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Evidence - North Carolina and Declarations Against Penal Interest

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EVIDENCE—NORTH CAROLINA AND DECLARATIONS AGAINST PENAL INTEREST—*State v. Haywood*, 295 N.C. 709, 249 S.E.2d 429 (1978).

A New Rule: What Does It Mean?

INTRODUCTION

Nearly one hundred and fifty years ago, the North Carolina Supreme Court acknowledged the apparent absurdity of convicting one for a crime to which another had confessed extra-judicially without permitting introduction of that confession as proof of the accused's innocence.[1] The emotional appeal of the court's statement notwithstanding, a majority of states have barred such confessions through their courts' refusal to recognize the declaration against penal interest exception to the hearsay rule.[2] While sound evidentiary theory buttresses the majority's position, at least from an historical perspective, the erosion of the hearsay rule, among other factors, has led a growing minority of states to adopt the penal interest exception in some form.[3]

Using the opportunity afforded by *State v. Haywood* (hereinafter *Haywood*), Chief Justice Sharp announced that in the future North Carolina will adhere to the growing minority's position by allowing admission of such declarations upon the satisfaction of specified conditions. Since the court decided *Haywood* on other grounds, the announcement was dicta; however, without a wholesale change in attitude, undoubtedly the principle of *Haywood* will become law. Accordingly, this note will treat the penal interest exception as such and will review its history, rationale and consequences.

THE CASE

Clinton police arrested five individuals in connection with the robbery of a grocery store and the shooting of the proprietor. Four of those arrested, Paul Haywood, John Brown, James Watkins and Ronald Covington, were subsequently indicted for assault with a deadly weapon with intent to kill inflicting serious injury[4] and rob-

1. State v. May, 15 N.C. 328, 332 (1833).
2. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 147 (Brandis Rev. 1973).
3. *See* HACK, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 BOSTON,U.L. REV. 148 (1976).
4. N.C. GEN. STAT. § 14-32(a) (Cum. Supp. 1977).

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bery with firearms.[5] Upon the state's motion and without objection by the defendants' counsel, the court consolidated the four cases for trial.[6]

Eyewitnesses to the robbery placed all four defendants at the crime scene, but neither they nor the wounded proprietor could identify which of the four entered the grocery store and which remained in the "getaway car." This lack of identification was one factor which prompted the state to prosecute on a joint venture theory. Defendants offered no evidence; but on cross-examination of the investigating officer, defendants Brown and Covington sought to elicit testimony concerning a written confession made by defendant Haywood which they felt would exonerate them. The statement was: "I came to Clinton from D.C. with James and Linda Watkins, John Brown and Ronald Covington. We stopped at Jackson's Red and White in Clinton. I went in to rob the store but Mr. Jackson put up such a fight that I shot him and ran out of the store." Counsel for Haywood objected to the admission of the confession as violative of his client's constitutional rights under *Miranda v. Arizona*[7] because Haywood had not been told that his statement could be used against him. Counsel specifically stated that his other client, Watkins, had no objection. The court sustained Haywood's motion for suppression and the other defendants excepted. The jury found all four guilty as charged.

On appeal to the North Carolina Supreme Court, Covington, Brown and Watkins conceded that Haywood's confession was inadmissible against him due to the *Miranda* defect but asserted that since the confession was voluntary with nothing indicating falsity and since it tended to exonerate them, fair play required the judge to allow the jury to hear it regardless of the incriminatory effect on Haywood. The court disagreed, holding that the admission of Haywood's statement would have bolstered the state's case against all defendants and therefore its exclusion was not prejudicial. In further support of the trial court's action, Chief Justice Sharp noted that the ruling was in accord with "prior decisions of this court holding inadmissible declarations against penal interest."[8] At this point the Chief Justice announced the new policy of the court that

5. N.C. GEN. STAT. § 14-87 (Cum. Supp. 1977). The female, Evette Watkins, entered a plea of guilty to common law robbery and therefore was not a defendant in this case.

6. N.C. GEN. STAT. § 15A-926(b)(2) (Cum. Supp. 1977).

7. 384 U.S. 436 (1966).

8. State v. Haywood, 295 N.C. 709, 721, 249 S.E.2d 429, 437 (1978).

declarations against penal interest are admissible under certain circumstances.

BACKGROUND

A. HEARSAY AND PENAL INTEREST IN GENERAL

The rule against the use of hearsay became fixed between 1675 and 1690.[9] While the lack of oath and the inability to confront the declarant and observe his demeanor are among the reasons cited in support of the rule,[10] authorities generally agree that the main justification for the exclusion of hearsay is the lack of opportunity for cross-examination.[11] Cross-examination has always been deemed of paramount importance in assuring the veracity and accuracy of testimony. Without this right to interrogate a declarant, the presumed unreliability of out-of-court statements compels their exclusion.[12]

Exceptions to the rule developed immediately[13] and are developing continuously, based on two basic principles: necessity[14] and circumstantial probability of trustworthiness.[15] Necessity is the concept that the court either accepts the evidence, although hearsay, or loses it forever because of the unavailability of the declarant. Unavailability may be due to death, absence from the jurisdiction or insanity.[16] Although unavailability of the declarant alone is not reason enough to make hearsay statements admissible,[17] its effect is to force the courts to look for circumstantial probability of trustworthiness as a practical substitute for the ordinary test of reliability (*i.e.*, cross-examination).

The admission of declarations against interest is a classic example of an exception to the hearsay exclusionary rule utilizing the above-mentioned principles. The elements for the admission of such declarations are: 1) the declarant must be unavailable; 2) the fact stated must be against the declarant's interest when made and he must be conscious that it is so; 3) the declarant must have compe-

9. 5 J. WIGMORE, EVIDENCE § 1364 (Chadbourn Rev. 1974).

10. 1 D. STANSBURY, *supra* note 2, at § 139.

11. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 245 (2d ed. 1972); 5 J. WIGMORE, *supra* note 9, at § 1362.

12. *See* Bruton v. United States, 391 U.S. 123 (1968); 5 J. WIGMORE, *supra* note 9, at § 1362.

13. 1 D. STANSBURY, *supra* note 2, at § 144, n. 67.

14. 5 J. WIGMORE, *supra* note 9, at § 1421.

15. *Id.* at § 1422.

16. *Id.* at § 1421.

17. Raleigh Improvement Co. v. Andrews, 176 N.C. 280, 96 S.E. 1032 (1918).

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tent knowledge of the fact declared; 4) no probable motive for the declarant to falsify may exist; 5) the interest must be a pecuniary or proprietary one.[18] The first element is a restatement of the unavailability principle while the second through the fifth reflect courts' attempts to assure the circumstantial probability of reliability. The fifth element, a pecuniary or proprietary interest as opposed to a penal interest, prevents a defendant in a criminal case in the majority of jurisdictions from using the confession of another to prove his own innocence.[19]

The distinction in admissibility between a penal interest and a pecuniary or proprietary interest is attributed generally to the *Sussex Peerage Case*,[20] an 1844 decision of the House of Lords holding the hearsay rule "to exclude the statement of a fact subjecting the declarant to a criminal liability."[21] Wigmore criticizes the case[22] and indeed calls it a "backward step,"[23] citing four prior cases and commentaries recognizing declarations against penal interest as competent evidence.[24] The criticisms notwithstanding, the case is probably still good law in England,[25] and American courts frequently cite it as authority.[26]

B. PENAL INTEREST IN NORTH CAROLINA

As is true in many states, the development of the penal interest exception in North Carolina was not based exclusively on its own merits but was influenced by other evidentiary doctrines.[27] *State v. May*[28] (hereinafter *May*) an 1833 decision, proved to be the progenitor of just such an interface. Daniel May, accused of stealing and selling a slave,[29] offered to prove that police had issued a warrant for William May, Hardy May and Daniel May for the same offense for which he solely was indicted; that William had absconded from

18. 1 D. STANSBURY, *supra* note 2, at § 147.

19. *Id.*

20. 8 Eng. Rep. 1034 (1844).

21. 5 J. WIGMORE, *supra* note 9, at § 1476.

22. *Id.* at §§ 1476-1477.

23. *Id.* at § 1476.

24. *Id.* at § 1476, n. 8, *citing* Hulet's Trial, 5 How. St. Tr. 1185 (1660); 1 HALE, PLEAS OF THE CROWN 306 (1680); Standen v. Standen, 3 Peake 32 (1791); Powell v. Harper, 5 Car. & P. 590 (1833).

25. *See* 5 J. WIGMORE, *supra* note 9, at § 1476.

26. *E.g.*, Donnelly v. United States, 228 U.S. 243 (1913); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923).

27. *See, e.g.*, 5 J. WIGMORE, *supra* note 9, at § 1477.

28. 15 N.C. 328 (1833).

29. *Id.* at 330 (theft of a slave was punishable by death).

the state after conveying a woman and child slave to the complainant as compensation for the loss of her slave and that William had confessed extra-judicially that he alone was the thief. The trial court allowed admission of certain of the facts but excluded the confession.[30] On appeal of Daniel May's conviction, the supreme court affirmed, with each of its three members expressing his concurring views in a separate opinion. Chief Justice Ruffin rejected the proffered confession as "mere hearsay . . . the words of a stranger to the parties."[31] Justice Gaston wrote, "I am of the opinion the whole of the testimony offered in order to show the taking by William was [inadmissible]."[32] He reasoned that "the question of William May's guilt or innocence was not necessarily connected with that of the guilt or innocence of Daniel. Both might be guilty or both might be innocent, and a common guilt or a common innocence was as presumable as the guilt of one only."[33] Subsequently, courts interpreted *May* as standing for the two doctrines that: 1) declarations against penal interest are not admissible as they are in violation of the hearsay rule[34] and 2) defendant in a criminal trial cannot offer proof that another person committed the offense "unless it was one that could have been committed only by a single individual acting alone"[35] (hereinafter the "exclusive guilt" doctrine).[36]

Some comment is necessary to appreciate the significance of *May*. First, the ruling that the confession was inadmissible was not surprising in that North Carolina did not recognize *any* declaration against interest exception[37] until *Peck v. Gilmer*,[38] some six years later. Second, the declaration against penal interest question usually arises in cases where a defendant is attempting to exculpate himself by showing the confession of another to the crime.[39] Third, when declarations against penal interest arise in civil cases, courts often interpret them as being against pecuniary interest.[40]

30. *Id.* at 329 (the court allowed admission of the warrant and the evidence of flight by William).

31. *Id.* at 332.

32. *Id.* at 339.

33. *Id.* at 338.

34. *E.g.*, State v. English, 201 N.C. 295, 159 S.E. 318 (1931).

35. 1 D. STANSBURY, *supra* note 2, at § 93, n. 6.

36. The name "exclusive guilt" doctrine is a creation of this author for the sake of brevity.

37. 1 D. STANSBURY, *supra* note 2, at § 147, n. 59.

38. 20 N.C. 391 (1839).

39. *See* State v. Gee, 92 N.C. 756 (1885); State v. Baxter, 82 N.C. 602 (1880); State v. Haynes, 71 N.C. 79 (1874).

40. "[T]he tendency seems to be to emphasize the pecuniary aspect when the declaration is offered in a civil case, while emphasizing the penal aspect of a

Given the three facts above-mentioned and the "exclusive guilt" doctrine of *May*, the North Carolina position barring admission of penal interest declarations became very difficult to change. The interface of the above-mentioned facts and doctrine was as follows: once courts admitted as competent evidence some types of declarations against interest, logic argued for the admission of penal interest declarations.[41] However, because of the way in which these questions generally arose, the "exclusive guilt" doctrine of *May* still prevented their admission as they were attempts to prove the innocence of the defendant by demonstrating the guilt of another. To further doom the penal interest exception, any pressures for admission that came from the civil side were negated by the simple conversion of penal interest into the then admissible pecuniary interest.

On several occasions the court reviewed its position but respectfully declined the invitation to change. In *State v. Duncan*,[42] the court held that other persons' threats to kill or confessions of killing a deceased were but hearsay and could not tend to establish that both they and the defendant were not guilty. In 1872 the court in *State v. White*[43] held that neither the acts nor the declarations of the third party were inconsistent with the guilt of the defendant and excluded both as hearsay.

As the cases continued, the "exclusive guilt" doctrine of *May* came under great pressure. As noted by Stansbury, "[T]he unreasonableness of such a rule and the unjust results which it invited are apparent."[44] In 1914, the court in *State v. Wiggins*[45] liberalized the rule by allowing admission of evidence that exculpated the defendant by incriminating third parties as long as "direct evidence connecting the others with the corpus delecti"[46] existed. The rule continues to evolve. Today the general principle of relevancy governs the admissibility of evidence of another's guilt.[47]

In 1931, after the emasculation of the "exclusive guilt" doctrine, in *State v. English*[48] (hereinafter *English*) the court had a

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comparable declaration when offered in a criminal case." 1 D. STANSBURY, *supra* note 2, at § 147, n. 60.

41. Stansbury calls any attempt to distinguish the penal interest from the pecuniary or propriety interest "both illogical and unfair." 1 D. STANSBURY, *supra* note 2, at § 147.

42. 28 N.C. 326 (1846).

43. 68 N.C. 158 (1873).

44. 1 D. STANSBURY, *supra* note 2, at § 93.

45. 171 N.C. 813, 89 S.E. 58 (1916).

46. *Id.* at 816, 89 S.E. at 59.

47. 1 D. STANSBURY, *supra* note 2, at § 93.

48. 201 N.C. 295, 159 S.E. 318 (1931).

chance to review the penal interest exception on its own merits. *English* demonstrates the rule's tenacity. The state charged the defendant with the brutal murder of his wife. The defendant offered to prove (an offer the trial court rejected) that one "D.L." made a full detailed confession in the presence of three policemen just one day after the murder.[49] For some unknown reason, the police released the confessor and he quickly disappeared. A jury convicted the defendant of second-degree murder[50] on the testimony of a boy alleged to be of bad character. On review of the trial court's exclusion of the third party's confession, Justice Brogden, writing for the supreme court, went to great effort to examine the pros and cons of the penal interest rule and the approaches taken by other jurisdictions. In summation he wrote: "[T]he writer of this opinion, speaking for himself, strings along with the minority, but it was the duty of the trial judge to apply the law as written, and the exceptions of the defendant are not sustained."[51] The equities of the case notwithstanding, the court refused to change the rule in North Carolina citing stare decisis as the reason. The *English* case proved to be the last serious challenge to the North Carolina position until the supreme court's announcement in *State v. Haywood*.

ANALYSIS

Declarations against penal interest are now admissible as competent evidence in North Carolina upon satisfying the following seven conditions:

> 1) The declarant must be unavailable. In addition to the usual methods of satisfying the unavailability requirement (death, out of reach of process and physical or mental illness sufficient to preclude appearance),[52] the court added unavailability due to a ruling on grounds of self-incrimination. Also, where appropriate, the court may require a good faith effort to secure the attendance of the declarant.
>
> 2) The declaration must have had the potential of actually jeopardizing the personal liberty of the declarant when made, and he must have understood its damaging potential.
>
> 3) The declarant must have had no probable motive to falsify when he made the declaration.

49. *Id.* at 298, 159 S.E. at 319 (the confession included a description of the deceased's "house, the condition of the body and the entire condition of the woman as she was afterwards found").

50. *Id.* (the state tried the defendant for first degree murder; the jury's verdict was for second degree asking "the mercy of the court").

51. *Id.* at 300, 159 S.E. at 320.

52. 29 AM. JUR. 2d *Evidence* § 618 (1967).

4) The declaration must have been voluntary.

5) The declarant must have been in a position to have committed the crime.

6) The facts and circumstances surrounding the commission of the crime and the making of the declaration must corroborate the declaration and indicate the probability of trustworthiness.

7) The admission must be that the declarant committed the crime for which the defendant is on trial, and the admission must be inconsistent with the guilt of the defendant.[53]

The trial judge will make the initial determination as to admissibility upon a voir dire out of the presence of the jury.

Drawing from a review of the North Carolina cases on point,[54] notable cases from other jurisdictions[55] and the works of numerous authorities,[56] the court found much support for the new position. Among the more traditional arguments favoring the penal interest exception which the court noted were: that a person's desires to avoid criminal liability are as strong as his desires to protect economic interest, and therefore his declarations are as reliable; that penal interest could logically include pecuniary interest and that excluding penal interest permits manifest injustice.[57] The court discussed at length the United States Supreme Court's holding in *Chambers v. Mississippi*[58] in which Justice Powell, writing for the majority, described the exclusion of the declaration against penal interest while admitting declarations against pecuniary interest as a "materialistic limitation."[59] The court emphasized that *Chambers* held a declaration against interest to be "critical evidence";[60] and its exclusion, coupled with a refusal to permit cross-examination, was a denial of due process. The Chief Justice noted that notwithstanding the specific limitation of *Chambers* to its facts, "any reconsideraton of the admissibility of declarations against penal interest must take *Chambers v. Mississippi* into account."[61] Also men-

53. For purposes of this note, the author changed the sequence of the conditions proposed by the court.

54. The court cited: State v. Madden, 292 N.C. 114, 232 S.E.2d 656 (1977); State v. English, 201 N.C. 295, 159 S.E. 318 (1931); State v. May, 15 N.C. 328 (1833).

55. *E.g.*, Donnelly v. United States, 228 U.S. 243 (1913); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923).

56. *E.g.*, C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE (1954); 1 D. STANSBURY, NORTH CAROLINA EVIDENCE (Brandis Rev. 1973).

57. 295 N.C. at 724, 249 S.E.2d at 438.

58. 410 U.S. 284 (1973).

59. *Id.* at 299.

60. *Id.* at 302.

61. 295 N.C. at 726, 249 S.E.2d at 440.

tioned by the court as inducements were the recent trend favoring admission of such declarations[62] and the newly enacted Federal Rules of Evidence providing for the penal interest exception.[63]

Balanced against the pro-admission arguments were several policy statements that expressed the widely held fears of the intentional abuse the change would invite. Examples include that the change would open a door to a "flood of perjured witnesses falsely testifying to confessions that were never made"[64] and that one criminal with little to lose might try to exculpate another.[65] Of course, mentioned also were the traditional hearsay arguments such as: lack of cross-examination of the declarant, lack of confrontation and lack of an oath.

As analysis of the conditions for admission makes clear, if the arguments for admission won the war, the arguments against admission won some battles. The first through the third conditions (unavailability, actual jeopardy and no motive to falsify) are the usual requirements for any declaration against interest[66] with the unavailability element modified to protect the constitutional right against self-incrimination. The fourth condition (the admission must be voluntary) is probably inherent in the admission of any type of declaration and certainly so as regards any confession. The fifth and sixth conditions (the declarant must have been in a position to have committed the crime and the facts and circumstances must indicate the probability of trustworthiness) represent the battles won by the anti-admission arguments. As noted by the court, these requirements are accepted universally[67] to aid in the prevention of perjured testimony and falsified confessions. No reason is given, however, why the likelihood of perjury is any greater in penal interest declarations than any other types, which are equally admissible in criminal trials. The two conditions seem a small price to pay for the admission of evidence that might have tremendous impact in a criminal trial. No doubt, the defendants in *May* and *English* would not have complained.

The seventh condition (the admission must be that the declarant committed the crime for which the defendant is on trial and

62. Hack, *supra* note 3, at 149.

63. FED. R. EVID. 804(b)(3).

64. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 255 (1954).

65. 295 N.C. at 727, 249 S.E.2d at 440, *citing*: S. SALTZBURG AND K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 602 (2d ed. 1977) (explanatory comment on Rule 804(B)(3)).

66. *See* D. STANSBURY, *supra* note 2, at § 147.

67. *See* 295 N.C. at 727-30, 249 S.E.2d at 440-42.

must be inconsistent with the guilt of the defendant) is most difficult to rationalize. The apparent effect of this condition is to limit the use of declarations against penal interest to criminal trials, qualified by the further requirements that the declaration be a confession to the crime being tried, and that the crime be one which only one of the two could have committed. This condition seems to reflect the position taken by the court in 1883 in *State v. Beverly*,[68] that if a crime could be committed by two people as well as one, proof that one person is guilty does not in the least tend to establish the innocence of another.[69] When viewed in this light, the seventh condition is a strict rule of relevancy and amounts to a restatement of the "exclusive guilt" doctrine that developed from *State v. May*.[70] It seems an unnecessary complication that precludes the use of declarations against penal interest by the defendant except in very narrow circumstances—by the prosecution[71] and in all civil cases—without adding to the assurances of reliability already present in the fifth and sixth conditions.

CONCLUSION

The proposed declaration against penal interest exception outlined in *Haywood* may be too narrow to be of any practical significance. Because the admission vel non of the declaration will be a discretionary ruling,[72] reversible only for abuse of discretion,[73] the scope of the new rule will be determined at the trial level. Should the trial judges opt for a strict interpretation of all the conditions

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68. 88 N.C. 632 (1883).

69. *Id.* at 633.

> The straightforward answer to this statement is that as a matter of logic it is not true . . . . [I]f it appears likely or possible that two or more persons acted in concert, this will lessen the weight of the evidence in the defendant's favor, but it is the function of the jury to determine such questions of weight and credibility.

1 D. STANSBURY, *supra* note 2, at § 93, n. 8.

70. 15 N.C. 328 (1833).

71. Whether the United States Supreme Court's holding in Bruton v. United States, 391 U.S. 123 (1968), totally eliminates such use by the prosecution is not clear.

72. 295 N.C. at 730, 249 S.E.2d at 442.

73. *See, e.g.*, University Motors, Inc. v. Durham Coca-Cola Bottling Co., 266 N.C. 251, 146 S.E.2d 102 (1966); Perfecting Serv. Co. v. Product Dev. and Sales Co., 259 N.C. 400, 131 S.E.2d 9 (1963); Invesco Financial Services v. Elks, 29 N.C. App. 512, 224 S.E.2d 660 (1976); Williams v. Duke Power Co., 26 N.C. App. 392, 216 S.E.2d 482 (1975); McGrady v. Quality Motors of Elkin, Inc., 23 N.C. App. 256, 208 S.E.2d 911 (1974).

for admission, the rule will "freeze" with little hope of liberalization.

Three areas of interpretation could make the difference between a viable rule concerning declarations against penal interest and one of little import. First, the courts must make some accommodation for use of the rule in civil cases, the possible conversion of penal interest to pecuniary interest notwithstanding. The court in *Haywood* tacitly acknowledged the usefulness of the rule; and the inclusion of certain of the conditions show that, as to admissibility, the court was discussing only the criminal side. For use in civil cases, the same conditions as for any other declaration against interest should apply.

Second, in discussing other courts' interpretations of the condition that the statement actually must have jeopardized the liberty of the declarant, the court quoted *Pitts v. State,*[74] a Florida decision, that "an admission by one who had already admitted or been convicted of other similar crimes could hardly be said to be against his penal interest."[75] Such an interpretation of the against interest condition is too restrictive. One wonders what past confessions to other crimes has to do with any present confession. The question is not the severity of the penalty to which the declarant subjected himself, but rather did the statement subject him to potential penalty. The possibility of concurrent or consecutive sentences for additional crimes and their consequent effect on such issues as paroles should qualify a statement as being against penal interest. The fact that the declarant had "little" to lose goes to the weight of the evidence, not its admissibility.

The third area of interpretation may be the most critical. The seventh condition of admission, that the guilt of the declarant and the defendant be "inconsistent," is capable of at least two interpretations: 1) that their guilt must be mutually exclusive or 2) that defendant's claim of innocence be to some degree enhanced by the statements of the declarant. The latter interpretation is preferable in that it allows the recognition of the declaration against penal interest rule within the full range of its potential uses.[76] Any possi-

74. 307 So. 2d 473 (Fla. Dist. Ct. App.), *cert. dismissed*, 423 U.S. 918 (1975).

75. 295 N.C. at 729, 249 S.E.2d at 442.

76. This is especially true in light of the general rule that declarations against interest are admissible in their entirety. 1 D. STANSBURY, *supra* note 2, at § 147. A strict interpretation would preclude the use of a declaration where a third party's confession to a totally unrelated crime might cast some light on the innocence of the defendant. *See* State v. Gardner, 13 Wash. App. 194, 534 P.2d 140 (1975). It would also preclude the use of a confession by an accomplice of defendant that he,

bilities of abuse that are created by this broader interpretation are negated by the prosecution's right to enter evidence that could lessen the weight of the declaration in the mind of the trier of fact.

Fortunately, the announcement in *Haywood* is dicta. That fact is a blessing because it gives the attorneys of North Carolina an opportunity to evaluate, discuss and, if necessary, criticize the rule as explained by the court before its implementation. The final form of the declaration against penal interest exception to hearsay in North Carolina may be substantially different from that introduced in the *Haywood* decision.

Samuel W. Meekins

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the accomplice, was the one who "pulled the trigger." While such a confession would not exculpate the defendant, it certainly would prove material to the sentencing.