

Inculpatory Statements Against Penal Interest: *State v. Parris Goes Too Far*

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I. INTRODUCTION

At common law and until the adoption of the Federal Rules of Evidence in 1975, declarations against interest were viewed with great suspicion. As stated by the Court of Errors and Appeals of Connecticut in 1963, “[t]he dangers inherent in this type of evidence are so great that a trial judge should not admit [a declaration against interest] unless, in the exercise of a sound discretion, he concludes that the particular declaration against interest meets this test.”¹ The Indiana Appellate Court observed:

Where declarations [against interest] . . . are received they are “generally considered a weak class of evidence, by reason of the fact that the party making them may not have clearly expressed his meaning, or may have been misunderstood, or the witness, by unintentionally altering a few words of the expressions really used, may give an effect to a declaration completely at variance with what the party did actually say.”²

Until 1975 the strong weight of authority in the United States excluded an *exculpatory*³ declaration by an unavailable

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1. *Ferguson v. Smazer*, 151 Conn. 226, 232-33, 196 A.2d 432, 436 (1963). The test for admission of declarations against interest is whether the statement is trustworthy under the particular circumstances, “that is, that safeguards reasonably equivalent to the oath and the test of cross-examination exist.” *Id.* *Ferguson* was a bastardy case. The declaration against interest was a declaration of paternity made by George Twenty, the deceased brother-in-law of the plaintiff. The defendant offered the declaration to prove that Twenty, not the defendant, was the father of the plaintiff’s illegitimate child. Four witnesses were prepared to swear to the extrajudicial statement, but the evidence was excluded.

2. *McGraw v. Horn*, 134 Ind. App. 645, 649-50, 183 N.E.2d 206, 209 (1962) (citing *Culp v. Wilson*, 133 Ind. 294, 296, 32 N.E. 928, 929 (1893)).

3. Exculpatory statements are declarations made by an out-of-court declarant that implicate the declarant and exonerate the defendant. The defendant normally uses the statements at trial to show that someone else confessed to committing the crime. For a

witness even if the witness, rather than the defendant, had committed the crime for which the defendant stood charged.⁴ Wigmore called the rule "barbarous,"⁵ and Mr. Justice Holmes observed that "no other statement is so much against interest as a confession of murder."⁶ No one dared propose, however, that the *inculpatory*⁷ declaration of an unavailable witness in a murder trial should be received to convict the defendant when the unavailable witness declared that he and the defendant committed the crime together. Yet this has been the trend since 1975,⁸ and it is the rule laid down by the Washington Supreme Court in *State v. Parris*.⁹ Under the *Parris* rule, a declaration against penal interest by a witness, inculcating both the witness and the defendant, may be received against the defendant in a criminal trial.¹⁰ The *Parris* rule is unsound for the reasons expounded in Judge William H. Williams' dissent in *Parris*¹¹ and developed in this article.

In 1975 the United States Congress adopted Federal Rule of Evidence 804(b)(3).¹² Four years later, Washington adopted verbatim the same rule, allowing into evidence a hearsay statement that is against one's interest as an exception to the general principle of excluding hearsay statements.¹³ Although this exception

thorough explanation of exculpatory statements, see Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CALIF. L. REV. 1189, 1190 n.7 (1978). See also FED. R. EVID. 804(b)(3).

4. 5 J. WIGMORE, EVIDENCE § 1476 (Chadbourn rev. 1974).

5. *Id.* § 1477.

6. *Donnelly v. United States*, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting).

7. Inculpatory statements implicate both the declarant and the defendant. Usually, the prosecution offers out-of-court statements at trial to convict the defendant. The out-of-court declarant has more often than not—according to the extrajudicial statement—been a coconspirator or codefendant. Example: A says to B: "C and I just killed V." The question of admissibility of this statement at C's trial is the focus of this article. See Comment, *supra* note 3, at 1190 n.7.

8. See, e.g., FED. R. EVID. 804(b)(3). See also *People v. Edwards*, 396 Mich. 551, 242 N.W.2d 739 (1976).

9. 98 Wash. 2d 140, 153-54, 654 P.2d 77, 84 (1982).

10. *Id.*

11. *Id.* at 154-73, 654 P.2d at 84-94.

12. The Federal Rules of Evidence were approved January 2, 1975, and became effective July 1, 1975. Pub. L. No. 93-595, 88 Stat. 1926 (1975).

13. See *infra* note 87. WASH. R. EVID. 804(b) provides:

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

(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 him to civil or crimi-

was traditionally limited to statements against the declarant's pecuniary or proprietary interest,¹⁴ the recently adopted version departs from common law and allows into evidence hearsay statements that are against the declarant's "penal" interest.

The new "penal interest" exception specifically authorizes the receipt into evidence of extrajudicial statements that tend to subject the declarant to criminal liability, at least when the declarant is "unavailable."¹⁵ At a criminal trial, such statements may be exculpatory, exonerating the defendant, or inculpatory, implicating the defendant. Rule 804(b)(3) expressly allows exculpatory statements into evidence when "corroborating circumstances clearly indicate the trustworthiness of the statements,"¹⁶ but the rule does not mention inculpatory statements. The *Parris* court, by a 6-3 vote, indicated that statements implicating both declarant and defendant are receivable as against penal interest.¹⁷

On the other hand, a declarant's statements implicating the defendant but not the declarant would not be receivable under Rule 804(b)(3) or, presumably, under *Parris*. The fact that the declarant's interest is disserved supplies the supposed psychological badge of authenticity.¹⁸ The damnification of the defendant is justified because the declarant would probably not speak ill of himself unless the entire statement were true.

Hearsay problems and confrontation clause¹⁹ difficulties were among the reasons inculpatory statements were omitted

nal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed 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.

14. See Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1 (1944); Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451 (1952).

15. FED. R. EVID. 804(b)(3); WASH. R. EVID. 804(b)(3). For the definition of "unavailability," see FED. R. EVID. 804(a).

16. FED. R. EVID. 804(b)(3); WASH. R. EVID. 804(a).

17. 98 Wash. 2d at 149-54, 654 P.2d at 81-84. The final version of the rule did not mention inculpatory statements. The original draft, however, specifically proposed that inculpatory statements be excluded. The legislative history of this rule continues to be the subject of a variety of interpretations by the courts. Compare, e.g., 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03], at 804-110 (1981) [hereinafter cited as 4 J. WEINSTEIN] with *United States v. Alvarez*, 584 F.2d 694, 700 (5th Cir. 1978).

18. *Parris*, 98 Wash. 2d at 149, 654 P.2d at 81.

19. U.S. CONST. amend. VI.

from the rule.²⁰ Confrontation clause problems are not present with exculpatory statements because such statements do not speak "against" the defendant, but only speak in his behalf.²¹ An inculpatory statement, however, is directed against the defendant, and the sixth amendment arguably is violated if the defendant cannot confront the declarant.²² Consequently, inculpatory statements must be scrutinized intensively to see if they conform to sound hearsay doctrine and confrontation clause requirements.

In 1982, in *State v. Parris*,²³ the Washington Supreme Court allowed inculpatory statements against penal interest into evidence without intense scrutiny of either hearsay or confrontation clause requirements.²⁴ *Parris* affirmed a court of appeals decision interpreting ER 804(b)(3) to allow inculpatory statements into evidence.²⁵ The supreme court concluded that because the penal interest exception adopted the federal rule verbatim, it was a "firmly rooted exception" and therefore reliable.²⁶ The court allowed inculpatory statements into evidence even though ER 804(b)(3) does not mention inculpatory state-

20. See *California v. Green*, 399 U.S. 149 (1970) (confrontation clause and hearsay rules protect similar values, but confrontation clause is not a codification of the hearsay rules).

21. Constitutional principles mandate that exculpatory statements be admitted into evidence in certain circumstances to ensure the defendant due process and to increase the chances of a fair trial. See *Chambers v. Mississippi*, 410 U.S. 284 (1973) (admission of exculpatory statement against penal interest may be constitutionally required to preserve defendant's fundamental constitutional right to present witnesses and testimony in his own behalf).

22. As in *Parris*, the declarant may be unavailable because of his own invocation of the self-incrimination clause. 98 Wash. 2d at 144, 654 P.2d at 79.

23. 98 Wash. 2d 140, 654 P.2d 77 (1982).

24. The hearsay evidentiary requirements were outlined in *Parris*, but not closely scrutinized. These requirements included: (1) the declarant must be unavailable; (2) the statement had to be against the interest of the declarant at the time the statement was made; and (3) there must be corroborating circumstances clearly indicating the trustworthiness of the statement. *Id.* at 145-48, 654 P.2d at 79-81.

25. *State v. Parris*, 30 Wash. App. 268, 278, 633 P.2d 914, 920 (1981), *modified*, 98 Wash. 2d 140, 654 P.2d 77 (1982).

26. At least if "accompanied by corroborating circumstances clearly indicating their trustworthiness." *Parris*, 98 Wash. 2d at 148, 654 P.2d at 81. The phrase "firmly rooted exception" comes from *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). In *Roberts*, the Court focused on the specific sixth amendment confrontation problem involved when inculpatory statements are received under Fed. R. Evid. 804(b)(3). The Court stated that the constitutional confrontation clause requirements are met if the statement has adequate "indicia of reliability." *Id.* Additionally, "[r]eliability can be inferred *without more* in a case where the evidence falls within a firmly rooted hearsay exception." *Id.* (emphasis added).

ments, and even though historical precedent excluded all penal interest statements from evidence.²⁷

The facts of the *Parris* case favored receipt of the evidence, and the result was the conviction of an apparent heroin pusher. It is not just right-wing, law-and-order advocacy that today protests "coddling criminals" and "handcuffing police." The Federation of New York State Judges recently announced such a policy resolution:

The residences of people of this State have become barricaded places in which they live behind chained and bolted doors; the streets have become the lawless marches of robbers, rapists and felons of every kind who victimize men, women and children. . . . The moral law, the oath of judicial office and the Canons of Judicial Ethics require every judge to execute the law by sentencing such defendants to prison terms that will effectively punish them for the crimes that they have committed.²⁸

It is incongruous that in a "liberal" era, evidence that would have been excluded throughout the history of our country should now be received to convict a criminal defendant.

This article first demonstrates that courts historically did not trust penal interest statements in general, and that courts were extremely suspicious of any statements by a third party that implicated the defendant. Since Washington adopted Federal Rule of Evidence 804(b)(3) verbatim, this article then analyzes the legislative history of the rule. The article concludes that the legislative history favored exclusion of inculpatory statements but that Congress failed to codify the exclusion because of unrelated problems. Finally, the article discusses the confrontation clause problems that arise when inculpatory statements are allowed into evidence. This article argues that the *Parris* holding²⁹ should be narrowed, in a case now pending in the court of appeals,³⁰ to exclude inculpatory statements alto-

27. See *supra* notes 1-11 and accompanying text.

28. Quoted in Wall St. J., Apr. 25, 1984, at 26, col. 1. See also N.Y. Times, Apr. 23, 1984, at 1, col. 3.

29. 98 Wash. 2d at 153, 654 P.2d at 83-84. Although not discussed in this article, another case involving inculpatory penal interest statements came before the Washington Supreme Court in 1983. *State v. Valladares*, 99 Wash. 2d 663, 664 P.2d 508 (1983). The court adopted, without discussion, the *Parris* analysis of inculpatory statements against penal interest. *Id.* at 670, 664 P.2d at 512. Because *Valladares* did not analyze the problem, the earlier *Parris* decision remains the focus of this article.

30. *State v. Edmondson*, appeal docketed, No. 6942-3-II (Wash. Ct. App. Div. II

gether. The authors urge a rule of exclusion notwithstanding the supreme court's rejection of this claim as having little merit.³¹

II. THE *Parris* CASE

A. *Facts*

John Parris was charged in Thurston County Superior Court as an accomplice in the unlawful delivery of heroin. He was arrested while participating in a drug deal that an informant had arranged with DeHart at a Taco Time restaurant. DeHart was the charged principal in the conspiracy and the person who made the incriminating statements about Parris. An undercover police officer and the informant were at the scene of the drug purchase. Parris drove up to the restaurant and had a discussion with DeHart inside his car. After Parris drove away, DeHart told the officer and the informant that "the drugs were being gotten." In response to the informant's question, "Do you think he'll return with the drugs, or the money and the quantity and quality will be accurate?", DeHart replied, "Yes, I think so. There won't be any problem."³²

Later, at a prearranged time, all parties returned to the restaurant. DeHart walked out from behind the building and delivered the heroin to the undercover police officer. At the same time, the police officer spotted the car that Parris had been driving earlier, leaving the back of the parking lot.

At trial, DeHart claimed his fifth amendment privilege against self-incrimination and was therefore unavailable as a witness.³³ The prosecutor examined the police officer and the informant regarding DeHart's out-of-court statements made at the scene of the drug deal. The superior court found the testimony admissible as penal interest statements under ER 804(b)(3). The court of appeals affirmed that decision.³⁴

Jan. 31, 1984). See *infra* text accompanying note 219.

31. *State v. Valladares*, 99 Wash. 2d 663, 667-68, 664 P.2d 508, 511 (1983) (argument that inculpatory statements against penal interest implicating an accused are per se inadmissible not well received by the court).

32. *Parris*, 98 Wash. 2d at 143, 654 P.2d at 78. The dissent argued that the statements made by DeHart at the scene of the crime were inherently untrustworthy because they were made in response to various questions from the informant and the police officer. *Id.* at 155, 162-63, 654 P.2d at 84, 88-89 (Williams, J., dissenting).

33. A declarant is considered unavailable if the declarant "[i]s exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement." FED. R. EVID. 804(a)(1); WASH. R. EVID. 804(a)(1).

34. *State v. Parris*, 30 Wash. App. 268, 279, 633 P.2d 914, 921 (1981), *modified*, 98

B. Analysis

In affirming the courts below, the Washington Supreme Court allowed into evidence inculpatory statements made against a criminal defendant without adequately addressing the newly enacted penal interest exception. The court ignored long-standing policies against penal interest statements as a whole and policies against inculpatory statements in particular. These policies should have given the court guidance to fill in a legislative omission. Instead, the court adopted a controversial federal circuit court case, *United States v. Alvarez*,³⁵ that had accepted inculpatory statements without a thorough analysis of the inherent differences between inculpatory and exculpatory³⁶ statements and without adequately addressing the confrontation clause problems.

The *Parris* court briefly examined³⁷ the legislative history of Federal Rule of Evidence 804(b)(3), as discussed in *Alvarez*. The court concluded that the legislative omission of inculpatory statements meant that these statements were to be admitted into evidence.³⁸ A closer look at legislative history reveals that the drafters of the bill and the House wanted total exclusion of such statements.³⁹

The *Parris* court also failed to scrutinize closely the sixth amendment confrontation problem, even though the holding

Wash. 2d 140, 654 P.2d 77 (1982).

35. 584 F.2d 694 (5th Cir. 1978). Throughout the *Parris* opinion the court relied on the *Alvarez* court's interpretation of the Federal Rules of Evidence. See also *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981) (inculpatory statements were not received in evidence because of the custodial context in which the statements were obtained). Cf. *United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981), cert. denied, 103 S. Ct. 742 (1983); *United States v. Palumbo*, 639 F.2d 123 (3d Cir.), cert. denied, 454 U.S. 819 (1981). Contra *United States v. Lilley*, 581 F.2d 182, 188 (8th Cir. 1978); *United States v. White*, 553 F.2d 310, 315 (2d Cir.), cert. denied, 431 U.S. 972 (1977).

36. Exculpatory statements have been constitutionally mandated in some cases. See *supra* note 21. Similarly, the confrontation clause mandates exclusion of inculpatory statements in certain situations. But see Justice Williams' dissent in *Parris* for a different treatment. 98 Wash. 2d at 157-60, 654 P.2d at 85-87.

37. 98 Wash. 2d at 147-48, 654 P.2d at 81.

38. *Id.* at 148, 654 P.2d at 81. In his dissent, Justice Williams discussed the original version of FED. R. EVID. 804(b)(3). 98 Wash. 2d at 158, 654 P.2d at 86.

39. See *infra* text accompanying notes 101-36. Justice Rosellini discussed the legislative history of FED. R. EVID. 804(b)(3) in two short paragraphs. *Parris*, 98 Wash. 2d at 147-48, 654 P.2d at 81. The court of appeals omitted in the text of its opinion any reference to the legislative history of the rule. The court did, however, insert two footnotes that attempted to deal with the rule's confusing legislative history. *Parris*, 30 Wash. App. at 276 nn.7-8, 633 P.2d at 919 nn.7-8.

allowed inculpatory statements into evidence without permitting the defendant to confront the witness who spoke against him.⁴⁰ Washington's constitution, which calls for "face-to-face" confrontation, suggests a special concern for confrontation clause problems in the criminal context.⁴¹ This concern is underscored further by the codification of the confrontation right in the Revised Code of Washington⁴² and by Washington's history of protecting the defendant when confrontation problems arise in a criminal context.⁴³

Finally, the *Parris* court completely ignored the history and policies of the statement against interest exception and its recent expansion allowing penal interest statements into evidence. That history shows that Washington should have adopted a narrow reading of rule 804(b)(3) because of the inherent unreliability of third party out-of-court statements that implicate a criminal defendant.⁴⁴

III. HISTORY OF THE PENAL INTEREST EXCEPTION

The rule against hearsay⁴⁵ has traditionally mandated that any out-of-court statement offered to prove the truth of the matter asserted be excluded from evidence. Hearsay statements were considered inadmissible because they were inherently unreliable.⁴⁶ Certain situations, however, naturally ensured that an

40. 98 Wash. 2d at 144, 654 P.2d at 79. The sixth amendment to the United States Constitution guarantees the right of a criminal defendant to confront the witnesses against him. See generally *Davis v. Alaska*, 415 U.S. 308 (1974) (discussing the requirements and purposes of the confrontation clause); *California v. Green*, 399 U.S. 149 (1970) (minimum requirements under the confrontation clause).

41. WASH. CONST. art. I, § 22. The Washington Constitution has a provision parallel to the sixth amendment, but adds that: "the accused shall have the right . . . to meet the witnesses against him *face to face*." *Id.* (emphasis added). In his dissent Justice Williams recognized that these words mean physical confrontation between the witness and the defendant. *Parris*, 98 Wash. 2d at 154, 654 P.2d at 84. Although the court discussed the sixth amendment confrontation problem and cited several federal cases, the majority did not mention Washington's constitutional protections.

42. WASH. REV. CODE § 10.52.060 (1983).

43. See, e.g., *In re Pettit*, 62 Wash. 2d 515, 383 P.2d 889 (1963); *State v. Roberts*, 25 Wash. App. 830, 611 P.2d 1297 (1980); *State v. Solomon*, 5 Wash. App. 412, 487 P.2d 643 (1971).

44. See *infra* notes 101-36 and accompanying text.

45. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

46. The unreliability of hearsay statements stems from the want of an oath, the absence of cross-examination, and the inability of the jury to view the declarant's demeanor. See, e.g., *California v. Green*, 399 U.S. 149, 158 (1970); *Donnelly v. United*

out-of-court statement was reliable. Thus, well-recognized exceptions to the hearsay rule evolved.⁴⁷

One of the exceptions to the hearsay rule was the "statement against interest" exception.⁴⁸ The common law allowed into evidence statements against the declarant's pecuniary or proprietary interest when the declarant was unavailable⁴⁹ at trial. Only statements against one's property or monetary interests were included at common law. Experience of human nature suggested that a person would not ordinarily make a statement against these interests unless it were true.⁵⁰ Additionally, these types of interests were usually evidenced by some sort of writing.⁵¹ The statements were, therefore, considered reliable, and the need to exclude them under the hearsay rule vanished.

Although hearsay statements against one's pecuniary and proprietary interests were allowed into evidence at common law, statements against one's penal interest were excluded. Such statements were treated with great distrust, a distrust stemming from the famous *Sussex Peerage* case.⁵² In *Peerage*, the Committee for Privileges of the House of Lords refused to admit penal statements at trial because it feared that if these statements were admitted, defendants' rights would suffer. The Com-

States, 228 U.S. 243, 273 (1913). See also C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 245 (2d ed. 1972); 4 J. WEINSTEIN, *supra* note 17, ¶ 801; 5 J. WIGMORE, *supra* note 4, § 1362.

47. Federal Rules of Evidence 803 and 804 enumerate a variety of exceptions to the general exclusion of hearsay statements.

48. A statement against one's criminal interest was not included within this exception at common law. Jefferson, *supra* note 14, at 39-40.

49. The declarant is still required to be unavailable. FED. R. EVID. 804; WASH. R. EVID. 804. This is consistent with the need to show a "special necessity" before the statement will be allowed into evidence. C. McCORMICK, *supra* note 46, § 253, at 608; Comment, *Evidence: The Unavailability Requirement of Declaration Against Interest Hearsay*, 55 IOWA L. REV. 477, 478 (1969).

50. McCormick agreed that the principal rationale for this exception is based upon the experience of human nature. C. McCORMICK, *supra* note 46, § 278. See also G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 77 (1978) (common observation probably supports the proposition that one is unlikely to make a dissembling statement unless it is true); 11 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE ¶ 804.06(3)[1], at VIII-277 (2d ed. 1948).

51. Some commentators suggest that the only viable reason that the statements against interest exception was limited to pecuniary or proprietary interests was that these interests usually appeared in accounting books or some other type of document, decreasing the likelihood of fabrication. See, e.g., 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 150, at 234 (16th ed. 1899) (common law reliance on documentary evidence); 5 J. WIGMORE, *supra* note 4, § 1476, at 350 (possibility of fabrication the only plausible reason to exclude penal interest statements).

52. 8 Eng. Rep. 1034 (H.L. 1844).

mittee was confronted with an exculpatory statement against penal interest, but expressed concern that if the rule were expanded beyond these exculpatory statements, prosecutors could unjustly use statements that implicated the defendant.⁵³ The Committee was concerned about the trustworthiness of all penal interest statements, but expressly rejected any type of statement implicating a criminal defendant.⁵⁴

Federal and state courts in the United States followed *Sussex Peerage*.⁵⁵ In 1913 the United States Supreme Court, though divided 6-3, rejected penal interest statements in *Donnelly v. United States*.⁵⁶ The *Donnelly* Court argued that the virtually unanimous weight of state court authority was against penal interest statements.⁵⁷ The Court did not review its own authority because it was deemed well settled that penal interest statements were to be excluded.⁵⁸ The Court also noted that the dangers of hearsay in general are great, and that no court should lightly yield to the "introduction of fresh exceptions."⁵⁹

Additional considerations justified exclusion of penal interest statements. Declarations of criminal activity are often motivated by selfish considerations and are not as reliable as statements against pecuniary or proprietary interest.⁶⁰ Judicial exclusion of penal interest statements prevailed until 1975, when Congress promulgated the new evidence rules.

Justice Holmes advocated acceptance of exculpatory penal interest statements in his famous dissent in *Donnelly*, in which he stated: "[N]o other statement is so much against interest as a confession of murder."⁶¹ Holmes was concerned in *Donnelly*, however, with *exculpatory* statements and the defendant's constitutional right to produce a witness. No one has suggested that the renowned dissenter advocated receipt of *inculpatory* penal

53. *Id.* at 1042.

54. *Id.* at 1045.

55. *See, e.g.*, *People v. Edwards*, 47 Mich. App. 307, 309, 209 N.W.2d 527, 528 (1973); *Halvorsen v. Moon & Kerr Lumber Co.*, 87 Minn. 18, 21-22, 91 N.W. 28, 29 (1902); *In re Wininegar*, 337 P.2d 445, 451-52 (Okla. Crim. 1958) (rehearing opinion). *See also* cases cited at 5 J. WIGMORE, *supra* note 4, §§ 1476-77.

56. 228 U.S. 243, 276 (1913).

57. *Id.* at 273-74 n.1.

58. *Id.* at 276.

59. *Id.* at 276-77.

60. *See generally* Note, *Declarations Against Penal Interest: What Must Be Corroborated Under the Newly Enacted Federal Rule of Evidence, Rule 804(b)(3)*, 9 VAL. U.L. REV. 421 (1975).

61. 228 U.S. at 278 (Holmes, J., dissenting).

interest statements.

Although some commentators argued that excluding penal interest statements was illogical,⁶² such statements were almost universally excluded until the new federal rules were promulgated in 1975. Even subsequent to adoption of the Federal Rules of Evidence, some states declined to adopt the penal interest exception.⁶³

IV. HISTORY OF PENAL INTEREST STATEMENTS IN WASHINGTON

Before 1967 Washington adhered strictly to the *Donnelly* policy that penal interest statements were inherently unreliable.⁶⁴ In 1967 the Washington Supreme Court excluded exculpatory statements in *State v. Garrison*.⁶⁵ The court concluded that the statement against interest exception included only proprietary or pecuniary interests. The court did not reach the penal interest issue because the statement was held not to be one against the declarant's "interest" and because the declarant was not, as the rule requires, unavailable.⁶⁶

62. Wigmore referred to the exclusion of penal interest statements as a "barbarous doctrine." 5 J. WIGMORE, *supra* note 4, § 1477, at 360. He argued that a person would be just as unlikely to make a statement that would subject him to criminal punishment as he would in circumstances involving monetary or property obligations. Additionally, Wigmore said that the *Peerage* decision represented a step backward in the rule of exceptions for statements against interest. *Id.* § 1476, at 351.

Weinstein states that the likelihood of perjured confessions to crimes is a policy reason for rejecting the penal interest exception, even though most courts fail to recognize this as a basis for their decisions. 4 J. WEINSTEIN, *supra* note 17, ¶ 804(b)(3)[01], at 804-91. *See also* C. McCORMICK, *supra* note 46, § 278 (hypothesizing that "the fear of opening a door to a flood of prepared witnesses falsely testifying to confessions that were never made," was a motivation for exclusion of penal statements). *But see* Jefferson, *supra* note 14, at 39-43; Note, *supra* note 60, at 424.

63. ARK. STAT. ANN. § 28-1001, Rule 804(b)(3)(1979); FLA. STAT. ANN. § 90.804(2)(c) (West 1979); ME. R. EVID. 804(b)(3) (1982); NEV. REV. STAT. § 51.345 (1979); N.J. STAT. ANN. § 2A:84A, Rule 63(10) (West 1976); N.D. R. EVID. 804(b)(3) (1983).

64. *See, e.g.,* Allen v. Dillard, 15 Wash. 2d 35, 54-60, 129 P.2d 813, 821-24 (1942) (setting out the traditional theory of this exception and outlining the common law requirements).

65. 71 Wash. 2d 312, 427 P.2d 1012 (1967). Garrison was charged with burglary in the second degree. He was stopped in a car that was carrying four cases of beer that had been spotted earlier being carried out the back door of a tavern. *Id.* at 312-13, 427 P.2d at 1013. The defendant sought to admit statements by his accomplice to a police officer that the stolen beer belonged to the accomplice and that the defendant had had nothing to do with getting the beer. *Id.* at 313, 427 P.2d at 1013.

66. *Id.* at 314, 427 P.2d at 1014. No reason was given why the declarant could not be subpoenaed or why he would not testify. The court noted that the statement was not against the declarant's penal interest because it was not a declaration for which he could be punished. *Id.* The statements were merely an attempt to absolve both the declarant

Two appellate courts, just prior to adoption of the new federal rules, briefly discussed penal interest statements.⁶⁷ In *State v. Grant*, the court noted that case law in other jurisdictions was split on whether or not penal interest statements should be allowed into evidence.⁶⁸ The court, however, did not directly confront the issue because the general requirement of unavailability had again not been met.⁶⁹

In *State v. Wicker*,⁷⁰ the appellate court stated that the question of the penal interest exception in Washington was "an open one."⁷¹ The court noted, however, that the "confession of an 'accomplice' . . . is . . . unreliable[,] . . . particularly where it is uncorroborated and not inherently inconsistent with the guilt of the accused."⁷² The *Wicker* court cited the then proposed federal rule for the proposition that even exculpatory statements are unreliable.⁷³

Following adoption of the federal rules, Washington courts confronted exculpatory penal interest statements in *State v. Gardner*.⁷⁴ The court concluded that declarations against penal interest could be admitted into evidence as exceptions to the hearsay rule only when all constitutional and evidentiary requirements were met.⁷⁵ The court struggled with the new constitutional mandate to admit certain exculpatory statements into evidence when due process so required.⁷⁶ The court was forced to address the issue when the defendant argued that an

and the defendant from the burglary, rather than the admission of an unlawful act. *Id.*

67. *State v. Wicker*, 10 Wash. App. 905, 520 P.2d 1404 (1974); *State v. Grant*, 9 Wash. App. 260, 511 P.2d 1013 (1973), *cert. denied*, 419 U.S. 849 (1974).

68. 9 Wash. App. 260, 268, 511 P.2d 1013, 1018 (1973).

69. *Id.* at 268, 511 P.2d at 1018-19. Although *Grant* involved exculpatory statements, the court was hesitant, because of the heinous nature of the murders, to allow defendants to bring in unreliable evidence. Two women had been raped, stabbed, and asphyxiated, and two six-year-old boys had been beaten and stabbed to death. *Id.* at 261-63, 511 P.2d at 1015.

70. 10 Wash. App. 905, 520 P.2d 1404 (1974).

71. *Id.* at 909, 520 P.2d at 1406.

72. *Id.*

73. *Id.*

74. 13 Wash. App. 194, 534 P.2d 140 (1975). In *Gardner*, a prostitute was on trial for assault and battery for using a piece of glass to slash a man's eye. The defendant claimed that it was an act of self-defense. Part of her defense was the statement of a young woman who had been a witness at the scene corroborating the defendant's self-defense claim. The young woman was killed prior to trial, however, and the defense attorney offered the dead woman's statement. *Id.* at 195-96, 534 P.2d at 140-41.

75. *Id.* at 196, 534 P.2d at 141.

76. *Id.* at 197, 534 P.2d at 141.

exculpatory statement had to be admitted as a matter of constitutional due process.⁷⁷

The *Gardner* court held that the United States Constitution required certain exculpatory penal interest statements to be admitted on behalf of the defendant.⁷⁸ The court remained suspicious of exculpatory statements, however, and adopted a stringent test for their admissibility:⁷⁹ the admission of such evidence must be necessary to prevent "manifest injustice."⁸⁰ *Gardner* failed to meet these strict requirements and the exculpatory statement was excluded at trial.⁸¹

The *Gardner* court adhered to the view that penal interest statements are unreliable.⁸² The court cited decisions in other jurisdictions evincing a reluctance to expand the traditional statement against interest exception because of the unreliability of criminal confessions, which are often motivated by extraneous considerations.⁸³

The Washington Supreme Court adopted the penal interest rule, as formulated by *Gardner*, in *State v. Young*.⁸⁴ Although the court found exculpatory statements constitutionally mandated in some instances, the court remained skeptical of penal interest statements in general and emphasized that the majority of states would not allow any type of penal interest declaration into evidence.⁸⁵

77. The defendant cited *Chambers v. Mississippi*, 410 U.S. 284 (1973), as authority for her claim. When the petitioner in *Chambers* was not allowed to cross-examine a witness or introduce testimony important to his case, the Supreme Court held that he had been denied a fair trial in violation of the due process clause. *Id.* at 302.

78. 13 Wash. App. at 196, 534 P.2d at 141.

79. The *Gardner* court stated that "[w]hat *Chambers* does is to constitutionally mandate use of the declaration against penal interest exception . . . when the evidence offered under that exception equates with the objective special circumstances found in *Chambers*, and the admission of such evidence is necessary to prevent manifest injustice." *Id.* at 198, 534 P.2d at 142.

80. *Id.* at 200, 534 P.2d at 143.

81. *Id.* at 199, 534 P.2d at 143.

82. *Id.* at 198-99, 534 P.2d at 142-43.

83. *Id.* at 199, 534 P.2d at 143. See also F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 114-15 (2d ed. 1967) (some confessions are motivated by the promise of leniency or immunity); T. REIK, *THE COMPULSION TO CONFESS* 261 (3d ed. 1959) (examines courts' reluctance to admit penal interest statements because of a fear of perjury and false confessions).

84. 89 Wash. 2d 613, 627, 574 P.2d 1171, 1180, cert. denied, 439 U.S. 870 (1978).

85. *Id.* at 626, 574 P.2d at 1179. *Young* was typical of a pattern that emerged in other courts of excluding exculpatory statements in murder trials. In *Young*, a bomb had been sent to the chambers of the judge who was going to sit at *Young's* pre-trial hearing. The bomb exploded, instantly killing the judge. The court refused to admit into evidence

One year after *Young*, Washington adopted Federal Rule of Evidence 804(b)(3).⁸⁶ The new rule and accompanying comments did not address inculpatory statements. The comment to ER 804(b)(3) stated that Washington had no prior authority on statements furnishing the basis for criminal liability and that rule 804 "expands" and "clarifies" the scope of the exception.⁸⁷ ER 804(b)(3) expanded the common law exception by embracing exculpatory statements.⁸⁸ However, because it omitted any mention of inculpatory statements,⁸⁹ the rule did not "clarify" the scope of the exception.

Following codification of the penal interest exception, Washington maintained stringent requirements for the admissibility of exculpatory statements against penal interest.⁹⁰ In 1980 the Washington Court of Appeals refused to admit exculpatory statements in *State v. Russell*⁹¹ because the minimum evidentiary requirements enumerated in *Chambers* had not been met.⁹² *Russell* sought admission of the written statement of a friend.⁹³ The statement would have suggested that its author had misrepresented her identity to the defendant and that the defendant had been given permission to use two credit cards that purportedly belonged to the author but that were in fact stolen.⁹⁴ The trial court excluded the statement.⁹⁵

Although *Russell* excluded an exculpatory penal interest statement, a footnote in the opinion intimated that ER 804 may

letters sent to the news media from an organization calling itself the People's Army and stating that the judge had been assassinated as "a purely military act of class struggle." *Id.* The court relied on the failure to meet the unavailability requirement when it denied defendant's attempt to admit the letters as exculpatory statements. *Id.* at 627, 574 P.2d at 1180.

86. The Washington Rules of Evidence became effective on April 2, 1979.

87. WASH. R. EVID. 804(b)(3) comment. One Washington commentator believed that inculpatory statements were without question part of the new 804 exception. See Meisenholder, *Federal Rules 803(17)-806*, in THE PROPOSED WASHINGTON RULES OF EVIDENCE 84, 127 (1978) (sponsored by U. of Puget Sound, Continuing Legal Education). The rule permits the prosecution to introduce declarations that inculpate the accused, but places specific limitations upon introduction of an exculpatory statement. Additionally, inculpatory statements introduced by the prosecutor need not be supported by corroborating evidence under the literal language of the rule. *Id.* at 122-28.

88. See *supra* note 3 and accompanying text.

89. See *supra* note 7 and accompanying text.

90. See *infra* notes 91-98 and accompanying text.

91. 27 Wash. App. 309, 617 P.2d 467 (1980).

92. *Id.* at 314-15, 617 P.2d at 471.

93. *Id.* at 311, 617 P.2d at 469.

94. *Id.*

95. *Id.*

have weakened Washington's strict criteria.⁹⁶ The court noted that "a relevant statement is admissible even though it may not be inconsistent with the guilt of the accused so long as it is clearly trustworthy."⁹⁷ However, since the court was confronted with an exculpatory statement, no inference that the rule should be broadened to include inculpatory statements can be indulged. Additionally, in 1982 the same appellate court specifically listed the "inherently inconsistent with the guilt of the accused" language as a requirement before the penal interest statement could be introduced at trial.⁹⁸

It was against this background of distrust that the Washington Court of Appeals confronted inculpatory statements against penal interest in *State v. Parris*.⁹⁹ The court permitted the admission of inculpatory statements even though the state and federal constitutions suggest, and possibly require, exclusion of these statements. The Washington Supreme Court affirmed,¹⁰⁰ thus ignoring Washington's apparent policy and its historical disfavor of hearsay statements in general and inculpatory statements against penal interest in particular.

V. LEGISLATIVE HISTORY OF FEDERAL RULE 804(b)(3)

The court of appeals stated in *State v. Parris* that the failure of Congress to include inculpatory statements in the 804(b)(3) exception was due in part to legislative "oversight."¹⁰¹

96. *Id.* at 314 n.1, 617 P.2d at 471 n.1.

97. *Id.*

98. *State v. Castro*, 32 Wash. App. 559, 566, 648 P.2d 485, 490 (1982). Even though the defendant argued that due process required admission under *Chambers*, the court said that the trial court has the discretion to judge corroboration requirements. The *Castro* court found insufficient corroboration. *Id.* at 565-66, 648 P.2d at 490.

99. 30 Wash. App. 268, 633 P.2d 914 (1981), *modified*, 98 Wash. 2d 140, 654 P.2d 77 (1982). *See also State v. Valladares*, 31 Wash. App. 63, 639 P.2d 813 (1982), *aff'd in part and rev'd in part*, 99 Wash. 2d 663, 664 P.2d 508 (1983).

100. 98 Wash. 2d at 154, 654 P.2d at 84.

101. 30 Wash. App. at 276 n.8, 633 P.2d at 919 n.8. The court did not address the legislative history in the text of the opinion. In a footnote, however, the court stated:

ER 804(b)(3) makes the corroboration requirement expressly applicable only to *exculpatory* statements. A review of the legislative history of Fed. R. Evid. 804(b)(3) indicates the failure to make the corroboration requirement applicable to inculpatory statements stems partly from a misreading of Supreme Court decisions regarding the confrontation clause and partly from legislative oversight. (Citations omitted.) Recent federal cases construing the new Fed. R. Evid. (804)(b)(3) have generally applied the corroboration requirement to inculpatory statements. *See United States v. Sarmiento-Perez*, [633 F.2d 1092 (5th Cir. 1981)]; *United States v. Oliver*, 626 F.2d 254 (2d Cir. 1980); *United*

The state supreme court explained that the only "sensible explanation" for the omission of inculpatory statements is that the drafters wanted to leave the task of delineating the requirements for admissibility to the courts.¹⁰² As the following discussion demonstrates, the omission of any reference to inculpatory statements in the rule was not an "oversight." The legislative history of the rule indicates that inculpatory statements were distrusted and were meant to be excluded.

A. Advisory Committee

The first Advisory Committee draft of rule 804 was published in 1969.¹⁰³ This first draft of the rule departed from the common law rule of excluding penal interest statements and explicitly allowed exculpatory statements against penal interest into evidence.¹⁰⁴ The last sentence of the draft, however, clearly stated that inculpatory statements were to be excluded under the rule.¹⁰⁵ The committee relied¹⁰⁶ on the dissent in *Bruton v.*

States v. Alvarez, 584 F.2d 694 (5th Cir. 1978). We agree with these cases and believe the corroboration requirement should apply to inculpatory statements. The drafters of the federal rule left to the courts the task of delineating the requirements regarding admissibility of inculpatory statements because of the constitutional questions raised by such statements. *Alvarez*, 584 F.2d at 700. Applying the corroboration requirement to inculpatory statements is consistent with the "indicia of reliability" language in *Roberts*, 448 U.S. at 66. Further, failure to require corroboration of inculpatory statements would subvert the general scheme of the Rules of Evidence, for without the corroboration requirement the statement against penal interest exception would allow the state to circumvent the traditional safeguards surrounding the coconspirator exception to the hearsay rule, ER 801(d)(2). See *Alvarez*, 584 F.2d at 701.

Id. at 276 n.8, 633 P.2d at 919 n.8.

102. 98 Wash. 2d at 148, 654 P.2d at 81.

103. In its preliminary form, the rule was originally numbered 804(b)(4). Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 378 (1969). The rule was renumbered during the course of congressional consideration and emerged in its final form as FED. R. EVID. 804(b)(3).

104. The first draft was published after three-and-one-half years of study by an Advisory Committee appointed by Chief Justice Warren in 1965 to draft rules of evidence for the federal courts. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 173-74 (1969).

105. The first draft provided:

(4) 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 him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or social disapproval, that a reasonable man in his position would not have made the statement unless he believed it to be true. *This example does not include a statement or confession offered against the accused in a criminal case, made*

*United States*¹⁰⁷ arguing that inculpatory statements are inherently unreliable.¹⁰⁸

Subsequent to the first proposed draft, the rule passed through two sessions of the Standing Committee and publication for comment by bench and bar with the last sentence excluding inculpatory statements unchanged.¹⁰⁹ Shortly thereafter, however, the last line of Rule 804(b)(3) was deleted.¹¹⁰ This ill-conceived revision, some suggest, was prompted by certain powerful politicians in Congress.¹¹¹ The sentence was dropped in the final version of the rule.¹¹²

Although the final draft of the Advisory Committee did not refer to inculpatory statements, the Advisory Committee's concluding note to the Federal Rules of Evidence cautioned against allowing inculpatory statements into evidence.¹¹³ The note cited

by a codefendant or other person implicating both himself and the accused.
46 F.R.D. at 378 (emphasis added).

106. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 386 (1969) (statements by codefendants implicating each other are unreliable because of self-serving circumstances).

107. 391 U.S. 123 (1968).

108. *Id.* at 138-44.

109. The sentence was retained in the 1971 Advisory Committee draft. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 438-39 (1971). After publication of the March 1971 draft, criticisms and suggestions were once more submitted to the committee.

110. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 321 (1973).

111. Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159, 175-76 (1983). The author suggests that Senator John L. McClellan, Chairman of the Senate Subcommittee of Criminal Laws and Procedure of the Senate Committee on the Judiciary, introduced a bill that would strip the courts of some rule-making power in response to the Proposed Draft. The Senator thought that the inclusion of the last sentence would further weaken the federal system of criminal justice. *Id.* at 175 n.109. "I would omit entirely the last sentence of 804(b)(1) [sic]." 117 CONG. REC. 33,648 (1971) (remarks by Senator McClellan). See also Tague, *Perils of the Rulemaking Process: The Development, Application and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851 (1981). Tague refers to a letter that Senator McClellan sent to the Chairman of the Standing Committee saying that he would expend all efforts to prohibit further erosion of the federal justice system. *Id.* at 873.

See also Comment, *supra* note 3. The Comment mentions statements by Charles R. Halpern and George T. Frampton to the House Subcommittee on Criminal Justice referring to political pressures. Both speakers pointed to Senator McClellan as coercing the Advisory Committee into making certain changes by threatening to obstruct the entire project. The Comment suggests that looking to the Advisory Committee's silence on inculpatory statements is suspect and inadequate. *Id.* at 1193-94.

112. See FED. R. EVID. 804(b)(3).

113. FED. R. EVID. 804(b)(3) advisory committee note.

*Douglas v. Alabama*¹¹⁴ and *Bruton v. United States*¹¹⁵ as cases that had assumed the inadmissibility of all third-person inculpatory statements.¹¹⁶ The note expressly outlined two major cautions that suggest the Committee's true stance favored exclusion of all inculpatory statements.¹¹⁷ The first caution was that a suspect's motivation to win the favor of prosecutorial authority renders inculpatory statements inherently suspect.¹¹⁸ The motivation to save one's own neck may be present any time a codefendant or coconspirator makes an inculpatory statement, regardless of whether or not the declarant is in police custody. Such inculpatory statements tend to exonerate the declarant by redirecting and spreading responsibility. The motivation behind such statements makes them grossly unreliable.

The Advisory Committee also warned that "[t]he rule does not purport to deal with questions of the right of confrontation."¹¹⁹ This caution mandates an intense constitutional scrutiny of inculpatory statements and suggests that inculpatory statements should be regarded with special suspicion.

The final advisory draft, which deleted any reference to inculpatory statements, was sent to the congressional committees.¹²⁰ Congress was split on the issue of inculpatory statements. The House of Representatives sided with the Advisory Committee's policies and reinserted, with a slight change in the original wording, the final sentence of 804(b)(3)¹²¹ excluding

114. 380 U.S. 415 (1965).

115. 391 U.S. 123 (1968).

116. FED. R. EVID. 804(b)(3) advisory committee note.

117. *Id.*

118. The idea that a declarant who is currying favor with authorities will be unreliable has been used in many jurisdictions to justify the exclusion of inculpatory statements. *See, e.g., Bruton v. United States*, 391 U.S. 123, 141 (1968) (White, J., dissenting); *United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981), *cert. denied*, 103 S. Ct. 742 (1983) ("curry favor" language used); *United States v. Palumbo*, 639 F.2d 123, 128 (3d Cir. 1981), *cert. denied*, 454 U.S. 819 (1981) ("curry favor" expression used); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (5th Cir. 1981); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980); *United States v. Bailey*, 581 F.2d 341, 345 (3d Cir. 1978).

119. FED. R. EVID. 804(b)(3) advisory committee note.

120. The Supreme Court, over the procedural dissent of Mr. Justice Douglas, also approved this version before it was submitted to the Congress. Douglas was concerned that such action would lend too much weight to the rule and stated that the Court's function is as a conduit, approval being purely perfunctory. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 185-86 (1973).

121. HOUSE COMM. ON THE JUDICIARY, REPORT ON THE FEDERAL RULES OF EVIDENCE, H.R. REP. No. 650, 93d Cong., 1st Sess. 16, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7089 [hereinafter cited as HOUSE REPORT].

inculpatory statements.¹²² The House addressed its reasons for excluding inculpatory statements in its final note, which asserted that the sentence was added "to codify the doctrine of *Bruton*."¹²³ The House apparently sought to protect the criminal defendant's constitutional rights.¹²⁴

The Senate Judiciary Committee, however, deleted the reference to inculpatory statements.¹²⁵ The Senate did not argue that inculpatory statements are reliable and should be received, but chose to attack the House's attempted codification of a constitutional principle.¹²⁶ The Senate was also concerned that the House version of the rule would exclude inculpatory statements even if those statements fell under another hearsay exception or exclusion,¹²⁷ such as vicarious admissions and "coconspirator's statements."

Because of the difference between the House and Senate versions, the issue had to be resolved by a Joint Conference Committee. The Conference Committee accepted the Senate's version of 804(b)(3) and deleted any reference to inculpatory statements.¹²⁸ The Committee aligned itself with the Senate's reasoning that Congress should "avoid attempting to codify constitutional evidentiary principles."¹²⁹ The Senate had been concerned that sixth amendment principles could be stifled in the future by such a blanket exclusion of all inculpatory statements.¹³⁰ As a result, the final version of rule 804(b)(3) had no express reference to inculpatory statements against penal interest.¹³¹

122. The final sentence of rule 804(b)(3) read: "A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception." 4 J. WEINSTEIN, *supra* note 17, at 804-11.

123. HOUSE REPORT, *supra* note 121.

124. *Id.*

125. SENATE COMM. ON THE JUDICIARY, REPORT ON THE FEDERAL RULES OF EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 21-22, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7068 [hereinafter cited as SENATE REPORT].

126. *Id.*

127. *Id.*

128. COMM. OF CONFERENCE, REPORT ON THE FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 1597, 93d Cong., 2d Sess. 12, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7098, 7106.

129. *Id.*

130. SENATE REPORT, *supra* note 125.

131. On Dec. 16, 1974, the Senate agreed to the Conference version of the rules. 120 CONG. REC. 40,069-070 (1974). Two days later, the House also accepted that version. *Id.* at 40,890-96. The rules became effective on July 1, 1975.

The omission of any reference to inculpatory statements in rule 804(b)(3) may be interpreted in two divergent ways. One interpretation is that the omission of the word "inculpatory" solidifies the drafters' intent to make these statements admissible. This means that the "omission" left to the courts the task of deciding the admissibility of these statements.¹³² On the other end of the spectrum, another interpretation concludes that because the original intent was to exclude inculpatory statements, and because the Advisory Committee note gave two express warnings against inculpatory statements, these statements should be banned from evidence.¹³³ The rationale for this viewpoint is that the last sentence of the rule was dropped because of unjustified Senate fears that actually support the exclusion of inculpatory statements.¹³⁴

Although the legislative history of inculpatory statements in the Senate and the House was inconsistent, the initial intent of the drafting committee and the notes following the proposed evidence rules supported the conclusion that inculpatory statements ought to be excluded.¹³⁵ Other traditional hearsay exceptions would still be available to prosecutors and litigants. This conclusion is in accord with the continuing view of many commentators who have considered the matter, and with the practice of pre-1975 courts that inculpatory statements against penal interest are inherently unreliable and should be excluded. The new penal interest exception is being used as a "fall-back" for prosecutors when they cannot justify receipt in evidence of the same statement under a traditional hearsay exception.

VI. FEDERAL CASE ANALYSIS OF FEDERAL RULE OF EVIDENCE 804(b)(3)

After congressional codification of rule 804, federal circuit

132. See Comment, *supra* note 3, at 1191. The author neglects the two cautionary statements that the same committee made. In addition, no credence is given to the fact that influential political pressures might have motivated the committee to drop its original sentence. See *supra* text accompanying note 111.

133. See *supra* text accompanying notes 118-19.

134. See 4 J. WEINSTEIN, *supra* note 17, ¶ 804(b)(3)[03], at 804-112 to -114. Weinstein's argument focuses on the initial drafting that excluded inculpatory statements and the confrontation clause issue. See also 5 J. WIGMORE, *supra* note 4, § 1477. Wigmore concluded that the general rationale for the exception to hearsay for statements against interest is lacking in the context of inculpatory statements.

135. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 386 (1969).

courts confronted primarily exculpatory statements against penal interest and problems with admissibility standards for those statements.¹³⁶ Cases involving inculpatory penal interest statements have emerged only recently in federal circuit courts.¹³⁷ The context in which the majority of inculpatory statement cases arise, however, shows remarkable consistency. Typically, the hearsay statement is argued under the coconspirator hearsay exception. When the prosecutor fails to meet the requirements under this exception, the statement is then offered under the new 804(b)(3) penal interest exception.¹³⁸

136. These problems include: (1) How much corroboration is necessary? See P. ROTHSTEIN, *RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES* 423 (2d ed. 1983) (corroboration is a middle ground between the common law exclusion and drafters' view that penal interest statements should be admissible). See also Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska*, 73 MICH. L. REV. 1465 (1975); Note, *Commonwealth v. Nash: Admissibility of Declarations Against Penal Interest*, 48 TEMP. L.Q. 796 (1975).

The rule requiring corroboration for exculpatory statements has been applied to inculpatory statements by a number of courts. See *United States v. MacDonald*, 688 F.2d 224, 232-33 (4th Cir. 1982), cert. denied, 103 S. Ct. 726 (1983); *United States v. Riley*, 657 F.2d 1377, 1382-83 (8th Cir. 1981), cert. denied, 103 S. Ct. 742 (1983); *United States v. Alvarez*, 584 F.2d 694, 701-02 (5th Cir. 1978).

(2) What does "tended to subject" to criminal liability mean? See *State v. Garrison*, 71 Wash. 2d 312, 314, 427 P.2d 1012, 1014 (1967) (statement must be an admission of an unlawful act and be a declaration for which a person could be punished).

(3) How should the "reasonable person" standard be applied? The federal rule uses a reasonable person standard. FED. R. EVID. 804(b)(3). Several states, including Washington, accept this standard. See CAL. EVID. CODE § 1230 (West 1984); KAN. STAT. ANN. § 60-460(j) (1983); WASH. R. EVID. 804(b)(3) (1983); WIS. STAT. ANN. § 908.045(4) (West 1975). However, some commentators advocate that the trial judge retain discretionary power to look at the subjective standard in special circumstances. See, e.g., G. LILLY, *supra* note 52, § 78, at 265; 11 J. MOORE & H. BENDIX, *supra* note 50, ¶ 804.06(3)[3], at VIII-284.

(4) When is a declarant unavailable? Some jurisdictions require the declarant to be dead. Others recognize insanity, physical incapacity, absence from the jurisdiction, and the successful claim of privilege. See C. McCORMICK, *supra* note 46, § 280; Note, *Evidence—The Unavailability Requirement for Declarations Against Interest—Should It Be Retained?*, 39 Mo. L. REV. 461 (1974).

(5) Can a statement against penal interest be carved out of a larger hearsay statement? See M. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 804.3, at 923-24 n.3 (1981); 5 J. WIGMORE, *supra* note 4, § 1465 (all parts of speech may be admitted if made while declarant was in the same trustworthy psychological conditions). See also *United States v. Thomas*, 571 F.2d 285, 289-90 (5th Cir. 1978); *United States v. Marquez*, 462 F.2d 893, 895 (2d Cir. 1972). McCormick summarizes the three different approaches for severance by the court. C. McCORMICK, *supra* note 46, § 279 (admit the entire declaration; compare the strength of self-serving and dis-serving interests and admit it all if the dis-serving statement preponderates or exclude it all if the self-serving interest is greater; and admit dis-serving parts and exclude self-serving parts).

137. See, e.g., *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978).

138. See Note, *Inculpatory Declarations Against Penal Interest and the Cocon-*

This pattern surfaced in 1978 in *United States v. Alvarez*.¹³⁹ The prosecutor in *Alvarez* was unable to meet the requirements for the coconspirator exception and the statements were held inadmissible. The prosecutor then argued that those same statements should be admissible as inculpatory penal interest statements under the new 804(b)(3) exception. Although the court held that in this case the statements were not admissible, the court outlined its requirements for inculpatory statements in future cases.¹⁴⁰ The *Alvarez* court test of admissibility for inculpatory statements was ultimately followed by other circuit courts and by some state courts.¹⁴¹

The *Alvarez* case itself brought into clear focus the undesirable results of allowing third-person inculpatory statements into evidence. Gilbert Alvarez was convicted of heroin trafficking solely on the word of a dead man. At trial, the prosecution's only witness, Lopez, reported a conversation with the decedent, in which the decedent had stated that Alvarez was the supplier. This was all the evidence that the prosecution produced. There was no corroboration, and Lopez had a strong motivation to implicate Alvarez in order to retain his own probation status.¹⁴²

The *Alvarez* court held that inculpatory statements were admissible and "that the admissibility of *inculpatory* declarations against interest requires corroborating circumstances that 'clearly indicate the trustworthiness of the statement.'"¹⁴³ These are the exact requirements for exculpatory statements.¹⁴⁴ The *Alvarez* court reasoned that if the standard for inculpatory statements were the same as the standard for exculpatory statements, a unifying principle for all penal interest statements

spirator Rule Under the Federal Rules of Evidence, 56 IND. L.J. 151 (1980) (in-depth discussion on interplay of these two exceptions).

139. 584 F.2d 694 (5th Cir. 1978).

140. *Id.* at 701.

141. See *United States v. Layton*, 720 F.2d 548, 560-61 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984); *United States v. Palumbo*, 639 F.2d 123, 127-28 (3rd Cir.), *cert. denied*, 454 U.S. 819 (1981); *United States v. Winley*, 638 F.2d 560, 562 (2nd Cir. 1981), *cert. denied*, 455 U.S. 959 (1982); *State v. Parris*, 98 Wash. 2d 140, 150-51, 654 P.2d 77, 82 (1982). At least two courts modified the *Alvarez* holding. See *Olson v. Green*, 668 F.2d 421, 428 (8th Cir.), *cert. denied*, 456 U.S. 1009 (1982) (must qualify under penal interest exception and in addition must comply with further confrontation requirements); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1101-02 (5th Cir. 1981).

142. *Alvarez*, 584 F.2d at 701.

143. *Id.*

144. See *supra* note 136 and accompanying text.

would be developed.¹⁴⁵ This rationale, however, completely ignores the divergent constitutional ramifications of exculpatory and inculpatory statements. Exculpatory statements may be constitutionally mandated to ensure criminal defendants a fair trial.¹⁴⁶ Inculpatory statements, on the other hand, involve sixth amendment confrontation problems; the Constitution often mandates that they be excluded from evidence.¹⁴⁷

The *Alvarez* court required clear corroboration for inculpatory statements.¹⁴⁸ The court was concerned about the unreliability of inculpatory statements when the declarant was motivated to "curry favor with the authorities."¹⁴⁹ Although the *Alvarez* opinion contained numerous warnings about the unreliability and unfairness of receiving inculpatory statements, the court adopted the view that certain inculpatory statements could be admissible.¹⁵⁰ Subsequent cases emerged, however, that modified the court's holding and challenged its reasoning.¹⁵¹

Alvarez was modified in the Fifth Circuit three years later in *United States v. Sarmiento-Perez*.¹⁵² *Sarmiento-Perez* dealt with an inculpatory coconspirator statement as part of a written, custodial confession and developed a heightened test for inculpatory statements in general.¹⁵³ Even though the court held that

145. 584 F.2d at 701.

146. *Chambers v. Mississippi*, 410 U.S. 284 (1973). See *supra* note 21 and accompanying text.

147. *Bruton v. United States*, 391 U.S. 123 (1968).

148. The *Alvarez* court cited *United States v. Hoyos*, 573 F.2d 1111 (9th Cir. 1978), as requiring clear corroboration. In addition, the court set out the following factors for courts to consider when faced with the reliability problem: any apparent motive to misrepresent the matter, general character of declarant, whether any other person heard the out-of-court statement, the spontaneity of the statement, the timing of the declaration, and the relationship between the speaker and the witness. *Alvarez*, 584 F.2d at 701-02.

149. The declarant in *Alvarez*, the prosecutor's principal witness, had pleaded guilty prior to *Alvarez*'s trial and had received probation. Even though the statements were made at the scene before custody, the declarant still had substantial motivation to "curry favor with the authorities." 584 F.2d at 701.

150. *Id.*

151. See, e.g., *United States v. Layton*, 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984); *Olson v. Green*, 668 F.2d 421 (8th Cir.), *cert. denied*, 456 U.S. 1009 (1982); *United States v. Palumbo*, 639 F.2d 123 (3rd Cir.), *cert. denied*, 454 U.S. 819 (1981); *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981).

152. 633 F.2d 1092 (5th Cir. 1981).

153. In *Sarmiento-Perez*, as in previous cases dealing with inculpatory statements, the statement was not admissible under the coconspirator exception because it was not made "in furtherance" of the conspiracy, as required by rule 801. The coconspirator rule distrusts any statements made after the crime has been committed, at a time when self-preservation and other motivations may evolve. 4 J. WEINSTEIN, *supra* note 17, ¶ 801(d)(2)(E)[01], at 801-166.

custodial inculpatory statements are per se inadmissible, the court discussed the appropriate analysis for all inculpatory statements. The court stated that *Alvarez* had not established maximum limits for confrontation clause requirements,¹⁵⁴ and that more than the threshold of admissibility under *Alvarez* is needed. The court recognized that exculpatory and inculpatory statements demand different constitutional treatment and that inculpatory statements invoke inherent confrontation clause problems. These problems, the court stated, require close constitutional examination.¹⁵⁵

A case outside the Fifth Circuit has also questioned the *Alvarez* court's ill-founded conclusions. The Seventh Circuit rejected the premise that rule 804 requirements are enough for inculpatory penal interest statements.¹⁵⁶ Beyond the hearsay requirements, "it must be clear that the declarant actually made the statement" and "there must be evidence supporting the truth of the statement."¹⁵⁷

In 1983 the Ninth Circuit, in *United States v. Layton*,¹⁵⁸ refused to rule on whether meeting the *Alvarez* test automatically satisfied sixth amendment confrontation problems.¹⁵⁹ The court acknowledged that inculpatory statements were new to the Ninth Circuit, but refused to rule on their admissibility.¹⁶⁰ The extrajudicial statement in *Layton*, however, was admitted because all the *Alvarez* tests had been met, and because confrontation problems did not exist.¹⁶¹

In 1982 the Eighth Circuit held that the Constitution requires a stronger test than the test proposed in *Alvarez*. *Olson v. Green*¹⁶² paralleled *Layton* in the heinous nature of the crime.

154. 633 F.2d at 1098-99.

155. *Id.* at 1099. The "close examination" test is consistent with the advisory note to FED. R. EVID. 804, which states that rule 804 does not deal with confrontation problems. Thus, above and beyond any corroboration tests, there must be a separate examination of confrontation problems.

156. *United States v. Blakey*, 607 F.2d 779, 786 (7th Cir. 1979).

157. *Id.*

158. 720 F.2d 548 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1423 (1984).

159. *Id.* at 561.

160. *Id.* at 558-59.

161. *Id.* at 557-58. *Layton* involved a sensational murder trial. *Layton* was indicted on four counts, one for killing Congressman Leo Ryan in Guyana. The first trial resulted in a hung jury without the admission of inculpatory statements. At the second trial the prosecutor moved to admit statements of unavailable third persons under the penal interest exception. They were received, and *Layton* was convicted. *Id.*

162. *Olson v. Green*, 668 F.2d 421 (8th Cir.), *cert. denied*, 456 U.S. 1009 (1982).

Three persons died in a fire after being bound, gagged, and doused with gasoline.¹⁶³ Although the statement was held to be harmless error, the court specifically stated that custodial statements implicating a third person do not fall within a firmly rooted hearsay exception and need independent reliability.¹⁶⁴ The court outlined two separate tests for inculpatory statements: one to ensure qualification under the new hearsay exception, and one for a sufficient degree of reliability for confrontation clause purposes.¹⁶⁵ The Eighth Circuit, along with others, indicated a growing concern for constitutional ramifications when inculpatory statements are offered in evidence.

Although federal courts have analyzed inculpatory statements in divergent ways, a common thread emerged in the circuits regarding one type of these statements.¹⁶⁶ This trend excluded all inculpatory statements that were made while the declarant was in police custody.¹⁶⁷ This exclusion was supported by the language in the Advisory Note cautioning against statements made to "curry favor with the authorities."¹⁶⁸ Following that caution, the Fifth Circuit stated that custodial confessions are to be viewed with "special suspicion."¹⁶⁹

The Eighth Circuit held that the "against criminal interest" element is not satisfied when a statement is made in police custody because the statement is not really against the penal interest of the declarant.¹⁷⁰ The Second Circuit concluded that statements made in custody must be viewed with strict scrutiny,¹⁷¹ because they are unreliable and not against the declarant's penal interest, and that they should be allowed in evidence only in narrow circumstances.

The Third Circuit also found custodial statements to be inadmissible.¹⁷² The concurring opinion of Judge Adams in

163. *Id.* at 423.

164. *Id.* at 427-28.

165. *Id.*

166. *Id.* at 427 n.11.

167. *United States v. Palumbo*, 639 F.2d 1092 (3d Cir.), *cert. denied*, 454 U.S. 819 (1981); *United States v. Lieberman*, 637 F.2d 95 (2d Cir. 1980); *United States v. Oliver*, 626 F.2d 254 (2d Cir. 1980).

168. *See supra* note 83.

169. *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (5th Cir. 1981) (citing *Bruton v. United States*, 391 U.S. 123 (1968) (White, J., dissenting)).

170. *United States v. Riley*, 657 F.2d 1377, 1383-84 (8th Cir. 1981), *cert. denied*, 103 S. Ct. 742 (1983).

171. *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980).

172. *United States v. Palumbo*, 639 F.2d 123, 127 (3d Cir.), *cert. denied*, 454 U.S.

United States v. Palumbo suggested that noncustodial inculpatory statements should also be intensely scrutinized.¹⁷³ He stated that "[t]he naming of another as a compatriot will often be accompanied by motivations which undermine the trustworthiness of the assertion."¹⁷⁴

The federal courts are now requiring a separate constitutional analysis for inculpatory penal interest statements. These constitutional mandates surfaced in cases subsequent to *Alvarez* and solidified the caution in the Advisory Note that the requirements of the rule did not purport to deal with confrontation problems. The *Parris* court should have heeded these cautions.

The *Parris* court should have looked, in any event, to other states' treatment of inculpatory statements. At least seven states have specifically enacted statutes that exclude all inculpatory statements against penal interest.¹⁷⁵

VII. THE CONFRONTATION CLAUSE

In *Parris*, the Washington Supreme Court held that hearsay statements satisfy the confrontation clause if they fall within a firmly rooted hearsay exception or if they have a particularized guarantee of trustworthiness.¹⁷⁶ The court noted that "inculpatory statements are a 'firmly rooted exception' if we add the proviso that they must be accompanied by corroborating circumstances clearly indicating their trustworthiness."¹⁷⁷ At the time of the decision, however, ER 804 had been codified only recently, and even if the exception were "firmly rooted," it did not mention inculpatory statements. The court should have

819 (1981).

173. *Id.* at 131.

174. *Id.* at 132. See also Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972). Davenport states:

The invocation of a name may be gratuitous, may be deliberately false in order to gain advantages for the declarant greater than those that would flow from naming a real participant or no one at all, may be a cover for concealment purposes (another kind of "advantage"), or may represent an effort to gain some personal revenge.

Id. at 1396.

175. Seven states exclude inculpatory statements by statute: ARK. STAT. ANN. § 28.1001, Rule 804(b)(3) (1979); FLA. STAT. ANN. § 90.804(2)(c) (West 1979); ME. R. EVID. 804(b)(3) (1983); NEV. REV. STAT. § 51.345 (1979); N.J. STAT. ANN. § 2A:84A, Rule 63 (10) (West 1976); N.D. R. EVID. 804(b)(3) (1983); VT. R. EVID. 804(b)(3) (1983).

176. 98 Wash. 2d at 148, 654 P.2d at 81.

177. *Id.*

looked more rigorously at the constitutional principles and policies that surround the confrontation clause of the United States Constitution and the similar clause in the Washington State Constitution.¹⁷⁸

A. *Constitution of the United States*

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him. . . ." ¹⁷⁹ The right to confrontation protects the reliability and trustworthiness of evidence introduced against a criminal defendant by requiring that a witness testify under oath,¹⁸⁰ by placing the declarant before the trier of fact to observe the declarant's demeanor,¹⁸¹ and by subjecting the declarant to cross-examination.¹⁸² Cross-examination has been called "a major reason underlying the confrontation rule"¹⁸³ and the "greatest legal engine ever invented for the discovery of truth."¹⁸⁴ The United

178. The court of appeals did attempt to squeeze in some legislative history within footnotes in its opinion. For example, footnote six states:

There can be no real dispute that the statement against penal interest exception to the hearsay rule is a "firmly rooted" exception. *Roberts*, 448 U.S. at 66. ER 804(b)(3) was adopted verbatim from Fed. R. Evid. 804(b)(3). Comment to ER 804. As noted by Judge Weinstein, the Federal Rules of Evidence are 'a firmly rooted' set of hearsay exceptions. 4 Weinstein & M. Berger, at 6. Thus, while the case law in Washington prior to adoption in 1979 of the Rules of Evidence is unclear as to the extent to which statements against penal interests were admissible, *see State v. Russell*, 27 Wash. App. 309, 314 n.1, 617 P.2d 467 (1980), we believe the adoption verbatim of the federal rule satisfies the "firmly rooted" requirements of *Roberts*.

Parris, 30 Wash. App. at 275 n.6, 633 P.2d at 919 n.6.

179. U.S. CONST. amend. VI. The sixth amendment was included in the first ten amendments proposed by the First Congress on Sept. 25, 1789. These amendments were ratified on December 15, 1791.

180. *See Ohio v. Roberts*, 448 U.S. 56, 64 n.6 (1980) (giving a statement under oath increases its reliability because it impresses upon the declarant the seriousness of the matter, and guards against the possibility of perjury); *California v. Green*, 399 U.S. 149, 158-59 (1970).

181. *See Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (the heart of this constitutional guarantee is the accused's right to compel the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."); *California v. Green*, 399 U.S. 149 (1970). *See also* 4 J. WEINSTEIN, *supra* note 17, ¶ 800[01], at 800-10 (the requirement of personal presence in front of the jury makes it more difficult to falsely accuse a person, particularly if that person is an accused and is present at trial).

182. *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

183. *Id.* at 406-07.

184. 5 J. WIGMORE, *supra* note 4, § 1367, at 32, *cited in California v. Green*, 399 U.S. 149, 158 (1970).

States Supreme Court has stated: "[W]e have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law."¹⁸⁵

When the penal interest hearsay exception has been involved, however, the Supreme Court has not permitted any significant erosion of the defendant's right to confrontation.¹⁸⁶ In *Douglas v. Alabama*,¹⁸⁷ the Supreme Court reversed a conviction for murder, excluding the inculpatory statement because the defendant had no opportunity to cross-examine the declarant and because the confession was a "crucial link" in the government's case.¹⁸⁸

In 1968 the Supreme Court again excluded an incriminating statement in *Bruton v. United States*.¹⁸⁹ The Supreme Court reversed Bruton's conviction and held that limiting instructions were inadequate protection in light of the defendant's right to confront the witness.¹⁹⁰ Moreover, when the introduction of a confession adds substantial or critical weight to the government's case in a form not subject to cross-examination, the defendant has been denied the sixth amendment confrontation right.¹⁹¹

Justice Brennan, writing for the majority, stated:

Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. . . . It was against such threats to a fair trial that the Confrontation Clause was directed.¹⁹²

185. *Pointer v. Texas*, 380 U.S. 400, 405 (1965). See also *Davis v. Alaska*, 415 U.S. 308 (1974) (right of cross-examination is the ultimate interest of confrontation).

186. See *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965). More recently the Court has stated that the diminution of the right to confrontation calls into question the "integrity of the fact-finding process." *Berger v. California*, 393 U.S. 314, 315 (1969) (quoting *Linkletter v. Walker*, 381 U.S. 618, 639 (1965)).

187. 380 U.S. 415 (1965).

188. *Id.* at 419.

189. 391 U.S. 123 (1968).

190. *Id.* at 126. The trial judge cautioned the jury that the admission "if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant . . . Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned, it is hearsay." *Id.* at 125 n.2.

191. *Id.* at 128.

192. *Id.* at 136. Justice Stewart, concurring, wrote:

I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the

The *Bruton* principle does not allow inculpatory statements into evidence if they add substantial weight to the case and there is no opportunity to cross-examine the declarant.¹⁹³

In 1970 the Supreme Court, in *California v. Green*,¹⁹⁴ reaffirmed the rule that some type of cross-examination is necessary to meet confrontation requirements. The Court held that the exercise of extensive cross-examination at a preliminary hearing by the same attorney representing the defendant at trial was sufficient to meet confrontation clause requirements when those preliminary statements were later admitted at trial. The Court recognized that more than once it had "found a violation of confrontation values even though the statements . . . were admitted under an arguably recognized hearsay exception."¹⁹⁵ The *Green* Court recognized as the core value of the confrontation clause the ability to "confront" the witness at trial.¹⁹⁶

Again in 1970 the Supreme Court, in *Dutton v. Evans*, held that a hearsay statement may be admissible when it is in no sense crucial or devastating to the case.¹⁹⁷ The Court stressed

highly damaging out-of-court statement of a codefendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give. . . . It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth.

Id. at 137-38.

Justice White, in his dissenting opinion, argued:

As to the defendant, the confession of the codefendant is wholly inadmissible. It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . More than this, however, the statements of a codefendant have traditionally been viewed with special suspicion. . . . Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence. . . . [T]he codefendant's confession implicating the defendant is intrinsically much less reliable.

Id. at 141-42.

193. *Id.* at 137.

194. 399 U.S. 149 (1970).

195. *Id.* at 155-56.

196. *Id.* at 157. The *Green* Court specifically stated that it did not choose to map out a theory of the confrontation clause that could be used for all hearsay exceptions. The Court reasoned that when the declarant is not absent, but is present to testify and to submit to cross-examination, the cases support the conclusion that the admission of his out-of-court statements does not create a confrontation problem. *Id.* at 158.

197. 400 U.S. 74 (1970). *Dutton* involved the murder of three police officers. One of the witnesses against Evans was a prison mate. He testified that a coconspirator of Evans

that this was, in a sense, a harmless error case because twenty witnesses were called for the prosecution. Under Georgia law the statement was received in evidence under its traditional coconspirator exception.¹⁹⁸

In 1980, in *Ohio v. Roberts*,¹⁹⁹ the Court addressed the confrontation clause and its interplay with the hearsay rule following the adoption of Federal Rule of Evidence 804. The Court held that testimony from a preliminary hearing was admissible in a subsequent trial. The Court explained that when prior testimony is given under oath and with cross-examination, confrontation requirements are satisfied.²⁰⁰ The Court held further that confrontation clause problems may not arise when the statement falls within a "firmly rooted" hearsay exception.²⁰¹ The Court warned that absent a showing of particularized guarantees of trustworthiness, such evidence must be excluded.²⁰²

The *Roberts* Court stressed reliability and actual "physical" confrontation as the guiding principle behind the confrontation clause.²⁰³ The Court held that when there is a "meaningful" opportunity to cross-examine the declarant at a prior time, the confrontation clause is not violated if all other evidentiary criteria are met.

The Supreme Court consistently has demanded some form of confrontation under oath in order to satisfy the sixth amendment. To pass muster, a statement that is an exception to the hearsay rule must meet strict evidentiary requirements, including the requirement that some "cross-examination" must have

told him, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." *Id.* at 77. See also Note, *supra* note 111; Note, *Inculpatory Declarations Against Interest and the Confrontation Clause: A Wider Spectrum of Admissible Evidence Against Co-Conspirators*, 48 BROOKLYN L. REV. 943 (1982) (concluding that inculpatory statements by coconspirators should be admitted under rule 801(d)(2)(e) to the extent that they are in fact against the declarant's interest, and alternatively, that the stringent requirements of the rule should be met before an inculpatory coconspirator's statement is received).

198. Contrary to the majority rule that the coconspirator exception is limited to statements made "during the furtherance of the conspiracy," Georgia admitted statements of coconspirators that were made during the concealment of a criminal enterprise. GA. CODE ANN. § 38-306 (1981). See *Chatterton v. State*, 221 Ga. 424, 144 S.E.2d 726, cert. denied, 384 U.S. 1015 (1965).

199. 448 U.S. 56 (1980).

200. *Id.* at 70.

201. *Id.* at 66.

202. *Id.* See also Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1, 48 (1972).

203. 448 U.S. at 66.

been possible in the past, or at least that the statement must not be "crucial" or "devastating" to the case. Only when these tests are met can a court be satisfied that the barrier of the sixth amendment has been overcome.

B. Washington State's Treatment of the Right of Confrontation

Under article I, section 22 of the Washington State Constitution, the accused is given the right "to meet the witnesses against him face to face."²⁰⁴ This "face-to-face" requirement is not found in the United States Constitution and, therefore, suggests a greater protection for a Washington criminal defendant's right to confrontation. Justice Williams has observed that "the face-to-face language of Const. art. 1, § 22 seems to require actual *physical* confrontation between the accused and any adverse witnesses [I]t also cannot be disputed that this language at least provides greater protection than is afforded under both hearsay rules and the Sixth Amendment."²⁰⁵

Washington courts have adamantly defended this right. The supreme court has consistently affirmed that the right to cross-examine is basic in a criminal case and should be "zealously guarded" by courts.²⁰⁶ Washington courts have also held that the ability of the jury to assess the credibility of the declarant at trial is a basic purpose of the confrontation clause.²⁰⁷ The right to confront a witness is not absolute,²⁰⁸ but may in an appropriate case bow to other legitimate interests, such as the need to

204. WASH. CONST. art. I, § 22 provides:

RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

205. *State v. Valladares*, 99 Wash. 2d 663, 674, 664 P.2d 508, 514 (1983) (Williams, C.J., concurring).

206. *State v. Swenson*, 62 Wash. 2d 259, 278, 382 P.2d 614, 625-26 (1963). See also *State v. York*, 28 Wash. App. 33, 621 P.2d 784 (1980) (fundamental constitutional right to cross-examine the witness).

207. *State v. Fullen*, 7 Wash. App. 369, 380, 499 P.2d 893, 900 (1972), *cert. denied*, 411 U.S. 985 (1973).

208. *State v. Dault*, 25 Wash. App. 568, 570, 608 P.2d 270, 272 (1980).

discover the truth when hearsay evidence is very reliable. When this happens, however, Washington courts have cautioned that "denial or diminution calls into question the integrity of the fact-finding process and requires the competing interest to be closely examined."²⁰⁹ In addition, as Justice Williams has stated, this close examination must include a careful balancing of the competing interests of the state and of the accused, with added weight being placed on the accused's side of the scale.²¹⁰

Very few situations have survived Washington's close scrutiny of competing interests and the confrontation clause. Among the few exceptions are testimony at a previous trial²¹¹ and prior testimony at some type of preliminary hearing.²¹² In both of these instances, the defendant's confrontation right was thoroughly satisfied at some point during the case.

Washington courts continue to stress that the defendant's right to an actual physical confrontation of an adverse witness is paramount. In *In re Pettit v. Rhay*,²¹³ the supreme court demanded a "meaningful" and "real" opportunity to cross-examine the adverse witness.²¹⁴ The court held that because cross-examination is essential to the purpose of confrontation, it must not be a mere matter of form.²¹⁵ Because Pettit was not represented by counsel at a preliminary hearing, he was unable to "effectively" cross-examine the witness.²¹⁶

The courts have extended the effective cross-examination rationale by holding that even at trial, when extensive cross-examination for credibility was not allowed, fundamental fair-

209. *State v. York*, 28 Wash. App. 33, 37, 621 P.2d 784, 786 (1980) (citing *Berger v. California*, 393 U.S. 314, 315 (1969)).

210. *Parris*, 98 Wash. 2d at 170-71, 654 P.2d at 92-93.

211. *State v. Dault*, 25 Wash. App. 568, 608 P.2d 270 (1980) (at retrial declarant claimed loss of memory and thus was unavailable; prosecutor brought in the testimony from the first trial); *State v. Ortego*, 22 Wash. 2d 552, 157 P.2d 320 (1945). In *Ortego*, the court established four stringent requirements that must be met for the admissibility of previous testimony: (1) the witness is unavailable; (2) the witness was sworn and testified at the previous trial; (3) the accused was present and given an opportunity to cross-examine; and (4) the person who relates the prior testimony was present, heard the testimony, and can state the substance and nature of the subject matter sought to be established. *Id.* at 563-64, 157 P.2d at 326.

212. *State v. Roebuck*, 75 Wash. 2d 67, 448 P.2d 934 (1968) (testimony at preliminary hearing admitted when defense counsel had opportunity to cross-examine at that preliminary hearing).

213. 62 Wash. 2d 515, 383 P.2d 889 (1963).

214. *Id.* at 521, 383 P.2d at 894.

215. *Id.* at 521, 383 P.2d at 893.

216. *Id.* at 521, 383 P.2d at 893-94.

ness demanded confrontation of such testimony.²¹⁷ They have also stated that “[i]t is fundamental that a defendant charged with commission of a crime should be given great latitude in the cross-examination of prosecution witnesses to show motive or credibility.”²¹⁸

Washington’s constitution and previous case law support the right of a criminal defendant to confront an opposing witness face-to-face. The *Parris* majority completely ignored these words in the state constitution and failed to balance the interests involved when inculpatory penal interest statements are in issue. Had the court done so, the defendant’s right to confrontation and a fair trial would have outweighed the inherently unreliable inculpatory statements against penal interest.

VIII. CONCLUSION

A crucial case is now pending before Division II of the Washington Court of Appeals.²¹⁹ *State v. Edmondson* involves a conviction for aggravated murder based almost exclusively on inculpatory statements against penal interest. The court should take this opportunity to reconsider the *Parris* case and to realign itself with the historical and continuing view that statements by a witness inculcating the defendant are inherently unreliable if they are merely against the penal interest of the witness. The federal courts should follow suit.

Throughout the history of United States jurisprudence until 1975, with exceptions in only a few jurisdictions, declarations against penal interest were excluded even when offered to exculpate the criminal defendant. The statement against the penal interest of a witness could not be received against the defendant because it inculpated the defendant as well. The extensive legislative history surrounding Federal Rule of Evidence 804(b)(3) clearly evidences opposition to the admissibility of inculpatory third-person penal interest statements. The text of rule 804(b)(3) expressly mentions exculpatory penal interest statements. The rule of construction, *expressio unius est exclusio alterius*, “expression of one thing is the exclusion of another,”

217. *State v. York*, 28 Wash. App. 33, 621 P.2d 784 (1980); *State v. Roberts*, 25 Wash. App. 830, 611 P.2d 1297 (1980).

218. *State v. Peterson*, 2 Wash. App. 464, 466-67, 469 P.2d 980, 981 (1970).

219. *State v. Edmondson*, *appeal docketed*, No. 6942-3-II (Wash. Ct. App. Div. II Jan. 31, 1984).

requires that inculpatory third-person penal interest statements be excluded. In any event, the context of virtually all such statements—the desire to displace or share guilt, or the desire to secure prosecutorial favor—proclaims their unreliability.

Admission of exculpatory declarations against penal interest may be constitutionally required. The authors believe that *exclusion* of inculpatory declarations against penal interest is constitutionally required by the sixth amendment to the Constitution of the United States and even more clearly by article I, section 22 of the Constitution of the State of Washington.

The State of Washington does have, and should have, a strong policy to convict criminals. An equally strong policy, however, is to ensure a fair trial to persons charged with a crime. The rule of the *Parris* case effectively abrogates the hearsay rule and often will result in unfair trials. The rule should be discarded.