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Evidence - FRE 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

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Casenotes

EVIDENCE—FRE 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*, 114 S. Ct. 2431 (1994).

Consider the following situation after a bank robbery: The police travel to Jane's house looking for Bill, the suspect. Jane answers the door and informs the officers that she hasn't seen Bill in a week. Later that day, Jane receives a phone call from Bill, and he says, "I robbed the bank and Joe helped me hide from the police." Now, imagine that Joe is on trial as an accessory after the fact. The prosecutor calls Jane to testify because Bill is dead. She is prepared to testify to Bill's out-of-court statement that implicated Joe. Defense counsel objects to the testimony as hearsay, and now the trial judge must decide whether to overrule or sustain the objection.

The United States Supreme Court recently considered the admissibility of testimony similar to Jane's in *Williamson v. United States*.¹ In *Williamson*, a deputy sheriff stopped a car driven by Reginald Harris because it was weaving on the highway.² After stopping, Harris consented to a search of the vehicle.³ The deputy sheriff discovered two suitcases containing 19 kilograms of cocaine in the trunk and arrested Harris.⁴

After the arrest, Special Agent Donald Walton of the Drug Enforcement Administration (DEA) interrogated Harris twice.⁵ In Harris' first telephone interview, he told Walton that he had received the cocaine from an unidentified Cuban in Fort Lauderdale, Florida.⁶ Harris also claimed that he was only transporting the cocaine which belonged to the petitioner, Williamson, and that it was to be delivered that night.⁷

1. 114 S. Ct. 2431 (1994).

2. *Id.* at 2433.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

In Harris' second interview with Walton, several hours later, Harris repeated his previous statements.⁸ However, when Agent Walton took steps to arrange a controlled delivery of the cocaine, Harris stopped him.⁹ Harris then told Walton that he had fabricated his previous story, that he was transporting the cocaine to Atlanta for Williamson, and that Williamson had been traveling in front of him in another rental car.¹⁰ Harris told Walton that he had lied about the drugs' source because he feared Williamson.¹¹ Agent Walton informed Harris in both interviews that the prosecuting attorney would use any information Harris provided to the DEA against him.¹²

At Williamson's trial, Harris refused to testify against Williamson and invoked his Fifth Amendment privilege against compelled self-incrimination.¹³ Despite a grant of immunity from the prosecution and a court order instructing him to testify, Harris refused to testify.¹⁴ The trial judge held him in contempt of court.¹⁵

At trial, Walton testified that Harris named Williamson as the cocaine's owner and that no one had promised Harris any reward for cooperating with the DEA's investigation at the time Harris made the statements.¹⁶ The District Court admitted the statements under the declarations against interest exception to the hearsay rule, Federal Rule of Evidence (FRE) 804(b)(3).¹⁷ Harris' statements satisfied the exception because they were against his penal interest and because Harris was unavailable to testify.¹⁸ The jury found Williamson guilty on three drug-related offenses.¹⁹

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 2434.

12. *Id.* "Walton testified that he had promised to report any cooperation by Harris to the Assistant United States Attorney. Walton said Harris was not promised any reward or other benefit for cooperating." *Id.*

13. *Id.* U.S. CONST amend. V.

14. *Williamson*, 114 S. Ct. at 2324.

15. *Id.*

16. *Id.*

17. *Id.* FED. R. EVID. 804(b)(3) states:

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

18. *Williamson*, 114 S. Ct. at 2434.

19. The jury found Williamson guilty of possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), conspiring to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846, and traveling interstate to promote the distribution of cocaine in violation of 18 U.S.C. § 1952. *Id.*

Williamson appealed his conviction and claimed that the admission of Harris' statements violated FRE 804(b)(3) and the Confrontation Clause of the Sixth Amendment.²⁰ The Court of Appeals for the Eleventh Circuit affirmed the District Court's decision.²¹ The United States Supreme Court granted certiorari.²²

Justice O'Connor delivered the opinion of the Court, and five other justices joined her with regard to the meaning of FRE 804(b)(3).²³ This majority held that FRE 804(b)(3) does not allow admission of non-self-inculpatory hearsay statements that are made within a broader self-inculpatory narrative.²⁴ This holding made it unnecessary for the Court to decide Williamson's claim that he was denied the right to confrontation under the Sixth Amendment.²⁵ Justice Scalia joined Justice O'Connor's entire opinion and wrote a separate concurrence.²⁶ Justice Ginsburg and three other Justices, however, concurred with Justice O'Connor only in part, and concurred in the judgment.²⁷ Finally, Justice Kennedy wrote an opinion, joined by two other Justices, concurring in the judgment.²⁸ Although, Justice Kennedy agreed with the majority's disposition of the particular case, he disagreed with the majority's analysis and holding with regard to the application of FRE 804(b)(3).²⁹

This casenote examines the history and reasoning behind the hearsay exception for statements against penal interest. The casenote evaluates the Supreme Court's decision in *Williamson* and discusses the conflicting pre-*Williamson* approaches to FRE 804(b)(3) taken by the Circuit Courts and their resolution after *Williamson*. Finally, the casenote applies the Court's holding to the robbery hypothetical posed in the introduction.

20. *Id.*

21. *Williamson v. United States*, 981 F.2d 1262 (11th Cir. 1992) (without opinion), *cert. granted*, 114 S. Ct. 681 (1994), *vacated and remanded*, 114 S. Ct. 2431 (1994).

22. *Williamson*, 114 S. Ct. at 2431.

23. *Williamson*, 114 S. Ct. at 2433 (opinion of O'Connor, J., joined as to parts I, IIA, and IIB by Scalia, Ginsburg, Blackmun, Stevens, and Souter, JJ.).

24. *Id.* at 2435.

25. Until a court declares a statement admissible under FED. R. EVID. 804(b)(3) there is no issue to be decided with regard to the defendant's right to confrontation. *Williamson*, 114 S. Ct. at 2437.

26. *Williamson*, 114 S. Ct. at 2438 (Scalia, J., concurring).

27. *Williamson*, 114 S. Ct. at 2438 (Ginsburg, J., joined by Blackmun, Stevens, and Souter, JJ., concurring in part and concurring in the judgment).

28. *Williamson*, 114 S. Ct. at 2440 (Kennedy, J., joined by Rehnquist and Thomas, JJ., concurring in the judgment).

29. *Id.*

BACKGROUND

Federal Rule of Evidence 801(c) defines hearsay as a statement, other than one made by the declarant while testifying at a trial or hearing, offered into evidence to prove the truth of the matter asserted.³⁰ The general prohibition against admitting hearsay³¹ evidence reflects concerns about the reliability of out-of-court statements not made under oath or tested by cross-examination.³² If admitted, out-of-court hearsay statements present particular hazards³³ which could be minimized if the statements were given in court, under oath, and subject to cross-examination.³⁴

Certain hearsay statements are admissible, despite the general rule against hearsay, because their reliable nature acts as an acceptable substitute for the ordinary test of cross-examination.³⁵ For example, hearsay statements that fit the exceptions contained in FRE 803 are admissible regardless of whether or not the declarant is available to testify.³⁶ However, if the declarant is unavailable and none of the FRE 803 exceptions are met, necessary testimony may be inadmissible.³⁷ The exceptions in FRE

30. FED. R. EVID. 801 states:

(a) Statement.—A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant.—A “declarant” is a person who makes a statement.

(c) Hearsay.—“Hearsay” 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.

31. FED. R. EVID. 802 states: “Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court or by Act of Congress.”

32. 5 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 1362 (Chad Bourn Rev. 1974) [hereinafter Wigmore]; See also 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 245, at 95 (4th ed. 1992) [hereinafter McCormick].

33. Williamson, 114 S. Ct. at 2434. “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.* See also MCCORMICK *supra* note 32, § 245, at 93.

34. The three factors upon which the credibility of testimony depends are perception, memory, and narration of the witness. Some commentators subdivide narration to include ambiguity and insincerity. Additionally, it is generally agreed that cross-examination is the best method by which a jury is able to determine the credibility of testimony. Consequently, the lack of cross-examination is the main reason for the exclusion of hearsay. MCCORMICK, *supra* note 32, § 245, at 93.

35. WIGMORE, *supra* note 32, § 1422, at 253. The exceptions in FED. R. EVID. 804 are different from those in FED. R. EVID. 803. For example, the exceptions in FED. R. EVID. 804 require the declarant to be unavailable. However, FED. R. EVID. 803 does not require the declarant to be unavailable because the statements are sufficiently reliable even absent the necessity factor that comes into play when the declarant is unavailable.

36. For example, FED. R. EVID. 803 states: “The following are not excluded by the hearsay rule, even though the declarant is available as a witness” FED. R. EVID. 803 continues on to name twenty-four exceptions that do not require an available declarant to testify.

37. CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, EVIDENCE, § 8.53, at 1000 (1995) [hereinafter Mueller and Kirkpatrick].

804 compensate for this need by admitting certain hearsay statements made by an unavailable declarant.³⁸ In effect, the hearsay covered by these exceptions is considered trustworthy only in the declarant's absence and rests on the policy that "less is better than nothing" if the testimony would be otherwise inadmissible.³⁹

History of the Hearsay Exception for Statements Against the Declarant's Penal Interest

Controversy regarding the against penal interest exception to the hearsay rule originated in the House of Lords with the *Sussex Peerage Case* in 1844.⁴⁰ Despite precedents recognizing the against penal interest exception, the Court held that the defendant could not offer evidence of a confession to the crime made by another person who was unavailable to testify.⁴¹ Consequently, the holding limited the admissibility of statements against interest to situations where the interest was proprietary or pecuniary.⁴²

The courts in the United States followed this decision for many years based largely on the policy of preventing the admission of fabricated self-inculpatory statements made in order to exculpate the accused.⁴³ Following this logic, the American courts rejected hearsay confessions in criminal trials made by third parties who were not defendants. Justice Holmes, dissenting in *Donnelly v. United States*,⁴⁴ expressed doubt regarding the indiscriminate rejection of all such evidence.⁴⁵ Since *Donnelly*, court decisions, statutes, and evidentiary rules in the United States have included statements against penal interest as an exception to the hearsay rule.⁴⁶

In 1975, Congress enacted the Federal Rules of Evidence and codified the against interest exception in the United States Federal Courts.⁴⁷ Federal Rule of Evidence 804(b)(3)⁴⁸ requires that the declar-

38. *Id.*

39. *Id.* See WIGMORE, *supra* note 32, § 1421, at 253.

40. McCORMICK, *supra* note 32, § 318, at 340; (citing 11 Cl. & F. 85, 8 Eng. Rep. 1034 (1844)).

41. *Id.*

42. *Id.*

43. WIGMORE, *supra* note 32, § 1477, at 358. There are other considerations with regard to the trustworthiness of statements against penal interest that exculpate the accused. One fear was that a defense witness could create a confession by another whose unavailability would protect the witness from perjury and make prosecution more difficult. Another concern was that an attack on a third-party confession's credibility and explanations as to why the third-party was not charged would unduly delay trial proceedings. MUELLER AND KIRKPATRICK, *supra* note 37, § 8.64, at 1049.

44. 228 U.S. 243, 277-78 (1913) (Holmes, J., dissenting).

45. *Id.* See *infra* note 138.

46. WIGMORE, *supra* note 32, § 1477, at 360 nn.6-7.

47. See *supra* note 17 for the text of FED. R. EVID. 804(b)(3). The exception includes statements against proprietary or pecuniary interest and statements against penal interest. However, this

ant be unavailable to testify⁴⁹ and that the statement be so contrary to the declarant's penal interest that a reasonable person would not have made it unless believing it to be true.⁵⁰ Corroborating circumstances must support the trustworthiness of a declarant's statement against penal interest if it is offered to exculpate a defendant.⁵¹ The rule does not mention a corroboration requirement for a hearsay statement that inculcates the defendant.⁵²

The language of FRE 804(b)(3) does not address the admissibility of statements which also contain remarks that are favorable or neutral to the declarant's interest.⁵³ These remarks are considered to be collateral to the actual statement against interest so long as they occur at the same time and not in a subsequent statement.⁵⁴ Finally, if the requirements of the Rule are met, the trial judge may admit the hearsay testimony pursuant to FRE 804(b)(3).⁵⁵

casenote discusses the portion of FED. R. EVID. 804(b)(3) as it applies to statements against penal interest. The Court, however, does not limit its holding to statements against penal interest and may affect the law with regard to statements against a declarant's pecuniary or proprietary interest as well. *Williamson*, 114 S. Ct. 2431 (1994).

48. See *supra* note 17 for the text of FED. R. EVID. 804(b)(3).

49. The declarant may be unavailable for different reasons including exemption on the ground of privilege, refusal to testify despite an order of the court to do so, testimony as to a lack of memory, inability to be present because of death or a then existing physical or mental illness or infirmity, or absence from the hearing where the proponent of his statement has been unable to procure his attendance or testimony. FED. R. EVID. 804(a).

If a witness is physically available to testify and does not claim lack of memory, the witness may be considered unavailable under FED. R. EVID. 804(a) if the witness refuses to testify. However, some jurisdictions have held that the trial court must first order the witness to testify before invoking Rule 804(a)(2). This insures that a recalcitrant witness may testify and later explain to an aggrieved defendant that he was forced to testify by a court order. *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980). See also MCCORMICK, *supra* note 32, § 253, at 132 n.11.

50. *Williamson*, 114 S. Ct. at 2437.

51. See *supra* note 17 for the text of FED. R. EVID. 804(b)(3).

52. *Id.* The question of whether or not this corroboration requirement is necessary for inculpatory statements against penal interest is expressly not addressed by the Court in *Williamson*. 114 S. Ct. at 2437. However, some circuit courts have held that inculpatory remarks are equally subject to corroboration requirements. See, e.g., *United States v. Alvarez*, 584 F.2d. 694, 701 (5th Cir. 1978); *United States v. Taggart*, 944 F.2d. 837, 840 (11th Cir. 1991).

53. Michael D. Bergeisen, Note, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CAL. L. REV. 1189, 1202 (1978) [hereinafter Bergeisen]; *Williamson*, 114 S.Ct. at 2441 (Kennedy, J., Concurring in judgment); Michael M. Martin, *The Supreme Court Rules on Statements Against Interest*, 11 TOURO L. REV. 179, 183 (1994) [hereinafter Martin].

54. MARTIN, *supra* note 53, at 183; The strongest argument for the admissibility of collateral statements occurs when the statement against interest refers to or incorporates the collateral statement. WIGMORE, *supra* note 32, § 1465, at 341.

55. In *United States v. Ospina*, the Ninth Circuit stated, "The determination of admissibility of statements against penal interest under Evidence Rule 804(b)(3) is committed to the sound discretion of the trial court, and should not be disturbed on appeal absent an abuse of discretion." *United States v. Ospina*, 739 F.2d 448, 452 (9th Cir. 1984), *cert. denied*, 471 U.S. 1126 (1985).

Caselaw Subsequent to the Federal Rules of Evidence

Prior to *Williamson*, the federal courts disagreed as to whether or not remarks collateral to statements against the declarant's penal interest were admissible evidence. In *United States v. Barrett*,⁵⁶ the First Circuit held that collateral remarks were admissible if they tended to fortify the statement's disserving aspects and were sufficiently integral to the statement as a whole.⁵⁷

In *United States v. Casamento*,⁵⁸ the Second Circuit held that to admit a statement under FRE 804(b)(3), the district court was not obligated to excise the portions which refer to other persons.⁵⁹ The court stated, "In admitting the entire statement even though it contains a reference to others is particularly appropriate when that reference is closely connected with the reference to the declarant."⁶⁰

Finally, in *United States v. Garris*⁶¹ the Second Circuit rejected the argument that an isolated remark must be against the declarant's penal interest even if it is taken out of a larger statement that as a whole is against the declarant's penal interest.⁶² The court went on to say that, "There is no such requirement for Rule 804(b)(3); rather, 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."⁶³

In contrast, the Eighth Circuit held that portions of hearsay statements which do not inculcate the declarant when standing alone are inadmissible.⁶⁴ In *United States v. Lilley*, the court held that only directly self-inculpatory portions of a declarant's statement may be admitted under

56. 539 F.2d 244 (1st Cir. 1976).

57. The Barrett Court said:

While we do not read the federal rule as incorporating the rather broad formulation put forward by Wigmore, who saw the against-interest exception as permitting reception not only of the "specific fact against interest, but also . . . every fact contained in the same statement" neither does it appear the Congress intended to constrict the scope of a declaration against interest to the point of excluding "collateral" material that, as hear actually tended to fortify the statement's disserving aspects.

Id. at 252 (quoting WIGMORE, *supra* note 32, § 1465, at 339).

58. 887 F.2d 1141 (2nd Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990).

59. *Id.* at 1171.

60. *Id.* (citing 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[02], at 137-38 (1988)).

61. 616 F.2d 626 (2nd Cir. 1980).

62. *Id.* at 630.

63. *Id.*

64. *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978).

FRE 804(b)(3).⁶⁵ The court stated that admitting only the disserving portions best complies with the Rule's premise that a statement is trustworthy only to the extent that it is against the declarant's penal interest.⁶⁶

In *U.S. v. Porter*,⁶⁷ the Tenth Circuit adopted an approach which is similar to *Lilley* and similar to the approach the Supreme Court adopted in *Williamson*.⁶⁸ At trial, the defense offered statements by Porter's brother about the robbery that Porter was accused of committing.⁶⁹ Porter's brother was not called to testify because he died before trial and was consequently unavailable.⁷⁰ The district court allowed Porter's sister to testify that the deceased had spoken to her about the robbery.⁷¹

The first part of the declarant's statement indicated that the deceased had robbed the bank with another person who was not the defendant.⁷² This assertion was clearly against the declarant's penal interest, and the court admitted it into evidence because it satisfied the requirements of FRE 804(b)(3).⁷³

The second part of the statement was a collateral remark that exculpated Porter. However, the court did not admit this statement into evidence because it was not sufficiently against the declarant's penal interest when he said that Porter, "should not have to do time when he has done nothing."⁷⁴

The jury found Porter guilty, and he argued on appeal that the trial court erred in severing the inculpatory and exculpatory portions of the deceased's statements.⁷⁵ Porter claimed that the exculpatory remark should have been admitted because it was background information and a necessary part of his brother's statement.⁷⁶ However, the Tenth Circuit held that for purposes of FRE 804(b)(3) the statements could be severed between the portion directly against the declarant's penal interest and the portion that was not against the declarant's penal interest.⁷⁷ To support its

65. *Id.* at 188.

66. *Id.*

67. 881 F.2d 878 (10th Cir. 1989).

68. *Porter*, 881 F.2d at 883.

69. *Id.* at 881.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 883.

74. *Id.* at 881. In addition to its discussion of FED. R. EVID. 804(b)(3), the Tenth Circuit affirmed the District Court's ruling that the deceased's statement was not supported by sufficient corroborating circumstances to ensure its trustworthiness. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

ruling, the court stated that, "Thus, to the extent that a statement not against the declarant's interest is severable from other statements satisfying 804(b)(3) . . . such statement should be excluded."⁷⁸

PRINCIPAL CASE

In *Williamson v. United States*, Justice O'Connor began her discussion of the rule against hearsay by acknowledging its premise that out-of-court statements are subject to particular hazards of unreliability.⁷⁹ Nonetheless, the Federal Rules of Evidence recognize certain hearsay exceptions, one of which is the against interest exception.⁸⁰

To qualify under the exception, the declarant's statement must be against the declarant's interest at the time of its making.⁸¹ In the case of statements against the declarant's penal interest, the statement must subject the declarant to criminal liability so that a reasonable person in the declarant's position would not have made the statement unless she believed it to be true.⁸²

Justice O'Connor held that the Court should narrowly construe FRE 804(b)(3)'s application.⁸³ The Rule was founded on the common sense notion that reasonable people, even those who are not particularly honest, tend not to make self-inculpatory statements unless they believe them to be true.⁸⁴ However, this does not necessarily extend to a broader definition of the word "statement".⁸⁵ Even if the declarant makes a generally self-inculpatory narrative, the non-self-inculpatory remarks do not gain extra value or reliability.⁸⁶ This seems especially true because one of the most effective ways to lie is to mix falsehood with truth.⁸⁷

78. *Id.* at 883 (citations omitted).

79. *Williamson*, 114 S. Ct. at 2434; *see supra* note 33 for the particular hazards mentioned by Justice O'Connor.

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

81. *Williamson*, 114 S. Ct. at 2434. *See also* MUELLER AND KIRKPATRICK, *supra* note 37, § 8.62, at 1036.

82. *Williamson*, 114 S. Ct. at 2435.

83. Justice O'Connor states:

Although the text of the Rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading. Rule 804(b)(3) is founded on the commonsense 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. This notion simply does not extend to the broader definition of "statement."

Id.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

Harris' first story, as given to Agent Walton, was largely self-exculpatory.⁸⁸ When part of the declarant's statement is self-exculpatory, the general notion upon which the exception is based becomes even less applicable because of the strong desire to spread blame or curry favor by cooperating.⁸⁹ In addition, the fact that self-serving and self-inculpatory remarks are made within the same narrative does not increase the credibility of the self-serving remarks.⁹⁰ Justice O'Connor stated, "[t]he district court 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."⁹¹

Justice O'Connor disagreed with Justice Kennedy's position that the Advisory Committee Note to FRE 804(b)(3) suggested a broader interpretation.⁹² She held that the Note gives little guidance to aid interpretation⁹³ and concluded that the policy expressed in the text of the rule is clear enough to outweigh any other interpretation.⁹⁴

Justice Scalia joined Justice O'Connor's entire opinion and wrote a concurrence.⁹⁵ He stated that, "the relevant inquiry must always be, as the text directs, whether the statement 'at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.'"⁹⁶ He also agreed that the term "statement" did not include self-exculpatory declarations.⁹⁷

Justice Scalia commented that despite the Court's narrow interpretation of FRE 804(b)(3), the exception remains valuable.⁹⁸ For example, Justice Scalia said, "A statement obviously can be self-inculpatory . . . without consisting of the confession 'I committed X ele-

88. *Id.* at 2433. In both interviews following his arrest Harris explained to Agent Walton that he was acting only as a carrier for someone who actually controlled the cocaine. *Id.*

89. *Id.* at 2435.

90. *Id.*

91. *Id.*

92. *Id.* In addition, Justice O'Connor cited *Shiavone v. Fortune*, 477 U.S. 21, 31 (1986) and *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in judgment) to indicate the Court's differing positions regarding the weight to be given the Advisory Committee Notes. However, Justice O'Connor ultimately determined that the text of FED. R. EVID. 804(b)(3) is sufficiently clear so that further inquiry into the drafter's intent was unnecessary. *Williamson*, 114 S. Ct. at 2436.

93. *Id.*

94. *Id.*

95. *Williamson*, 114 S. Ct. at 2438 (Scalia, J., concurring).

96. *Id.* (citing FED. R. EVID. 804(b)(3)).

97. *Id.*

98. *Id.*

ment of crime Y.”⁹⁹ This statement confessing crime Y would be admissible because it tends to link the declarant to crime Y.¹⁰⁰

Likewise, implicating someone else does not automatically negate the fact that the statement is against the declarant’s penal interest.¹⁰¹ However, Justice Scalia recognized that a declaration may not be admissible where the declarant attempts to minimize her criminal liability.¹⁰² According to Justice Scalia, the Court’s inquiry must always begin at the particular remark at issue and not at the extended narrative.¹⁰³ Justice O’Connor and Justice Scalia agreed that the Court should remand the case to the Court of Appeals to determine whether each of the statements in Harris’ confession were truly self-inculpatory.¹⁰⁴

Justice Ginsburg, like Justice Scalia, joined Justice O’Connor’s interpretation of what remarks are sufficiently self-inculpatory to be admitted under the FRE 804(b)(3) hearsay exception.¹⁰⁵ However, Justice Ginsburg concluded that Reginald Harris’ statements did not fit, even in part, within the exception.¹⁰⁶ Harris intended his statements to be self-serving, and because of their self-exculpatory nature, the remarks were inherently untrustworthy.¹⁰⁷ Both of Harris’ accounts painted Williamson as the “big fish” and attempted to shift principal responsibility for the crime to Williamson.¹⁰⁸ In addition, Justice Ginsburg referred to *United States v. Sarmiento-Perez*¹⁰⁹ where the Fifth Circuit found that where a declarant views a statement as a whole to be in his interest rather than against it, the statement does not fit

99. *Id.*

100. *Id.* Of Course, FED. R. EVID. 804(b)(3) would still require corroboration if the statement were offered to exculpate the accused. *See supra* note 17.

101. Justice Scalia said:

For example, if a lieutenant in an organized crime operation described the inner workings of an extortion and protection racket, naming some of the other actors and thereby inculpating himself on racketeering and/or conspiracy charges, I have no doubt that some of those remarks could be admitted as statements against penal interest.

Williamson, 114 S. Ct. at 2438 (Scalia, J., concurring).

102. *Id.* *See infra* note 123.

103. *Williamson*, 114 S. Ct. at 2438 (Scalia, J., concurring).

104. *Id.* at 2437 (O’Connor, J., joined by Scalia, J.). On remand, the Eleventh Circuit remanded the case to the District Court to resolve issues relating to the government’s ability or desire to continue the prosecution of Williamson. *United States v. Williamson*, No. 89-8938, 1995 U.S. App. LEXIS 5495, at *1 (11th Cir. Mar. 16, 1995).

105. *Williamson*, 114 S. Ct. at 2438 (Ginsburg, J., concurring in part and concurring in the judgment).

106. *Id.* at 2439.

107. *Id.*

108. Justice Ginsburg stated, “Harris’ second account differed as to collateral details, but he continued to paint Williamson as the ‘big fish’.” *Id.*

109. 633 F.2d 1092 (5th Cir. 1981).

within the FRE 804(b)(3) hearsay exception.¹¹⁰ As a consequence of the declarant's perception, such a statement is not considered to be against the declarant's penal interest.¹¹¹

Justice Kennedy, joined by the Chief Justice Rehnquist and Justice Thomas, concurred in the judgment.¹¹² However, Justice Kennedy's approach and rationale for the hearsay exception differed from that of the other six justices, and Justice Kennedy essentially dissented from the Court's analysis and interpretation of FRE 804(b)(3).¹¹³ Justice Kennedy suggested an approach to FRE 804(b)(3) that would allow the admission of testimony collateral to the declarant's actual statement against penal interest.¹¹⁴

Justice Kennedy pointed out that Congress' silence on the issue of collateral statements no more adopts a view admitting collateral statements than one excluding them.¹¹⁵ However, he gave three reasons to conclude that FRE 804(b)(3) allows the admission of some collateral statements. First, Justice Kennedy cited the Advisory Committee Note to establish that some collateral statements are admissible.¹¹⁶ Second, he concluded that absent contrary indication, the Court should apply terms as they were applied at common law unless Congress intends to change a judicially created concept and makes its intent specific.¹¹⁷ Finally, the fact that the text of FRE

110. *Williamson*, 114 S. Ct. at 2440 (Ginsburg, J., concurring in part and concurring in the judgment). Attempting to determine whether a particular statement was truly contrary to the declarant's interest, the Court in *Sarmiento-Perez* stated:

From these circumstances, which are not counterbalanced by circumstances indicating the reliability of the statement, it is reasonable to suppose that this declarant, and indeed a reasonable person in his position, might well have been motivated to misrepresent the role of others in the criminal enterprise, and might well have viewed the statement as a whole - including the ostensibly diserving portions - to be *in* his interest rather than against it.

Sarmiento-Perez, 633 F.2d at 1102.

In *Sarmiento-Perez*, the declarant made an explicit confession of criminal activity. However, the Court held that the statement was not against his penal interest because it was made as a custodial confession under potentially coercive circumstances. *Id.*

111. *Williamson*, 114 S. Ct. at 2439 (Ginsburg, J., concurring in part and concurring in the judgment).

112. *Id.* at 114 S. Ct. at 2440 (Kennedy, J., concurring in the judgment).

113. *Id.*

114. *Id.* at 2445.

115. *Id.* at 2442.

116. *Id.* The Note states:

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.

Id. (citing 28 U.S.C. App., p. 790).

117. *Williamson*, 114 S. Ct. at 2442 (Kennedy, J., concurring in the judgment). One commentator stated, "From the very beginning of this exception, it has been held that a declaration against interest is admissible, not only to prove the diserving fact stated, but also to prove other facts con-

804(b)(3) does not address the admissibility of statements against penal interest suggests that they are admissible, as under common law.¹¹⁸ According to Justice Kennedy, the Court should not remove all meaningful effect from the exception as applied to inculpatory and exculpatory collateral remarks without direction from Congress to the contrary.¹¹⁹ In a final note, Justice Kennedy commented that the Court's decision as it is written applies equally to statements exculpating the accused.¹²⁰

ANALYSIS

The majority's opinion in *Williamson* guarantees that all evidence admitted under FRE 804(b)(3) will be supported by sufficient trustworthiness. The Court's bright-line test will admit only those statements directly against the declarant's penal interest without considering the relationship between the statement against interest and other collateral statements.¹²¹ However, the majority invites the exclusion of valuable evidence by not adequately considering a statement's context, the inequitable effect of a bright-line test, or FRE 804(b)(3)'s intended scope according to the Advisory Committee Note.

If a hearsay statement is to be admitted under FRE 804(b)(3), a court must determine if some fact asserted by the statement is against the declarant's penal interest.¹²² This determination involves an analysis of the surrounding circumstances such as to whom the statement was made, whether the declarant was in custody when she made the statement, or whether the declarant perceived the statement to be in her interest even though it clearly implicated her in criminal activity on its face.¹²³

tained in collateral statements connected with the disserving statement." *Id.* (citing Jefferson, 58 HARV.L.REV. 1, 57 (1944)). McCormick also discusses the admission of inculpatory statements before the Federal Rules of Evidence in civil cases as allowing collateral or "contextual" statements. MCCORMICK *supra* note 32, § 319, at 344.

118. *Williamson*, 114 S. Ct. at 2443 (Kennedy, J., concurring in the judgment).

119. *Id.*

120. *Id.* Exculpatory statements are statements made by the declarant that limit or remove criminal liability from the defendant. BERGEISEN, *supra* note 53, at 1190 n.7.

121. Writing for the majority, Justice O'Connor stated, "In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Williamson*, 114 S. Ct. at 2435.

122. MUELLER AND KIRKPATRICK, *supra* note 37, § 8.62, at 1042.

123. In *United States v. Love* 592 F.2d 1022, (8th Cir. 1979), the Court held that a desire to "curry favor" negated the statement's self-incriminating nature. *Id.* at 1025. Another Court held that a declarant's statements in an attempt to plea bargain were not against interest because it was reasonable to infer that the declarant was motivated towards helping his own interest. *United States v. Bailey*, 581 F.2d 341, 345 (3rd Cir. 1978). The Court in *United States v. Lilley*, 581 F.2d 182, (8th

When referring to collateral statements, one commentary states,

One builds on the idea that the reference to the defendant is an integral part of an against-interest statement. The facts may be logically related and the reference to the defendant may be attached (close logical and narrative connection) so that reference may add meaning and dimension to the description of the speaker's own acts . . . or it may provide more facts that in context further impair the speaker's interest.¹²⁴

They suggested that a close logical and narrative connection between the statement against the declarant's penal interest and other collateral remarks should enable a court to apply the exception.¹²⁵ However, they were careful to express their uncertainty after the Court's decision in *Williamson*.¹²⁶

In *Williamson*, the Court's majority agreed that the context in which the declarant makes a statement affects whether or not a statement is against the declarant's penal interest.¹²⁷ However, the context in which a statement is made should also determine the admissibility of related statements under FRE 804(b)(3). If the related remarks enhance or add context to the entire narrative's meaning, the declarant's self-interest operates to insure that the collateral remarks are trustworthy.¹²⁸ Justice Kennedy cited another commentator who stated,

Cir. 1978) held that a declarant's statements that were likely made to shift suspicion away from himself or to minimize his criminal liability were not against his penal interest even though the statements implicated him in criminal activity on their face. *Id.* at 187. When a declarant makes a statement that is facially against his penal interest but he believes such a statement to be ultimately in his best interest, the statement is not considered to be against the declarant's penal interest for purposes of FED. R. EVID. 804(b)(3). *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (5th Cir, 1981).

124. MUELLER AND KIRKPATRICK, *supra* note 37, § 8.62, at 1052.

125. *Id.* As Justice Ginsburg pointed out, however, it is possible that a statement against interest may tend to foist blame on another and thus be regarded as actually serving the declarant's interest. With respect to Harris' statements, Justice Ginsburg stated, "[t]o the extent some of these statements tended to incriminate Harris, they provided only marginal or cumulative evidence of his guilt. They project an image of a person acting not against his penal interest, but striving mightily to shift principal responsibility to someone else." *Williamson*, 114 S. Ct. at 2438 (Ginsburg, J., concurring in part and concurring in the judgment). Justice Ginsburg also cited *United States v. Sarmiento-Perez*, 633 F.2d 1092 where the Court held that even though the declarant's statements implicated him in criminal activity, he may have viewed the statement to be in his interest rather than against it because he was attempting to shift the blame. *Id.*

126. MUELLER AND KIRKPATRICK, *supra* note 37, § 8.62, at 1052.

127. The majority states, "Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant's interest." *Williamson*, 114 S. Ct. at 2436.

128. WIGMORE, *supra* note 32, § 1465, at 339.

Since the principle is that the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy . . . it is obvious that the situation indicates the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also to *every fact contained in the same statement*.¹²⁹

Justice Kennedy proposed a two step analysis for determining the admissibility of collateral remarks.¹³⁰ First, the court must assess whether or not the declarant's statement contained a fact against her penal interest.¹³¹ Second, the court must find the statement to be against the declarant's penal interest after analyzing the context in which it is made. If the trial judge determines that both conditions are met, the judge should admit as evidence collateral remarks that are related to the precise fact against the declarant's penal interest.¹³²

This approach would be subject to two constraints. First, the statement should exclude a collateral statement that is so self-serving as to render it unreliable.¹³³ Second, a court should not admit statements made in circumstances where the declarant is seeking to secure favorable treatment.¹³⁴

By limiting the exception's applicability to circumstances where the offered testimony is directly against an unavailable declarant's penal interest, the Court ignored the potentially inequitable results of its decision. For example, Justice Kennedy points out that the Court's decision excluding collateral statements applies to statements against penal interest that exculpate the accused as well as to those that inculpate the accused.¹³⁵

129. *Williamson*, 114 S. Ct. at 2444. (Kennedy, J., concurring in the judgment) (citing WIGMORE, *supra* note 32, § 1465, at 339).

130. *Williamson*, 114 S. Ct. at 2445 (Kennedy, J., concurring in the judgment). Most commentators agree that collateral statements made within a larger narrative should be admissible in some instances. *See, e.g.*, MCCORMICK, *supra* note 32, § 319, at 345; MUELLER AND KIRKPATRICK, *supra* note 37, § 8.64, at 1051; WIGMORE, *supra* note 32, § 1465, at 339; *see also infra* note 139.

However, one exception is Professor Jefferson. He argues that the reliability of statements against interest can only stem from the disserving fact contained in the statement. Consequently, admission of hearsay pursuant to the against penal interest hearsay exception should stem only from the portion of the statement that is against the declarant's interest. Bernard S. Jefferson, *Declarations Against Interest: An Exception To The Hearsay Rule*, 58 HAR. L. REV. 1, 62 (1944).

131. *Williamson*, 114 S. Ct. at 2445 (Kennedy, J., concurring in judgment).

132. *Id.* United States v. Ospina, 739 F.2d 448, 452 (9th Cir. 1984), *cert. denied*, 471 U.S. 1126 (1985).

133. *Williamson*, 114 S. Ct. at 2445 (Kennedy, J., concurring in the judgment).

134. *Id.* A declarant seeking favorable treatment, especially when in police custody, has an increased potential to fabricate testimony that reduces her culpability. Consequently, trial judges must look closely at the context and motive surrounding the statement to determine whether or not it really was against interest. MUELLER AND KIRKPATRICK, *supra* note 37, § 8.64, at 1048.

135. *Williamson*, 114 S. Ct. at 2443 (Kennedy, J., concurring in judgment).

Justice Kennedy stated, "Thus, if the declarant said, 'I robbed the store alone', only the portion of the statement in which the declarant said, 'I robbed the store' could be introduced by a criminal defendant on trial for robbery."¹³⁶ This seems extremely inequitable and contrary to Justice Holmes' dissent in *Donnelly*.¹³⁷ Justice Holmes argued that statements against the declarant's penal interest should be admitted in order to avoid the inequitable result of preventing a defendant from introducing evidence of his innocence.¹³⁸ As another commentator states, "A strict application of a rule excluding all collateral statements can lead to the arbitrary rejection of valuable evidence."¹³⁹

The majority relied entirely on the rule's text to achieve its narrow result despite the Advisory Committee Note's suggestion that collateral statements may be admissible under the general theory of the against interest hearsay exception.¹⁴⁰ Justice Kennedy suggested:

When as here the text of a rule of Evidence does not answer a question that must be answered in order to apply the Rule, and when the Advisory Committee Note does answer the question, our practice indicates that we should pay attention to the Advisory Committee Note.¹⁴¹

Consequently, the Advisory Committee Note to FRE 804(b)(3) strengthens Justice Kennedy's argument that collateral statements should be admissible.¹⁴²

The hypothetical that began this casenote illustrates the difference between the two approaches in *Williamson*. Bill's remark "I robbed the bank . . ." undoubtedly is against his penal interest. Consequently, if he is unavailable to testify it would be admissible hearsay evidence.

136. *Id.*

137. *Donnelly*, 228 U.S. at 277 (Holmes, J., dissenting).

138. Justice Holmes stated:

There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man, *Mattox v. United States*, 146 U.S. 140; and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight.

Id. at 278.

139. Jay L. Hack, Note, *Declarations Against Penal Interest: Standards of Admissibility Under An Emerging Majority Rule*, 56 B.U. L. REV. 148, 166 (1976).

140. *Williamson*, 114 S. Ct. at 2436.

141. *Id.* at 2442 (Kennedy, J., concurring in the judgment).

142. For the text of the Advisory Committee Note see *supra* note 116.

The remark “. . . and Joe helped me hide from the police” is against Bill’s penal interest only to the extent that it showed Bill’s desire to hide from the police. The fact that Joe helped him is neutral in regard to Bill’s penal interest. However, if considered with the first remark, Bill’s account of hiding from the police established the context and circumstances following the robbery.

The majority’s approach would admit the first remark into evidence because it squarely implicated Bill even if isolated from the other portion of the statement.¹⁴³ The second remark established Bill’s attempt to hide from the police, but the fact that Joe helped Bill is not against Bill’s penal interest. Consequently, the majority’s position that statements must squarely implicate the declarant when standing alone would prevent this evidence from being offered against Joe.

The majority’s analysis fails to consider the context in which the statement was made and the fact that hiding from the police is logically related to the robbery. It also fails to recognize that the statement’s trustworthiness was guaranteed by Bill’s self-interest and the fact that such a statement might lead to valuable evidence that would further incriminate him.

Under Justice Kennedy’s approach, both remarks would be admissible. First, Bill did not attempt to shift responsibility for the robbery to Joe or anyone else.¹⁴⁴ Second, Bill was not seeking favorable treatment from authorities. Furthermore, information regarding Joe’s acts placed Bill’s actions into a logical and narrative context which suggests its trustworthiness. The exclusion of this evidence would severely limit prosecutors in this situation by denying the admission of valuable evidence.

CONCLUSION

The Federal Rules of Evidence exclude all hearsay evidence unless it falls into one of many exceptions. FRE 804(b)(3) is one such exception to the hearsay rule. Statements made by a declarant that are against the declarant’s penal interest are admissible because people do not generally speak against their penal interest unless they believe the statement to be true.

The majority in *Williamson* held that only statements directly against the declarant’s interest are admissible. Prior to *Williamson*, however,

143. See *supra* note 121.

144. See *supra* note 123. The motivation for shifting responsibility is a factor that reduces a statement’s trustworthiness as actually against the declarant’s penal interest.

some Circuit Courts held that collateral statements were also admissible because the circumstances surrounding them insured their trustworthiness. Following *Williamson*, the Court's holding will limit admissible evidence for both prosecutors and defendants under FRE 804(b)(3) in federal courts by requiring that all admitted statements be directly against the declarant's penal interest. The decision in *Williamson* is a bright-line approach to the against penal interest hearsay exception. However, the holding could be improved by admitting collateral remarks that are not entirely self-serving or made in order to curry favors with authorities.

Hearsay evidence admitted under the majority's approach will always be supported by sufficient trustworthiness. However, as demonstrated by commentary and Justice Kennedy's analysis, the restrictive interpretation will lead to the rejection of valuable evidence for defendants and prosecutors that is supported by sufficient circumstantial evidence of trustworthiness.

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