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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, SALT LAKE CITY

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| **THE STATE OF UTAH**,<br><br>Plaintiff,<br><br>vs.<br><br>**GOOD CLIENT**,<br><br>Defendant. | **MEMORANDUM OF LAW IN SUPPORT OF THE ADMISSION OF MATERIAL EVIDENCE SUBJECT TO HEARSAY EXCEPTIONS**<br><br>Case Number: 123456789<br><br>Judge: Good Judge |

The above-captioned defendant, Good Client (hereinafter referred to as "**Defendant**"), by and through his counsel of record, Saul Goodman, hereby respectfully files this "Memorandum of Law in Support of the Admission of Material Evidence Subject to Hearsay Exceptions" (hereinafter referred to as this "**Memorandum**") to reasonably persuade the Court to admit the statements made by the alleged victim in this matter, Guilty Decedent (hereinafter referred to as "**Mr. Decedent**"), which statements are not hearsay because they are not being offered for the truth of the matter asserted by Mr. Decedent. In addition, the statements made by Mr. Decedent are admissible, even if they are viewed as hearsay, as they amply fall under several hearsay exceptions, as provided herein.

In support of this Memorandum, Defendant provides the following recitation of facts and arguments:

## INTRODUCTION OF ISSUE AND RELIEF REQUESTED

1. There was a self-defense hearing held in this matter on October 5, 2022, wherein counsel for Defendant attempted to admit Mr. Decedent's statements made to Defendant immediately prior to the incident, which were something to the effect of (because the statements were made in Spanish), "I cannot believe that you are talking shit behind my back" and "I am going to send someone to pick you up," to establish that Defendant acted in self-defense when he shot and killed Mr. Decedent.

2. However, at the hearing, the prosecution objected to the admission of these two statements as evidence on the grounds that they wrongfully considered it hearsay.

3. Defendant herein provides the relevant legal and factual arguments as to why Mr. Decedent's out-of-court statements do not constitute hearsay, as they were not offered to prove the truth of the matter asserted in the statements, but rather, to demonstrate the impact that Mr. Decedent's statements had on Defendant and Defendant's perception of the danger presented by Mr. Decedent considering his statements to Defendant.

4. Mr. Decedent's statements not only fall outside of the definition of hearsay and, as a result, are admissible as evidence, but the two statements also fall within recognized exceptions to the hearsay rule contained in the Utah Rules of Evidence and relevant commentaries on those rules.

5. Furthermore, as covered more in-depth hereinafter, it is incumbent upon the Court to admit Mr. Decedent's statements to promote the best interests of justice in this matter.

6. For these reasons, Defendant seeks to have Mr. Decedent's statements admitted into the record as evidence in this matter.

## ARGUMENT

### RULE 801

### DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM HEARSAY

**Mr. Decedent's Statements Are Not Hearsay**

7. The basic foundational elements of a hearsay statement include the following:

   a. A statement (written, oral, or assertive conduct);

   b. By an out-of-court declarant (person);

   c. Offered to prove the truth of the matter asserted in the statement.[1]

8. In other words, under Rule 801(c) of the Utah Rules of Evidence, it is clearly and conspicuously established that "'[h]earsay' means a statement that . . . (c)(1) the declarant does not make while testifying at the current trial or hearing[,] *and* (c)(2) a party offers in evidence *to prove the truth of the matter asserted in the statement*" (emphasis added).

9. Therefore, to constitute hearsay, a statement must meet both the requirements of (c)(1) and (c)(2) of Rule 801.

10. The Westlaw publication "Mangrum & Benson on Utah Evidence" (hereinafter referred to as "**Mangrum & Benson**") by R. Collin Mangrum and Honorable Dee Benson provides that "[t]he Supreme Court in *Tennessee v. Street*[2] explained that if a statement is

[1] *See id.* at 796 (stating that "[t]raditionally accepted nonhearsay categories for which out-of-court statements may be admissible for another relevant purpose (other than truthfulness of the matter asserted) include: (1) verbal acts or verbal parts of acts; (2) effect on hearer (e.g., notice); [and] (3) independent rational significance (*State v. Peeler*, 126 Ariz. 254, 614 P.2d 335 (Ct. App. Div. 2 1980)).").

[2] 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425, 17 Fed. R. Evid. Serv. 817 (1985).

conceptually nonhearsay because it is not offered to prove the truth of the matter asserted, then neither the hearsay rule nor the Confrontation Clause applies."[3]

11. Mangrum & Benson further provides that "[i]f the statement has probative value for purposes other than the truth content of the statement, then cross-examination of the original declarant is unessential, and coincidentally neither the hearsay rule nor the Confrontation Clause apply."[4]

12. Furthermore, "[i]f the words are legally significant, then the statement is neither hearsay nor subject to the Confrontation Clause."[5]

13. In addition, the evidence to be submitted must be *reliable*.

14. According to the case of *Ohio v. Roberts*, "reliability can be established if either (1) the exception is 'firmly rooted' as a common law hearsay exception or (2) the statement overcomes a presumption of unreliability because it possesses 'particularized guarantees of trustworthiness.'"[6]

15. Furthermore, reliability "must be established by the reliability of the circumstances surrounding the making of the statement itself."[7]

16. In applying this principle, the circumstances surrounding the making of the statements in question are reliable, as Mr. Decedent's actions (which constitute the

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[3] 1 MANGRUM & BENSON, *supra*, at 801.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 802.

[7] *Id.*

circumstances) demonstrated that the statements he made were true and reliable, as he followed through with his threats against Defendant contained in his statements.

**Mr. Decedent's Statements Are Not Hearsay Because the Statements Are Not Being Offered to Prove the Truth of the Matter Asserted in Mr. Decedent's Statements**

17. Because the statements made by Mr. Decedent are not being offered to prove the truth of the matter asserted in the statements (the assertion that Mr. Decedent was going to Defendant's location to do him harm), but are instead being offered to prove that the words were spoken and that those words had an impact on Defendant, the statements do not constitute hearsay.

18. Mangrum & Benson provides that "[i]f [out-of-court statements are] offered to prove that they have been stated, they are nonhearsay. As explained by the court, 'If an out-of-court statement is 'offered simply to prove that it was made, without regard to whether it is true, such testimony is not proscribed by the hearsay rule.''"[8]

19. Furthermore, "whenever words constitute the criminal act . . . these words would qualify as nonhearsay as verbal acts or words of legal significance. The statement would not be offered to prove the truth of the threat made, but simply to prove that the statement was made."[9]

20. "Additionally, such a statement would also likely be admissible as both a statement of a party opponent (801(D)(2)(A)) and a statement of the then-existing state of mind (803(3)) of the declarant."[10]

[8] *Id.* at 833.

[9] 1 MANGRUM & BENSON, *supra*, at 834.

[10] *Id.*

21. Therefore, Mr. Decedent's statements are nonhearsay and admissible under this premise, as well.

**Mr. Decedent's Statements Are Not Hearsay Because They Constitute an Adoptive Admission [Rule 801(d)(2)(B) of the Utah Rules of Evidence]**

22. The foundation for adoptive admissions includes the following:

a. A declarant made a statement;

b. The statement was made in the party-opponent's presence;

c. The party-opponent heard and understood the statement; and

d. The party-opponent's behavior either expressly or impliedly affirmed the declarant's statement.[11]

23. In applying the foregoing, the following is true:

a. the declarant, Mr. Decedent, made statements;

b. Mr. Decedent's statements were made in Defendant's—i.e., the party-opponent's—presence, as Mr. Decedent was on the phone with Defendant when the statements were made;

c. the party-opponent, Defendant, clearly heard and understood the statements; and

d. Defendant's behavior either expressly or impliedly affirmed Mr. Decedent's statements.

24. Therefore, Mr. Decedent's statements constitute an adoptive admission under the relevant parts of this rule of evidence.

[11] *Id*. at 799.

**Mr. Decedent's Statements Are Not Hearsay Because His Words Were Accompanied by Verbal Acts**

25. Mangrum & Benson further provides that "the fact that the words are accompanied by the act has legal significance; therefore, the words are nonhearsay if offered to prove that they were spoken."[12]

26. The fact that Mr. Decedent's statements to Defendant were accompanied by the act of arriving at Defendant's location to do him harm or inflict death upon him has indisputable legal significance and renders the statements admissible as nonhearsay.

**Words Relevant Because of the Impact on the Hearer**

27. Mangrum & Benson provides that "[s]tatements may be relevant to the issues of any particular case because of their effect on the hearer. Such statements have consistently been held to be Nonhearsay in a variety of contexts."[13]

28. To further illustrate this point, Mangrum & Benson provides the following:

> The Utah Court of Appeals in *State v. Scott*[14] reversed and remanded a murder conviction because the defense counsel failed to comprehend and argue the "effect on hearer" nonhearsay category. In *Scott*, the accused did not dispute that he had shot his wife, but claimed that he was "scared to death" when he did so, which potentially would mitigate the murder charge to manslaughter. Part of his fear arose from the fact that on the day of the shooting the couple had been "fighting and arguing" when the accused went to their bedroom and saw the gun safe open and his wife's gun missing. In response the accused took his own gun out of the safe and shot and killed his wife.[15]

[12] *Id.*

[13] *Id.* at 834.

[14] 2017 UT App 74, 397 P.3d 837 (Utah Ct. App. 2017).

[15] 1 MANGRUM & BENSON, *supra*, at 835.

> The statement that was excluded during the trial was the accused's testimony that his wife had "threatened him" earlier in the day. When the defense began to ask the accused about the threat, the prosecution objected on grounds of hearsay. At side bar the judge commented, "There's no way that you're going to dance around and get [in] a threat without [it] being hearsay." Defense responded "Okay" and made no argument to the contrary. In holding that counsel's failure to argue that under the defense case theory a threat would be nonhearsay because it would be relevant to show the effect on the hearer, the Court of Appeals quoted this treatise's statement that the "effect on the hearer" nonhearsay category has "consistently been held to be non-hearsay in a variety of contexts." The court further explained: "threats are commonly not hearsay, because they do not make assertions capable of being proved true or false."[16]

29. Because Mr. Decedent indisputably threatened Defendant, his statements impacted Defendant, causing Defendant to protect himself and those around him upon Mr. Decedent's arrival.

30. Furthermore, because Mr. Decedent's statements constituted a threat, they are not hearsay "because [the statements did] not make assertions capable of being proved true or false."

31. The court in *Scott* further provided that "the threat was admissible because it was offered to show its effect on Scott, rather than to prove the truth of what [the victim] asserted . . . ."[17]

32. Likewise, the threat made by Mr. Decedent is admissible because it would be offered to show the statements' effect on Defendant, rather than to prove the truth of what Mr. Decedent asserted in the statements.

[16] *Id.*

[17] 2017 UT App 74, 397 P.3d 837, 842 (Utah Ct. App. 2017).

33. Therefore, Mr. Decedent's statements should be admitted under this premise as well.

**Nondeclaratory Statements**

34. A nondeclaratory statement such as an order, an exclamation, or an interrogatory may be admissible as nonhearsay and relevant because the statement was made.[18]

35. Thus, for example, a ship captain's order may be admissible when it is not a declaratory statement that is being offered for any fact issue, but rather to explain why people acted the way they did.

36. Similarly, Mr. Decedent's exclamation which threatened harm upon Defendant may be admissible, as it is not a declaratory statement being offered for any fact issue, but rather to explain why Defendant acted the way he did.

**Nonhearsay Categories [Rule 801(c) of the Utah Rules of Evidence]**

37. The court in *Kallas v. Kallas*[19] held that the statements were not offered to prove the truth of the matter asserted, but rather were "circumstantial evidence of their states of mind."[20]

38. Likewise, the statements made by Mr. Decedent are not offered to prove the truth of the matter asserted in the statements, but are rather offered as circumstantial evidence of the parties' respective mental states.

[18] *See, e.g., U.S. v. Reilly*, 33 F.3d 1396, 1410, 39 Fed. R. Evid. Serv. 1213 (3d Cir. 1994).

[19] 614 P.2d 641 (Utah 1980).

[20] *Id.* at 644.

39. Therefore, because Mr. Decedent's statements constituted "circumstantial evidence of [the parties'] states of mind," they are admissible as nonhearsay.

**RULE 803**

**EXCEPTIONS TO THE RULE AGAINST HEARSAY—REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS**

40. The following pertaining to the case at hand are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

a. **Present Sense Impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

b. **Excited Utterance.** A statement relating to a startling even or condition, made while the declarant was under the stress of the excitement that it caused.

c. **Then-Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

41. As to the "Present Sense Impression" exception, it is clear that Mr. Decedent's threat to Defendant were statements describing an event—i.e., the fact that he was going to Defendant's location—and a condition—i.e., Mr. Decedent's anger and hostility toward Defendant and his resulting actions—and Mr. Decedent's statements were made while Mr. Decedent perceived them.

42. As to the "Excited Utterance" exception, it is amply evident that Mr. Decedent was under the effect of anger and other powerful negative emotions as a result of thinking that Defendant was talking badly about him, and, therefore, Mr. Decedent made an excited utterance regarding his threat to do harm against Defendant, and Mr. Decedent was clearly under the stress of the excitement that his anger and other negative emotions caused.

43. As to the "Then-Existing Mental, Emotional, or Physical Condition" exception, Mr. Decedent's statements constituted statements of his then-existing state of mind, which encompassed his motive, intent, *and* plan to do harm to Defendant.

**Present Sense Impression [Rule 803(1) of the Utah Rules of Evidence]**

44. Mangrum & Benson provides that "[t]he present-sense-impression exception applies to instances of reflexive speech where there is neither time nor motivation to lie; in which case the testimonial infirmities of sincerity and memory are less of a problem."

45. In applying the foregoing, Mr. Decedent's statements certainly constituted reflexive speech where there was neither time nor motivation to lie.

46. Furthermore, the foundational elements of the present sense impression exception, as it has developed at common law, include:

a. Evidence an event occurred;

b. The declarant had firsthand knowledge of the event;

c. The declarant made the statement during or shortly after the event;

d. The statement describes or explains an event or condition; and

e. The in-court witness was a percipient witness of the event.

47. In applying the foregoing elements to the case at hand, it is true that,

a. the evidence of the event that occurred was Defendant allegedly talking badly behind Mr. Decedent's back;

b. Mr. Decedent certainly had firsthand knowledge of the above described event, as he was on the phone with Defendant;

c. Mr. Decedent, indeed, made the statements in questions: "I cannot believe that you are talking shit behind my back" and "I am going to send someone to pick you up";

d. Mr. Decedent made the above statement right after the event of Defendant allegedly talking badly about Mr. Decedent occurred;

e. Mr. Decedent's statement described the event of him going to Defendant's location, *as well as* the condition of Mr. Decedent being in an altered state of mind; and

f. the in-court witness, who in this case would be Defendant, was certainly a percipient witness of the event, as he was on the phone with Mr. Decedent.

**Excited Utterance [Rule 803(2) of the Utah Rules of Evidence]**

48. An excited utterance is nontestimonial if there "was no reasonable expectation that it would be used in a later legal proceeding."[21]

49. The facts of the case at hand, and the nature of the parties, strongly compel one to conclude that Mr. Decedent's excited utterance was made with no reasonable expectation that it would be used in a later legal proceeding; indeed, Mr. Decedent likely would not have made the statements if he knew that they were going to be used in a legal proceeding.

[21] *Salt Lake City v. Williams*, 2005 UT App 493, 128 P.3d 47 (Utah Ct. App. 2005).

50. Therefore, Mr. Decedent's excited utterance, as explained herein, was nontestimonial and, thusly, not subject to the rules against hearsay.

51. However, even if Mr. Decedent's excited utterance is considered testimonial, it would nevertheless be subject the "Excited Utterance" hearsay exception.

52. Mangrum & Benson provides that "[t]he proponent of an excited utterance has the burden to establish each element that an exciting event occurred, that the declarant made the statement shortly after the event, describing or explaining the event, while the declarant was still under stress or excitement from the event."[22]

53. With reference to the excited utterance exception, the Utah Supreme Court has summarized the following minimal foundation:

> Three conditions must be met to allow an out-of-court excited utterance into evidence. First, an "event or condition" must occur that is sufficiently startling to cause an excitement that stills normal reflective thought processes. Second, the declarant's declaration must be a spontaneous reaction to the event or condition, not the result of reflective thought. Third, the utterance must relate to the startling event.[23]

54. In conjunction with the foregoing paragraph, the foundation for an excited utterance hearsay exception includes the following elements:

a. An event occurred;

b. The event was startling or stressful;

c. The declarant had personal knowledge of the event;

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[22] *See State v. Tiliaia*, 2006 UT App 474, 153 P.3d 757 (Utah Ct. App. 2006) (providing that Tiliaia had the burden to show that the statement was made while [the percipient witness] was still under the original excitement from the shooting).

[23] *State v. Smith*, 909 P.2d 236, 239 (Utah 1995).

d. The declarant made a spontaneous statement that related to the event; and

e. The statement was made while the declarant was under stress from the excitement of the event.

55. In applying the foregoing elements to the case at hand, it is true that,

a. An event occurred, which was Defendant allegedly talking badly about Mr. Decedent;

b. The above event was certainly stressful and sufficiently startling to Mr. Decedent, as evidenced by his aggressive reaction against Defendant, and in strong consideration of the fact that Mr. Decedent and Defendant are past gang members, and so in that gang culture, things like talking badly about someone behind their back is extremely startling and would cause any reasonable person in the same perilous situation to make an excited utterance;

c. Mr. Decedent certainly did make spontaneous, non-reflective statements due to the influence of stress that related to the above event—to wit: "I cannot believe that you are talking shit behind my back" and "I am going to send someone to pick you up"; and

d. It is clear that Mr. Decedent made these statements while under the stress of the event, which was Defendant allegedly talking badly about Mr. Decedent.

56. Furthermore, "[a]n excited utterance is viewed as a responsive reflex (non-premeditated) to an exciting event, in which case memory and sincerity are less at issue than other out-of-court 'reflective' statements."[24]

57. Also, a "person who gives a statement under stress of nervous excitement need not be hysterical as long as she is still under the emotional influence of the event."[25]

58. Therefore, even though Mr. Decedent was not necessarily hysterical during the phone call with Defendant, he was still heavily under the emotional influence of the event.

59. Furthermore, as provided in *State v. Cude*,[26] "the shorter the gap between the startling event and the utterance, the more reliable the statement since the excitement of the event is unlikely to have yielded to reasoned reflection and conscious fabrication."[27]

60. Therefore, because there was an infinitesimally short gap between the startling event (Mr. Decedent learning that Defendant was allegedly talking badly about him behind his back) and the utterance ("I cannot believe that you are talking shit behind my back" and "I am going to send someone to pick you up"), the excited utterance of Mr. Decedent constitutes a more reliable statement.

**State of Mind [Rule 803(3) of the Utah Rules of Evidence]**

61. The state-of-mind hearsay exception combines two common law exceptions: (1) present state of mind, and (2) present bodily conditions.

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[24] 1 MANGRUM & BENSON, *supra*, at 893.

[25] *State v. Kaytso*, 684 P.2d 63, 64 (Utah 1984).

[26] 784 P.2d 1197 (Utah 1989).

[27] *Id.* at 1200.

62. The rationale for this exception is that while sincerity is at issue, the testimonial infirmities of memory and perception are minimal.

63. The foundational elements of the state-of-mind hearsay exception include the following:

a. A statement was made (the proponent would have to establish the normal foundation for the statement, such as who made the statement, when, where and the circumstances and substance of the statement);

b. The statement is expressly assertive of the present state of mind or bodily condition (firsthand knowledge implicit) of the declarant;

c. If offered to prove conduct, then (a) unless it involves a will case, it must pertain to intended conduct, rather than past acts, and (b) it must relate to the conduct of the declarant.

64. In applying the foregoing elements of the "State of Mind" hearsay exception to the case at hand, the following is true:

a. Statements were certainly made by Mr. Decedent, and the proponent (Defendant) can amply establish who made the statements, when, and where, as well as the circumstances and substance of the statements, as provided below;

i. The person **who** made the statements was Mr. Decedent;

ii. The statements were made by Mr. Decedent **when** he was on the phone with Defendant;

iii. The place **where** the statements were made was at the parties' respective locations;

iv. The **circumstances** of the statements involved a heated discussion between Mr. Decedent and Defendant, where Mr. Decedent threatened Defendant by telling Defendant that "I am going to send someone to pick you up," which, in the context of the gangster vernacular used by the parties, the statements indisputably referred to causing bodily harm or death upon Defendant; and

v. The **substance** of the statements made by Mr. Decedent to Defendant was, literally, "I cannot believe that you are talking shit behind my back" and "I am going to send someone to pick you up";

b. The statements made by Mr. Decedent were expressly assertive of his present state of mind, which was that of anger, aggression, and agitation; and

c. The statements made by Mr. Decedent certainly pertained to intended future conduct.

65. In the case of *State v. Wauneka*,[28] the court explained that victim's statements should generally be excluded on state of mind grounds unless "(i) the evidence is probative of the decedent's state of mind at the time of the killing, and (ii) the decedent's state of mind has already been placed in issue by defense evidence or argument that the killing was (a) a suicide,

[28] 560 P.2d 1377 (Utah 1977).

(b) in self-defense, or (c) an accident to which the decedent contributed by acting as an aggressor."[29]

66. In applying the foregoing elements of *Wauneka*, the following is true:

a. The statements by Mr. Decedent constituting evidence include "I cannot believe that you are talking shit behind my back" and "I am going to send someone to pick you up," and these statements are absolutely probative of Mr. Decedent's state of mind at the time of the killing, as they showed that he was under the influence of stress, anger, and aggression, and had the state of mind (clearly established by his actions) to cause harm upon Defendant; and

b. Mr. Decedent's state of mind has been placed in issue by Defendant's evidence and arguments that the killing was in self-defense.

**RULE 804**

**EXCEPTIONS TO THE RULE AGAINST HEARSAY—WHEN THE DECLARANT IS UNAVAILABLE AS A WITNESS**

67. Mangrum & Benson provides that "[a] declarant is considered to be unavailable as a witness if the declarant,"[30] among other permissible reasons, "cannot be present or testify at the trial or hearing because of death . . . ."[31]

68. Therefore, Mr. Decedent is considered unavailable in this matter due to his death caused by Defendant's warranted and appropriate defensive actions, so the exceptions of Rule 804 of the Utah Rules of Evidence apply.

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[29] *Id.* at 1380.

[30] 1 MANGRUM & BENSON, *supra*, at 943.

[31] *Id.*

**Declarations Against Interest [Rule 804(b)(3) of the Utah Rules of Evidence]**

69. In law, there exists the "statement-against-interest" hearsay exception, which provides that a declarant's statements made against his or her own interests constitute an exception to the hearsay rule against out-of-court statements.

70. Therefore, because Mr. Decedent's statements to Defendant that "I cannot believe that you are talking shit behind my back" and "I am going to send someone to pick you up" prove that Mr. Decedent posed an imminent threat of violence or death against Defendant, these statements were against Mr. Decedent's interests at the time made, and so Mr. Decedent's statements are excepted from the rules against hearsay.

71. For example, a statement by a drug user that he was waiting to buy drugs from a named individual, would be admissible as a statement against interest.

72. Similarly, Mr. Decedent's statements, as they go against his penal interests, would be admissible as a statement against interest as well.

73. The following, among others, are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

a. **Statement Against Interest.** A statement-against-interest is a statement that,

i. a reasonable person in the declarant's position would have made only if the person believed it to be true because when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

ii. is supported by corroborating circumstances that clearly indicate its trustworthiness if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

74. In addition, "[t]he modern rules extend the 'against interest' exception to include penal interests as well."[32]

75. Moreover, as provided by Mangrum & Benson, the foundation for declarations against interests include the following:

a. Unavailability of the out-of-court declarant;

b. The declarant has firsthand knowledge of the content of the statement;

c. The statement must be the type of statement that a reasonable person would not have made unless he believed it to be true;

d. The declarant must subjectively believe that the statement was contrary to his or her pecuniary, proprietary or penal (but not social) interest at the time the statement was made;

e. If against the declarant's penal interest and exculpatory of another (a confession exculpating another accused), there exists corroborative evidence supporting the statement's truthfulness;

f. If inculpatory of another person, then the statement inculpating another person must bear a close narrative or logical connection with the statement against

[32] *Id.* at 811.

interest (if the portion inculpating a third person reasonably can be redacted from the statement against interest it normally should be).[33]

76. In applying the foregoing elements of declarations-against-interest as provided above, the following is true:

a. The out-of-court declarant, Mr. Decedent, is unavailable due to death;

b. Mr. Decedent obviously had firsthand knowledge of the content of the statements, as he made the statements;

c. A reasonable person in Mr. Decedent's place would not have made the statements that Mr. Decedent made, as said statements would reasonably subject one to criminal liability, unless said reasonable person believed the statement to be true, as is the case with Mr. Decedent—i.e., Mr. Decedent obviously believed his threats against Defendant to be true, as evidenced by his subsequent action of visiting Defendant to inflict harm or death upon him, thus following through with Mr. Decedent's threat, which, again, Mr. Decedent indubitably believed to be true;

d. Mr. Decedent—considering his background as a former gang member and having been affiliated with criminals and likely subjected to the law and legal repercussions for crime—reason compels the strong conclusion that Mr. Decedent *must have* been able to appreciate that his statements, because they were threatening, would expose him to criminal liability and thus were made contrary to his penal interests at the time the statements were made;

[33] *Id.* at 946.

e. Because Mr. Decedent's statements went directly against his penal interests, and because said statements are exculpatory of Defendant because the statements prove that Defendant acted in self-defense when he killed Mr. Decedent, there exists corroborative evidence supporting the truthfulness of Mr. Decedent's statements; and

f. Mr. Decedent's statements were not inculpatory of another person, but this is irrelevant because inculpation is not a requirement.

77. Regarding Mr. Decedent's death, "[t]he fact that the declarant is dead or otherwise unavailable may weight on the need for admitting the statement . . . ."

78. Therefore, the fact that Mr. Decedent is dead weighs on the need for admitting his statements.

79. Furthermore, "Rule 804(b)(3) clearly provides that a statement against interest that is exculpatory of another, qualifies under the statement against interest exception only if corroborating circumstances clearly indicate the trustworthiness of the statement."[34]

80. In applying the foregoing, the corroborating circumstance which indicates the trustworthiness of Mr. Decedent's statements was the fact that he, indeed, arrived at Defendant's location, thus making his stated threats (the statements) true.

81. The United States Court of Appeals for the Eighth Circuit in *United States v. Rasmussen*,[35] outlined mandatory corroboration requirements to include considerations of (1) whether there is an apparent motive for the declarant to misrepresent the matter; (2) the general

[34] *Id.* at 960.

[35] 790 F.2d 65, 20 Fed. R. Evid. Serv. 1015 (8th Cir. 1986).

character of the declarant; (3) whether other people heard the out-of-court statement; (4) whether the statement was made spontaneously; and (5) the timing of the declaration and the relationship between the speaker and the witness.

82. In applying the foregoing corroboration requirements of *Rasmussen* to the case at hand, it is true that,

a. there was no apparent motive for Mr. Decedent to misrepresent his statements—and there is nothing that suggests otherwise—and, indeed, the fact that Mr. Decedent followed through with his threat corroborates the truthfulness of the statements;

b. the general character of Mr. Decedent, in consideration of his past as a gang member, compels the strong conclusion that he did not misrepresent his threats and that said threats against Defendant were very real, as, again, evidenced by Mr. Decedent's arrival at Defendant's location with several other people;

c. other people heard the out-of-court statement—to wit: the people Mr. Decedent was with when he arrived at Defendant's location, as well as Defendant, considering that Mr. Decedent arrived at Defendant's location with several other individuals;

d. Mr. Decedent's statements were made spontaneously once he learned of Defendant allegedly talking badly about him behind his back; therefore, the circumstances surrounding the statements made by Mr. Decedent support the reasonable conclusion that Mr. Decedent's statements were made

spontaneously and to threaten Defendant, and not in a premeditated, planned, calculated fashion; and

e. the timing of the declaration in relation to Mr. Decedent's follow-through with his threats (i.e., the fact that he arrived at Defendant's location) was such that it would lead any reasonable person in the same circumstances to believe that they are at risk of imminent harm, and the timing clearly shows the trustworthiness of the statements he made, and the relationship between Mr. Decedent and Defendant also lead one to reasonably conclude that the statements were made in earnest.

**RULE 807**

**RESIDUAL EXCEPTION**

83. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

a. the statement has equivalent circumstantial guarantees of trustworthiness;

b. it is offered as evidence of a material fact;

c. it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

d. admitting it will best serve the purposes of these rules and the interests of justice.

84. In applying the foregoing considerations to the case at hand, the following is true and evident:

a. the statements' circumstantial guarantees of trustworthiness are the fact that Mr. Decedent followed through with his threat against Defendant, so his statements are demonstrably trustworthy;

b. Mr. Decedent's statements were offered as evidence of a material fact—i.e., the death of Mr. Decedent in relation to Defendant's culpability, which are material facts in this matter;

c. Mr. Decedent's statements are more probative than any other evidence that Defendant can obtain through reasonable efforts; Mr. Decedent's statements directly favor a verdict of self-defense in this matter, and said statements are more probative of this fact than anything Defendant can obtain otherwise; and

d. admitting Mr. Decedent's statements would best serve the purposes of the rules of evidence and the interests of justice, in consideration that Defendant acted in self-defense and, therefore, he should not be penalized with a murder charge—he does not deserve this—and the interests of justice favor this conclusion.

85. Furthermore, "[t]he court has held that the residual exception 'was intended for use in those rare cases where, although the out-of-court statement does not fit into a recognized exception, its admission is justified by the inherent reliability of the statement and the need for its admission.'"[36]

86. In applying the foregoing, even if Mr. Decedent's statements do not fit into a recognized hearsay exception, their admission is justified by their inherent reliability (as proven

[36] 1 MANGRUM & BENSON, supra, at 969.

by Mr. Decedent following through with his threats), and it is essential for Defendant's fair defense that the statements be admitted, because they directly *exculpate* Defendant to a degree that no other evidence can.

87. This is the end of the arguments of this Memorandum.

## CONCLUSION

As amply covered and proven in this Memorandum, and in satisfaction of all the requirements of the hearsay exceptions named herein as well as the fact that Mr. Decedent's statements are nonhearsay, the following are the compelling reasons why Mr. Decedent's statements should be admitted into these proceedings as evidence:

A. Mr. Decedent's statements are not hearsay;

B. Mr. Decedent's statements are not hearsay because the statements are not being offered to prove the truth of the matter asserted in Mr. Decedent's statements;

C. Mr. Decedent's statements are excepted from hearsay because they constitute an adoptive admission [Rule 801(d)(2)(B) of the Utah Rules of Evidence];

D. Mr. Decedent's statements are excepted from hearsay because his words were accompanied by verbal acts;

E. Mr. Decedent's statements are excepted from hearsay due to the statements' effect on the hearer—Defendant;

F. Mr. Decedent's statements are excepted from hearsay because they constitute nondeclaratory statements;

G. Mr. Decedent's statements are nonhearsay because they are not offered to prove the truth of the matter asserted in the statements, but are rather offered as circumstantial evidence of the parties' respective mental states;

H. Mr. Decedent's statements are excepted from hearsay because they constitute a present sense impression [Rule 803(1) of the Utah Rules of Evidence];

I. Mr. Decedent's statements are excepted from hearsay because they constitute an excited utterance [Rule 803(2) of the Utah Rules of Evidence];

J. Mr. Decedent's statements are excepted from hearsay because they fall within the state-of-mind hearsay exception;

K. Mr. Decedent's statements are excepted from hearsay because they constitute declarations against interests [Rule 804(b)(3) of the Utah Rules of Evidence];

L. Mr. Decedent being dead weighs on the need for admitting his statements; and

M. Mr. Decedent's statements are excepted from hearsay because they fall within the Residual Exceptions category of Rule 807.

WHEREFORE, upon the arguments and merits of this Memorandum, Defendant respectfully requests that the Court admit into evidence Mr. Decedent's statements, "I cannot believe that you are talking shit behind my back" and "I am going to send someone to pick you up," as the statements are not hearsay, or the statements fall within the many hearsay exceptions named herein, and the admission of these statements would best satisfy the interests of justice.

DATED October 24, 2022.

**ALTIOREM LEGAL SERVICES**

/s/ Saul Goodman
Saul Goodman,
*Attorney for Defendant*

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2022, I served, via electronic filing, a true and correct copy of the foregoing upon:

` Prosecuting Attorney

/s/ Saul Goodman