective Weis's testimony that the summary of his interview with Thompson was inaccurate to the extent that it referenced Carlisle. Of course, Weis's summary of his interview with Stith, in which Stith said that a "local crack head" named Nick told him that Carlisle confessed to the shooting (Def. Exh. D), contains multiple layers of hearsay and thus has no corroborative value.

Defendant's alibi witnesses do not make Carlisle's out-of-court statements any more reliable. Each of these witnesses was closely aligned with defendant. Glenn, McGraph, and Green all referred to defendant as their "nephew," and Holland was the mother of defendant's child. Also detracting from these witnesses' credibility was their lack of cooperation with the police. Glenn and McGraph both knew that defendant was charged in the shooting, but neither spoke to the police. And while Green and Holland initially spoke with the police, they both later refused to cooperate with the police's investigation.

Apparently in an effort to portray the State's evidence as weak, Judge Tyack stated that it was dark when the shooting occurred and that Stith identified defendant as the shooter based solely on his recognition of defendant's voice. *Swann*, at ¶8. But as pointed out by Judge Sadler in her partial dissent, Stith's identification of defendant as

the shooter was based on much more than just his voice. *Id.* at ¶47. Stith testified that, although he did not see the gun in defendant’s hand, he saw the “fire” come from defendant immediately before the bullet hit his neck. Thompson also testified that he saw defendant shoot Stith. And both Stith and Thompson identified defendant as the shooter from photo arrays. Thus, even if weakness in the State’s evidence could corroborate the trustworthiness of an out-of-court statement, such factor would have no application here.

C. Carlisle Was Unavailable for Cross-Examination

Finally, the Court in *Chambers* identified the availability of the declarant for cross-examination as a factor supporting the admission of the out-of-court statements. *Chambers*, 410 U.S. at 301. This Court has relied on this factor in finding that *Chambers* did not require the admission of out-of-court statements. *Yarbrough*, at ¶68. Unlike the declarant in *Chambers*, who testified at trial, Carlisle invoked his Fifth Amendment privilege and thus was unavailable for cross-examination.

In the end, Carlisle’s out-of-court statements possess nowhere near the “persuasive assurances of trustworthiness” *Chambers*, 410 U.S. at 302, that would require their admission under the Federal Constitution. Because Judge Tyack wrongly concluded that the exclusion of Carlisle’s statements violated defendant’s right to present a defense, the Tenth District’s judgment should be reversed.

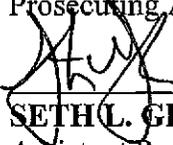
CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment of the Tenth District Court of Appeals should be reversed. Given that the Tenth District reached no majority ruling with respect to whether Carlisle’s statements were admissible under Evid.R. 804(B)(3), the case should be remanded for the Tenth District to re-address

whether the trial court abused its discretion in excluding the statements under the rule. Moreover, because both Judge Tyack and Judge Brown declined to reach the merits of the portion of defendant's second assignment of error concerning the trial court's limitation on the defense's cross-examination of Thompson, *Swann*, at ¶¶20, 36, the Tenth District will need to address this issue on remand as well.³

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, December 10, 2007, to DIANNE WORTHINGTON, P.O. Box 425, Galloway, Ohio 43119, Counsel for Defendant-Appellee.



SETH L. GILBERT 0072929
Assistant Prosecuting Attorney

³ If this Court *sua sponte* contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

APPENDIX

Notice of Appeal (filed June 11, 2007)A-1

Judgment Entry (filed April 26, 2007)A-3

Opinion (rendered and filed April 26, 2007).....A-4

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Evid.R. 804A-25

Fed.R.Evid. 804.....A-27

Sup.R.13A-29

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

CHRISTOPHER SWANN,

Defendant-Appellee.

Case No.

07-1046

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case Nos. 06AP-870
06AP-899

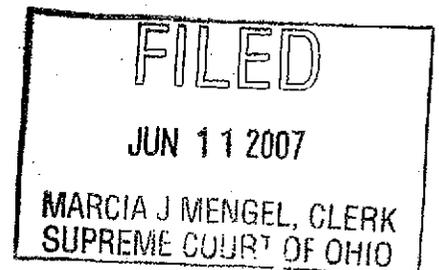
NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

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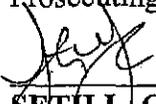
NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

Plaintiff-appellant, the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in *State v. Swann*, Court of Appeals Nos. 06AP-870, 06AP899, on April 26, 2007.

The State of Ohio invokes the jurisdiction of the Supreme Court on the ground that this is a felony case presenting substantial constitutional questions and questions of public or great general interest, thus warranting the granting of leave to appeal.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



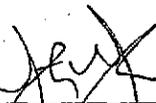
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Counsel for Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, June 11, 2007, to DIANNE WORTHINGTON, P.O. Box 452, Galloway, Ohio 43119; Counsel for Defendant-Appellee.

Pursuant to S. Ct. Prac. R. XIV(2)(A), a copy of this notice was also sent by regular U.S. mail on this day, June 11, 2007, to the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215.



SETH L. GILBERT 0072929
Assistant Prosecuting Attorney

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio ,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	Nos. 06AP-870
	:	and 06AP-899✓
Christopher Swann,	:	(C.P.C. No. 05CR-09-6331)
	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on April 26, 2007, appellant's first assignment of error is sustained and appellant's second assignment of error is overruled in part and rendered moot in part. The third and fourth assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is vacated and this case is remanded for further appropriate proceedings in accordance with law and consistent with said opinion. Costs are assessed against appellee.

TYACK and BROWN, JJ., concur.
SADLER, J., concurs in part.

By *Gary Tyack*
Judge G. Gary Tyack

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio , :
Plaintiff-Appellee, :
v. : Nos. 06AP-870
Christopher Swann, : and 06AP-899
(C.P.C. No. 05CR-09-6331)
Defendant-Appellant. : (REGULAR CALENDAR)

O P I N I O N

Rendered on April 26, 2007

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for
appellee.

Dianne Worthington, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

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TYACK, J.

{¶1} Christopher Swann ("appellant" or "Swann") appeals from his conviction of felonious assault with a firearm specification, and the resulting sentence of nine years incarceration. For the reasons set forth below, we reverse.

{¶2} On the evening of June 25, 2005, John "Cash" Stith ("Stith") was shot outside his grandmother's house on the south side of Columbus, Ohio. Stith, who was not fatally wounded, identified his assailant as Christopher Swann, whom Stith and others in the neighborhood refer to as "Kurt," or "C." (Tr. 185.) Stith and Swann had known

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each other for about seven years, and prior to the shooting, Stith considered Swann a friend.

{¶3} Swann maintained his innocence and, at his trial, he presented alibi testimony from four witnesses to demonstrate that he was not Stith's shooter. (Tr. 697-698, 714-715, 733, 745.) Additionally, Swann proffered testimony and other evidence that another neighborhood man, Delmar "Marty" Carlisle ("Carlisle"), confessed to the shooting. (Tr. 842-898.) Carlisle's purported confession was corroborated by at least four other nearby residents. The trial judge excluded Carlisle's statements from being admitted into evidence and from the hearing of the jury on the basis that the statements did not meet the requirements of the hearsay exception in Evid.R. 804(B)(3).

{¶4} In this appeal, Swann raises four assignments of error. The trial judge's exclusion of statements alleging third-party guilt is appellant's first assignment of error:

[I.] THE TRIAL COURT ERRED BY PREVENTING APPELLANT FROM INTRODUCING TESTIMONY CONCERNING DELMAR CARLISLE'S CONFESSIONS TO COMMITTING THE OFFENSE.

{¶5} Swann raises as error the trial judge's systematic exclusion of testimony and evidence relating to statements by Carlisle, who had purportedly confessed to the crime for which Swann was charged. (Tr. 126-127.) We review the record in accordance with Crim.R. 52(A), which governs criminal appeals of non-forfeited error. See, e.g., *Columbus v. Dials*, Franklin App. No. 04AP-1099, 2006-Ohio-227, at ¶19; *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, at ¶7. Crim.R. 52(A) provides a two-prong test that must be satisfied before we may correct an alleged error: first, we determine whether there was an "error"—i.e., a "[d]eviation from a legal rule." *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770. Second, if we find error, we examine the error in

the context of the trial court record to determine whether the error affected a "substantial right" of the accused. A criminal defendant's substantial rights are affected when the occurring error was prejudicial to the extent the error altered the outcome of the trial court proceedings. *Id.* at 734.

{¶6} Evid.R. 804(B) provides, in pertinent part:

Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:¹

* * *

(3) *Statement against interest.* A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The Ohio Rules of Evidence are intended to foster a fair presentation of the evidence and to protect the right of an accused to due process of law under the Fourteenth Amendment to the United States Constitution. See, also, Section 5(B), Article IV, Ohio Constitution. The rules of evidence, whether state or federal, were not intended to deprive a criminal defendant of a fair opportunity to present a defense. See, e.g., *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, 1731; *Crane v. Kentucky* (1986), 476 U.S. 683, 690, 106 S.Ct. 2142; *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, at ¶69.

¹ Evid.R. 804(A) defines "unavailability" for the purposes of section B. The trial judge determined that the witness was unavailable for the purposes of the hearsay exception (Tr. 663), but excluded the testimony based on lack of corroboration. Thus, we do not need to address whether Carlisle was, in fact, unavailable.

{¶7} Shortly before Swann's trial, the United States Supreme Court decided *Holmes*, which underscored the trial court's paramount duty owed to a criminal defendant:

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process[,] or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."

Id. at 1728 (quoting *United States v. Scheffer* [1998], 523 U.S. 303, 118 S.Ct. 1261). In *Holmes*, the United States Supreme Court vacated a State Supreme Court interpretation of a state evidentiary rule that precluded the accused from offering statements alleging third-party guilt because the statements were contrary to the prosecution's forensic evidence, which implicated the defendant. Id. at 1730-1731. The *Holmes* court concluded that such a construction of the rule ignored the probative value of the proffered evidence, and discounted the fact-finder's role in weighing the credibility of witnesses. Id. at 1733-1734. Instead of performing an independent examination of all the evidence in the case, the *Holmes* court found that the lower court's inquiry focused only on the strength of the prosecution's case—if the prosecution's case is strong enough, evidence of third-party guilt is per se excluded, even if that evidence would have great probative value when viewed independently of the conflicting evidence, and even if it prevented the defendant from his constitutional right to present a fair defense. Id. at 1734. *Holmes* was on trial for rape and murder, which ultimately resulted in his conviction and sentence to death, despite the fact *Holmes* offered witnesses who would have testified that they saw another man in the area near the time of the attack and that this other man had made statements implicating himself in the murder.

{¶8} Fortunately, John Stith did not die from his wounds. Notwithstanding that fact, the similarities between this case and *Holmes* are striking. The trial judge excluded Carlisle's statements on the basis that the defense did not present sufficient corroboratory circumstances to indicate the trustworthiness of those statements under Evid.R. 804(B)(3). Interestingly, Ohio's Evid.R. 803(B)(3) differs from its federal rule counterpart only insofar as it imposes this additional "corroboration" requirement. Weissenberger's *Ohio Evidence* (2005) 421; cf. Federal Evid.R. 804(b)(3). Stith was always convinced that Swann was his assailant; however, Stith testified that he did not see a weapon in Swann's hand at the time of the shooting. (Tr. 223.) Stith and prosecution witness Kavar Thompson also stated that there were two men who perpetrated the attack. Stith testified that Swann was standing near a large bush when the shooting occurred, and that he heard a voice he recognized as Swann's shout an expletive at him. (Tr. 219.) It was dark when the shooting occurred, and Stith made his identification of Swann based solely on his recollection of Swann's voice. (Tr. 223, 224.)

{¶9} Thompson and Stith both testified that Carlisle and another man, Andre "Dre" Sharp, were frequently in Swann's company. Carlisle told others that he had been standing behind the bush and that he had done the actual shooting. Carlisle claimed that he was angry with Stith because Stith had had sexual intercourse with Carlisle's girlfriend when she was already pregnant with Carlisle's child.

{¶10} Swann also presented four witnesses who claimed that Swann was at a nearby house playing cards and socializing at the time the shooting took place. (Tr. 697-698, 714-715, 733, 745.)

{¶11} The defense subpoenaed Carlisle, but during voir dire of the witness, Carlisle's court-appointed attorney advised him not to answer any questions relating to Stith, Swann, the witnesses to whom he allegedly confessed to the shooting, or anything else tangential to the night of the shooting. (Tr. 648-661.) The trial judge, correctly, did not allow Carlisle to take the stand before the jury simply to have him invoke the Fifth Amendment each time he was asked questions relevant to the shooting. (Tr. 673.) The defense fully proffered the testimony of four witnesses who were prevented from testifying about the numerous statements Carlisle was claimed to have made about being the shooter, and the trial judge did permit cross-examination of the witnesses being proffered. (Tr. 842-898.) The proffered witnesses were friends of both Carlisle and Swann.

{¶12} We find that the trial court's exclusion of the defense's evidence essentially allowed them to present only half of their case—the alibi portion. The second half—that a third party, who had motive to shoot John Stith, made statements claiming responsibility for the shooting—was kept entirely from the jury. In light of *Holmes*, we hold that Evid.R. 804(B)(3) cannot be construed in a way that denies an accused a meaningful opportunity to present a complete defense. See *Holmes*, at 1733. "The accused may introduce any legal evidence tending to prove that another person may have committed the crime with which the defendant is charged." *Id.* (citing 40A American Jurisprudence 2d [2007] 136-138 Homicide, Section 286, 136-138). The court further held that this evidence alleging third-party guilt was crucial to the defendant's constitutional right to a fair trial, and that it could only be excluded under circumstances where the evidence is "speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." *Ibid.* In this case, the trial court should have allowed the proffered testimony and

evidence to be presented to the jury for its own consideration. Thus, the trial court erred by denying Swann a meaningful opportunity to present a complete defense.

{¶13} Under Crim.R. 52(A), we find the trial court's error to have affected a substantial right of the accused. Appellant's first assignment of error is sustained.

{¶14} Appellant's second of assignment of error:

[II.] THE TRIAL COURT ERRED BY PREVENTING APPELLANT FROM CROSS-EXAMINING JOHN STITH ABOUT PENDING CRIMINAL CHARGES, AND KEVAR [sic] THOMPSON REGARDING POSSIBLE JUDICIAL RELEASE.

{¶15} In his second assignment of error, Swann argues that the trial court erred in limiting the cross-examination of the State's two principle witnesses—John Stith, the victim, and Kavar Thompson. We find that no error occurred with respect to Stith, and we do not rule on appellant's assignment of error with respect to the cross-examination of Kavar Thompson in light of our ruling on the first assignment of error.

{¶16} At the time of Swann's trial, Stith had felony charges pending against him. Defense counsel argued that the scope of Stith's cross-examination should include reference to the fact that charges were pending because those charges tended to show the witness's bias toward the State.

{¶17} Evid.R. 608 and 609, respectively, govern the admissibility of a witness's character as evidence, and impeachment of a witness using evidence of a prior conviction. Neither rule applies here, because with respect to Evid.R. 608, the witness's character may not be attacked on cross-examination unless first offered on direct; moreover, Evid.R. 609 only applies to prior convictions—i.e., not current or pending charges. See, generally, *State v. Brooks* (1996), 75 Ohio St.3d 148, 151; but cf. *State v. Hector* (1969), 19 Ohio St.2d 167, 178.

{¶18} Under Ohio law, a witness can ordinarily be impeached using "[b]ias, prejudice, interest, or any motive to misrepresent." See Evid.R. 616(A); *Brooks*, at 151-152; see, also, *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶¶107-108. In this case, however, the record demonstrates sufficient indicia of the truthfulness of Stith's trial testimony based on the fact that it was consistent with Stith's prior statements to the police immediately after the shooting. Coupled with the prosecution's vigorous assertions that they made no deals in exchange for Stith's testimony (Tr. 44), we are not persuaded that the defense was prejudiced by any alleged bias. Furthermore, if any bias were present as to the victim, the result would have been harmless error. See, e.g., *Drummond*; *State v. Durant*, 159 Ohio App.3d 208, 2004-Ohio-6224, at ¶34. Clearly, Stith was shot and seriously wounded. (Tr. 182-183, 322-324.) Stith maintained his belief that Swann was the man who shot him from the night of the shooting (Tr. 323) long before any deal could have been made with the State in exchange for testimony at Swann's trial.

{¶19} The circumstances surrounding Kavar Thompson's testimony, however, were entirely different. Thompson was arrested (on an unrelated matter) shortly after Stith's shooting. At the time of Swann's trial, Thompson was incarcerated at Southeastern Correctional Institution for, inter alia, aggravated burglary. (Tr. 344.) Thompson was to be considered for judicial release, and the Franklin County Prosecutor's Office had promised it would not oppose his placement on community control. The lead detective in Swann's investigation testified that he and one of the assistant prosecutors in the case traveled to the prison where Thompson was locked up, and that they interviewed him in preparation for Swann's trial. (Tr. 551.) Thompson

asked if his testimony would affect his early release from prison, to which the assistant prosecutor replied: "No," as long as Thompson told "the truth" on the witness stand. The problem this situation presents is that the assistant prosecutor's statement could be easily construed by Thompson to have meant: testify the way the State wants me to, and they won't oppose my early release from prison. But, if I say something different, they might think I am lying, and then things will be different.

{¶20} Under those circumstances, it is at least arguable that Thompson had a motive to testify in a manner that would please the prosecution. Under Evid.R. 616(A), defense counsel arguably should have been afforded the opportunity to explore the witness's potential bias during cross. (Tr. 392, 393); see, e.g., *Brooks*, at 151-153; see, also, *Drummond*, supra. Again, we do not reach the merits of this part of the assignment of error in light of our ruling on the first assignment of error.

{¶21} Appellant's second assignment of error is overruled in part and moot in part.

{¶22} Appellant's third assignment of error:

[III.] TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN NOT MAKING A RECORD REGARDING THE EXISTENCE OF PENDING CHARGES OF WITNESS STITH, NOT REQUESTING THAT THE COURT CONDUCT AN IN CAMERA INSPECTION OF RULE 16(B)(1)(g) MATERIAL BEFORE FINISHING CROSS EXAMINATION OF KAVAR THOMPSON, AND IN NOT RAISING APPELLANT'S DUE PROCESS CLAUSE RIGHTS AS WELL AS A HEARSAY EXCEPTION REGARDING THE TESTIMONY OF A CONFESSION OF A THIRD PARTY, RESULTING IN THE DENIAL OF THE RIGHT TO A FAIR TRIAL AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION.

{¶23} We review ineffectiveness of counsel in accordance with the Supreme Court's test in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. See, e.g., *State v. Lewis* (July 21, 1998), Franklin App. No. 97APA09-1263; *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

{¶24} The *Strickland* test has two prongs: (1) appellant must demonstrate that counsel's failure was so serious that they ceased to serve as "counsel" under the Sixth Amendment; and (2) appellant must demonstrate that he was harmed by the error. See *State v. Farrah* (Apr. 18, 2002), Franklin App. No. 01AP-968. Any error, even if prejudicial, does not warrant reversal—counsel's error must have affected the outcome of the trial. See *Strickland*, at 691; see, also, *Farrah*, at *9-10 (Tyack, P.J., concurring).

{¶25} Appellate counsel for Swann asserts three failures of Swann's trial lawyer. First, the failure to proffer details of Stith's criminal charges into the record. Having previously found no error existed with respect to the trial court disallowing cross-examination of Stith about these charges, we cannot see how providing any additional details would have affected the court's ruling on the verdict below.

{¶26} Second, trial counsel was ineffective on the basis that he failed to review a tape recording of Kavar Thompson's prison interview conducted by the assistant prosecutor and homicide detective. Ordinarily, Crim.R. 16(B)(1)(g) dictates that the interview tape should have been reviewed in camera with trial counsel prior to cross-examination. In this case, however, the trial judge reviewed the tape and found no significant discrepancies between Thompson's trial testimony and what the witness said in the taped interview. (Tr. 284.) Again, counsel's failure to review the tape in strict accordance with Crim.R. 16 could not have affected the trial outcome given the trial

judge's determination that nothing in the tape could have been used for purposes of cross-examination.

{¶27} Third, trial counsel failed to develop fully theories on the trial judge's refusal to allow Carlisle's third-party guilt statements. After reviewing the entire record, we found the discussion of these issues in the trial court to have been extensively developed. Indeed, Swann's first assignment of error alleges 25 pages of discussion on the issue. The Supreme Court of the United States has indicated that a number of legal theories are involved in allowing such statements to be presented (due process, compulsory process, and confrontation). See, e.g., *Holmes*, supra. We have already sustained appellant's first assignment of error as to the exclusion of Carlisle's statements. Trial counsel for the defense cannot be said to have rendered ineffective assistance for failing to make the record even more detailed.

{¶28} The third assignment of error is overruled.

{¶29} Appellant's fourth assignment of error:

[IV.] THE TRIAL COURT ERRED BY NOT SENTENCING APPELLANT TO MINIMUM AND CONCURRENT TERMS OF IMPRISONMENT, THEREFORE DEPRIVING APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE OHIO AND UNITED STATES CONSTITUTION.

{¶30} In February 2006, the Supreme Court of Ohio announced its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶¶96-102, which severed large portions of Ohio's felony sentencing statutes involving judicial fact-finding from the other sentencing statutes. *Id.*, citing *Blakely v. Washington* [2004], 542 U.S. 296, at 308-309, 124 S.Ct. 2531; *Booker*, at 234, 125 S.Ct. 738. Like *Blakely* and *Booker*, *Foster* eliminated judicial fact-finding from the felony sentencing procedure. *Foster* invalidated

the statutory provisions allowing for increased prison terms based on judicially-found facts, but because Ohio's pre-*Foster* sentencing guidelines favored minimum sentences within the given statutory range, the practical effect of *Foster*, by contrast to *Blakely* and *Booker*, tends to increase prison terms. See *Sentencing Law & Policy* (Feb. 28, 2006) ("Eliminating guideline mandates in the federal system gives judges more leeway to be lenient, but eliminating structured sentencing rules in Ohio gives judges more leeway to be harsh").

{¶31} In his fourth assignment of error, Swann argues that the severance remedy in *Foster* violated his constitutional rights because the severance effectively raised the statutory presumptive minimum sentence, and because the alleged conduct for which he was convicted occurred while the pre-*Foster* sentencing guidelines were still intact; therefore, he should be sentenced in accordance therewith.

{¶32} In *Gibson*, we found the retroactive application of *Foster* did not violate appellant's right to due process of law or the ex post facto clause of the United States Constitution. *Id.* at ¶15. We determined that we were bound to follow *Foster* as written. See, also, *State v. Henderson*, Franklin App. No. 06AP-645, 2007-Ohio-382, at ¶7. Given that the Supreme Court invalidated portions of R.C. 2929.14 as unconstitutional under *Blakely*, the sentencing court must apply whatever portions of the statute remain in effect.

{¶33} We are similarly unpersuaded by appellant's argument that *Foster* violates the rule of lenity. See, e.g., *Chapman v. United States* (1991), 500 U.S. 453, 463-464, 111 S.Ct. 1919. The rule of lenity is a canon of statutory construction which, by its definition, applies only where a given statute is vague or ambiguous. See *id.* If a statute

is vague or ambiguous such that there could be two (or more) equally plausible meanings to the text, the rule of lenity provides that the ambiguity should be resolved in favor of the criminal defendant. We find nothing ambiguous in R.C. 2929.14. Therefore, we find appellant's reliance on the rule of lenity misplaced.

{¶34} In summary, we sustain appellant's first assignment of error. The second assignment of error is overruled in part and rendered moot in part. We overrule the third and fourth assignments of error. As a result, we vacate the judgment of the trial court and remand the case for further appropriate proceedings.

*Judgment vacated and case remanded
for further appropriate proceedings.*

BROWN, J., concurs separately.
SADLER, J., concurs in part and dissents in part.

BROWN, J., concurring separately.

{¶35} As I agree with the ultimate conclusion in assignment of error one, but disagree with portions of the majority's decision, I respectfully concur separately. With regard to the first assignment of error, the sole issue is whether the testimony of four witnesses, that a third party, Carlisle, confessed to shooting the victim, should have been admitted as an exception to the hearsay rule under Evid.R. 804(B)(3). Specifically at issue is whether corroborating circumstances clearly indicate the trustworthiness of Carlisle's statement. Although I agree there are useful similarities with *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, I disagree with the majority's analysis of *Holmes*. However, I do agree with the majority's ultimate conclusion that the trial court erred when it denied appellant the opportunity to present the testimony of the four witnesses. After a review of the evidence, I would find corroborating circumstances

indicate the trustworthiness of the statement Carlisle made to the four witnesses. Therefore, I would sustain appellant's first assignment of error, albeit for different reasons than those relied upon by the majority.

{¶36} Further, because we must remand the matter for a new trial based upon our disposition of appellant's first assignment of error, I would decline to address the remaining assignments of error. Therefore, I would find appellant's second, third, and fourth assignments of error moot.

SADLER, P.J., concurring in part and dissenting in part

{¶37} Being unable to agree with the majority's disposition of appellant's first assignment of error remanding this case for a new trial, I respectfully dissent.

{¶38} Initially, with respect to appellant's first assignment of error, I believe the lead opinion's focus on the decision rendered by the United States Supreme Court in *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503, is misplaced. Although *Holmes* and this case involve a defendant attempting to introduce evidence that a third party confessed to the crime of which the defendant was accused, the similarities end there. In focusing on *Holmes*, the lead opinion appears to be suggesting that the requirement in Evid.R. 804(B)(3) that evidence of a third party confession is not admissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement" is itself a violation of appellant's right to present a complete defense, an issue appellant has not raised either at the trial court or on appeal.

{¶39} *Holmes* involved consideration of a South Carolina evidentiary rule that excluded evidence of a third party confession where the trial court determined that the evidence of the defendant's guilt was so strong that the evidence of the third party's

confession was not sufficient to raise a reasonable inference of the defendant's own innocence. The court recognized that some evidentiary rules may properly limit evidence regarding third party guilt, stating that:

While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. An application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged. Such rules are widely accepted and are not challenged here.

Id. at syllabus. The court recognized that evidence that another person committed the crime may be excluded "where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." 126 S.Ct. at 1733, citing 40A American Jurisprudence 2d (1999) 136-138, Homicide, Section 286. The court found that South Carolina's rule violated this principle because it required the trial court to consider only the strength of the prosecution's case, rather than to engage in a separate evaluation of the evidence showing the third party's guilt. *Id.* at 1734-1735.

{¶40} Since Evid.R. 804(B)(3) requires the trial court to engage in an analysis of the evidence indicating the third party's guilt, it is not a rule of the sort that suffers from the constitutional infirmity discussed in *Holmes*. Furthermore, it is clear that in this case, the issue is not whether the trial court properly *construed* Evid.R. 804(B)(3), which was the issue with the evidentiary rule in *Holmes*. The issue is whether the trial court properly *applied* the rule.

{¶41} Generally, the decision to admit or refuse to admit evidence of a third party confession under Evid.R. 804(B)(3) is one reviewed under an abuse of discretion standard. *State v. Sumlin*, 69 Ohio St.3d 105, 1994-Ohio-508, 630 N.E.2d 681. Thus, as with the review of any evidentiary decision by a trial court, our review should be limited to whether the trial court acted unreasonably, arbitrarily, or unconscionably in deciding whether to exclude evidence of Carlisle's confessions. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810.

{¶42} Courts have generally recognized three requirements when considering whether hearsay evidence regarding a third party's confession should be admitted under Evid.R. 804(B)(3): (1) the declarant must be unavailable; (2) the declarant's statement must be of a nature that would subject the declarant to criminal liability such that a reasonable person in the declarant's position would not have made the statement if the declarant did not believe it to be true; and (3) corroborating circumstances must clearly indicate the trustworthiness of the confession. *State v. Durant*, 159 Ohio App.3d 208, 2004-Ohio-6224, 823 N.E.2d 506. In this case, Carlisle was unavailable by virtue of his invocation of his Fifth Amendment right against self-incrimination, and his confessions, if believed, could have subjected him to criminal liability. Consequently, the only issue is whether there were corroborating circumstances clearly demonstrating the trustworthiness of Carlisle's confessions.

{¶43} Courts have stressed that the hurdle of showing corroborating circumstances is not an insignificant one. *State v. Landrum* (1990), 53 Ohio St.3d 107, 559 N.E.2d 710. The concern underlying the requirement for corroborating circumstances for Evid.R. 804(B)(3) purposes is that it allows an individual to make

statements exculpating another, and then avoid cross-examination on the issue by claiming the privilege against self-incrimination. *State v. Mengistu*, Franklin App. No. 02AP-497, 2003-Ohio-1452, citing *United States v. Mackey* (C.A.1, 1997), 117 F.3d 24.

{¶44} A number of courts have discussed the question of what facts demonstrate sufficient corroborating circumstances for the purposes of admitting evidence of a third party confession. These courts have generally recognized that due process concerns require consideration not only of the circumstances surrounding the making of the statement, but of any other corroborating evidence as well. See *Sumlin*, supra; *Durant*, supra, citing *Chambers v. Mississippi* (1973), 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038.

{¶45} In this case, the corroborating circumstances do not clearly demonstrate the trustworthiness of Carlisle's confessions. Initially, I must disagree with the lead opinion's assertion that "Carlisle's purported confession was corroborated by at least four other nearby residents." *Infra*, at ¶13. In its literal sense, this statement suggests that the proffered witnesses were corroborating the substance of Carlisle's confessions, i.e. that Carlisle was the shooter. In actuality, the statements only serve to corroborate that Carlisle made the confession.

{¶46} Further, the circumstances surrounding Carlisle's purported confession do not indicate a degree of trustworthiness such that the trial court abused its discretion by declining to admit them under Evid.R. 804(B)(3). One of the witnesses who proffered testimony regarding Carlisle's confessions was Tia Holland, appellant's girlfriend and the mother of his child. The other three proffered witnesses were Lisa Hughes and her daughters, Ciera and Tiffany. Lisa Hughes is Holland's cousin. All of the proffered

testimony showed that Carlisle was extremely close with appellant; in fact, the testimony was that appellant was a father figure to Carlisle. (Tr. at 850). The closeness of the relationship between appellant and the witnesses to Carlisle's confession is a factor that undermines the trustworthiness of Carlisle's confession. See *Sumlin*, supra. The trustworthiness of Carlisle's purported confession is further undermined by the closeness between appellant and Carlisle. *Mengistu*, supra.

{¶47} Furthermore, there is no evidence in the record that would support a conclusion that Carlisle was the shooter. The lead opinion relies to some extent on what it apparently deems to be weak testimony identifying appellant as the shooter, stating that, "[I]t was dark when the shooting occurred, and Stith made his identification of Swann based solely on his recollection of Swann's voice." (Infra, at ¶8.) This conclusion is contradicted by other testimony from John Stith, who testified:

I looked straight up and I seen Mr. Christopher Swann, I could not exactly see what he was holding in his hand. But I seen the fire come from him. He told me fuck me and shot me in my neck.

(Tr. at 155.) Thus, the identification of appellant as the shooter was not based solely on Stith's recognition of appellant's voice.

{¶48} The defense attempted to enter as evidence summaries prepared by Columbus Police Department detectives of statements made after the shooting by Stith and Kavar Thompson in which each allegedly stated that Carlisle had been seen with appellant and Andre Sharp shooting guns into the air, which was the cause of the confrontation that resulted in Stith being shot. However, these summaries were not entered into evidence. In their trial testimony, both Stith and Thompson denied having seen Carlisle at the scene either before or during the shooting and denied telling the

police that he was present. Detective John Weis, who had prepared the summary of Thompson's statement, testified that Thompson had not said Carlisle was at the scene, and that the reference to Carlisle in the summary of Thompson's statement was an error.

{¶49} Given these facts, I cannot agree with the conclusion that the trial court abused its discretion in the manner it applied Evid.R. 804(B)(3). Thus, I would overrule appellant's first assignment of error.

{¶50} Since I would overrule appellant's first assignment of error, I would proceed to consider appellant's remaining assignments of error. The lead opinion does, in fact, consider each of the remaining assignments of error, overruling appellant's third and fourth assignments on their merits, overruling appellant's second assignment on the merits as it relates to the trial court's decision not to admit evidence regarding pending criminal charges against John Stith, and finding the second assignment moot as it relates to the trial court's decision not to admit evidence regarding Kavar Thompson's pending motion for judicial release (although still including an extensive discussion of the assignment as it relates to Thompson's motion).

{¶51} To the extent that the lead opinion does address the merits of appellant's remaining three assignments of error, I concur, in judgment only, with the decision to overrule appellant's third and fourth assignments of error on their merits, and with the decision to overrule appellant's second assignment of error on its merits as it relates to Stith's pending criminal charge. I would also find that the trial court's failure to admit evidence regarding Thompson's pending motion for judicial release was harmless error, and would therefore affirm the judgment of the trial court.

§ 5. Additional powers of supreme court; supervision; rule making.

(A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

HISTORY: (Amended, effective Nov. 6, 1973; SJR No.30. Adopted May 7, 1968.)

Not analogous to former § 5, repealed October 9, 1883.

CivR 40. Pre-recorded testimony.

All of the testimony and such other evidence as may be appropriate may be presented at a trial by videotape, subject to the provisions of the Rules of Superintendence.

HISTORY: New, eff 7-1-72

EvR 804. Hearsay Exceptions; Declarant Unavailable.

(A) Definition of unavailability. "Unavailability as a witness" includes any of the following situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- (3) testifies to a lack of memory of the subject matter of the declarant's statement;
- (4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;
- (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(B) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.
- (2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.
- (3) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against

another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculcate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.

(4) Statement against personal or family history. A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Statement by a deceased or incompetent person. The statement was made by a decedent or a mentally incompetent person, where all of the following apply:

(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

(b) the statement was made before the death or the development of the incompetency;

(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

(6) Forfeiture by wrongdoing. A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

HISTORY: Amended, eff 7-1-81; 7-1-93; 7-1-01

Fed.Evid.R. 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

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

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless

corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Transferred to Rule 807]

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

HISTORY: (Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1942; Dec. 12, 1975, P.L. 94-149, § 1(12), (13), 89 Stat. 806; Oct. 1, 1987; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7075(b), 102 Stat. 4405; Dec. 1, 1997.)

SupR 13. Videotaped Testimony and Evidence.

(A) Videotape depositions.

(1) Authority. Videotape depositions are authorized by Civil Rule 30(B)(3).

(2) Notice. The notice requirements of Civil Rule 30(B)(3) regarding the manner of recording, preserving, and filing depositions apply to videotape depositions. Notice is sufficient if it specifies that the videotape deposition is to be taken pursuant to the provisions of this rule.

(3) Persons authorized to take depositions. The officer before whom a videotape deposition is taken shall be one of those persons enumerated in Civil Rule 28.

(4) Date and time recording. A date and time generator shall be used to superimpose the year, month, day, hour, minute, and second over the video portion of the recording during the taking of the deposition. The total deposition time shall be noted on the outside of the videotape.

(5) Objections. The officer shall keep a log of objections referenced to the time of making each objection as superimposed on the video portion of the recording. If the deposition is transcribed, the log shall include the page of the transcript on which each objection occurs.

(6) Copies of the deposition. Upon the request of a party, the officer shall provide an audio cassette recording of the deposition at the conclusion of its taking. Upon the request of a party, the officer shall provide a copy of the deposition in the medium of videotape or a written transcript of the deposition within a reasonable period of time. The requesting party shall bear the cost of the copy requested.

(7) Submission to witness. After a videotape deposition is taken, the videotape shall be shown immediately to the witness for his examination, unless the examination is waived by the witness and the parties.

(8) Certification of original videotape deposition. The officer before whom the videotape deposition is taken shall cause a written certification to be attached to the original videotape. The certification shall state that the witness was fully sworn or affirmed by the officer and that the videotape is a true record of the testimony given by the witness. If the witness has not waived his or her right to a showing and examination of the videotape deposition, the witness shall also sign the certification.

When an officer makes a copy or a transcription of the videotape deposition in any medium, he or she shall attach a written certification to the copy or transcription. The certification shall state that the copy is a true record of the videotape testimony of the witness.

(9) Certification of edited videotape depositions. The officer who edits the original videotape deposition shall attach a written certification to the edited copy of the videotape deposition. The certification shall state that the editing complies with the rulings of the court and that the original videotape deposition has not been affected by the editing process.

(10) Filing where objections not made. Where objections are not made by a party or witness during the deposition and, if pursuant to Civil Rule 30(F)(1) a party requests, or the court orders, that the deposition be filed with the court, the officer shall file the deposition with the clerk of the court.

(11) Filings where objections made. When a deposition containing objections is filed with the court pursuant to Civil Rule 30(F)(1), it shall be accompanied by the officer's log of objections. A party may request that the court rule upon the objections within fourteen days of the filing of the deposition or within a reasonable time as stipulated by the parties. In ruling upon objections, the court may view the videotape recording in its entirety or view only those parts of the videotape recording pertinent to the objections made. If the parties are not present at the time the court's rulings are made, the court shall provide the parties with copies of its rulings on the objections and his instructions as to editing.

(12) Editing alternatives. The original videotape shall not be affected by any editing process.

(a) In its order and editing instructions the court may do any of the following:

(i) Release the videotape to the officer with instructions to keep the original videotape intact and make an edited copy of the videotape that deletes all references to objections and objectionable material;

(ii) Order the person showing the original videotape at trial to suppress the objectionable audio portions of the videotape;

(iii) Order the person showing the original videotape at trial to suppress the objectionable audio and video portions of the videotape.

(b) If the court uses alternative in division (A)(12)(a)(i) of this rule, the officer shall cause both the original videotape recording and the edited videotape recording, each clearly identified, to be filed with the clerk of the court. If the court uses the alternative in division (A)(12)(a)(ii) of this rule, it shall, in jury trials, instruct the jury to disregard the video portions of the presentation when the audio portion is suppressed. If the court uses the alternative in division (A)(12)(a)(iii) of this rule, it shall, in jury trials, instruct the jury to disregard any deletions apparent in the playing of the videotape.

(13) Storage. Each court shall provide secure and adequate facilities for the storage of videotape recordings.

(14) Inspection or viewing. Except upon order of the court and upon such terms as it may provide, the videotape recordings on file with the clerk of the court shall not be available for inspection or viewing after filing and prior to use at trial or disposition in accordance with this rule. Upon the request of a party under division (A)(3) of this rule, the clerk, without court order, may release the videotape to the officer to allow the making of a copy of the videotape.

(15) Objections at trial. Objections should be made prior to trial, and all objections shall be made before actual presentation of the videotape at trial. If an objection is made at trial that has not been waived pursuant to Civil Rule 32(D)(3) or previously raised and ruled upon, the objection shall be made before the videotape deposition is presented. The trial judge shall rule on objections prior to the presentation of the videotape. If an objection is sustained, that portion of the videotape containing the objectionable testimony shall not be presented.

(B) Videotape trials.

(1) Authority. Videotape trials are authorized by Civil Rule 40. In videotape trials, videotape is the exclusive medium of presenting testimony irrespective of the availability of the individual witness to testify in person. All testimony is recorded on videotape and the limitations of Civil Rule 32 upon the use of depositions shall not apply.

(2) Initiation of videotape trial. By agreement of the parties and with the consent of the trial judge all or a portion of testimony and appropriate evidence may be presented by videotape. The trial judge may order the recording of all or a portion of testimony and evidence on videotape in an appropriate case. In determining whether to order a videotape trial, the trial judge, after consultation with counsel, shall consider the costs involved, the nature of the action, and the nature and amount of testimony.

(3) Procedure. Divisions (A)(3) to (13) and (D) apply to videotape trials. The sequence of taking the testimony of individual witnesses and the sequence of presentation of that testimony shall be at the option of the proponent. In ordering or consenting to the recording of all of the testimony on videotape, the trial judge shall fix a date prior to the date of trial by which all recorded testimony shall be filed with the clerk of the court.

(4) Objections. All objections shall be made and ruled upon in advance of the trial. Objections may not be made during the presentation of the videotape evidence.

(5) Presence of counsel and trial judge. In jury trials, counsel for the parties and the trial judge are not required to be present in the courtroom when the videotape testimony is played to the jury. If the trial judge leaves the courtroom during the playing of the videotape, the judge shall admonish the jurors regarding their duties and responsibilities. In the absence of the judge, a responsible officer of the court shall remain with the jury.

The trial judge shall remain within such proximity to the courtroom that he or she can be readily summoned.

(C) Equipment.

(1) Standard. There are several recording format standards used in the trial courts of this state. Proponents of videotape testimony or evidence shall determine the format utilized by the trial court in which the videotape is to be filed and shall make the videotape recording on the appropriate format machine. If a party records testimony or evidence on videotape that is not compatible with the trial court equipment, the party shall be responsible for the furnishing of reproduction equipment of institutional quality or for the conversion of the videotape to the standards used in trial court equipment, all of which shall be at the cost of the party and not chargeable as costs of the action.

Each court shall provide for the availability of playback equipment. As may be appropriate, the court may purchase or lease equipment or make contract for the equipment on occasions of need. The court shall provide for the adequate training of an operator from the personnel of the court or for the services of a competent operator to operate the equipment when videotape testimony or evidence is presented in court.

(2) Minimum equipment. At a minimum, facilities for playback at trial shall consist of a videotape player and one monitor, having at least a fourteen-inch screen. Color facilities are not required.

(3) Maintenance. The trial court shall take reasonable steps to ensure that the equipment is maintained within operating tolerances. The trial court shall provide for competent regular maintenance of equipment that is owned or leased by the court.

(D) Costs; videotape depositions.

(1) The expense of videotape as a material shall be borne by the proponent.

(2) The reasonable expense of recording testimony on videotape, the expense of playing the videotape recording at trial, and the expense of playing the videotape recording for the purpose of ruling upon objections shall be allocated as costs in the proceeding in accordance with Civil Rule 54.

(3) The expense of producing the edited version of the videotape recording shall be costs in the action, provided that the expense of the videotape, as a material, shall be borne by the proponent of the testimony.

(4) The expense of a copy of the videotape recording and the expense of an audio tape recording of the videotape sound track shall be borne by the party requesting the copy.

(E) Disposition of videotape filed with the court.

(1) Ownership. Videotape used in recording testimony shall remain the property of the proponent of the testimony. Videotape may be reused, but the proponent is responsible for submitting a recording of acceptable quality.

(2) Release of videotape recordings.

(a) The court may authorize the clerk of the court to release the original videotape recording and the edited videotape recording to the owner of the videotape upon any of the following:

(i) The final disposition of the cause where no trial occurs;

(ii) The expiration of the appeal period following trial, if no appeal is taken;

(iii) The final determination of the cause, if an appeal is taken.

If the testimony is recorded stenographically by a court reporter during the playing of the videotape at trial, the videotape may be returned to the proponent upon disposition of the cause following the trial.

(b) The court shall order release by journal entry.