

# Statements Against Interest, Reliability, and the Confrontation Clause

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## I. INTRODUCTION

This article argues that the Supreme Court has implicitly read Confrontation Clause requirements into the standard for the admission of statements against interest. As a result, the Court has constitutionalized 804(b)(3) of the Federal Rules of Evidence.<sup>1</sup>

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<sup>1</sup> See FED. R. EVID. 804(b)(3). Rule 804(b)(3) defines a statement against interest as:

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 sub-

In the course of making this argument, this article defines the statement against interest exception and collateral statements<sup>2</sup> and discusses the rationale for admitting collateral statements.<sup>3</sup> The article examines the three forms of reliability that have been implicitly used in Confrontation Clause analysis but not often explicitly distinguished.<sup>4</sup> It then describes in detail the case of *Williamson v. United States*,<sup>5</sup> in which this conflation of Confrontation Clause jurisprudence and the federal rule on statements against interest took place.<sup>6</sup> The article then discusses the pre-*Williamson* authority for resolving statement against interest admission problems<sup>7</sup> and addresses the effect of the Court's decision on the Confrontation Clause analysis of statements against interest and some of the difficulties involved in applying the Court's holding.<sup>8</sup> The article concludes with a suggestion for how statement against interest admission issues might be better handled and what the appropriate place of Confrontation Clause analysis should be.<sup>9</sup>

When the Supreme Court granted the writ of certiorari in *Williamson v. United States*,<sup>10</sup> many hoped that the decision would clarify Confrontation Clause jurisprudence<sup>11</sup> and the place of statements against interest under Federal Rule of Evidence (F.R.E.) 804(b)(3).<sup>12</sup>

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ject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true . . . .

*Id.*

<sup>2</sup> See *infra* notes 36-48 and accompanying text. The term "contextual" has also been used. See CHARLES T. MCCORMICK, LAW OF EVIDENCE § 256, at 552-53 (1954).

<sup>3</sup> See *infra* notes 49-56 and accompanying text.

<sup>4</sup> See *infra* notes 94-100 and accompanying text.

<sup>5</sup> 512 U.S. 594 (1994).

<sup>6</sup> See *infra* notes 101-149 and accompanying text.

<sup>7</sup> See *infra* notes 155-173 and accompanying text.

<sup>8</sup> See *infra* notes 207-271 and accompanying text.

<sup>9</sup> See *infra* notes 272-290 and accompanying text.

<sup>10</sup> 510 U.S. 1039 (1994).

<sup>11</sup> See Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 VA. L. REV. 149, 165-69 (1995) (arguing that, to admit hearsay for purposes of Confrontation Clause analysis, judges should make a decision about the evidence's "foundational adequacy" and also require corroboration of that hearsay); see also Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 34-39, 46 (1987) (suggesting that the Supreme Court should move away from the "firmly rooted" concept in its Confrontation Clause analysis and adopt a standard that focuses on the trustworthiness of hearsay statements in the context of each case).

<sup>12</sup> See FED. R. EVID. 804(b)(3). The rule allows, in part, for the introduction of hearsay statements that were, at the time of their making, "so far contrary to the de-

In his petition for the writ, Williamson posed the question of whether the statement against interest exception should be considered a firmly rooted hearsay exception<sup>15</sup> and, thus, presumptively reliable and admissible without additional Confrontation Clause analysis.<sup>14</sup> Assuming that the Court would not find statements against interest to be a firmly rooted exception, Williamson asked whether the confession introduced in the case bore sufficient indications of reliability to render it admissible under the Confrontation Clause of the Sixth Amendment to the Constitution.<sup>15</sup>

The Court failed to decide whether the statement against interest exception is firmly rooted<sup>16</sup> or whether the statements against interest in *Williamson* had sufficient "indicia of reliability"<sup>17</sup> to be admissible under Confrontation Clause analysis. Instead, the Court ducked these issues and based the decision on its interpretation of the word "statement" in F.R.E. 804(b)(3).<sup>18</sup> The Court defined the term statement to mean a single remark or declaration<sup>19</sup> rather than an extended declaration. The Court also decided that only those remarks that are individually self-inculpatory are included within F.R.E. 804(b)(3). The Court found that the 804(b)(3) exception did

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clarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *Id.*

<sup>13</sup> See *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (citing *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)) (explaining that "no independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception'"); see also *infra* notes 59-65 and accompanying text.

<sup>14</sup> Petition for a Writ of Certiorari at i, *Williamson v. United States*, 512 U.S. 594 (1994) (No. A-942).

<sup>15</sup> See *id.* The Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI. In his petition, Williamson also asked "[w]hether 804(b)(3)'s requirement that a statement must be corroborated by circumstances clearly indicating its trustworthiness [ ] is subject to the further requirement of *Idaho v. Wright*, 497 U.S. 805 (1990), that the only circumstances that can be considered are those surrounding the making of the statement?" Petition for a Writ of Certiorari at i, *Williamson v. United States*, 512 U.S. 594 (1994) (No. A-942).

<sup>16</sup> See *Williamson v. United States*, 512 U.S. 594, 605 (1994). Various United States Courts of Appeals have addressed this issue and reached contrary results. Compare *United States v. Flores*, 985 F.2d 770, 775 (5th Cir. 1993) (holding that the exception is not firmly rooted) with *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989) (finding the exception to be firmly rooted).

<sup>17</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The Supreme Court found that the statement of an unavailable witness "is admissible only if it bears adequate 'indicia of reliability.'" *Id.*

<sup>18</sup> See *Williamson*, 512 U.S. at 599.

<sup>19</sup> See *id.*

not include portions of a declaration that are "collateral statements, even ones that are neutral as to interest. . . ."<sup>20</sup> The foundation of the Court's analysis was that statements against interest are a hearsay exception because they are reliable. The Court explained that such statements are reliable because they are against interest and that only the self-inculpatory portion of a declaration is sufficiently reliable to be admissible as a statement against interest.<sup>21</sup>

In deciding the case by defining the word "statement" and remanding the case to the lower court for application of that definition,<sup>22</sup> the Court expressly avoided the Confrontation Clause issue and did not decide whether the statement against interest exception is a firmly rooted exception to the hearsay rule.<sup>23</sup> The Court also expressly dodged the issue of whether the corroboration requirement in F.R.E. 804(b)(3) for the admission of statements exculpating the accused<sup>24</sup> is also applicable to statements inculcating the accused.<sup>25</sup>

The effect of the *Williamson* decision is to narrow the scope of the statement against interest exception. As noted, it also implicitly conflates Confrontation Clause jurisprudence with the federal rule on statements against interest.

## II. A PRIMER ON STATEMENTS AGAINST INTEREST AND THE CONFRONTATION CLAUSE

Because of the plethora of television lawyers and televised trials, persons in the United States believe that hearsay is inadmissible and understand hearsay to be an in-court witness's statement about something said out of court by another. As evidence students know, this concept is only the beginning of an understanding or misunderstanding of hearsay. As defined by the Federal Rules of Evidence, "[h]earsay is 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."<sup>26</sup> Rule 802 makes hearsay generally inadmissible.<sup>27</sup> Of course, much hearsay is admissible under the

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<sup>20</sup> *Id.* at 600.

<sup>21</sup> *See id.*

<sup>22</sup> *See id.* at 604.

<sup>23</sup> *See id.* at 605.

<sup>24</sup> *See* FED. R. EVID. 804(b)(3). "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." *Id.*

<sup>25</sup> *See Williamson*, 512 U.S. at 605.

<sup>26</sup> FED. R. EVID. 801(c).

<sup>27</sup> *See* FED. R. EVID. 802. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory

rules,<sup>28</sup> and in fact, the prohibition against the admission is in danger of being swallowed by the exceptions.<sup>29</sup>

Hearsay exceptions are generally established by balancing the need for the evidence against its reliability.<sup>30</sup> In some instances, reliability may be marginal. For example, dying declarations<sup>31</sup> may be highly unreliable.<sup>32</sup> The linchpin for truthfulness in such declarations is that one does not meet one's maker with a lie on the lips.<sup>33</sup> Apart from whether this assumption about human behavior and the dying declarant's motivation is correct, the declarant may have only stated an assumption about the cause of death, and these assumptions are unlikely to be tested when death is impending.<sup>34</sup> Despite the potential unreliability of such statements, the exception was established in homicide cases to compensate for the unavailability of the declarant.<sup>35</sup>

Need was also a factor in establishing the statement against interest exception, which, in addition, depends on the unavailability of

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authority or by Act of Congress." *Id.*

<sup>28</sup> See FED. R. EVID. 803(1)-(24); see also FED. R. EVID. 804(b)(1)-(5).

<sup>29</sup> See Robert E. Oliphant, *Basic Concepts in the Law of Evidence; An Outline of the Younger Lectures*, at 83 (2d ed. 1982); Jacob A. Stein, *Trial Handbook For Maryland Lawyers* §26.5, at 360 (2d ed. 1986).

<sup>30</sup> See, e.g., *Matthews v. United States*, 217 F.2d 409, 417 (5th Cir. 1954). The court concluded: "[O]ur holding is supported . . . by the absence here of the rational justification which obtains in every recognized exception to the hearsay rule; that is a circumstantial probability of trustworthiness, and a necessity for the evidence." *Id.*; see also *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 207 F. 515, 518 (2d Cir. 1913) in which Judge Learned Hand, then a district court judge, stated, "I think it fair to insist that to reject such a statement is to refuse evidence about the truth of which no reasonable person should have any doubt whatever, because it fulfills both the requisites of an exception of the hearsay rule, necessity and circumstantial guaranty of trustworthiness." *Id.* (citing JOHN HENRY WIGMORE, *WIGMORE ON EVIDENCE* §§ 1421, 1422, 1690 (1st ed. 1913)).

<sup>31</sup> See FED. R. EVID. 804(b)(2). "Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." *Id.*

<sup>32</sup> For a discussion of the unreliability of dying declarations, see Goldman, *supra* note 11, at 1-2.

<sup>33</sup> See MCCORMICK ON EVIDENCE, § 281 (E. Cleary ed., 3d ed. 1984); see also 5 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE*, § 804(b)(2) (1985).

<sup>34</sup> For example, persons surrounding the dying person are unlikely to ask questions such as, "Are you sure?" and "Did you get a good look at him?" Despite this lack of testing, a prosecutor in a homicide case will likely be able to introduce the deceased's statement naming an assailant. See FED. R. EVID. 804(b)(2).

<sup>35</sup> See generally Leonard R. Jaffee, *The Constitution and Proof by Dead or Unconfrontable Declarants*, 33 ARK. L. REV. 227 (1979) (discussing the development of the dying declaration exception).

the declarant for its admission.<sup>36</sup> Of course, the linchpin of the exception is that the statement is against the declarant's interest.<sup>37</sup> At common law, the exception applied only to statements against proprietary or pecuniary interest,<sup>38</sup> but later, various states and the federal system added penal interest.<sup>39</sup> As with statements against pecuniary and proprietary interests, declarations against penal interest rest upon "the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true . . . [and that] exposure to punishment for crime [is] a sufficient stake."<sup>40</sup> Of course, as with other statements against interest, in applying the declaration against penal interest exception, one is involved in a fact-intensive inquiry as to whether the statement truly was against the declarant's interest at the time it was made.<sup>41</sup> In addition, the precondition of unavailability makes this inquiry more difficult.

One reason for the slowness of the courts to adopt the declaration against penal interest exception was the concern that persons would confess to save others from jeopardy.<sup>42</sup> Another reason was the view that what appears to be a declaration against penal interest, especially if the statement names another, may in fact be a statement in favor of one's own interest and, thus, lacking in reliability.<sup>43</sup> The declarant, especially when naming another, may "desire to shift or

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<sup>36</sup> See FED. R. EVID. 804(a)(1)-(5); see also *id.* at 804(b)(1)-(5).

<sup>37</sup> In addition to the requirement that the statement must be against interest and that the declarant be unavailable, the declarant must have had personal knowledge and understood the fact asserted. See 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 496, at 813-14 (2d ed. 1994).

<sup>38</sup> See, e.g., *The Queen v. Overseers of Birmingham*, 121 ENG. REP. 897 (K.B. 1861); *Higham v. Ridgway*, 103 ENG. REP. 717 (K.B. 1808); *Searle v. Lord Barrington*, 93 ENG. REP. 875 (K.B. 1725).

<sup>39</sup> For a history of the development of the against-penal-interest exception in one state, see E. M. Morgan, *Declarations Against Interest in Texas*, 10 TEX. L. REV. 399 (1932). See also *People v. Spriggs*, 389 P.2d 377 (Cal. 1964); *Sutter v. Easterly*, 189 S.W.2d 284 (Mo. 1945); *Band's Refuse Removal, Inc. v. Fairlawn*, 62 N.J. Super. 522, 163 A.2d 465 (App. Div. 1960); *Newberry v. Commonwealth*, 61 S.E.2d 318 (Va. 1950).

<sup>40</sup> FED. R. EVID. 804(b)(3) advisory committee's notes.

<sup>41</sup> See *Williamson v. United States*, 512 U.S. 594, 604 (1994); *Laumer v. United States*, 409 A.2d 190, 201-03 (D.C. 1979) (en banc).

<sup>42</sup> See *Donnelly v. United States*, 228 U.S. 243, 273-74 (1913). This concern is expressed in the Rule 804(b)(3) requirement that statements exculpating the accused not be admitted "unless corroborating circumstances clearly indicate the trustworthiness of the statement." FED. R. EVID. 804(b)(3).

<sup>43</sup> See, e.g., *Donnelly*, 228 U.S. at 243.

spread blame, curry favor, avenge himself, or divert attention to another."<sup>44</sup>

Even if the statement<sup>45</sup> fits the exception as being against interest, there remains the question of whether the entire statement or only a portion of it should be admitted. Furthermore, if only a portion should be admitted, what portion should be included? Assuming the statement would otherwise be entitled to be admitted, those portions of the statement that are against pecuniary or proprietary interest or subject the declarant to civil or criminal liability should be admitted. At the other extreme, those portions that are self-serving should not be admitted; they are in favor of the declarant's interest and do not fit the most basic requirement of the rule.<sup>46</sup> For example, a statement might acknowledge an individual's participation in a criminal act but include a statement naming another as primarily responsible for the crime. The portion placing primary responsibility on another would not be against interest and, in fact, would be self-serving.

The troubling issue for admission, and the one on which commentators<sup>47</sup> and courts<sup>48</sup> differ, is whether collateral or related portions of the statement that are neutral as to interest should be admitted. An example would be the non-self-inculpatory portion of a statement about a transaction involving two persons, such as a drug sale, by one of the parties to the transaction.<sup>49</sup> In discussing such statements, the Advisory Committee's Note to Rule 804, Exception (3), seems to pave the way for the introduction of such a statement under the rule. The committee's note provides that "[o]rdinarily the third-party confession is thought of in terms of exculpating the

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<sup>44</sup> Lee v. Illinois, 476 U.S. 530, 545 (1986).

<sup>45</sup> The word statement is used here to describe the entire narrative and not, as the Supreme Court found in *Williamson*, only those portions of the statement that are against interest. See *Williamson*, 512 U.S. at 599.

<sup>46</sup> See 4 MUELLER & KIRKPATRICK, *supra* note 37, at 816-17.

<sup>47</sup> See CHARLES T. MCCORMICK, LAW OF EVIDENCE § 256, at 552-53 (1954); see also 5 JOHN WIGMORE, EVIDENCE § 1465, at 271 (3d ed. 1940); Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 62-63 (1944).

<sup>48</sup> Compare *United States v. Lieberman*, 637 F.2d 95, 103-04 (2d Cir. 1980) and *United States v. Garris*, 616 F.2d 626, 629-33 (2d Cir. 1980) with *United States v. Lilley*, 581 F.2d 182, 187-88 (8th Cir. 1978).

<sup>49</sup> One example is a statement about an action taken by two persons made by one of the participants and naming the other. See 4 MUELLER & KIRKPATRICK, *supra* note 37, at 833 & n.6 (citing *United States v. Bakhtiar*, 994 F.2d 970, 977 (2d Cir. 1993)). Other examples are statements made by co-conspirators that show insider information by naming others also involved. See *id.* at 835.

accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as *related statements*.”<sup>50</sup> Of course, it seems most appropriate that portions of the statement that are closely related to the self-inculpatory part should be admitted but the portions much attenuated in time, narrative, or meaning should not. In *United States v. Garris*,<sup>51</sup> the court reasoned that those portions of the statement that are “integral”<sup>52</sup> to the parts of the statement that are against interest should be admitted.<sup>53</sup> “[T]he court seemed to mean two things: The fact adverse to the defendant and the fact adverse to the speaker had a close logical connection in appraising the speaker’s conduct, and the speaker closely connected her description of both facts in her statement (close narrative connection).”<sup>54</sup>

Before *Williamson*, the weight of authority held that the appropriate test for deciding whether neutral portions of a statement should be admitted was whether there was a close connection between the against-interest segments and the related neutral or collateral portions of the statement.<sup>55</sup> This proximity lent trustworthiness to the neutral portions of the statement. In discussing “contextual” or related statements, McCormick suggests that “to admit the critical related statement or part of the statement is acceptable, even though not itself against interest, if it is closely enough connected and neutral as to interest.”<sup>56</sup> In a civil action, apart from issues such as unfair prejudice under F.R.E. 403,<sup>57</sup> the general analysis to decide whether a

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<sup>50</sup> FED. R. EVID. 804(b)(3) advisory committee’s notes (emphasis added).

<sup>51</sup> 616 F.2d 626 (2d Cir. 1980).

<sup>52</sup> *Id.* at 630.

<sup>53</sup> *See id.* at 629-33. In *Garris*, four men robbed a bank and three of them were photographed by the bank’s surveillance camera. *See id.* at 627-28. At trial, the government adduced evidence that Benjamin Garris was the fourth robber. *See id.* at 628. To corroborate the testimony of the principal witness against Garris, the government sought to introduce statements implicating Garris made by Garris’s sister to an FBI agent. *See id.* Those statements not only implicated Garris in the robbery, but they also implicated Garris’s sister in another robbery. *See id.* at 629. At the trial, his sister did not recall making the statements; the court found that her lack of memory made her an unavailable witness and allowed the agent to testify to the statements under Rule 804(b)(3)—the “penal interest” exception to the hearsay rule. *See id.*

<sup>54</sup> 4 MUELLER & KIRKPATRICK, *supra* note 37, at 832.

<sup>55</sup> *See infra* notes 155-162 and accompanying text.

<sup>56</sup> CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 319, at 531 (John W. Strong ed., 4th ed. 1992).

<sup>57</sup> “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or mis-



statement against interest should be admitted would end at this point. Of course, in a criminal case, the judge would also need to decide whether the admission of the statement would violate the defendant's Sixth Amendment confrontation rights.

Modern Sixth Amendment Confrontation Clause analysis is based on the case of *Ohio v. Roberts*.<sup>58</sup> In *Roberts*, the Supreme Court set out a two-prong Confrontation Clause test for determining the admissibility of hearsay: "When a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'"<sup>59</sup>

*Roberts* also held that no inquiry into reliability is needed when the evidence "falls within a firmly rooted hearsay exception."<sup>60</sup> Because the Court has found so many exceptions to be firmly rooted, the reliability analysis set out in *Roberts* now is used for only a few major exceptions. In *Roberts*, the Court stated that the business records exception, public records exception, and former testimony exception are all "firmly rooted."<sup>61</sup> At this point, "firmly rooted" exceptions also include dying declarations,<sup>62</sup> the co-conspirator exception,<sup>63</sup> excited utterances,<sup>64</sup> and statements for medical purposes.<sup>65</sup>

As mentioned earlier, the Supreme Court has not ruled on whether the statement against interest exception is "firmly rooted."<sup>66</sup> For several reasons, the Court is unlikely to find the statement against interest exception to be "firmly rooted." First, in *Williamson* the Court struggled to decide the case on a ground that would avoid the Confrontation Clause issues.<sup>67</sup> Having recently ducked the constitutional issue, the Court is unlikely to revisit it in the near future. Second, the inclusion within the exception of statements against penal interest is a relatively recent development<sup>68</sup> and this weighs

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leading the jury, or by considerations of undue delay, waste of time, or needless presentation of the evidence." FED. R. EVID. 403.

<sup>58</sup> 448 U.S. 56 (1980).

<sup>59</sup> *Id.* at 66.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*; see also *California v. Green*, 399 U.S. 149, 165-68 (1970) (preliminary hearing testimony); *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972) (prior trial testimony); *Mattox v. United States*, 156 U.S. 237, 244 (1895) (first trial testimony).

<sup>62</sup> See *Mattox*, 156 U.S. at 250.

<sup>63</sup> See *Bourjaily v. United States*, 483 U.S. 171, 183-84 (1987).

<sup>64</sup> See *White v. Illinois*, 502 U.S. 346, 356 (1992).

<sup>65</sup> See *id.* at 355-56 & n.8.

<sup>66</sup> *Williamson v. United States*, 512 U.S. 594, 605 (1994).

<sup>67</sup> See *infra* notes 244-246 and accompanying text.

<sup>68</sup> See *supra* notes 38-44 and accompanying text.

against a finding that the exception is "firmly rooted." Third, "use of the exception to admit against-interest statements by third parties implicating . . . the defendant was not entirely expected and represents a new departure raising some concern. In this setting, individualized constitutional scrutiny of uses of the exception should continue to be required . . ." <sup>69</sup> For these reasons, statements against interest will continue to be analyzed under the reliability standard required by *Roberts*. Since *Roberts*, the Court has defined the reliability standard for the admission of hearsay statements under non-firmly rooted exceptions in a series of cases including *Lee v. Illinois*,<sup>70</sup> *Cruz v. New York*,<sup>71</sup> and *Idaho v. Wright*.<sup>72</sup>

In *Lee*, Lee and her boyfriend, Thomas, were tried and convicted for a double murder.<sup>73</sup> Police officers had asked Lee to identify the body of her deceased aunt.<sup>74</sup> She then was given a *Miranda* warning and confessed to the murder of her aunt and her aunt's friend.<sup>75</sup> After being told that Lee had confessed, Thomas also confessed.<sup>76</sup> His confession, unlike Lee's, implicated Lee in a premeditated murder.<sup>77</sup> The Supreme Court held "that Thomas' statement, as the confession of an accomplice, was presumptively unreliable and that it did not bear sufficient independent 'indicia of reliability' to overcome that presumption."<sup>78</sup> The Court reasoned:

[T]he circumstances surrounding the confession do not rebut the presumption that Thomas' statement could not be trusted as regards Lee's participation in the murders. When Thomas was taken in for questioning and read his rights he refused to talk to the police. The confession was elicited only after Thomas was

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<sup>69</sup> 4 MUELLER & KIRKPATRICK, *supra* note 37, at 151.

<sup>70</sup> 476 U.S. 530 (1986).

<sup>71</sup> 481 U.S. 186 (1987).

<sup>72</sup> 497 U.S. 805 (1990). Another important case dealing with confrontation is *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton*, however, provides little guidance on when a statement against interest should be admitted. In *Bruton*, the Court held that a jury instruction not to consider an improperly admitted codefendant's confession was insufficient to overcome the admissibility error. When *Bruton* was decided, no hearsay exception existed under which the codefendant's confession could have been admitted against Bruton. Thus, earlier in *Bruton*, the Eighth Circuit had set aside the codefendant's conviction on the ground that the confession should not have been admitted against him but had affirmed Bruton's conviction because of the instruction. *See id.* at 124-25.

<sup>73</sup> *See Lee*, 476 U.S. at 531.

<sup>74</sup> *See id.* at 532.

<sup>75</sup> *See id.*

<sup>76</sup> *See id.* at 533.

<sup>77</sup> *See id.* at 535.

<sup>78</sup> *Id.* at 539.

told that Lee had already implicated him and only after he was implored by Lee to share "the rap" with her. The unsworn statement was given in response to the questions of police, who, having already interrogated Lee, no doubt knew what they were looking for . . . . [Although] the confession was found to be voluntary for Fifth Amendment purposes, such a finding does not bear on the question of whether the confession was also free from any desire, motive, or impulse Thomas may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders.<sup>79</sup>

The Court concluded that it was "not convinced that there exist[ed] sufficient 'indicia of reliability,' flowing from either the circumstances surrounding the confession or the 'interlocking' character of the confessions, to overcome the weighty presumption against the admission of such uncross-examined evidence."<sup>80</sup> The Court overturned Lee's conviction but remanded the case to the trial court on the issue of whether the error was harmless.<sup>81</sup>

In *Cruz v. New York*, two brothers, Eulogio Cruz, the petitioner, and Benjamin Cruz, were tried for felony murder.<sup>82</sup> Benjamin, who did not take the stand, made a videotaped confession to the police that was introduced at trial.<sup>83</sup> The prosecution also introduced testimony from the victim's brother, who claimed that Eulogio had confided his involvement in the felony murder.<sup>84</sup> Eulogio's attorney argued to the jury that the victim's brother, who suspected Eulogio and Benjamin of killing his brother, had fabricated the testimony to gain revenge.<sup>85</sup> In reversing and remanding the case, the Supreme Court held:

Where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, see *Lee v. Illinois*, *supra*, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him. Of course, the defendant's confession *may be considered at trial in assessing whether his codefendant's statements are supported by sufficient "indicia of reliability" to be directly*

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<sup>79</sup> *Lee*, 476 U.S. at 544.

<sup>80</sup> *Id.* at 546.

<sup>81</sup> *See id.* at 547.

<sup>82</sup> *See Cruz v. New York*, 481 U.S. 186, 189 (1987).

<sup>83</sup> *See id.* at 188-89.

<sup>84</sup> *See id.* at 189.

<sup>85</sup> *See id.*

*admissible against him (assuming the "unavailability" of the codefendant) despite the lack of opportunity for cross-examination, and may be considered on appeal in assessing whether any Confrontation Clause violation was harmless.*<sup>86</sup>

The expression in both *Lee* and *Cruz* that a court might look to an "interlocking confession"—one by the defendant that squares with the declarant's confession—in deciding for Confrontation Clause purposes the reliability and admissibility of a declarant's confession was dashed in *Idaho v. Wright*.<sup>87</sup> Although many of the facts of *Wright* are not important to a discussion of statements against interest,<sup>88</sup> its holding is highly relevant. In *Wright*, the State sought to use physical evidence to bolster the reliability of a two-year old's hearsay statement about sexual abuse in order to get the statement admitted.<sup>89</sup> The Court found that "unless an affirmative reason, *arising from the circumstances in which the statement was made*, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement."<sup>90</sup> The Court went on to say:

[T]he use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.<sup>91</sup>

In sum, to withstand Confrontation Clause analysis, a statement against interest must have sufficient "indicia of reliability," and these indications must come from "the totality of circumstances that surround the making of the statement."<sup>92</sup> The rationale is that these in-

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<sup>86</sup> *Id.* at 193-94 (emphasis added) (citations omitted).

<sup>87</sup> 497 U.S. 805 (1990).

<sup>88</sup> In *Wright*, the Court was faced with whether a hearsay statement of sexual abuse made by a two-year old should have been admitted. *See id.* at 808. The child had been asked leading questions, and the Supreme Court of Idaho found that the "interrogation was performed by someone with a preconceived idea of what the child should be disclosing." *Id.* at 813 (quoting *Idaho v. Wright*, 775 P.2d 1224, 1227 (Idaho 1989)).

<sup>89</sup> *See id.* at 809-12.

<sup>90</sup> *Id.* at 821 (emphasis added).

<sup>91</sup> *Id.* at 823.

<sup>92</sup> *Id.* at 820.

dications of reliability would make the evidence "so trustworthy that adversarial testing would add little to their reliability."<sup>95</sup>

### III. THE VARIATIONS OF RELIABILITY

The concept of reliability is at the forefront when one assesses hearsay exceptions and a defendant's Sixth Amendment Confrontation Clause rights.<sup>94</sup> Courts may list a number of factors that can be used in assessing reliability, but they are often quite inarticulate about the standard to be used in making this determination. In addition, courts often fail to articulate the stages of analysis and how the reliability standard varies depending upon the task at hand.

In statement against interest analysis in the criminal law context, there are three forms of reliability and varying standards for applying each. A knowledge of these forms is important in understanding the law in this area and the *Williamson* case. First, there is the standard for reliability that is to be applied in establishing an exception.<sup>95</sup> This standard, "exception reliability," requires that the type of statement have some general underpinning of reliability in logic and human experience. For example, in the case of a statement against interest, persons are unlikely to say things against their interest unless they are true.<sup>96</sup>

Once an exception is established, individual statements have to be tested to see if they fit the requirements of the exception and thus have sufficient reliability to be admissible. This form of reliability, "admission reliability," involves a specific application of reliability in the case being tried or decided on appeal.<sup>97</sup>

In a criminal case, a third form of reliability analysis is required because of the application of Confrontation Clause principles to the potential introduction of evidence that cannot be cross-examined.<sup>98</sup>

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<sup>95</sup> *Wright*, 497 U.S. at 821.

<sup>94</sup> See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); see also *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 207 F. 515, 518 (2d Cir. 1913).

<sup>95</sup> See *Matthews v. United States*, 217 F.2d 409, 417 (5th Cir. 1954). "(O)ur holding is supported . . . by the absence here of the rational justification which obtains in every recognized exception to the hearsay rule; that is, a circumstantial probability of trustworthiness . . . ." *Id.*

<sup>96</sup> See FED. R. EVID. 804(b)(3) advisory committee's notes. "The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." *Id.* (citing *Hileman v. Northwest Eng'g Co.*, 346 F.2d 668 (6th Cir. 1965)).

<sup>97</sup> For a discussion of admission reliability, see *infra* notes 193-198 and accompanying text.

<sup>98</sup> See *Roberts*, 448 U.S. at 66.

As is discussed later, "indicia of reliability" or "Confrontation Clause reliability" requires a higher standard of reliability analysis than "admission reliability."<sup>99</sup> A major subpart of "Confrontation Clause reliability" is "firmly rooted exception reliability." "No independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.'"<sup>100</sup>

#### IV. THE DECISION IN *WILLIAMSON*

The decision in *Williamson*, like so many recent decisions of the Court, is composed of a number of opinions. There is the majority opinion written by Justice O'Connor; a concurrence by Justice Scalia; a concurrence in part by Justice Ginsburg, joined by Justices Blackmun, Stevens, and Souter; and a concurrence in the judgment by Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas. In the words of one commentator, the decision is "a complete mess."<sup>101</sup>

##### A. *Justice O'Connor's Opinion*

In part I of the decision, Justice O'Connor set out the facts.<sup>102</sup> A police officer's traffic stop of Reginald Harris for weaving led to Williamson's prosecution.<sup>103</sup> After the stop, Harris consented to a search of the rental car, and the officer found two suitcases containing cocaine.<sup>104</sup>

Harris was arrested and later questioned over the telephone by a DEA agent.<sup>105</sup> Harris told the agent that he got the cocaine from a Cuban, that Williamson was the owner, and that he was to deliver the cocaine to a dumpster.<sup>106</sup> Physical evidence from the car also tied Williamson to Harris.<sup>107</sup> The luggage had Williamson's sister's ini-

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<sup>99</sup> For a discussion of the higher standard for Confrontation Clause reliability, see *infra* notes 191-206 and accompanying text.

<sup>100</sup> *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)).

<sup>101</sup> Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1795 (1995). Professor Welsh White was somewhat more charitable in describing the decision as "cryptic," with "some of the majority's critical language [ ] subject to widely different interpretations." Welsh S. White, *Accomplices' Confessions and the Confrontation Clause*, 4 WM. & MARY BILL RTS. J. 753, 762 (1996).

<sup>102</sup> See *Williamson v. United States*, 512 U.S. 594, 596-97 (1994).

<sup>103</sup> See *id.* at 596.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

<sup>107</sup> See *id.*

tials, the rental agreement listed Williamson as a driver, and the glove compartment contained a receipt that had Williamson's girlfriend's address on it and an envelope that was addressed to Williamson.<sup>108</sup>

Following the telephone interview, the DEA agent interviewed Harris in person, and Harris told him that "he had rented the car a few days earlier and had driven it to Fort Lauderdale to meet Williamson."<sup>109</sup> There, a Cuban who knew Williamson "put the cocaine in the car with a note telling Harris how to deliver the drugs."<sup>110</sup> The agent began arranging for "a controlled delivery of the cocaine."<sup>111</sup> Harris stopped him by saying, "I can't let you do that . . . that's not true, I can't let you go up there for no reason."<sup>112</sup> Harris then explained that he had been transporting the drugs to Atlanta for Williamson, and that Williamson, traveling in another car, had seen Harris's car with the trunk open following the stop.<sup>113</sup> Because of this, Harris said an attempt at delivery would be futile.<sup>114</sup> Harris told the agent that he had made up the earlier story because he feared Williamson.<sup>115</sup>

At Williamson's trial, Harris refused to testify despite a grant of immunity, a court order to do so, and a finding of contempt for failure to obey the order. The trial court allowed the DEA agent to testify to what he had been told by Harris. Williamson was convicted of several drug charges.<sup>116</sup>

In reviewing the conviction in part II-A of the decision, Justice O'Connor started the analysis by setting out the hazards of hearsay testimony<sup>117</sup> and describing the ways in which these dangers are reduced with in-court statements.<sup>118</sup> Noting that exceptions exist to the general prohibition on admitting hearsay and that one exception is

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<sup>108</sup> See *Williamson*, 512 U.S. at 596.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 597.

<sup>113</sup> See *id.*

<sup>114</sup> See *Williamson*, 512 U.S. at 597.

<sup>115</sup> See *id.*

<sup>116</sup> See *id.* at 597-98.

<sup>117</sup> See *id.* at 598. "The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener." *Id.*

<sup>118</sup> When a witness testifies in court, the hearsay dangers are reduced by "the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine . . ." *Id.*

for statements against interest, Justice O'Connor explained that the Court first had to determine the meaning of the term "statement" in Rule 804(b)(3). The Court could have looked to precedent, to the Advisory Committee Notes to the rule, or to various commentators, but Justice O'Connor first turned to *Webster's Third New International Dictionary*. There, the Justice found two definitions of statement: One is "a report or narrative" and the other is "a single declaration or remark."<sup>119</sup> Justice O'Connor then noted that the "principle behind the rule" is that "reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true."<sup>120</sup> The Justice argued that "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature."<sup>121</sup> Using this as a basis, Justice O'Connor argued that the notion that people do not make self-inculpatory statements unless they are true does not extend to the broader definition of statement—that is, a report or narrative and not a single declaration or remark.<sup>122</sup> The Justice found additional support for this view because the non-self-inculpatory remarks that Harris made in his first statement proved to be false.

Justice O'Connor then criticized the view expressed in Justice Kennedy's dissent. Justice Kennedy concluded that comments that are collateral to the against-interest statement and neutral as to interest should be admissible as part of the exception.<sup>123</sup> Although Justice O'Connor explicitly refused to suggest how much weight should be given to the Advisory Committee Notes, the Justice did conclude that the language in the note to Rule 804(b)(3) is not particularly clear,<sup>124</sup> but that the policy of the rule pulls so clearly "in one direction that it outweighs whatever force the Notes may have."<sup>125</sup>

In part II-B of the decision, Justice O'Connor tried to rebut Justice Kennedy's view that the decision eviscerates the against penal in-

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<sup>119</sup> *Id.* at 599 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2229 (1961)).

<sup>120</sup> *Williamson*, 512 U.S. at 599.

<sup>121</sup> *Id.* at 599-600.

<sup>122</sup> *See id.* at 599.

<sup>123</sup> *See id.* at 618-20 (Kennedy, J., concurring).

<sup>124</sup> The Advisory Committee Note to Rule 804(b)(3) provides in part: "Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest *they would be admissible as related statements.*" FED. R. EVID. 804(b)(3) advisory committee's notes (emphasis added).

<sup>125</sup> *Williamson*, 512 U.S. at 602.



terest exception. Justice O'Connor provided examples of statements against interest that might be admissible and then reasoned that courts must view statements in context to decide whether they are admissible.

In part II-C, Justice O'Connor concluded that portions of Harris's statement were admissible but that the case should be remanded to the court of appeals for inquiry as to "whether each of the statements in Harris's confession was truly self-inculpatory."<sup>126</sup> Justice O'Connor ended the decision with a list of issues the Court did not decide.<sup>127</sup> These included whether the admission of Harris's statements would violate the Confrontation Clause and, despite conflicting circuit court decisions, whether the declaration against interest exception is firmly rooted.<sup>128</sup> In addition, the Court refused to decide whether statements inculpatory of the accused must be supported by corroborating circumstances, since Rule 804(b)(3) requires that statements exculpating the accused not be admitted "unless corroborating circumstances clearly indicate the trustworthiness of the statement."<sup>129</sup>

### B. Justice Scalia's Opinion

Justice Scalia fully concurred in Justice O'Connor's opinion but wrote separately, in part it appears, to take a few jabs at Justice Kennedy's opinion. Justice Scalia made three main points. First, the Justice stated that "[e]mploying the narrower definition of 'statement,' so that Rule 804(b)(3) allows admission of only those remarks that are individually self-inculpatory, does not, as Justice Kennedy states, 'eviscerate the against penal interest exception.'"<sup>130</sup> To support this view, Justice Scalia set out a few examples of statements that may be self-inculpatory without being direct confessions. Second, the Justice reasoned that a statement against penal interest may be admissible even if it "names another person or implicates a possible codefendant."<sup>131</sup> Third, Justice Scalia concluded his concurrence by denigrating the classifications of collateral statements used by Justice Kennedy. "The relevant inquiry, however—and one that is

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<sup>126</sup> *Id.* at 604.

<sup>127</sup> *See id.* at 605.

<sup>128</sup> *See id.* (citing *United States v. Flores*, 985 F.2d 770, 775-76 (5th Cir. 1993) (holding that it is not a firmly rooted exception); *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989) (holding that it is a firmly rooted exception)).

<sup>129</sup> *Id.*; *see also* FED. R. EVID. 804(b)(3).

<sup>130</sup> *Williamson*, 512 U.S. at 606 (Scalia, J., concurring).

<sup>131</sup> *Id.*

not furthered by clouding the waters with manufactured categories such as 'collateral neutral' and 'collateral self-serving,'—must always be whether the particular remark at issue (and *not* the extended narrative) meets the standard set forth in the Rule."<sup>152</sup>

### C. Justice Ginsburg's Opinion

Justice Ginsburg concurred in parts I, II-A, and II-B of the Court's opinion. Justice Ginsburg began by agreeing with the Court's view that "the exception for statements against penal interest 'does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory . . . .'"<sup>153</sup> Justice Ginsburg then discussed the lack of trustworthiness in statements implicating another and quoted from the decisions in *Lee v. Illinois*<sup>154</sup> and *Bruton v. United States*.<sup>155</sup> Justice Ginsburg departed from the Court's decision in finding that no part of Harris's statements to the DEA agent fit within Rule 804(b)(3) because his "arguably inculpatory statements [were] too closely intertwined with his self-serving declarations to be ranked as trustworthy."<sup>156</sup> The Justice suggested that Harris's statements painted Williamson as the "big fish" and admitted his own involvement in a way that minimized his own role. Justice Ginsburg concluded by stating that because she had not reviewed the entire record, she would not foreclose the prosecution from arguing that admitting Harris's statements was harmless error.<sup>157</sup>

### D. Justice Kennedy's Opinion

Justice Kennedy concurred in the judgment but disagreed with the majority's reasoning in almost every way. After setting out that hearsay is generally inadmissible but that many exceptions exist, the Justice defined the issue before the Court as whether collateral statements are admissible under F.R.E. 804(b)(3).

Noting that there has been long debate on this issue, Justice Kennedy highlighted the positions of three commentators. First, the Justice cited to Dean Wigmore, who argued that "the statement may be accepted, not merely as to the specific fact against interest, but

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<sup>152</sup> *Id.* at 607 (Scalia, J., concurring).

<sup>153</sup> *Id.* at 608 (Ginsburg, J., concurring) (quoting *id.* at 600).

<sup>154</sup> 476 U.S. 530, 541 (1986).

<sup>155</sup> 391 U.S. 123, 141 (1968) (White, J., dissenting).

<sup>156</sup> *Williamson*, 512 U.S. at 608 (Ginsburg, J., concurring).

<sup>157</sup> *See id.* at 610-11 (Ginsburg, J., concurring).

also as to every fact contained in the same statement.”<sup>138</sup> Justice Kennedy then cited Dean McCormick, who “argued for the admissibility of collateral statements of a neutral character, and for the exclusion of collateral statements of a self-serving character.”<sup>139</sup> Justice Kennedy concluded his discussion of the commentators with a reference to Bernard Jefferson: “Professor Jefferson took the narrowest approach, arguing that the reliability of a statement against interest stems only from the dis-serving fact stated and so should be confined ‘to the proof of the fact which is against interest.’”<sup>140</sup>

Justice Kennedy then stated that the text of the rule does not contain the answer as to whether collateral statements are admissible. This view conflicted with the majority, who found that the policy expressed in the text prohibited the introduction of collateral statements.<sup>141</sup> Because Justice Kennedy did not find an answer in the text, the Justice looked to other sources.

In part II, Justice Kennedy looked to the Advisory Committee Note and found:

[It] establishes that some collateral statements are admissible. In fact, it refers in specific terms to the issue we here confront: “Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements.”<sup>142</sup>

After discussing the Advisory Committee Note, Justice Kennedy argued that the common law allowed for the admission of collateral statements, and that, by failing to express a change, “Congress intended the principles and terms used in the Federal Rules of Evidence to be applied as they were at common law.”<sup>143</sup> Next, the Justice argued that collateral statements should be introduced because precluding their admission would severely limit the statement against penal interest exception. Justice Kennedy argued that Congress could not have intended the rule to have so little effect. The Justice pointed out that the effect of the Court’s decision would be to limit

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<sup>138</sup> *Id.* at 611-12 (Kennedy, J., concurring) (quoting 5 WIGMORE, *supra* note 47, at 339).

<sup>139</sup> *Id.* (quoting MCCORMICK, *supra* note 47, at 552-53).

<sup>140</sup> *Id.* at 612 (Kennedy, J., concurring) (quoting Jefferson, *supra* note 47, at 62-63).

<sup>141</sup> *See id.* at 600.

<sup>142</sup> *Williamson*, 512 U.S. at 614 (Kennedy, J., concurring).

<sup>143</sup> *Id.* at 615 (Kennedy, J., concurring).

severely not only the introduction of statements that inculpate the accused but also those that exculpate.<sup>144</sup>

In part III, Justice Kennedy addressed the question of which collateral statements should be admitted. Justice Kennedy took the position that the reference to McCormick in the Advisory Committee's Note on the balancing of self-serving versus dis-serving portions of the declaration was an incorporation of McCormick's view. "McCormick stated that '[a] certain latitude as to contextual [*i.e.*, collateral] statements, neutral as to interest, giving meaning to the declaration against interest seems defensible, but bringing in self-serving statements contextually seems questionable."<sup>145</sup>

Justice Kennedy then suggested that statements that are self-serving in the criminal context are ones that would reduce the charges against or mitigate the punishment of the declarant. The Justice found that statements made to authorities may be an attempt to curry favor and that both the collateral comments and the statement that appears to be against interest may need to be excluded.<sup>146</sup> Justice Kennedy noted that because the declarant is unavailable, courts have created categories for the exclusion of such statements.<sup>147</sup>

Justice Kennedy then suggested an approach for dealing with the statement against interest exception. Initially, a court should determine if the statement contains a fact against interest. If it does, the court should admit all statements related to that statement against interest with two limitations. First, the court should exclude collateral statements that are so self-serving as to be unreliable. Second, the court should exclude the entire statement where "the declarant had a significant motivation to obtain favorable treatment, as when the government made an explicit offer of leniency in exchange for the declarant's admission of guilt."<sup>148</sup> Justice Kennedy concluded that the case should be remanded "for application of the analysis set forth in this opinion" because decisions on statements against interest involve fact-bound judgments.<sup>149</sup> Although the basic holding of *Williamson* seems relatively clear, "some of the majority's critical lan-

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<sup>144</sup> See *id.* at 617 (Kennedy, J., concurring).

<sup>145</sup> *Id.* at 618 (Kennedy, J., concurring) (quoting MCCORMICK, *supra* note 47, at 552).

<sup>146</sup> See *id.* at 618-19 (Kennedy, J., concurring). For a discussion of why an accomplice's confession resulting from formal police interrogation should not be introduced against an accused, see generally White, *supra* note 101.

<sup>147</sup> See *Williamson*, 512 U.S. at 619 (Kennedy, J., concurring).

<sup>148</sup> *Id.* at 620 (Kennedy, J., concurring).

<sup>149</sup> *Id.* at 621 (Kennedy, J., concurring).

guage is subject to widely different interpretations"<sup>150</sup> and one is left wondering how courts will apply the decision.

#### V. THE CONSTITUTIONALIZATION OF RULE 804(b)(3)

As mentioned earlier, one thesis of this article is that the Supreme Court in *Williamson*, by limiting the admission of statements against interest to only those portions of a declaration that are against the declarant's interest, has constitutionalized Federal Rule of Evidence 804(b)(3).<sup>151</sup> This section of the article discusses that thesis. First, this section reviews the common law on statements against interest and the breadth that courts have given to the admission of statements against interest under Rule 804(b)(3). Second, this section discusses the Supreme Court's interpretation of the Confrontation Clause of the Sixth Amendment as it applies to the statement against interest exception.<sup>152</sup> Third, the section shows how allowing the admission of only self-inculpatory portions of a declaration presses a new and higher admission standard for statements against interest than earlier precedent. This results in an incorporation of the Sixth Amendment standard and virtually eliminates the need for Confrontation Clause analysis.

The notion that the Supreme Court has constitutionalized Rule 804(b)(3) is somewhat slippery because both statement against interest admissibility and Confrontation Clause analysis focus on reliability. Although other interests perhaps should be major forces in Confrontation Clause analysis,<sup>153</sup> I have focused on reliability because the Supreme Court has made the reliability of the statement of an unavailable declarant the key admissibility issue under its Confrontation Clause analysis.<sup>154</sup> The constitutionalization argument is also less facile because courts often fail to distinguish between the statement against interest exception and Confrontation Clause analysis.

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<sup>150</sup> White, *supra* note 101, at 762.

<sup>151</sup> See *supra* note 1 and accompanying text.

<sup>152</sup> This discussion assumes that the Supreme Court will not find the statement against interest exception to be a firmly rooted exception to the hearsay rule. See *supra* notes 66-69 and accompanying text.

<sup>153</sup> See generally Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992); Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485 (1987); Scallen, *supra* note 101.

<sup>154</sup> See *White v. Illinois*, 502 U.S. 346 (1992). The Court in *White* held that a hearsay statement may be admitted if it is reliable because of "substantial guarantees of trustworthiness" or because of a "firmly rooted hearsay exception." *Id.* at 355-57; see also CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.75, at 1097 (3d ed. 1995).

In addition, courts are often inarticulate about the standard of reliability being used.

A. *The Common Law on Statements Against Interest and the Pre-Williamson Interpretation of Rule 804(b)(3).*

Because the Federal Rules of Evidence made few changes to the common law,<sup>155</sup> it is helpful to examine the common law on the admission of statements against interest and the introduction of portions of a statement that are not against interest. Very early on, statements against interest were introduced despite that some portions might be considered neutral as to interest and even self-serving.<sup>156</sup> The view that the "collateral statements connected with the disserving statements" were admissible at common law was even acknowledged by Professor Jefferson, one of the strong opponents to their introduction.<sup>157</sup> Following the adoption of the Federal Rules of Evidence and Rule 804(b)(3), many federal courts adopted the view taken by the common law on collateral statements. The Second Circuit, in *United States v. Garris*,<sup>158</sup> found that "it suffices for admission under that rule that a remark which is itself neutral as to the declarant's interest be integral to a larger statement which is against the declarant's interest."<sup>159</sup> The notion that neutral collateral statements may be admitted as part of a statement against interest if they are sufficiently "integral" or "connected" to the against interest portion permeates the case law dealing with collateral comments. In *United States v. Barrett*,<sup>160</sup> the First Circuit admitted collateral comments that added to the statement's against interest aspect. The court said that it did not "appear that Congress intended to constrict the scope of a declaration against interest to the point of excluding 'collateral' material that, as here, actually tended to fortify the statement's disserving aspects."<sup>161</sup> Of course, if what at first appears to be neutral actu-

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<sup>155</sup> See David P. Leonard, *Foreword: Twenty Years of the Federal Rules of Evidence*, 28 LOY. L.A. L. REV. 1251, 1252 (1995); see also Faust S. Rossi, *The Federal Rules of Evidence—Past, Present and Future: A Twenty Year Prospective*, 28 LOY. L.A. L. REV. 1271, 1272 (1995).

<sup>156</sup> See *Higham v. Ridgway*, 103 ENG. REP. 717, 721 (K.B. 1808); see also 5 WIGMORE, *supra* note 47, at 271.

<sup>157</sup> See Jefferson, *supra* note 47, at 62-63.

<sup>158</sup> 616 F.2d 626 (2d Cir. 1980).

<sup>159</sup> *Id.* at 630.

<sup>160</sup> 539 F.2d 244 (1st Cir. 1976).

<sup>161</sup> *Id.* at 252; see also *United States v. Casamento*, 887 F.2d 1141, 1172 (2d Cir. 1989) (admitting references to others in statement where the reference was closely connected to the reference to the declarant); *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980) (holding that even a wholly neutral portion of a declaration

ally is self-serving, that portion would not, and should not, be admitted.<sup>162</sup>

Before *Williamson*, some authority was read to exclude statements that were collateral to statements against interest.<sup>163</sup> In one such case, *United States v. Lilley*,<sup>164</sup> the court was faced with the issue of admitting a husband's confession to his involvement in cashing a tax refund check that also placed much of the guilt on the appellant, his wife. In deciding to admit only those portions of the statement that were actually against interest, if severable, the court stated that "all portions of Mr. Lilley's statement which were not against his interest should have been excluded from evidence because they lacked the indicia of truthfulness associated with Rule 804(b)(3)."<sup>165</sup> The court, however, found that "for the most part his statement was inculpatory of appellant and not against Mr. Lilley's interest."<sup>166</sup> Although *Lilley* may be in line with *Williamson*, it might be read as a case simply confirming the need for a statement to be against interest and excluding statements that shift blame. *Lilley* did not directly address whether, before *Williamson*, case law allowed the admission of related portions of statements against interest.

*United States v. Porter*<sup>167</sup> is another case that has been read as prohibiting the introduction of collateral statements of a neutral character as part of a statement against interest,<sup>168</sup> and the general language and holding in fact support this notion.<sup>169</sup> The statement at issue in

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might be admitted if "it was part and parcel of a larger conversation in which clearly self-incriminating statements were made").

<sup>162</sup> See *United States v. Coachman*, 727 F.2d 1293, 1296-97 (D.C. Cir. 1984).

Whether a statement is in fact against interest depends upon the circumstances of the particular case. We are mindful of the Advisory Committee's warning that an in-custody statement which inculpates another as well as the speaker may have been made with a view to currying favor with law-enforcement authorities, and consequently might not qualify as a declaration against penal interest.

*Id.* (citing FED. R. EVID. 804(b)(3) advisory committee's note).

<sup>163</sup> See Keith M. Aurzada, Case Note, *Evidence—Rule 804(b)(3): The Williamson Decision Establishes a Bright-Line Rule That Invites Injustice and Cripples the Hearsay Exception For Statements Against Penal Interest*, *Williamson v. United States*, 30 LAND & WATER L. REV. 591, 597-98 (1995) (arguing that *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978), and *United States v. Porter*, 881 F.2d 878 (10th Cir. 1989), held that remarks collateral to statements against interest are not admissible).

<sup>164</sup> 581 F.2d 182 (8th Cir. 1978).

<sup>165</sup> *Id.* at 188.

<sup>166</sup> *Id.* at 187.

<sup>167</sup> 881 F.2d 878 (10th Cir. 1989).

<sup>168</sup> See Aurzada, *supra* note 163, at 597-98.

<sup>169</sup> See *Porter*, 881 F.2d at 883. "Thus, to the extent that a statement not against the declarant's interest is severable from other statements satisfying 804(b)(3), such

*Porter*, however, was one *exculpating* the accused (Danny Porter) and was made by the defendant's brother (Dick), deceased at the time of trial, to the defendant's sister-in-law. One of the grounds for the decision was that "there is the need for corroborating circumstances that clearly indicate the trustworthiness of Dick's statement exculpating Danny . . . [and] the district court's apparent finding of insufficient corroboration is not without support in the record."<sup>170</sup> One wonders if the holding and general language of *Porter* would have been the same if a less biased witness, a living declarant, and an inculpatory statement had been involved.

Although some pre-*Williamson* authority supports the exclusion of collateral statements, the great weight of federal authority has read Rule 804(b)(3) as allowing the introduction of collateral statements.<sup>171</sup> In addition, many states that have adopted the Federal Rules of Evidence or their own variations also allow for the introduction of collateral statements.<sup>172</sup> States without codified evidence rules have also admitted collateral statements.<sup>173</sup>

#### B. *The Difference Between the Prohibition Against Hearsay and the Confrontation Clause*

Although both the prohibition against hearsay and the Confrontation Clause have similar antecedents<sup>174</sup> and protect similar values, they are different in both substance and application. In *California v. Green*,<sup>175</sup> Justice White wrote for the Court:

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statement should be excluded." *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> This point and this article focus on inculpatory statements against interest. Because of the corroboration requirement, the admissibility of exculpatory statements is often treated quite differently. See FED. R. EVID. 804(b)(3).

<sup>172</sup> See also *State v. Kiewert*, 605 A.2d 1031, 1035-36 (N.H. 1992); *State v. Parris*, 654 P.2d 77, 81 (Wash. 1982) (en banc). See generally Julianna Gortner, Note, *The Admissibility of Inculpatory Statements in Washington under the Rule for Declarations Against Interest After Williamson v. United States*, 70 WASH. L. REV. 859 (1995).

<sup>173</sup> See *Maryland v. Standifur*, 526 A.2d 955, 962 (Md. 1987). "A statement against interest that survives this analysis, and those *related* statements so closely connected with it as to be equally trustworthy, are admissible as declarations against interest." *Id.* (emphasis added).

<sup>174</sup> The rule against hearsay testimony and the Confrontation Clause may both trace their roots to the trial of Sir Walter Raleigh, whose conviction was based on out of court statements attributed to Lord Cobham. For a brief account of the trial of Sir Walter Raleigh, see *California v. Green*, 399 U.S. 149, 157 n.10 (1970). For an historical discussion of the origins of the Confrontation Clause, see *id.* at 174-83 (Harlan, J., concurring).

<sup>175</sup> 399 U.S. 149 (1970).



While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.<sup>176</sup>

The Court affirmed this view in *Dutton v. Evans*,<sup>177</sup> when it quoted the above excerpt from *Green* and iterated the view in a terser fashion: "It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now."<sup>178</sup> The Court reinforced the position by quoting approvingly a commentator who wrote that, "[d]espite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature."<sup>179</sup> In a concurrence in *Dutton*, Justice Harlan, quoting Wigmore, suggested that the major difference between the rules of evidence and the Confrontation Clause is that the rules dictate the substantive form of evidence that may be admitted while the Confrontation Clause sets forth the process:

The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed—*i.e.* a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially.<sup>180</sup>

Professor Andrew Keller pointed out the difference in a similar way:

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<sup>176</sup> *Id.* at 155-56 (citing *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965)).

<sup>177</sup> 400 U.S. 74 (1970).

<sup>178</sup> *Id.* at 86 (footnotes omitted).

<sup>179</sup> *Id.* at n.17 (quoting Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1436 (1966)).

<sup>180</sup> *Id.* at 94 (Harlan, J., concurring) (quoting WIGMORE, *supra* note 47, § 1397, at 131) (footnote omitted).

[T]he fact that the confrontation clause appears in the sixth amendment of the Bill of Rights demonstrates that it is not simply a rule of trial procedure—as is the hearsay rule—but “a fundamental right essential to a fair trial in a criminal prosecution.”<sup>181</sup>

Later, “[h]aving equated confrontation with the right to cross-examination and defined the right instrumentally,”<sup>182</sup> in *Lee v. Illinois*,<sup>183</sup> the Supreme Court concluded that the right to cross-examine may be satisfied if there is a showing that the hearsay statement is sufficiently reliable.<sup>184</sup>

Given the Court’s pronouncements in *Dutton* and *Green*, the confrontation right and hearsay rule are different. Although this difference has been limited by the firmly rooted exception analysis,<sup>185</sup> standard reliability analysis is used for the catchall exceptions<sup>186</sup> and will continue to be used for statements against interest.<sup>187</sup> Because the Supreme Court has focused its confrontation analysis on reliability, the standard for the introduction of statements against interest and the standard for excusing confrontation seem to merge. But, pre-*Williamson*, the standards were different for the introduction of statements against interest and for not enforcing confrontation.

One may find support for the differing standards in a number of places. First, the history of the adoption of Rule 804(b)(3) shows that the drafters had no intention of imbuing the rule with the constitutional confrontation standard. During the drafting of Rule 804:

The House amended this exception to add a sentence making inadmissible 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. The sentence was added to codify the constitutional principle announced in *Bruton v. United States*, 391 U.S. 123 (1968) . . . .

The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles such as the fifth

<sup>181</sup> Andrew R. Keller, Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159, 183-84 (1983) (footnote omitted).

<sup>182</sup> Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521, 525 (1992).

<sup>183</sup> 476 U.S. 530 (1986).

<sup>184</sup> See *id.* at 540. “The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in a criminal trial.” *Id.*

<sup>185</sup> See *supra* notes 60-65 and accompanying text.

<sup>186</sup> See *Idaho v. Wright*, 497 U.S. 805, 817-18 (1990); see also FED. R. EVID. 803(24); FED. R. EVID. 804(b)(5).

<sup>187</sup> See *supra* notes 66-69 and accompanying text.

amendment's right against self-incrimination and the sixth amendment's right of confrontation.<sup>188</sup>

The sentence that limited the exception, and that was later omitted, provided that the rule would not allow for the admission of "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."<sup>189</sup> Because of the elimination of that sentence and from language of the Senate Judiciary Committee Report, it is clear that Rule 804(b)(3) was not intended to be co-extensive with the Confrontation Clause. In fact, the intent was to steer clear of codifying constitutional principles.<sup>190</sup>

Second, in addition to the history of the rule showing the dichotomy between Rule 804(b)(3) and the Confrontation Clause, the standards used in their application before *Williamson* show the differences between the two. While a declaration must be reliable to be admitted as a statement against interest, and a statement against interest must be reliable to be admitted in contravention of the Confrontation Clause, the standards for reliability are different for each.

In *Ohio v. Roberts*,<sup>191</sup> the Supreme Court said that an unavailable declarant's "statement is admissible only if it bears adequate 'indicia of reliability,'" and went on to say that, where no firmly rooted exception to the hearsay rule applies, "the evidence must be excluded, at least absent a showing of *particularized guarantees of trustworthiness*."<sup>192</sup> In contrast to the Confrontation Clause standard, reliability for statements against interest "is founded on the commonplace notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true."<sup>193</sup> The reliability standard for admission decisions was set out by the Court in *Bourjaily v. United States*.<sup>194</sup> In *Bourjaily*, the Court confirmed that admissibility decisions that

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<sup>188</sup> FED. R. EVID. 804(b)(3) Senate Judiciary Committee Report.

<sup>189</sup> Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 378 (1969).

<sup>190</sup> There was some confusion on the part of the drafters about the meaning of *Bruton*, but the intent to avoid constitutional issues is clear. For a further discussion of *Bruton*, see *supra* note 72.

<sup>191</sup> 448 U.S. 56 (1980).

<sup>192</sup> *Id.* at 66. (emphasis added). Factors that have been used by courts in finding this level of reliability have included the motive to misrepresent, the speaker's general character, the timing of the statement, and whether the declaration was made spontaneously. See *United States v. Alvarez*, 584 F.2d 694, 702 & n.10 (5th Cir. 1978).

<sup>193</sup> *Williamson v. United States*, 512 U.S. 594, 599 (1994).

<sup>194</sup> 483 U.S. 171, 175 (1987).

hinge on preliminary factual questions must "be established by a preponderance of proof."<sup>195</sup> Other courts have described the degree of reliability that is required for the admission of a hearsay statement as "unlikely to be false,"<sup>196</sup> and as "a threshold test" of admissibility.<sup>197</sup> In the view of some, reliability may come from the mere fact that the hearsay fits an exception. Judge Friendly stated:

[I]t is doubtless true that all the hearsay exceptions in Rules 803 and 804 rest on a belief that declarations of the sort there described have "some particular assurance of credibility." But the scheme of the Rules is to determine that issue by categories; if a declaration comes within a category defined as an exception, the declaration is admissible without any preliminary finding of probable credibility by the judge, save for the "catch-all" exceptions of Rules 803(24) and 804(b)(5) and the business records exception of Rule 803(6) ("unless the source of information or the method or circumstance of preparation indicate lack of trustworthiness").<sup>198</sup>

The language used to describe the standards for admitting hearsay leads to the conclusion that confrontation reliability creates a higher standard than does exception reliability for hearsay exceptions that are not firmly rooted.

Third, the sequence courts have used in analyzing cases in which statement against interest and Confrontation Clause issues exist also supports the view that not only are confrontation reliability and exception reliability different standards but also that confrontation reliability presents a higher standard. A case that makes this point well is *United States v. Coachman*.<sup>199</sup> In *Coachman*, the United States Court of Appeals for the District of Columbia was faced with the issue of whether "a Secret Service agent's recapitulation of an inculpatory statement" made by an alleged accomplice and naming Coachman had been properly admitted.<sup>200</sup> The court first looked to the statement to see whether it fit the statement against interest exception to the hearsay rule.<sup>201</sup> Because the declarant "did not at-

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<sup>195</sup> *Id.*

<sup>196</sup> *People v. Spriggs*, 389 P.2d 377, 381 (Cal. 1964) (en banc); see also Jay L. Hack, Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 B.U. L. REV. 148, 154 (1976).

<sup>197</sup> See *State v. Higginbotham*, 212 N.W.2d 881, 883 (Minn. 1973); see also Hack, *supra* note 196, at 154 n.34.

<sup>198</sup> *United States v. DiMaria*, 727 F.2d 265, 272 (2d Cir. 1984) (citation omitted).

<sup>199</sup> 727 F.2d 1293 (D.C. Cir. 1984).

<sup>200</sup> *Id.* at 1296.

<sup>201</sup> See *id.* at 1296-97.

tempt to trivialize his own involvement in the nefarious scheme by shifting responsibility to his cohorts<sup>202</sup> and because other evidence corroborated the statement, the court found the statement to be a declaration against interest and admissible under Rule 804(b)(3).<sup>203</sup> The court then analyzed whether the admission of the statement "deprived Coachman of the benefit of the Confrontation Clause of the Sixth Amendment."<sup>204</sup> The court went on to find that the appellant's Confrontation Clause rights had been violated.<sup>205</sup>

In addition to precedential support for the proposition that Confrontation Clause reliability generally represents a higher standard than exception reliability, commentators have also expressed this view. For example, Professor Keller has written:

[W]hen a statement against penal interest is introduced as hearsay evidence against a defendant, its reliability must not only meet the evidentiary requirements of the hearsay rule, but the additional constitutional requirements mandated by the confrontation clause. Thus inculpatory hearsay statements are subject to stricter admissibility standards than exculpatory hearsay statements.<sup>206</sup>

Pre-*Williamson*, it seems clear that the standard for admission under the statement against interest exception was significantly lower than for the Confrontation Clause. But, in *Williamson*, the Supreme Court adopted a standard for the admission of statements against interest that was so stringent that it implicitly read Confrontation Clause requirements into the exception.

### C. *The Merger of Rule 804(b)(3) and the Confrontation Clause*

Several indicators point to this conflation of Confrontation Clause jurisprudence and the statement against interest exception.

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<sup>202</sup> *Id.* at 1297.

<sup>203</sup> *See id.*

<sup>204</sup> *Id.* (citing U.S. CONST. amend. VI).

<sup>205</sup> *See Coachman*, 727 F.2d at 1297. The court found the error to be harmless because of properly admitted evidence that it considered to be overwhelming. *See id.* at 1297-98; *see also State v. Matusky*, 682 A.2d 694, 701, n.7 (Md. 1996).

Moreover, even if hearsay evidence satisfies the requirements of the declaration against penal interest exception, it must also meet the requirements of the Confrontation Clause of the Sixth Amendment to be admissible . . . . We have previously concluded that the declaration against penal interest exception to the hearsay rule is not "firmly rooted," and therefore, the proponent must demonstrate "particularized guarantees of trustworthiness."

*Id.*

<sup>206</sup> Keller, *supra* note 181, at 184.

First, the Court has set a high standard for admission. Despite common law precedent and numerous federal court interpretations of Rule 804(b)(3) that allowed for the introduction of portions of a statement that are "integral" or "connected" to the statement against interest,<sup>207</sup> the *Williamson* Court found that only the self-inculpatory portions of statements against interest should be admissible.<sup>208</sup> This standard presses upon the statement against interest exception an admission threshold so high that only highly reliable statements will be admitted. By their nature, statements against interest are reliable.<sup>209</sup> Even before the Supreme Court's limited reading of Rule 804(b)(3), many had expressed the view that statements against interest, including collateral portions, are so reliable that they should be treated more favorably than other forms of hearsay for Confrontation Clause analysis. For example, "[t]he California Supreme Court once championed the view that declarations against interest are so trustworthy that there is no need for a showing of declarant unavailability."<sup>210</sup> Several courts have found declarations against interest to be so reliable as to be a "firmly rooted" exception to the hearsay rule and entitled to an inference of reliability.<sup>211</sup>

Given the high level of reliability for statements against interest, especially when narrowly defined to exclude related comments, the need for testing through cross-examination is dramatically decreased, if not obviated. It seems that testing through cross-examination might only marginally enhance the reliability of these already highly trustworthy statements. Of course, the need for testing reliability through cross-examination is the hallmark of the Court's reading of the right to confrontation.<sup>212</sup> This right may be dispensed with where "cross-examination of the declarant would be of marginal utility."<sup>213</sup>

Second, the merging of Confrontation Clause principles and the statement against interest exception is shown by the likelihood

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<sup>207</sup> See *supra* notes 47-54 and accompanying text.

<sup>208</sup> See *Williamson v. United States*, 512 U.S. 594, 600 (1994).

<sup>209</sup> See *id.* at 599. "[R]easonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Id.*

<sup>210</sup> *Imwinkelried*, *supra* note 182, at 553 (citing *People v. Spriggs*, 389 P.2d 377, 381-82 (Cal. 1964)).

<sup>211</sup> See *Jennings v. Maynard*, 946 F.2d 1502, 1505 (10th Cir. 1991); *accord* *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991); *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989).

<sup>212</sup> See *Ohio v. Roberts*, 448 U.S. 56, 62-66 (1980).

<sup>213</sup> *Idaho v. Wright*, 497 U.S. 805, 823 (1990).

that far fewer declarations will be found to be statements against interest post-*Williamson*, and that these are likely to be only those that have sufficient "indicia of reliability."<sup>214</sup> An example of this likelihood is found in the post-*Williamson* case of *Ciccarelli v. Gichner Systems Group, Inc.*<sup>215</sup> In that civil action, the court was faced with deciding how much of an affidavit that was against the affiant's (Woodend's) interest and named others should be admitted.<sup>216</sup> Interpreting *Williamson*, the court took the view "that only those words that are actually self-inculpatory fit within the Rule 804(b)(3) exception . . . . [A]ny references in the Woodend affidavit to persons other than Mr. Woodend would be inadmissible."<sup>217</sup> Limited in this way by the *Ciccarelli* court, the statement against interest exception rises to the level of the "indicia of reliability" standard of the Confrontation Clause.

In fact, the Supreme Court's holding on statements against interest may more fully limit the admission of these declarations than would the Confrontation Clause because "most statements inculpatory a defendant are only collateral to the portion of the declarant's statement that is against his own penal interest. The portion of the statement that specifically implicates the defendant is rarely directly counter to the declarant's penal interest."<sup>218</sup>

Third, the precedent relied on by the Court points to this conflation of Confrontation Clause jurisprudence and the statement against interest exception. After taking a textualist approach, citing to *Webster's Third New International Dictionary*, and then taking a purposive approach—by asserting "that reasonable people . . . tend not to make self-inculpatory statements unless they believe them to be true"<sup>219</sup>—Justice O'Connor cited not to statement against interest precedent, but rather to the Court's Confrontation Clause cases. The Justice wrote that the courts

may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else. "[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation

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<sup>214</sup> *Roberts*, 448 U.S. at 66.

<sup>215</sup> 862 F. Supp. 1293 (M.D. Pa. 1994).

<sup>216</sup> *See id.* at 1298.

<sup>217</sup> *Id.*

<sup>218</sup> *Keller*, *supra* note 181, at 163, *cited in Williamson v. United States*, 512 U.S. 594, 616 (1994) (Kennedy, J., concurring).

<sup>219</sup> *Williamson*, 512 U.S. at 599. For a discussion of the approaches followed by the Court, see Scallen, *supra* note 101, at 1795-1808.

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."<sup>220</sup>

After quoting from *Lee*, Justice O'Connor cited to *Bruton v. United States*<sup>221</sup> and *Dutton v. Evans*,<sup>222</sup> two other major cases in the Court's Sixth Amendment jurisprudence. Likewise, Justice Ginsburg, in a concurrence, cited to *Lee v. Illinois*<sup>223</sup> and *Bruton v. United States*<sup>224</sup> in pointing to the lack of trustworthiness of in-custody statements that implicate another.<sup>225</sup>

Fourth, case law following *Williamson* points to the Court's conflation of Confrontation Clause jurisprudence and statement against interest analysis. In *United States v. Sasso*,<sup>226</sup> the United States Court of Appeals for the Second Circuit was faced with the issue of whether an unavailable declarant's statements implicating Sasso had been properly admitted under Rule 804(b)(3) and the Confrontation Clause.<sup>227</sup> The prosecution alleged that Sasso had illegally arranged for one Armienti to pick up weapons ordered by Sasso and deliver payments for Sasso.<sup>228</sup> At trial, Armienti's girlfriend, Kramer, testified that Armienti told her that he was running guns for Sasso.<sup>229</sup> She also testified that Armienti had told her that he "had improvidently allowed someone to witness Sasso grinding gun serial numbers."<sup>230</sup> On appeal, Sasso relied heavily on *Williamson*. The court wrote:

*Williamson* is not inconsistent with *Matthews*. First, whereas *Matthews* concerned only a Confrontation Clause challenge, *Williamson* was limited to the hearsay rule ("we need not address *Williamson's* claim that the statements were also made inadmissible by the Confrontation Clause"). Furthermore, the analyses in the two cases are consistent. In *Williamson*, the Court interpreted the term "statement" within 804(b)(3) narrowly because it recog-

<sup>220</sup> *Id.* at 601 (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986) (internal quotation marks omitted)).

<sup>221</sup> 391 U.S. 123, 136 (1968).

<sup>222</sup> 400 U.S. 74, 98 (1970) (Harlan, J., concurring).

<sup>223</sup> 476 U.S. 530, 541 (1986).

<sup>224</sup> 391 U.S. 123, 141 (1968) (White, J., dissenting).

<sup>225</sup> See *Williamson*, 512 U.S. at 608 (Ginsburg, J., concurring). For a discussion of the practical realities of police interrogation and an argument as to why accomplices' confessions to police are per se unreliable, see generally White, *supra* note 101.

<sup>226</sup> 59 F.3d 341 (2d Cir. 1995).

<sup>227</sup> See *id.* at 347, 348.

<sup>228</sup> See *id.* at 345-46.

<sup>229</sup> See *id.* at 346.

<sup>230</sup> *Id.*



nized that a declarant might attempt to shift blame to another by mixing within a narrative true self-inculpatory statements and false blame-shifting ones. *Matthews* too recognized this problem, ("to the extent that the declarant's statement implicates another person in the crime, it may in some circumstances constitute an attempt to minimize the declarant's own culpability"), and for this reason we rested our decision on the "particularized guarantees of trustworthiness" surrounding the statements, including the fact that the statements inculpated both the declarant and defendant equally, rather than relying on mere proximity to statements inculpatory of the declarant.<sup>231</sup>

Having decided that *Williamson's* statement against interest analysis and its own Confrontation Clause analysis were consistent, the *Sasso* court found that, in the statements, Armienti had not attempted to shift blame, that he had no reason falsely to bring Sasso into the picture, and that the statements were not made to curry favor with the authorities or Kramer.<sup>232</sup> Then, without parsing the statements as suggested by *Williamson*, the court concluded "that the statements bore sufficient indicia of reliability that their admission against Sasso did not violate Sasso's confrontation rights."<sup>233</sup>

A state court case in which this conflation appears is *Smith v. State*.<sup>234</sup> In that case an accomplice told his wife that the defendant Smith had struck the victim's head with a bat as though he were hitting a baseball.<sup>235</sup> In deciding whether the trial court erred in admitting the statement, the court applied *Williamson*. The court said:

A hearsay declaration is admissible, usually under a specific exception, only where the declaration has some theoretical basis making it inherently trustworthy. Thus, absent some special *indicia of reliability* and trustworthiness, hearsay statements are inadmissible. Neutral, collateral statements enjoy no such guarantees of reliability and trustworthiness.<sup>236</sup>

In discussing the admission of a hearsay statement apart from Confrontation Clause analysis, rather than citing a threshold standard that would be appropriate for the admission of such hearsay, the court pointed to the "indicia of reliability" standard that the Supreme Court laid out as the Sixth Amendment standard in *Ohio v.*

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<sup>231</sup> *Id.* at 349 (citations omitted).

<sup>232</sup> See *Sasso*, 59 F.3d at 349-50.

<sup>233</sup> *Id.* at 350.

<sup>234</sup> 647 A.2d 1083 (Del. 1994).

<sup>235</sup> See *id.* at 1085.

<sup>236</sup> *Id.* at 1088 (citations omitted) (emphasis added).

*Roberts*.<sup>237</sup> The court's confusion, at least in part, seems attributable to the Supreme Court's *Williamson* analysis and its conflation of hearsay and the Sixth Amendment.

This conflation is also supported by *State v. Kimble*,<sup>238</sup> a state appellate case that addressed the defendant's contention that the introduction of an unavailable declarant's statement "contravenes her right to confront and cross-examine adverse witnesses as guaranteed by the Sixth Amendment of the United States Constitution and Article 1, Section 16 of the Louisiana Constitution."<sup>239</sup> In addressing this claim and discussing *Williamson*, the court found:

In *Williamson*, although choosing not to address this issue directly, the prevailing [J]ustices observed that the very fact that a statement is genuinely self-inculpatory is, itself, one of the "particularized guarantees of trustworthiness" affording admissibility under the Confrontation Clause. Thus, having previously determined Coleman's confession to be self-inculpatory, we discern no constitutional infringement.<sup>240</sup>

For the Louisiana court, post-*Williamson*, the fact that a statement was self-inculpatory was sufficient for it to meet a Confrontation Clause challenge. Thus, *Louisiana v. Kimble* evinces the conflation of statements against interest and the Sixth Amendment that occurred in *Williamson*.

A case that directly stated the conflation is *Akins v. United States*,<sup>241</sup> in which the court remanded the case for the trial court to decide whether certain statements could have properly been admitted as declarations against penal interest.<sup>242</sup> In *Akins*, the court stated:

Although the Supreme Court has not squarely addressed the constitutional issue arising under our facts, it is likely that statements which satisfy the requirements of the exception for declarations against penal interest would simultaneously withstand Confrontation Clause objections. Notably, Justice O'Connor explained in dictum that "the very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause."<sup>243</sup>

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<sup>237</sup> 448 U.S. 56, 66 (1980).

<sup>238</sup> 688 So.2d 552 (La. App. 1996).

<sup>239</sup> *Id.* at 557.

<sup>240</sup> *Id.* (citing *Williamson v. United States*, 512 U.S. 594, 605 (1994)).

<sup>241</sup> 679 A.2d 1017 (D.C. 1996).

<sup>242</sup> *See id.* at 1033-34.

<sup>243</sup> *Id.* at 1033.

Given the Supreme Court's language in *Williamson*, the high standard the Court pressed for Rule 804(b)(3), and post-*Williamson* cases, it seems the Court constitutionalized Rule 804(b)(3), but the question remains as to why. Although it is often a tricky business to ascribe motivation to an individual or even a group, I am led to the conclusion that the Court decided the case the way it did in order to avoid dealing with the constitutional issues and yet achieve an outcome as though it had. One commentator has observed that "[o]ne senses that both Justice O'Connor and Justice Kennedy fought to resolve *Williamson* by interpreting the text of Rule 804(b)(3) because they were attempting to avoid the constitutional Confrontation Clause issue."<sup>244</sup> One may speculate that the Court avoided the Confrontation Clause issue because it was impossible for this Court to decide. This is a court that produced four opinions in *Williamson* and is one for which the "plurality opinion, amorphous majority, or doctrinal zigzag"<sup>245</sup> is often the norm. To resolve the Confrontation Clause issue, the Court would have needed to decide whether the statement against interest exception is "firmly rooted," whether to continue the current standard for deciding whether an exception is "firmly rooted,"<sup>246</sup> and whether *Williamson*'s Confrontation Clause rights had been violated. Thus, the narrow and yet broad ground of *Williamson* may have provided a method for reaching a decision on admissibility as if the Confrontation Clause issue had been resolved without inviting the discord that undoubtedly would have resulted from this Court's efforts to resolve the more difficult constitutional issues. It is also possible that some Justices avoided the Confrontation Clause issue out of concern that the Court's resolution of this issue would produce a narrower or broader reading of the clause than individual Justices might desire or a rule of interpretation at odds with favored approaches.<sup>247</sup>

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<sup>244</sup> Scallen, *supra* note 101, at 1805.

<sup>245</sup> Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 124 & n.153 (1994) (citing Laura K. Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 820 (1990); John F. Davis & William L. Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 64; Ralph S. Spritzer, *Multiple-Issue Cases and Multi-Member Courts: Observations on Decision Making by Discordant Minorities*, 28 JURIMETRICS J. 139, 141-45 (1988)).

<sup>246</sup> For a persuasive argument that the firmly rooted concept is unworkable and that a trustworthiness standard should be applied in the admission of hearsay, see generally Goldman, *supra* note 11.

<sup>247</sup> See Cornelius M. Murphy, Note, *Justice Scalia and the Confrontation Clause: A Case Study in Originalist Adjudication of Individual Rights*, 34 AM. CRIM. L. REV. 1243 (1997). For a discussion of the Justices' reasons for producing concurring opin-

## VI. SOME PROBLEMS WITH THE COURT'S APPROACH

Statement against interest issues are most often discussed in the context of criminal prosecutions, but the exception is equally applicable in civil litigation. Further, while much of the Court's analysis in *Williamson* is applicable to criminal cases, the holding applies equally to civil trials. One might argue that, because *Williamson* decided the rights of a criminal defendant, the case's holding should be limited to criminal cases, but the Court's focus on the definition of statement within Rule 804(b)(3) makes this a difficult argument at best. Nothing in the Court's opinion would lead one to so limit the case. Courts will apply and be required to apply the holding in both types of proceedings.<sup>248</sup>

Although a high standard for the admission of statements against interest inculcating criminal defendants is appropriate,<sup>249</sup> especially when one applies a Confrontation Clause analysis, that same high standard seems inappropriate in civil cases and will lead to the exclusion of relevant and reliable evidence. In civil cases, fact-finders are better able to assess the reliability of contextual or collateral statements and less likely to be prejudiced by their introduction.

Another problem with the *Williamson* opinions is the Court's failure to give courts direction on Confrontation Clause issues and how the statement against interest exception fits within Confrontation Clause analysis. The Court specifically stated:

[W]e need not address *Williamson's* claim that the statements were also made inadmissible by the Confrontation Clause, and in particular we need not decide whether the hearsay exception for declarations against interest is "firmly rooted" for Confrontation Clause purposes. Compare, e.g., *United States v. Seeley*, 892 F.2d 1,2 (CA1 1989) (holding that the exception is firmly rooted), with *United States v. Flores*, 985 F.2d 770 (CA5 1993) (holding the contrary).<sup>250</sup>

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ions, see Ray, *supra* note 245.

<sup>248</sup> See *Ciccarelli v. Gichner Sys. Group, Inc.*, 862 F. Supp. 1293 (M.D. Pa. 1994). Also, while *Williamson* does not interpret the state counterparts to Rule 804(b)(3), the decision is likely to influence state courts' practices. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES* 389 (3d ed. 1996). See, e.g., *Smith v. State*, 647 A.2d 1088 (Del. 1994); *State v. Coates*, 661 So. 2d 571 (La. Ct. App. 1995); *State v. Matusky*, 682 A.2d 694 (Md. 1996); *Cofield v. State*, 891 S.W.2d 952 (Tex. Crim. App. 1994); *State v. Mason*, 460 S.E.2d 36 (W. Va. 1995).

<sup>249</sup> See generally Sherry F. Colb, *Freedom From Incarceration: Why is This Right Different From All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994).

<sup>250</sup> *Williamson v. United States*, 512 U.S. 594, 605 (1994) (citing *White v. Illinois*, 502 U.S. 346 (1992)).

This ducking of the Sixth Amendment issues is bound to continue the confusion and disarray among the circuit courts. There will be no short-term resolution of the "firmly rooted" issue and the division among the circuits on this issue will persist. In addition, because of the lack of guidance on the place of the statements against interest exception in Confrontation Clause analysis, courts are likely to misapply *Williamson*, especially when also faced with a Confrontation Clause issue.

Two examples of the types of errors that courts may make are illustrated by the previously discussed cases of *Ciccarelli v. Gichner Systems Group, Inc.*<sup>251</sup> and *United States v. Sasso*.<sup>252</sup> In *Ciccarelli*, the court, in deciding what portions of an affidavit should have been admitted, decided that only those portions that were self-inculpatory should be admitted and that they should exclude portions that referred to others.<sup>253</sup> A cursory reading of *Williamson* seems to require this rather simple approach, but the *Williamson* Court advised lower courts that "whether a statement is self-inculpatory or not can only be determined by viewing it in context."<sup>254</sup> This suggestion of a wider inquiry, apparently lost on the *Ciccarelli* court,<sup>255</sup> would more likely be understood if the Court had addressed the Confrontation Clause issue, which necessarily relies on the importance of context. In *Sasso*, again because of the conflation of Rule 804(b)(3) and the Confrontation Clause, the United States Court of Appeals for the Second Circuit read *Williamson* as consistent with its own decision in *Matthews*, a case decided on Confrontation Clause grounds.<sup>256</sup> The court, ignoring the narrow reading of statement and the analysis of the Supreme Court in *Williamson*, applied only Confrontation Clause analysis to the hearsay and found that the out of court declarations, although they named various others and possibly shifted blame, "bore sufficient indicia of reliability that their admission against Sasso did not violate Sasso's confrontation rights."<sup>257</sup> Had the Supreme Court set out the interplay of its statement against interest analysis with

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<sup>251</sup> 862 F. Supp. 1293 (M.D. Pa. 1994).

<sup>252</sup> 59 F.3d 341 (2d Cir. 1995).

<sup>253</sup> See *supra* notes 215-218 and accompanying text.

<sup>254</sup> *Williamson*, 512 U.S. at 603.

<sup>255</sup> For a discussion of *Ciccarelli's* application of the *Williamson* standard, see generally Emily F. Duck, Note, *The Williamson Standard for the Exception to the Rule Against Hearsay for Statements Against Penal Interest*, 85 J. CRIM. L. & CRIMINOLOGY 1084 (1995).

<sup>256</sup> For a discussion of *Sasso*, see *supra* notes 226-233 and accompanying text.

<sup>257</sup> *Sasso*, 59 F.3d at 350.

Confrontation Clause analysis, it is less likely the Second Circuit would have so lightly skipped over the *Williamson* analysis.

The *Williamson* Court also failed to deal with issues raised by exculpatory statements and the treatment of these statements under Rule 804(b)(3). For example, the Court did not address the issue of whether corroboration, required for statements exculpating the accused,<sup>258</sup> is needed for the proper introduction of statements inculcating the accused.<sup>259</sup> The opinion also failed to discuss the introduction of exculpatory statements and what corroboration is required for these.

Although the failure to discuss some types of exculpatory statements is not problematic—for example, statements in which the declarant admits involvement and the circumstances preclude the accused's involvement—in many instances the *Williamson* decision is likely to create problems for courts analyzing exculpatory statements and is likely to lead to the exclusion of statements that may otherwise be highly reliable. In this latter category are statements that both name and exculpate the accused. Although some courts will admit references to the accused where the part exculpating the defendant "has a close narrative and logical connection to the part implicating the speaker" and references to the accused are inculpatory of the declarant,<sup>260</sup> many courts are likely to find that most references to the accused are not against the speaker's interest and will preclude their introduction.<sup>261</sup> This outcome is likely to please (1) those who opposed the inclusion of the against penal interest exception for fear that trumped-up confessions would be used to exonerate the guilty and (2) those who pressed for the inclusion of the corroboration requirement.<sup>262</sup> Unfortunately, the exclusion of many reliable exculpatory statements is likely to be another of the unintended consequences of the *Williamson* decision and is a result of the Court's failure to address exculpatory statements.

While implicitly avoiding discussing exculpatory statements, the Court explicitly stated that it

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<sup>258</sup> See FED. R. EVID. 804(b)(3).

<sup>259</sup> See *Williamson*, 512 U.S. at 605.

<sup>260</sup> MUELLER & KIRKPATRICK, *supra* note 154, at 1051.

<sup>261</sup> For a discussion of the introduction of inculpatory and exculpatory references see *supra* notes 215-218 and accompanying text, and *infra* notes 264-271 and accompanying text. See generally *Ciccarelli v. Gichner Sys. Group, Inc.*, 862 F. Supp. 1293 (M.D. Pa. 1994).

<sup>262</sup> For a discussion of the history of Rule 804, see 4 MUELLER & KIRKPATRICK, *supra* note 37, at 708-24.

need not decide whether, as some Courts of Appeals have held, the second sentence of Rule 804(b)(3)—“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” (emphasis added)—also requires that statements inculcating the accused be supported by corroborating circumstances.<sup>265</sup>

The failure of the Court to decide this issue has perpetuated a split in authority among the circuits, some requiring corroboration for the introduction of statements against interest that are inculpatory,<sup>264</sup> and others admitting inculpatory declarations against interest without corroboration.<sup>265</sup> Due process and equal protection principles argue strongly for symmetrical application of the corroboration requirement,<sup>266</sup> but such a reading is contrary to the plain meaning of the rule. Lack of guidance from the Court on whether constitutional protection should dictate a movement away from the plain meaning of the rule has left courts and practitioners to define their own solutions.

Having failed to address the corroboration requirement for exculpatory statements, the Court naturally did not discuss what evidence might be used for corroboration. This failure is especially troubling because of the likely dichotomy between evidence that may be used for corroboration for hearsay purposes and evidence that may be used for corroboration for constitutional purposes. The dichotomy exists because of the Court's holding in *Idaho v. Wright*.<sup>267</sup> In *Wright*, the Court found that only the circumstances “that surround the making of the statement and that render the declarant particularly worthy of belief” could be used to support the statement's reliability under the Confrontation Clause.<sup>268</sup> Conversely, in deciding on the admissibility of hearsay and corroboration for exculpatory statements against interest, courts have a great deal more latitude. Under Rule 804(b)(3), exculpatory statements may be admitted where there are “corroborating circumstances [that] clearly

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<sup>265</sup> *Williamson*, 512 U.S. at 605.

<sup>264</sup> See also *United States v. Garcia*, 897 F.2d 1413, 1420-21 (7th Cir. 1990) (holding that corroboration is required for the admission of inculpatory statements against interest).

<sup>265</sup> See *United States v. Bakhtiar*, 994 F.2d 970, 978 (2d Cir. 1993).

<sup>266</sup> See Peter W. 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, 990 (1981).

<sup>267</sup> 497 U.S. 805 (1990). For a discussion of this case, see *supra* notes 87-91 and accompanying text.

<sup>268</sup> *Wright*, 497 U.S. at 819.

indicate the trustworthiness" of the statement.<sup>269</sup> This corroboration requirement certainly "is satisfied by independent evidence that directly or circumstantially tends to prove the points for which the statement is offered. But the term 'corroborating circumstances' seems much broader . . . ."<sup>270</sup> They might include the fact that the declarant repeated the statement or that the speaker "is unavailable at trial because he properly claims his privilege against self-incrimination . . . ."<sup>271</sup>

The dichotomy between what may be considered in assessing an inculpatory statement's reliability and what may be used as corroboration for an exculpatory statement is less troubling than the dichotomy between requiring corroboration for exculpatory statements but not for statements that are inculpatory. This is so because both limiting the circumstances that may be considered in testing the reliability of an inculpatory statement and taking a broad view of the factors that may be considered in corroborating an exculpatory statement inure to the benefit of the defendant. Despite the lower level of concern, this area is another where guidance from the Court would have been helpful to courts in applying the statement against interest exception.

#### VII. A BETTER APPROACH TO RESOLVING STATEMENT AGAINST INTEREST AND CONFRONTATION CLAUSE PROBLEMS

A more appropriate approach to resolving statement against interest and Confrontation Clause issues would be to recognize the distinct stages or steps involved in the decisions and avoid the conflation of exception and constitutional analysis. After deciding the unavailability of the declarant,<sup>272</sup> a court needs to discern if any portion of a statement is against interest and, if so, which parts of the statement are against interest, which portions are self-serving, and whether there are any portions that are neither against interest nor self-serving. Although simple enough to state, this analysis is difficult to apply because it involves complex and context bound fact-based

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<sup>269</sup> FED. R. EVID. 804(b)(3).

<sup>270</sup> 4 MUELLER & KIRKPATRICK, *supra* note 37, at 851; *see also* 5 WEINSTEIN & BERGER, *supra* note 33, at 153 (citing *United States v. Lopez*, 777 F.2d 543 (10th Cir. 1985)).

<sup>271</sup> 4 MUELLER & KIRKPATRICK, *supra* note 37, at 852; *see also* UNITED STATES V. LOPEZ, 777 F.2D 543, 554 (10TH CIR. 1985) (concluding that absence of fingerprints on cocaine containers along with other facts was sufficient corroboration).

<sup>272</sup> *See* FED. R. EVID. 804(a). Although beyond the scope of this article, the decision on availability is itself quite complex. *See generally* Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665 (1986).



determinations.<sup>273</sup> What at first may appear neutral as to interest may be, when examined in context, against interest.<sup>274</sup> The difficulty of making these decisions is increased because the judge will be making assumptions about the understanding of the declarant at the time the statement was made.<sup>275</sup>

After the statement is parsed for its against interest, self-serving, and neutral portions, the court should exclude those portions that are self-serving. Once this determination is made and before beginning its Confrontation Clause analysis, the court should decide which of the neutral portions are sufficiently related or "integral"<sup>276</sup> to the against interest portion to be admitted and which are too attenuated in time, narrative, or meaning to warrant admission.<sup>277</sup> In civil cases, the analysis should end here with the court admitting those portions that are against interest and the neutral portions that are closely related.<sup>278</sup>

At this stage in criminal cases, the court should begin its Confrontation Clause analysis. The court should decide whether the statement has sufficient reliability or "indicia of reliability" to be admitted absent confrontation.<sup>279</sup> Many of the factors and circumstances that were used by the court in deciding whether the statement was against interest will also be used in deciding whether the statement has sufficient indications of reliability to be admitted in the face of the unavailability of the declarant for cross-examination. One factor that will be obvious from the earlier parsing is whether the statement, assuming it is an accomplice's confession, was made to the police or others. This is especially important because, for Confrontation Clause purposes, there is a presumption of unreliability in an accomplice's confession to the police.<sup>280</sup> Other factors to examine include whether the declarant sought to mitigate her or his own culpability, whether the declarant sought retaliation against the accused, and whether the statement was given to curry favor with

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<sup>273</sup> See *Williamson v. United States*, 512 U.S. 594, 620 (1994) (Kennedy, J., concurring).

<sup>274</sup> See *MUELLER & KIRKPATRICK*, *supra* note 248, at 389. "[I]sn't it true that just being part of an against-interest statement can make other statements against interest that otherwise might not be?" *Id.*

<sup>275</sup> For a discussion of the decision, see *supra* notes 36-41 and accompanying text.

<sup>276</sup> *United States v. Garris*, 616 F.2d 626, 630 (2d Cir. 1980).

<sup>277</sup> See *supra* notes 47-56 and accompanying text.

<sup>278</sup> Of course, prejudice might weigh in favor of exclusion. See *FED. R. EVID.* 403; see also *WEINSTEIN*, *supra* note 33, at 804-45.

<sup>279</sup> See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>280</sup> See *Lee v. Illinois*, 476 U.S. 530, 539 (1986).

authorities.<sup>281</sup> The timing of the confession will also be important. For example, if the confession is the second one given to the police, they will be able to form the statement in a preconceived fashion.<sup>282</sup> Unlike the standard for exception admission, given the holding in *Lee*,<sup>283</sup> the standard for Confrontation Clause admission must be one that overcomes the presumption of unreliability. One way to ensure meeting this standard may be to adopt the suggestion of Professor Nesson that the admission of hearsay over a Confrontation Clause objection should be allowed only if "the hearsay is independently corroborated."<sup>284</sup>

Although the use of corroboration is at odds with the holding in *Idaho v. Wright*,<sup>285</sup> the long term viability of that decision is questionable. First, *Wright* was a 5-4 decision, and two Justices from the majority have since retired. Second, "[o]ften corroborating evidence is strong proof of important points in a statement, and *Wright's* approach to the difficulties in this area is not promising."<sup>286</sup> Third, as the dissenters in *Wright* argued, there is "no difference between the factors that the Court believes indicate 'inherent trustworthiness' and those, like corroborating evidence, that apparently do not."<sup>287</sup> Fourth, earlier Supreme Court decisions had used corroborating facts in testing reliability.<sup>288</sup> Finally, some scholars have suggested that *Wright's* "bar against considering independent corroborative evidence should be dropped."<sup>289</sup>

A corroboration requirement would accomplish much in assuring that only hearsay of a constitutionally-reliable nature is admitted against a criminal defendant. Absent the corroboration requirement, the analysis suggested here is unlikely to produce outcomes at variance with an application of *Williamson*, but it would avoid the limits the Court has placed on statements against interest in civil cases and provide clearer guidance to lower courts on these issues.<sup>290</sup>

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<sup>281</sup> See *id.* at 544-45.

<sup>282</sup> See *id.* at 544.

<sup>283</sup> See *id.*

<sup>284</sup> Nesson & Benkler, *supra* note 11, at 173; see also *Idaho v. Wright*, 497 U.S. 805, 827 (1990) (Kennedy, J., dissenting).

<sup>285</sup> 497 U.S. 805 (1990).

<sup>286</sup> MUELLER & KIRKPATRICK, *supra* note 154, at 1068.

<sup>287</sup> *Wright*, 497 U.S. at 833 (Kennedy, J., dissenting).

<sup>288</sup> See, e.g., *Cruz v. New York*, 481 U.S. 186, 192 (1987); *Lee v. Illinois*, 476 U.S. 530, 546 (1986); *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970) (plurality opinion).

<sup>289</sup> MUELLER & KIRKPATRICK, *supra* note 154, at 1068 (citing *Imwinkelried*, *supra* note 182, at 528-29).

<sup>290</sup> This analysis is also likely to avoid some of the other problems created by the *Williamson* decision. See *supra* notes 248-262 and accompanying text.

## VIII. CONCLUSION

Before *Williamson*, the common law authority on declarations against interest and the weight of decisional law on Rule 804(b)(3) allowed for the admission of collateral statements. In addition, Confrontation Clause analysis and statement against interest analysis differed in that the Confrontation Clause standard for admission was higher because of the indicia of reliability requirement in *Roberts* and the presumption against admission in the case of statements against interest that were the confessions of accomplices to authorities.

The *Williamson* decision, in raising the bar for the admission of statements against interest, brings admissible statements to the point where there is little, if any, value in testing by cross-examination. This higher standard eliminates many reliable portions of statements against interest, especially in civil cases, and has resulted in a conflation of statement against interest and Confrontation Clause analysis. This conflation arises in part because of the Court's failure to distinguish between admission reliability and Confrontation Clause reliability.

*Williamson*, in failing to grapple with the constitutional issues, has left many statement against interest issues unresolved and failed to provide lower courts with guidance when deciding criminal cases involving statements against interest.