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THE *WILLIAMSON* STANDARD FOR THE EXCEPTION TO THE RULE AGAINST HEARSAY FOR STATEMENTS AGAINST PENAL INTEREST

Williamson v. United States, 114 S. Ct. 2431 (1994)

I. INTRODUCTION

In *Williamson v. United States*,¹ the United States Supreme Court defined the scope of Federal Rule of Evidence 804(b)(3)'s (Rule 804(b)(3)) exception from the rule against hearsay for statements that subject a declarant to criminal liability.² Rule 804(b)(3) reads:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject 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. 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.

Rule 804(b)(3) "permits the introduction of statements against penal interest—defined as statements tending to subject the declarant to criminal liability."³ When used as evidence in a criminal trial, these statements may be exculpatory—tending to exonerate the defendant—or inculpatory—tending to implicate the defendant.⁴

In *Williamson*, the Court held that statements against interest are admissible only if they are individually self-inculpatory as to the declarant.⁵ In the majority's view, non-self-inculpatory statements (described as collateral statements in the parlance of Rule 804(b)(3)) are not admissible even if the declarant made them within a broader nar-

¹ 114 S. Ct. 2431 (1994).

² FED. R. EVID. 804(b)(3).

³ Andrew R. Keller, Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159, 159 (1983).

⁴ *Id.*

⁵ *Williamson*, 114 S. Ct. at 2435.

rative that is generally self-inculpatory.⁶ Justice Kennedy argued in his concurrence that collateral statements, as well as individual statements against interest, are admissible.⁷

This Note argues that the majority correctly adopted a narrow interpretation of Rule 804(b)(3). The Court's approach properly ensures the reliability of statements against interest by focusing on the rationale underlying the rule—that reasonable persons do not make statements against their penal interest unless they believe those statements to be true.⁸

II. BACKGROUND

Hearsay—defined as the in-court repetition of an out-of-court statement offered to prove the truth of the matter asserted—is not generally admissible as evidence.⁹ The rule prohibiting the admission of hearsay reflects concerns about its trustworthiness and reliability.¹⁰ Unlike in-court testimony, hearsay statements are not usually given under oath or solemn affirmation and are not subject to cross-examination by opposing counsel to test the perception, memory, veracity, and articulateness of the out-of-court declarant.¹¹ In short, hearsay evidence is inadmissible because it is not possible to subject it to in-court procedures designed to ensure the reliability of evidence.¹²

A. THE COMMON LAW EXCEPTION TO THE RULE AGAINST HEARSAY FOR STATEMENTS AGAINST INTEREST

Exceptions to the rule against hearsay allow courts to admit certain hearsay statements that display indicia of reliability sufficient to overcome the dangers typically posed by hearsay.¹³ Even though common law courts did not recognize an exception for declarations

⁶ *Id.* For a discussion of the distinction between collateral and noncollateral inculpatory statements, see *United States v. Riley*, 657 F.2d 1377, 1381 n.5 (8th Cir. 1981) (defining "noncollateral inculpatory statements" as statements in which the "facts inculpatory the defendant are found in the portion of the statement directly against the declarant's interest," and "collateral inculpatory statements" as "statements" in which "the inculpatory material is not found in the portion of the statement directly against the declarant's interest, but appears instead in another portion of the statement.").

⁷ *Williamson*, 114 S. Ct. at 2445.

⁸ FED. R. EVID. 804(b)(3).

⁹ Jay L. Hack, Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule*, 56 B.U. L. REV. 148 (1976).

¹⁰ V. JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1362, at 3 (James H. Chadbourne rev., 1974).

¹¹ *Id.*

¹² David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1378 (1972).

¹³ Hack, *supra* note 9.

against penal interest, the exceptions for declarations that directly affected the declarant's pecuniary or proprietary interest form the foundation for Rule 804(b)(3).¹⁴ Under this exception, common law courts admitted statements if: (1) the declarant was dead; (2) the declaration was against the pecuniary or proprietary interest of the declarant; (3) the declaration was of a fact immediately cognizable by the declarant personally; and (4) the declarant had no motive to falsify the fact declared.¹⁵

Traditionally, courts viewed inculpatory statements against penal interest as unreliable for three reasons.¹⁶ First, the psychological premise that reasonable persons will not make a statement against their penal interest, although perhaps true as a generalization, can break down when applied to a specific individual.¹⁷ Second, most statements inculcating a defendant are collateral to the portion of the statement that is against the declarant's interest.¹⁸ Following this argument, the portion of the statement that specifically implicates the defendant is rarely against the declarant's penal interest, thereby weakening the inference that the statement is trustworthy.¹⁹ Third, the declarant may often be motivated either to make false statements to curry favor with the authorities, or to shift or share blame for a crime.²⁰ Because of these factors, courts at common law were reluctant to expand the rule admitting statements against interest to include inculpatory statements against penal interest.²¹ In 1913, the Supreme Court, in *Donnelly v. United States*,²² adopted the early English precedents against admitting statements against penal interests.

B. THE LEGISLATIVE HISTORY OF FEDERAL RULE OF EVIDENCE 804(b)(3)

In 1969, the Advisory Committee to the Standing Committee on Rules of Practice and Procedure completed its first draft of the Federal Rules of Evidence.²³ The Committee departed from the common law rule of *Donnelly* and instituted an exception for statements against penal interest in response to "an increasing amount of decisional law

¹⁴ *Id.*

¹⁵ Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1 (1944).

¹⁶ Keller, *supra* note 3, at 163.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 163-64.

²¹ *Id.* at 164.

²² 228 U.S. 243, 273 (1913).

²³ Keller, *supra* note 3, at 174.

recogniz[ing that] exposure to punishment for crime" was a sufficient guarantor of evidentiary reliability.²⁴ The Committee sided with Justice Holmes' dissent in *Donnelly* and agreed that the common law's refusal to allow the introduction of any statement against penal interest could not be reconciled with a rule allowing the admission of statements against pecuniary or proprietary interests.²⁵

However, the Committee refused to allow the admission of statements against penal interest that inculpated the defendant, citing their inherent evidentiary unreliability.²⁶ Pointing out that "statements of codefendants have traditionally been regarded with suspicion because of the readily supposed advantages of implicating another," the Committee explicitly limited the new federal hearsay exception in the last line of the rule: "[T]his example does not include a statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused."²⁷

When the Supreme Court issued the official draft of the Federal Rules of Evidence, however, it omitted the restriction against inculpatory statements against penal interest from Rule 804(b)(3). The accompanying Advisory Committee Note (Committee Note) explained that such inculpatory statements could qualify as statements against interest within the meaning of the Rule.²⁸ Although the House of Representatives sought to bar the admission of inculpatory statements against penal interest,²⁹ the Senate rejected that limitation on the hearsay exception.³⁰ The Senate's view prevailed in Conference, and the Conference Report explained that "[t]he Conferees agree[d] to delete the provision regarding statements by a co-defendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify the constitutional evidentiary principles."³¹ The

²⁴ *Id.* at 175.

²⁵ *Id.* See also, *Donnelly v. United States*, 228 U.S. 243, 273 (1913).

²⁶ *Keller*, *supra* note 3, at 175.

²⁷ Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 378 (1969).

²⁸ See Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 321, 327-28 (1972).

²⁹ See H.R. REP. NO. 650, 93d Cong., 1st Sess. 16 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7089-90.

³⁰ See S. REP. NO. 1277, 93d Cong., 2d Sess. 21-22 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7067-68.

³¹ H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 12 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7089-90; see also SENATE COMM. ON THE JUDICIARY, REPORT ON THE FEDERAL RULES OF EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 7068 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7067-68 (referring to the Sixth Amendment's right to confrontation).

Conference Committee, focusing on the Constitutional right to confrontation, concluded that Rule 804(b)(3) should not exclude inculpatory statements against interest.³²

Currently, the text of Rule 804(b)(3) discusses exculpatory statements, but is silent as to the admissibility of inculpatory statements against penal interest.³³ The Committee Note following the Rule, however, states that "[o]rdinarily 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."³⁴ The Committee Note goes on to state that neither *Douglas v. Alabama*³⁵ nor *Bruton v. United States*³⁶ "require[s] that all statements implicating another person be excluded from the category of declarations against interest."³⁷ As a rationale for including declarations against penal interest within the common law exception for statements against interest, the Committee Note affirms that exposure to criminal liability satisfies the against-interest requirement.³⁸ The Committee Note emphasizes the important need to consider the circumstances surrounding the statements and warns against statements made in custody that may have been attempts to curry favor with the authorities.³⁹

C. CASE LAW INTERPRETING RULE 804(b)(3)

In its final form, Rule 804(b)(3) states that the hearsay rule does not exclude "a statement which . . . 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." Since the adoption of Rule 804(b)(3) in 1975, lower federal court opinions have considered,⁴⁰ and in some cases admitted, inculpatory statements against penal interest as a valid exception to the hearsay rule.⁴¹ In 1978, the Fifth Circuit proposed a three-part test in *United States v. Alvarez*.⁴²

³² Keller, *supra* note 3, at 177-78.

³³ *Id.* at 178.

³⁴ FED. R. EVID. 804(b)(3) advisory committee's note, 28 U.S.C. app. at 790-92.

³⁵ 380 U.S. 415 (1965).

³⁶ 391 U.S. 123 (1968).

³⁷ FED. R. EVID. 804(b)(3) advisory committee's note, 28 U.S.C. app. at 790-92.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See, e.g., *United States v. Riley*, 657 F.2d 1377, 1382 (8th Cir. 1981); *United States v. Palumbo*, 639 F.2d 123, 129 (3d Cir.), *cert. denied*, 454 U.S. 819 (1981).

⁴¹ See, e.g., *United States v. Lieberman*, 637 F.2d 95, 103-04 (2d Cir. 1980); *United States v. Garriss*, 616 F.2d 626, 630-32 (2d Cir.), *cert. denied*, 447 U.S. 926 (1980).

⁴² 584 F.2d 694, 699 (5th Cir. 1978). See, e.g., *Riley*, 657 F.2d at 1382-83, and *United*

The defendant in *Alvarez* had been convicted of heroin trafficking after the introduction of an incriminating statement made by a man who was dead at the time of the trial.⁴³ The Fifth Circuit reversed the lower court and determined that the out-of-court statements of the alleged accomplice were untrustworthy and were inadmissible as declarations against penal interest.⁴⁴ The Court in *Alvarez* held that a statement against interest may be admissible when: (1) the declarant is unavailable; (2) the statement so far tends to subject the declarant to criminal liability "that a reasonable [person] in his position would not have made the statement unless he believed it to be true;" and (3) if the declarant offered the statement to exculpate the accused, there are circumstances clearly indicating its trustworthiness.⁴⁵ This test sets forth the most specific standards any lower federal court has used for the admission of an inculpatory statement against penal interest.⁴⁶

Courts of Appeals have on numerous occasions upheld the admission of inculpatory statements made to the police by accomplices, but only after satisfying themselves that the statements were genuinely against the declarant's interest. For example, in *United States v. Coachman*⁴⁷ an accomplice pleaded guilty prior to trial to a charge of defrauding the government, but refused to testify against the defendant. Applying Rule 804(b)(3), the Court of Appeals approved the admission against the defendant of "a Secret Service agent's recapitulation of an inculpatory statement made by [the accomplice] after his arrest."⁴⁸ The court recognized that "[w]hether a statement is in fact against interest depends upon the circumstances of the particular case."⁴⁹ Although it was "mindful . . . 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,"⁵⁰ after analyzing the surrounding circumstances, it found no such danger in the accomplice's confession because his "version [of the crime] did not attempt to trivialize his own involvement in the nefarious scheme by shifting responsibility to his cohorts; rather, it frankly disclosed the extent of his own participation without any effort to demonstrate that others were really the ones to blame."⁵¹ Thus, the court concluded

States v. Oliver, 626 F.2d 254, 260 (2d Cir. 1980).

⁴³ *Alvarez*, 584 F.2d at 695.

⁴⁴ *Id.* at 701-02.

⁴⁵ *Id.* at 699.

⁴⁶ Keller, *supra* note 3, at 178.

⁴⁷ 727 F.2d 1293 (D.C. Cir. 1984).

⁴⁸ *Id.* at 1296.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1297.

that the accomplice's statement satisfied the rule because it was genuinely against his penal interest.⁵²

Similarly, Courts of Appeals have refused to admit evidence as statements against penal interest by an accomplice because they were not sufficiently contrary to the declarant's penal interest, under the circumstances of a particular case, so that a reasonable person would not have made them unless believing the statements to be true.⁵³

In cases involving collateral statements, some Courts of Appeals have admitted such statements provided that they are "sufficiently integral" to the entirety of statements against interest.⁵⁴ In support of this approach, the Second Circuit stated:

[e]ven if [the statement] were wholly neutral, however, it could constitute a statement against interest within the meaning of Rule 804(b) (3)

⁵² *Id.* See, e.g., *United States v. Garcia*, 897 F.2d 1413, 1420-21 (7th Cir. 1990) (co-defendant's post-arrest statement to authorities that he and defendant were both involved in drug conspiracy); *United States v. Koskerides*, 877 F.2d 1129, 1135-36 (2d Cir. 1989) (statement made in Greece by defendant's father-in-law to FBI implicating himself and defendant in violation of Greek and American law); *United States v. Scopo*, 861 F.2d 339, 348-49 (2d Cir. 1988), *cert. denied*, 490 U.S. 1022 (1989) (upholding admission of co-defendant's Fed. R. Crim. P. 11 colloquy that implicated defendant); *United States v. Carruth*, 699 F.2d 1017, 1022-23 (9th Cir. 1983) (statement of defendant's accountant to IRS agent implicating both co-defendant and defendant in tax fraud), *cert. denied*, 464 U.S. 1038 (1984); *United States v. Robinson*, 635 F.2d 363, 364 (5th Cir.) (non-custodial statement by co-defendant and defendant in drug conspiracy; declarant received "no promises" or reason to expect leniency and made no effort "to shift the balance [of culpability] elsewhere"), *cert. denied*, 452 U.S. 916 (1981); *United States v. Winley*, 638 F.2d 560, 562 (2d Cir. 1981) (same), *cert. denied*, 455 U.S. 959 (1982); cf. *Jennings v. Maynard*, 946 F.2d 1502, 1504-06 (10th Cir. 1991) (upholding admission under OKLA. STAT. ANN. tit. 12, § 2804(B)(3) of statement of robbery victim's son-in-law to state officer that he had told the defendant about the floor plan of victim's home).

⁵³ See, e.g., *United States v. Magana-Olvera*, 917 F.2d 401, 407-09 (9th Cir. 1990) (statements were not sufficiently against declarant's penal interest where they were made in custody after government suggested that he could cut his prison time in half for cooperation, and where statements "trivialized [the declarant's] role in the drug conspiracy"); *United States v. Johnson*, 802 F.2d 1459, 1465 (D.C. Cir. 1986) (holding inadmissible teenager's post-arrest statement trivializing his own role in narcotics offense and implicating an older man and store owner as "the kingpin in a drug operation"); *United States v. Palumbo*, 639 F.2d 123, 127-28 (3d Cir.) (excluding statements based on "the totality of 'circumstances of [this] case'"), *cert. denied*, 454 U.S. 819 (1981); *United States v. Love*, 592 F.2d 1022, 1025 (8th Cir. 1979) (finding that declarant's statement did not subject her to criminal liability); *United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (declarant had been convicted and given immunity when he made statements at issue).

⁵⁴ *United States v. Casamento*, 887 F.2d 1141, 1171-72 (2d Cir. 1989) ("Admitting the entire statement even though it contains a reference to others is particularly appropriate when that reference is closely connected to the reference to the declarant"); *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980) (holding statement which on its own was not damaging to be against interest because it was probative of declarant's knowledge of the crime); *United States v. Garris*, 616 F.2d 626, 630 (2d Cir.), *cert. denied*, 447 U.S. 926 (1980); *United States v. Barrett*, 539 F.2d 244, 252 (1st Cir. 1976) (admitting a collateral statement that was arguably disserving because it strengthened the impression that he had an insider's knowledge of the crimes).

since it was part and parcel of a larger conversation in which clearly self-incriminating statements were made: "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."⁵⁵

In *Lieberman*, a prosecution for a conspiracy to distribute marijuana, the Second Circuit addressed the admissibility of two related statements under Rule 804(b)(3). First, the court determined that the declarant's statement that he had packed certain boxes was clearly self-inculpatory because the boxes contained marijuana.⁵⁶ In the second statement, the declarant admitted that the defendant had told him not to open the door of the storeroom for anyone.⁵⁷ Although the court determined that the second statement was less damaging to the declarant, it held that the statement was self-incriminating because it was probative of the declarant's knowledge of the furtive nature of his activities.⁵⁸ The court further reasoned that the second statement was admissible because it was "part and parcel" of the larger conversation that was self-inculpatory.⁵⁹

Other Courts of Appeals have rejected the "substantially integral" test regarding collateral statements and have instead held that only self-inculpatory statements are admissible.⁶⁰ *United States v. Lilley* involved a prosecution for publishing a forged treasury check.⁶¹ The lower court allowed a federal agent to recount a statement made by the defendant's husband, on the ground that he was unavailable as a witness under spousal immunity.⁶² In the statement at issue, the husband admitted to forging a signature on an income tax refund, but also inculpatated the defendant (his wife) in the forgery.⁶³ The Eighth Circuit reversed the lower court and held that the "small portion of Mr. Lilley's statement which was against his interest should have been excluded absent severability from those portions of the statement inculpatating the accused."⁶⁴ The court reasoned that the portions of the declarant's statement which inculpatated the defendant, but did not tend to subject the declarant to criminal liability (in other words, collateral statements) were not contrary enough to the declarant's inter-

⁵⁵ *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980) (citing *United States v. Garris*, 616 F.2d 626, 630 (2d Cir.), cert. denied, 447 U.S. 926 (1980)).

⁵⁶ *Lieberman*, 637 F.2d at 103.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *United States v. Lilley*, 581 F.2d 182, 187 (8th Cir. 1978).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 186-87.

⁶⁴ *Id.* at 188.

ests that a reasonable person would not have made them unless he believed them to be true.⁶⁵

III. FACTS AND PROCEDURAL HISTORY

On 26 March 1989, a deputy sheriff in Dooly County, Georgia, stopped Reginald Harris for weaving his rental car on the highway.⁶⁶ Harris consented to a search of the vehicle, during which the deputy sheriff discovered nineteen kilograms of cocaine in two suitcases in the trunk.⁶⁷ Several items discovered during the search connected Harris with the petitioner, Fredel Williamson.⁶⁸ The deputy sheriff found an envelope addressed to Williamson, and a receipt bearing Williamson's girlfriend's address inside the glove compartment.⁶⁹ In addition, the suitcases containing the cocaine bore the initials of Williamson's sister, and the car rental agreement listed Williamson as an additional driver.⁷⁰

Over the next several hours, the police arrested Harris and interrogated him twice.⁷¹ Shortly after the arrest, Special Agent Donald Walton of the Drug Enforcement Agency (DEA) interviewed Harris by telephone.⁷² During that conversation, Agent Walton informed Harris that he would relay any cooperation Harris provided to the prosecuting attorney.⁷³ After asking whether Agent Walton was recording the call and receiving a negative response, Harris told Agent Walton that he obtained the cocaine from an unidentified Cuban man in Fort Lauderdale and that the cocaine belonged to petitioner Williamson.⁷⁴ He further stated that he was supposed to deliver the cocaine to a dumpster in Atlanta later that night.⁷⁵

Several hours later, Agent Walton spoke to Harris in person.⁷⁶ As in the first interview, Agent Walton told Harris that he would document any cooperation Harris provided and relay it to the prosecutor.⁷⁷ During the second interview, Harris said he had rented the car a few days earlier and had driven to Fort Lauderdale to meet William-

⁶⁵ *Id.*

⁶⁶ *Williamson v. United States*, 114 S. Ct. 2431, 2433 (1994).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Brief for Petitioner, 1994 WL 192030 at *3-4, *Williamson v. United States*, 114 S. Ct. 2431 (1994) (No. 93-5256).

⁷⁴ *Williamson*, 114 S. Ct. at 2433.

⁷⁵ Petitioner's Brief at *4, *Williamson* (No. 93-5256).

⁷⁶ *Williamson*, 114 S. Ct. at 2433.

⁷⁷ Petitioner's Brief at *4, *Williamson*, (No. 93-5256).

son.⁷⁸ Harris stated that he received the cocaine from a Cuban acquaintance of Williamson, and that the Cuban had put the cocaine in the car with a note telling Harris how to deliver it.⁷⁹ Harris then repeated that he had been instructed to leave the drugs in a certain dumpster, to return to his car, and to leave without waiting for anyone to pick up the drugs.⁸⁰

Acting on this information, Agent Walton began to arrange a delivery of the cocaine.⁸¹ However, as Agent Walton was preparing to leave the interview room, Harris "got out of [his] chair . . . and . . . took a half step toward [Walton] . . . and . . . said, 'I can't let you do that . . . that's not true, I can't let you go up there for no reason.'" ⁸² Harris told Agent Walton that he had lied about the Cuban, the note, and the dumpster.⁸³ The real story, Harris said, was that he was transporting the cocaine to Atlanta for Williamson, and Williamson was traveling in another rental car.⁸⁴ Harris added that after the police pulled him over, Williamson turned around and drove past the location of the stop, where he could see Harris' car with its trunk open.⁸⁵ Because Williamson had apparently seen the police searching the car, Harris explained that it would be impossible to make a controlled delivery.⁸⁶

Harris told Agent Walton that he had lied about the source of the drugs because he was afraid of Williamson.⁸⁷ Although Harris freely implicated himself, he did not want Walton to record his second story, and he also refused to sign a written version of the statement.⁸⁸ Agent Walton testified that he had promised to report any cooperation by Harris to the Assistant United States Attorney.⁸⁹ However, Agent Walton testified that he had not promised Harris any reward or other benefit for cooperating.⁹⁰

Even though the prosecution gave Harris use immunity, Harris refused to testify when the prosecution called him at Williamson's

⁷⁸ *Williamson*, 114 S. Ct. at 2433.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Brief for Respondent, 1994 WL 106730 at *4, *Williamson v. United States*, 114 S. Ct. 2431 (1994) (No. 93-5256).

⁸³ *Williamson*, 114 S. Ct. at 2433.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 2434.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

trial.⁹¹ The court ordered Harris to testify and eventually held him in contempt.⁹² In response to Harris' refusal, the district court ruled that, under Rule 804(b)(3), Agent Walton could relate what Harris had said to him:

The ruling of the Court is that the statements . . . are admissible under [FED. R. EVID. 804(b)(3)], which deals with statements made against interest. First, defendant Harris' statements clearly implicated himself, and therefore, are against his penal interest. Second, defendant Harris, the declarant, is unavailable. And third, as I found yesterday, there are sufficient corroborating circumstances in this case to ensure the trustworthiness of his testimony. Therefore, under [*United States v. Harrell*, 788 F.2d 1524 (11th Cir. 1986)] these statements by defendant Harris implicating [Williamson] are admissible.⁹³

Williamson was convicted of possessing cocaine with intent to distribute, conspiring to possess cocaine with intent to distribute, and traveling interstate to promote the distribution of cocaine.⁹⁴ The district court sentenced Williamson to 327 months in prison, followed by five years of supervised release.⁹⁵ Williamson appealed his conviction, claiming that the District Court violated Rule 804(b)(3) and the Confrontation Clause of the Sixth Amendment by admitting Harris' statements. The Court of Appeals for the Eleventh Circuit affirmed without opinion,⁹⁶ and the United States Supreme Court granted certiorari to determine the scope of the hearsay exception admitting statements against interest.⁹⁷

IV. SUMMARY OF OPINIONS

In *Williamson v. United States*,⁹⁸ the Supreme Court determined the scope of the exception from the rule against hearsay provided under Rule 804(b)(3) for statements inculcating the defendant and subjecting the declarant to criminal liability. The Court issued four opinions. Justice O'Connor announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, and II-B, in which Justices Blackmun, Stevens, Scalia, Souter, and Ginsburg joined, and she authored an opinion with respect to Part II-C, in which Justice Scalia joined. Justice Scalia also filed a concurring opinion. Justice Ginsburg filed an opinion concurring in part and

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Respondent's Brief at *2, *Williamson* (No. 93-5256).

⁹⁵ *Id.*

⁹⁶ *United States v. Williamson*, 981 F.2d 1262 (11th Cir. 1992).

⁹⁷ *Williamson v. United States*, 114 S. Ct. 2431 (1994).

⁹⁸ 114 S. Ct. 2431 (1994).

concurring in the judgment, in which Justices Blackmun, Stevens, and Souter joined. Justice Kennedy filed an opinion concurring in the judgment, in which Chief Justice Rehnquist and Justice Thomas joined.

The Supreme Court unanimously vacated the Court of Appeals' order admitting all of Harris' statements and remanded the case for further proceedings.⁹⁹ However, the Justices disagreed about two important points. First, Justices Kennedy and Thomas and Chief Justice Rehnquist disagreed with Justices O'Connor, Scalia, Ginsburg, Blackmun, Stevens, and Souter regarding the test trial courts should use to determine the admissibility of statements against interest. Second, the Justices disagreed about the application of the tests to the facts of the case. Chief Justice Rehnquist and Justices Kennedy and Thomas, as well as Justices O'Connor and Scalia, held that some of Harris' statements were admissible under their respective tests. Justices Ginsburg, Blackmun, Stevens, and Souter, on the other hand, stated that none of Harris' statements were admissible, but agreed to remand the case to allow the government to argue that the District Court's admission of the statements was harmless error.

A. JUSTICE O'CONNOR'S OPINION

After recanting the history of the case in Part I, Justice O'Connor, in Parts II-A and II-B, set forth a test for determining the admissibility of statements against penal interest and her rationale for adopting this test.¹⁰⁰ Justice O'Connor adopted a narrow interpretation of Rule 804(b)(3) and stated that "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."¹⁰¹ Under Justice O'Connor's formulation, only statements that are "individually self-inculpatory" are admissible under Rule 804(b)(3).¹⁰² Justice O'Connor's test requires district courts to determine whether a statement is sufficiently individually self-inculpatory, by evaluating whether "a reasonable person in the declarant's position would not have made the statement unless believing it to be true," while taking the surrounding circumstances into consideration.¹⁰³

To reach this conclusion, Justice O'Connor looked to the text of Rule 804(b)(3). Rule 804(b)(3) admits "statement[s] which . . . at the

⁹⁹ *Id.* at 2437, 2438, 2440, 2445.

¹⁰⁰ In Part I, Justice O'Connor set forth the facts and procedural history of the case.

¹⁰¹ *Williamson*, 114 S. Ct. at 2435.

¹⁰² *Id.*

¹⁰³ *Id.* at 2437.

time of [their] 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[s] unless believing [them] to be true."¹⁰⁴ Specifically, Justice O'Connor relied on the word "statement" to determine the scope of the exception.¹⁰⁵ She noted that Federal Rule of Evidence 801(a)(1) defines "statement" as "an oral or written assertion," but concluded that she had to look at other plain meaning definitions of the word to resolve the issue. According to Justice O'Connor, the word "statement" has two possible meanings.¹⁰⁶ The first meaning, "a report or narrative,"¹⁰⁷ connotes an extended declaration.¹⁰⁸ Under this definition, Justice O'Connor argued that Harris' *entire* confession, both the self-inculpatory and non-self-inculpatory parts, would be admissible so long as in the aggregate the confession sufficiently inculpatates him.¹⁰⁹ Justice O'Connor argued that the second meaning, "a single declaration or remark,"¹¹⁰ would suggest that Rule 804(b)(3) covers only those declarations or remarks within a confession that are *individually* self-inculpatory.¹¹¹

Although Justice O'Connor noted that the text of the Rule does not directly resolve the issue, she concluded that the principle behind the Rule mandated the narrower reading.¹¹² Justice O'Connor stated that "Rule 804(b)(3) is founded on the common sense 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."¹¹³ Justice O'Connor reasoned that the rationale underlying the rule was not applicable to extended declarations that contained both inculpatory and exculpatory statements, arguing that the mere proximity of non-self-inculpatory words to self-inculpatory words does not guarantee their reliability.¹¹⁴ Justice O'Connor reasoned further that, "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts."¹¹⁵ She argued, "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that

¹⁰⁴ *Id.* at 2434.

¹⁰⁵ *Id.* at 2434-35.

¹⁰⁶ *Id.* at 2434.

¹⁰⁷ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2229, defn. 2(a) (1961).

¹⁰⁸ *Williamson*, 114 S. Ct. at 2434.

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2229, defn. 2(b) (1961).

¹¹¹ *Williamson*, 114 S. Ct. at 2434-35 (emphasis added).

¹¹² *Id.* at 2435.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

seems particularly persuasive because of its self-inculpatory nature.”¹¹⁶ To support her conclusion, Justice O’Connor cited *Lee v. Illinois*,¹¹⁷ *Bruton v. United States*,¹¹⁸ and *Dutton v. Evans*¹¹⁹ for the proposition that courts have traditionally viewed statements of co-defendants with suspicion due to co-defendants’ desire to exonerate themselves or curry favor with the authorities.¹²⁰ Thus, the majority concluded that the rationale only applies to the narrow definition of “statement,” which would result in the admission of only individually self-inculpatory statements.¹²¹

Justice O’Connor rejected Justice Kennedy’s argument that the Advisory Committee Note suggests that an entire narrative, including non-self-inculpatory, but excluding clearly self-serving parts, may be admissible if it is in the aggregate self-inculpatory.¹²² The Advisory Committee Note reads, in relevant part:

[T]he third-party confession . . . may include statements implicating [the accused], and under the general theory of declarations against interest they would be admissible as related statements . . . [*Douglas v. Alabama*¹²³ . . . and *Bruton v. United States*¹²⁴ . . .] . . . by no means require[] that all statements implicating another person be excluded from the category of declarations against interest. . . . On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying The balancing of the self-serving against the dissenting [sic] aspects of a declaration is discussed in *McCormick* § 256.¹²⁵

Justice O’Connor interpreted the Note to be “not particularly clear” and relied instead on the rationale underlying the rule to conclude that collateral statements, or non-self-inculpatory statements, are not admissible under Rule 804(b)(3).¹²⁶ Justice O’Connor also rejected Justice Kennedy’s fear that this test would eviscerate the penal interest exception or would rob it of meaningful effect.¹²⁷

In Part II-C, the Court¹²⁸ revoked the appellate court’s order ad-

¹¹⁶ *Id.*

¹¹⁷ 476 U.S. 530 (1986).

¹¹⁸ 391 U.S. 123 (1968).

¹¹⁹ 400 U.S. 74 (1970).

¹²⁰ *Williamson*, 114 S. Ct. at 2435.

¹²¹ *Id.*

¹²² *Id.*

¹²³ 380 U.S. 415 (1965).

¹²⁴ 391 U.S. 123 (1968).

¹²⁵ *Williamson*, 114 S. Ct. at 2435-36.

¹²⁶ *Williamson*, 114 S. Ct. at 2436.

¹²⁷ *Id.* Justice O’Connor provided examples of statements that would be admissible under Rule 804(b)(3). *Id.* These included inculpatory statements about the declarant’s actions that could be used against accomplices and statements that could allow a jury to infer from the declarant’s statement that accomplices had knowledge about a fact. *Id.*

¹²⁸ Justice Scalia joined this part of the opinion.

mitting Agent Walton's statements and remanded the case with directions to the Court of Appeals to analyze the admissibility of each of Agent Walton's statements in light of the test outlined in Part II-B.¹²⁹ Justice O'Connor concluded that some, but not all, of Harris' statements would be admissible.¹³⁰ Justice O'Connor noted that the statements implicating Williamson were to be the most questionable.¹³¹ Again, the majority emphasized that the determination was fact-intensive and required careful consideration of all of the circumstances surrounding the criminal activity involved.¹³²

Because the Court remanded the case to the district court for further factual inquiry into whether Harris' statements were truly self-inculpatory, Justice O'Connor refused to address Williamson's claim that the statements were inadmissible under the Confrontation Clause, and that the hearsay exception for declarations against interest is "firmly rooted" for Confrontation Clause purposes.¹³³ She also declined to address Williamson's contention that statements inculpat- ing the accused must be supported by corroborating circumstances.¹³⁴

B. JUSTICE SCALIA'S CONCURRENCE

Justice Scalia stated that the crucial inquiry under Rule 804(b) (3) is whether a particular remark at issue (and not the extended narrative) meets the standard set forth in the rule.¹³⁵ Thus, to be admissible, a statement against interest must "so far tend[] 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."¹³⁶ Justice Scalia referred strictly to the text of the rule and refused to consider classifications such as "collateral self-serving" and "collateral neutral" in making the determination.¹³⁷

Justice Scalia agreed with Justice O'Connor that the Court's holding did not obliterate the penal interest exception to the hearsay rule.¹³⁸ To show that certain statements, while not a confession to a crime, could be admissible as against the declarant's penal interest, Justice Scalia argued that statements describing events leading up to the commission of a crime would be admissible based on the sur-

¹²⁹ *Williamson*, 114 S. Ct. at 2437. See *supra* note 103 and accompanying text.

¹³⁰ *Williamson*, 114 S. Ct. at 2437.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 2438 (Scalia, J., concurring).

¹³⁶ *Id.* (Scalia, J., concurring).

¹³⁷ *Id.* (Scalia, J., concurring).

¹³⁸ *Id.* (Scalia, J., concurring).

rounding circumstances in which the declarant made the statements.¹³⁹ Along the same lines, Justice Scalia argued that statements that name another person as a co-defendant are not automatically inadmissible.¹⁴⁰ However, Justice Scalia clarified that to be admissible, a declarant who names another person as a co-defendant must not have been acting with the intent to minimize liability.¹⁴¹

C. JUSTICE GINSBURG'S CONCURRENCE

Justice Ginsburg joined in Parts I, II-A, and II-B of the Court's opinion.¹⁴² Justice Ginsburg agreed with the Court that Rule 804(b)(3) provides an exception from the general rule that hearsay is inadmissible *only* for "those declarations or remarks within [a narrative] that are individually self-inculpatory."¹⁴³ Justice Ginsburg endorsed this ruling to ensure the reliability of statements implicating another person.¹⁴⁴

However, unlike Justice O'Connor, Justice Ginsburg concluded that the Court of Appeals should not have admitted any of Harris' statements as recounted by Agent Walton.¹⁴⁵ Justice Ginsburg argued that Harris' "arguably inculpatory" statements were too closely intertwined with his self-serving declarations to be trustworthy.¹⁴⁶ Justice Ginsburg cited several facts that she felt detracted from the reliability of Harris' statements. First, she concluded that the fact that Harris did not deny the existence of the drugs was not against his penal interest.¹⁴⁷ To the contrary, because the police caught Harris red-handed, with enough cocaine to subject him to twelve-and-one-half years of imprisonment, Justice Ginsburg argued that Harris' denial of knowledge would have done little to help him avoid criminal prosecution.¹⁴⁸ Second, Justice Ginsburg noted that many of Harris' statements focused on Williamson's actions to minimize Harris' own role in the crime.¹⁴⁹ Third, although Harris admitted that he had previously lied, in his second statement of the facts Harris continued to depict Williamson as the leader of the operation.¹⁵⁰ Justice Ginsburg

¹³⁹ *Id.* (Scalia, J., concurring).

¹⁴⁰ *Id.* (Scalia, J., concurring).

¹⁴¹ *Id.* (Scalia, J., concurring).

¹⁴² *Williamson*, 114 S. Ct. at 2438 (Ginsburg, J., concurring). Justices Blackmun, Stevens, and Souter joined in Justice Ginsburg's concurring opinion.

¹⁴³ *Id.* (Ginsburg, J., concurring) (emphasis added).

¹⁴⁴ *Id.* at 2439 (Ginsburg, J., concurring).

¹⁴⁵ *Id.* (Ginsburg, J., concurring).

¹⁴⁶ *Id.* (Ginsburg, J., concurring).

¹⁴⁷ *Id.* (Ginsburg, J., concurring).

¹⁴⁸ *Id.* (Ginsburg, J., concurring).

¹⁴⁹ *Id.* (Ginsburg, J., concurring).

¹⁵⁰ *Id.* (Ginsburg, J., concurring).

concluded that, although these statements were incriminatory, they provided only marginal or cumulative evidence of his guilt.¹⁵¹

For these reasons, Justice Ginsburg concluded that she would not have admitted *any* of Harris' statements.¹⁵² However, because she had not reviewed the entire record, Justice Ginsburg concurred with the Court's judgment to vacate the Court of Appeals' decision.¹⁵³ Justice Ginsburg stated that the Government should have the opportunity to argue on appeal that the erroneous admission of the hearsay statements constituted harmless error.¹⁵⁴

D. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy¹⁵⁵ agreed with the opinion of the Court and the other concurrences that the rationale behind Rule 804(b)(3) is that people seldom make statements that are damaging to themselves unless they believe the statements to be true.¹⁵⁶ However, in his concurrence, Justice Kennedy framed the issue presented in different terms than the preceding three opinions. According to Justice Kennedy, the issue presented by the case was whether courts may admit "collateral statements" under the exception to the hearsay rule for statements made against interest.¹⁵⁷ Justice Kennedy described "collateral statements" as those related to, but not directly against, the declarant's interest.¹⁵⁸

Because the text of the Rule does not answer the question, Justice Kennedy traced the debate among commentators over the admissibility of collateral statements.¹⁵⁹ Justice Kennedy first cited Dean Wigmore's position in favor of admissibility, which argued that "the statement may be accepted, not merely as to the specific fact against interest, but also as to every fact contained in the same statement."¹⁶⁰

¹⁵¹ *Id.* (Ginsburg, J., concurring).

¹⁵² *Id.* at 2440 (Ginsburg, J., concurring). Justice Ginsburg also argued that none of Harris' statements were admissible under the exception for statements made by a co-conspirator (Rule 801(d)(2)(E)). *Id.* Rule 801(d)(2)(E) reads:

Statements Which Are Not Hearsay. A statement is not hearsay if - (2) Admissions by Party-Opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID. 801(d)(2)(E).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Justices Rehnquist and Thomas joined in Justice Kennedy's concurrence.

¹⁵⁶ *Williamson*, 114 S. Ct. at 2440 (Kennedy, J., concurring).

¹⁵⁷ *Id.* (Kennedy, J., concurring).

¹⁵⁸ *Id.* (Kennedy, J., concurring). Justice Kennedy cited the example "I shot the bank teller" as a statement against interest and the statement "John Doe drove the getaway car" as a collateral, but related statement. *Id.*

¹⁵⁹ *Id.* at 2441 (Kennedy, J., concurring).

¹⁶⁰ *Id.* (Kennedy, J., concurring).

Second, Justice Kennedy described Dean McCormick's more qualified approach that courts should admit "neutral" collateral statements, but not "self-serving" statements.¹⁶¹ Third, Justice Kennedy explained that Professor Jefferson took the narrowest approach, arguing that courts may admit statements against interest that pertain only to the proof of the fact that is against interest.¹⁶² Under Jefferson's approach, Justice Kennedy argued that neither neutral nor self-serving collateral statements were admissible.¹⁶³

According to Justice Kennedy, the Court adopted Jefferson's approach, the strictest interpretation of Rule 804(b)(3). Justice Kennedy rejected the Court's conclusion that the policy of Rule 804(b)(3) precluded the admission of collateral statements. To the contrary, he argued that the existing authorities suggested that some collateral statements were admissible. In support of his argument, Justice Kennedy cited three sources of authority: (1) the Advisory Committee Note; (2) the common law hearsay exception for statements against interest; and (3) the general presumption that Congress does not enact statutes that have no meaning.¹⁶⁴

First, Justice Kennedy argued that the Advisory Committee Note (Committee Note) established that some collateral statements are admissible. He cited the language of the Committee Note as a forthright admission that some collateral statements are admissible.¹⁶⁵ The Committee Note reads:

[o]rdinarily 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.¹⁶⁶

Justice Kennedy maintained that where, as here, the text of a rule does not answer a question relative to how courts should apply the rule of evidence, the Court should look to the Committee Note for guidance.¹⁶⁷

Second, Justice Kennedy argued that even if the Committee Note was silent, the Court should not presume that Congress intended to enact legislation in contrast to the existing common law without mak-

¹⁶¹ *Id.* (Kennedy, J., concurring).

¹⁶² *Id.* (Kennedy, J., concurring).

¹⁶³ *Id.* (Kennedy, J., concurring).

¹⁶⁴ *Id.* at 2442 (Kennedy, J., concurring).

¹⁶⁵ *Id.* (Kennedy, J., concurring).

¹⁶⁶ *Id.* (Kennedy, J., concurring) (citing FED. R. EVID. 804(b)(3) advisory committee's note, 28 U.S.C. app. at 790-92).

¹⁶⁷ *Id.* (Kennedy, J., concurring).

ing that intent specific.¹⁶⁸ Kennedy argued that the Committee Note reflects the existing "general theory" that collateral statements were admissible, and thus is an indication that the Rule followed the common law.¹⁶⁹ Justice Kennedy concluded that, although the Rule is silent on the issue, Congress legislated against the common law background allowing the admission of some collateral statements, and did not intend to give the common law a silent burial.¹⁷⁰

Third, Justice Kennedy argued that the Court's interpretation of the Rule would cause courts to exclude almost all statements inculpat- ing defendants.¹⁷¹ Justice Kennedy conceded that the Court's decision would allow the rule to apply to a limited number of situations; however, he concluded that it would be rare to find a case in which the precise self-inculpatory words of the declarant would also incul- pate the defendant.¹⁷² Justice Kennedy argued that Congress would not pass a rule that had such a small effect.¹⁷³

Thus, Justice Kennedy concluded that Rule 804(b)(3) allows courts to admit statements that are collateral to the precise words against the declarant's interest.¹⁷⁴ However, to determine whether all collateral statements related to the statement against interest would be admissible under Rule 804(b)(3), Justice Kennedy looked to the Committee Note.¹⁷⁵ Because the Committee Note cites McCormick's treatise, Justice Kennedy concluded that Rule 804(b)(3) excludes self-serving collateral statements, but allows neutral collateral state- ments.¹⁷⁶ McCormick states that within a declaration containing both self-serving and dis-serving parts, he would "admit the dis-serving parts of the declaration, and exclude the self-serving parts" at least "where the serving and dis-serving parts can be severed."¹⁷⁷ In addi- tion to excluding collateral, self-serving statements, Justice Kennedy argued that the admissibility of statements made to the authorities should be limited under Rule 804(b)(3) to avoid relying upon state- ments made to curry favor.¹⁷⁸ Thus, if a declarant makes a statement in response to a promise of leniency, the statement is admissible.¹⁷⁹ Justice Kennedy acknowledged that such a rule required judicial dis-

¹⁶⁸ *Id.* (Kennedy, J., concurring).

¹⁶⁹ *Id.* (Kennedy, J., concurring).

¹⁷⁰ *Id.* (Kennedy, J., concurring).

¹⁷¹ *Id.* at 2443 (Kennedy, J., concurring).

¹⁷² *Id.* (Kennedy, J., concurring).

¹⁷³ *Id.* (Kennedy, J., concurring).

¹⁷⁴ *Id.* (Kennedy, J., concurring).

¹⁷⁵ *Id.* (Kennedy, J., concurring).

¹⁷⁶ *Id.* at 2444 (Kennedy, J., concurring).

¹⁷⁷ *Id.* (Kennedy, J., concurring).

¹⁷⁸ *Id.* (Kennedy, J., concurring).

¹⁷⁹ *Id.* (Kennedy, J., concurring).

cretion. He concluded, however, that judicial line drawing was necessary to avoid excluding all statements made to the police.¹⁸⁰

Finally, Justice Kennedy outlined his approach to determine whether courts may admit statements under Rule 804(b)(3). According to Justice Kennedy, a court should first determine whether the declarant made a statement that contained a fact against penal interest.¹⁸¹ If the court makes such a finding, it should admit all statements related to the precise statement against penal interest, subject to two limitations.¹⁸² The court should exclude a collateral statement that is so self-serving as to render it unreliable.¹⁸³ In addition, in cases where the statement was made under circumstances where it is likely that the declarant had a significant motivation to obtain favorable treatment, the entire statement should be inadmissible.¹⁸⁴ Justice Kennedy concluded that the decision is at the discretion of the district court judge and must depend on the circumstances of the case.¹⁸⁵

V. ANALYSIS

This Note argues that the Supreme Court properly determined that collateral statements (even those that are neutral) do not fall within the scope of Rule 804(b)(3)'s exception to the rule against hearsay for statements against penal interest. In Part A, this Note compares the standards of admissibility announced in the majority opinion and in Justice Kennedy's concurrence and applies the varying standards to specific fact patterns to compare and contrast the results derived from each standard. This Note argues that Justice O'Connor's majority approach best reflects the principles underlying Rule 804(b)(3) and adequately ensures the reliability of statements against penal interest. In Part B, this Note discusses some questions the *Williamson* decision left unresolved and discusses a subsequent case involving statements against interest.

A. JUSTICE O'CONNOR'S APPROACH BEST ENSURES THE RELIABILITY OF STATEMENTS ADMITTED UNDER RULE 804(b)(3)

The Supreme Court granted certiorari to determine the scope of Rule 804(b)(3).¹⁸⁶ All of the Justices agreed that clearly self-serving or self-exculpatory out-of-court statements may not qualify as sufficiently

¹⁸⁰ *Id.* at 2445 (Kennedy, J., concurring).

¹⁸¹ *Id.* (Kennedy, J., concurring).

¹⁸² *Id.* (Kennedy, J., concurring).

¹⁸³ *Id.* (Kennedy, J., concurring).

¹⁸⁴ *Id.* (Kennedy, J., concurring).

¹⁸⁵ *Id.* (Kennedy, J., concurring).

¹⁸⁶ *Williamson v. United States*, 114 S. Ct. 2431, 2433 (1994).

against interest to ensure reliability.¹⁸⁷ Similarly, all of the Justices agreed that statements that singly inculcate the declarant are admissible under Rule 804(b)(3).¹⁸⁸ The crucial point of contention between the majority approach and Justice Kennedy's concurrence concerned the admissibility of "neutral" or "non-self-inculpatory" statements that are collateral to the precisely self-inculpatory words (collateral statements).¹⁸⁹

Justice O'Connor held that Rule 804(b)(3) does not allow the admission of collateral statements.¹⁹⁰ According to the majority approach, to be admissible under Rule 804(b)(3), statements must be sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."¹⁹¹ To determine whether a statement is self-inculpatory, it is necessary to view it in context.¹⁹²

Contrary to the majority opinion, Justice Kennedy concluded that Rule 804(b)(3) allows admission of collateral statements.¹⁹³ Under Justice Kennedy's approach, a court must first determine whether the statement contains a fact against penal interest.¹⁹⁴ If the court makes such a finding, the court should admit all statements related to the precise statement against penal interest, except statements that are self-serving and statements made to curry favor with the authorities.¹⁹⁵ Justice Kennedy also stressed that courts should consider the circumstances of the case in making this determination.¹⁹⁶

To compare the practical consequences of the two standards, it may be helpful to analyze statements under both standards. For example, one of Justice O'Connor's hypotheticals involved the statement, "Sam and I went to Joe's house."¹⁹⁷ According to Justice O'Connor's reasoning, this statement may be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe and Sam would implicate the declarant in Joe

¹⁸⁷ *Id.* at 2435, 2439 (Ginsburg, J., concurring); *Id.* at 2444 (Kennedy, J., concurring).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 2440.

¹⁹⁰ *Id.* at 2435.

¹⁹¹ *Id.* at 2437.

¹⁹² *Id.* at 2436. For a more detailed discussion of Justice O'Connor's rationale in adopting this standard, see *supra* notes 100 to 133 and accompanying text. Justice Scalia and Justice Ginsburg adopted the standard set forth by Justice O'Connor. *Id.* at 2437 (Scalia, J., concurring); see also *id.* at 2438 (Ginsburg, J., concurring).

¹⁹³ *Id.* at 2443 (Kennedy, J., concurring).

¹⁹⁴ *Id.* (Kennedy, J., concurring).

¹⁹⁵ *Id.* (Kennedy, J., concurring).

¹⁹⁶ *Id.* (Kennedy, J., concurring).

¹⁹⁷ *Id.* at 2437.

and Sam's conspiracy.¹⁹⁸ Justice Kennedy would likely agree that the statement would subject the declarant to criminal liability. Consequently, assuming that the statement was not self-serving, and that the declarant did not make it to curry favor with the authorities, Justice Kennedy would admit the entire statement.¹⁹⁹ In this example, the Justices probably would reach the same conclusion that the entire statement was admissible. This result may not be surprising in light of the fact that all of the Justices were primarily concerned about the same risks in regard to statements against interest—the possibility that the declarant made the statements to curry favor with the authorities and the risk that the declarant made the statements to shift the blame for the crime.²⁰⁰

However, under other circumstances, such as the *Williamson* case itself, the two approaches might yield quite different results. In *Williamson*, Harris asserted that he had been transporting the cocaine to Atlanta for Williamson, and that Williamson was traveling in the car in front of him.²⁰¹ Harris also stated that after he stopped his car, Williamson turned around and drove past the location of the stop, where he could see Harris' car with its trunk open.²⁰² Because Williamson had apparently seen the police searching the car, Harris explained that it would be impossible to deliver the drugs as originally planned.²⁰³

Justice O'Connor remanded the case for further factual determinations.²⁰⁴ However, based on the facts as stated in the case, Justice O'Connor suggested that the portions of the statement in which Harris forfeited his only defense, lack of knowledge that the cocaine was in the trunk, would be admissible as statements against penal interest.²⁰⁵ On the other hand, Justice O'Connor questioned the reliability of the portions of the statement in which Harris implicated Williamson.²⁰⁶ Justice O'Connor feared that "[a] reasonable person in Harris'[s] position might even think that implicating someone else would decrease his practical exposure to criminal liability."²⁰⁷ From these remarks, it seems that Justice O'Connor would admit only the statements in which Harris made allegations that directly subjected him to

¹⁹⁸ *Id.*

¹⁹⁹ See *id.* at 2445 (Kennedy, J., concurring).

²⁰⁰ *Id.* at 2431, 2439 (Ginsburg, J., concurring), 2445 (Kennedy, J., concurring).

²⁰¹ *Id.* at 2433.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 2437-38.

²⁰⁵ *Id.* at 2437.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

criminal liability, and would not admit any of the statements involving Williamson.

Justice Kennedy concurred in the judgment because he too believed that the Court should remand the case.²⁰⁸ To determine which portions of Harris' statement would be admissible, Justice Kennedy would first determine whether the statement, presumably as a whole, contained statements against interest.²⁰⁹ In this case, the statement meets the first requirement because Harris admitted that he knew cocaine was in the trunk and because he acknowledged his participation in the transportation of drugs.

Next, Justice Kennedy would determine whether Harris' statement was overly self-serving or whether Harris made it to shift the blame for the crime.²¹⁰ Perhaps Justice Kennedy would not admit the portion of the statement in which Harris stated that he was delivering the drugs for Williamson, fearing that Harris was trying to shift the blame for the crime. However, he might consider the other portions of the statement, in which Harris stated that Williamson was driving in front of him in another car and that Williamson turned around when Harris was pulled over, neutral as to Harris' interest, and therefore admit them as collateral statements. These statements may be considered neutral because they neither appear to minimize the fact that Harris had the drugs in his car nor attempt to describe Williamson as the owner of the drugs.²¹¹ From this hypothetical application of Justice Kennedy's standard of admissibility under Rule 804(b)(3), it seems that Justice Kennedy would admit a larger portion of the statement than Justice O'Connor.

These comparisons demonstrate that application of the two standards to particular facts may yield different results. The question then becomes which standard creates results consistent with the statutory directive of Rule 804(b)(3) and the policies underlying the rule. Justice O'Connor properly focused her analysis on whether statements collateral to the specific statement against interest have sufficient guarantees of reliability. The general rule against hearsay, that out-of-court statements presented at trial to prove the truth of matters asserted are inadmissible, is based on a basic concern for reliability.²¹² However, the Federal Rules of Evidence make an exception for out-of-court statements that are necessary and bear circumstantial proof of

²⁰⁸ *Id.* at 2445. Unlike Justice O'Connor's opinion, Justice Kennedy did not provide any analysis regarding the facts involved in the case.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See id.* at 2435.

²¹² *V WIGMORE*, *supra* note 10. *See also* Davenport, *supra* note 12.

trustworthiness.²¹³ Accordingly, the exception to the rule against hearsay for statements against penal interest (made by an unavailable witness) is based on the rationale that "a reasonable person in the declarant's position would not have made the statement[s] unless believing [them] to be true."²¹⁴ On the issue of collateral statements, Justice O'Connor noted that "[t]he fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statements says nothing at all about the collateral statement's reliability."²¹⁵ By admitting only statements that are individually self-inculpatory, Justice O'Connor's interpretation of Rule 804(b)(3) requires lower courts to focus on the factor that renders statements against interest reliable—the self-inculpatory effect of the declarant's words. Justice O'Connor's standard creates results consistent with the rationale of Rule 804(b)(3)'s exception to the rule against hearsay.

Justice Kennedy's approach, on the other hand, extends the scope of Rule 804(b)(3)'s exception to the rule against hearsay beyond the rationale that underlies the rule.²¹⁶ As Justice O'Connor noted, "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One 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."²¹⁷ Absent the exception for statements against interest, the entire statement in *Williamson* would be inadmissible as hearsay, based on the rationale that the statement was not protected by the precautions available at trial. As noted, the exception for statements against interest is based on the rationale that people do not make statements against their interest unless they believe them to be true.²¹⁸ This rationale serves as a surrogate for the in-

²¹³ IIIA WIGMORE, *supra* note 10, § 1420.

²¹⁴ FED. R. EVID. 804(b)(3).

²¹⁵ *Williamson*, 114 S. Ct. at 2435.

²¹⁶ Justice Kennedy argued that "[b]ecause the text of Rule 804(b)(3) expresses no position regarding the admissibility of collateral statements, we must determine whether there are other authoritative guides on the question." *Williamson*, 114 S. Ct. at 2442 (Kennedy, J., concurring). Justice Kennedy then argued that the question regarding the admissibility of collateral statements should be answered by reference to outside sources. *Id.* (Kennedy, J., concurring) (for a summary of Justice Kennedy's argument see *supra* notes 155 to 184 and accompanying text). The rule against hearsay sets forth a negative presumption against out-of-court statements. FED. R. EVID. 802. Justice Kennedy's reference to outside sources ignores the presumption that out-of-court statements are not admissible unless they fall under an exception to the rule against hearsay. See *id.* Contrary to Justice Kennedy's suggestion, Rule 804(b)(3)'s silence regarding the admissibility of collateral statements favors excluding such statements. See *Williamson*, 114 S. Ct. at 2435.

²¹⁷ *Id.* at 2435.

²¹⁸ FED. R. EVID. 804(b)(3) advisory committee's note, 28 U.S.C. app. at 789.

court procedures that guarantee reliability and trustworthiness.²¹⁹ Thus, there is no reason, absent explicit guidance in the text (or in the Advisory Committee Notes), to admit statements that otherwise would be considered hearsay simply because they are collateral to statements against interest.²²⁰ Applying Justice Kennedy's approach would result in an outcome not contemplated by the text of the rule.

B. POTENTIAL PROBLEMS WITH APPLYING THE *WILLIAMSON* STANDARD

Justice O'Connor adopts a narrow interpretation of Rule 804(b)(3). However, her opinion may present some practical problems for courts trying to apply her standard. A discussion of a district court opinion issued after the Court's decision in *Williamson* illustrates some of the problems involved in determining what portions of an extended declaration are admissible as statements against penal interest.

In *Ciccarelli v. Gichner Systems Group, Inc.*²²¹ former executives of the defendant company filed a civil action, alleging that the defendant had breached a fiduciary duty under ERISA²²² to provide retirement benefits.²²³ The relevant issue for Rule 804(b)(3) purposes was whether an affidavit of Mr. Woodend, the retired vice president of the defendant company, was admissible at trial.²²⁴ The court presented the issue by stating,

The issue here is not whether the affidavit contains statements against interest but just how wide a net the exception casts. Put more succinctly, does the exception render admissible only those portions of sentences that specifically inculcate Mr. Woodend or does it also include the remainders of those sentences, including references to others?²²⁵

The court concluded that Mr. Woodend's affidavit contained statements against interest because in it he essentially admitted that he had

²¹⁹ *Id.*

²²⁰ Justice Kennedy argues that the following text of the Advisory Committee Note is a "forthright statement that collateral statements are admissible under Rule 804(b)(3)": "[o]rdinarily 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." *Williamson*, 114 S. Ct. at 2442. From this quote, Justice Kennedy seems to conclude that the rationale behind Rule 804(b)(3) applies to collateral statements. On the contrary, the quote merely seems to acknowledge that third-party statements may be used both by the prosecution to inculcate the defendant and the defense to exculpate the defendant depending on the content of the statement against interest.

²²¹ No. CIV. A.1: CV-93-643, 1994 WL 483873 (M.D. Pa. Sept. 6, 1994).

²²² The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1100.

²²³ *Ciccarelli*, 1994 WL 483873 at *2.

²²⁴ *Id.* at *4. Because the relevant paragraphs of the affidavit were confidential, the court referred to only the individual paragraphs involved.

²²⁵ *Id.*

defrauded a company and had subjected himself to a suit by that company as well as a forfeiture of his pension.²²⁶ The court then recognized that the issue was controlled by the Supreme Court's decision in *Williamson*.²²⁷

The court in *Ciccarelli* noted that it could read *Williamson* in one of two ways:

The first would be that, in a statement of several sentences, some of which are self-inculpatory and some of which are not, the sentences that are self-inculpatory are admissible—even if they contain nonself-inculpatory references—and the other sentences are not. As an example, in the following statement, the entire second sentence would be admissible under the rule but the first would not be: "Derek purchased the gun. Then, he and I robbed Kenneth." Under such a formulation, those sentences within the Woodend affidavit that implicate Mr. Woodend and Plaintiffs in wrongdoing would be admissible, with the references to Plaintiffs being, in some sense, *res gestae*.

The other way we could interpret *Williamson* is that only those words that are actually self-inculpatory fit within the Rule 804(b)(3) exception. Thus, a sentence that is generally self-inculpatory might have portions that are collateral and inadmissible. For example, in the following sentence, only the parts referring to culpable conduct by the declarant would be admissible: "Matthew, Derek, and I robbed Kenneth." The references to Matthew and Derek would have to be redacted. If this were the teaching of *Williamson*, any references in the Woodend affidavit to persons other than Mr. Woodend would be inadmissible.²²⁸

The court in *Ciccarelli* adopted the second, more narrow, interpretation of *Williamson*.²²⁹

The court in *Ciccarelli* stated three reasons why it believed the more narrow interpretation of *Williamson* was correct. First, because the Supreme Court held that the rationale behind statements against interest did not apply to collateral statements, the court in *Ciccarelli* concluded that the Supreme Court could not have intended the fortuity of sentence structure to dictate admissibility.²³⁰ Second, the court cited several examples in the *Williamson* opinion that bolstered its own interpretation of *Williamson*.²³¹ The court concluded that "[a]ll of the examples of permissible statements are ones in which only the declarant is implicated—none involve naming third parties."²³² Third, the

²²⁶ *Id.*

²²⁷ *Id.* The court in *Ciccarelli* stated that the Supreme Court in *Williamson* held that "[w]e see no reason why collateral statements, even ones that are neutral as to interest, . . . should be treated any differently than other hearsay statements that are generally excluded." *Id.* at *5.

²²⁸ *Id.* at *5.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at *6.

²³² *Id.*

court stated that Justice Kennedy's concurrence suggested that the majority found that "the exception [was] so narrow as to apply only to the particular words that are against the declarant's interest."²³³ The court in *Ciccarelli* concluded that, according to *Williamson*, the only portions of the affidavit that were admissible were those that specifically referred to Mr. Woodend, not those that referred to any other persons.²³⁴

The court's opinion in *Ciccarelli* highlights the portions of the *Williamson* opinion that may cause confusion. The court properly understood *Williamson* to permit only those statements that individually inculcate the declarant to be admitted against a defendant under Rule 804(b)(3). However, because the *Williamson* standard, which defined "statement" as an assertion that is individually self-inculpatory, does not, in and of itself, provide an easily applied standard for lower courts, the court in *Ciccarelli* determined that for Rule 804(b)(3) purposes "statement" could either refer to a single word or to a larger grammatical unit, such as a sentence. The court in *Ciccarelli* determined that the Supreme Court intended a narrow analysis under *Williamson* and therefore determined that only the "words" that are self-inculpatory are admissible against a defendant.

The court properly determined that the Court in *Williamson* adopted a narrow interpretation of Rule 804(b)(3); however, the court further narrowed the Supreme Court's holding to apply to individually self-inculpatory words.²³⁵ Although Justice O'Connor narrowly defined the word "statement" as "a single remark or declaration,"²³⁶ for Rule 804(b)(3) purposes, she began her analysis by recognizing that the Federal Rules of Evidence define "statement" more generally as "an oral or written assertion."²³⁷ Contrary to the court's decision in *Ciccarelli*, Justice O'Connor did not suggest that "statement" referred to individual words.²³⁸ Instead of focusing on individual words or on sentences (the two options put forth by the court in *Ciccarelli*), a better approach might be to focus on phrases within the statement. This would coincide with Justice O'Connor's narrow interpretation of Rule 804(b)(3) and would surround admissi-

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See FED. R. EVID. 804(b)(3) advisory committee's note, 28 U.S.C. app. at 790-92.

²³⁶ *Williamson v. United States*, 114 S. Ct. 2431, 2434 (1994).

²³⁷ *Id.*

²³⁸ However, Justice Kennedy's discussion of McCormick's Treatise on Evidence focuses on the character of individual words. *Id.* at 2441 ("For example, in the statement 'John and I robbed the bank,' the words 'John and' are neutral (save for the possibility of conspiracy charges). On the other hand, the statement, 'John, not I, shot the bank teller' is to some extent self-serving and therefore might be inadmissible."). *Id.*

ble statements with enough context to render them intelligible at trial. By focusing on individual words, courts could edit statements so that they would become meaningless, irrelevant, or both.²³⁹

The court in *Ciccarelli* ignored or misconstrued other important aspects of the Court's holding in *Williamson*. First, the court in *Ciccarelli* suggested that the Court adopted a per se rule against the admissibility of statements against the declarant's interest that also inculcate other persons.²⁴⁰ Although the petitioner in *Williamson* asked the Supreme Court to adopt a per se rule regarding statements against interest,²⁴¹ the Court declined to do so.²⁴² The Court conceded that statements that inculcate someone other than the declarant have been traditionally viewed with suspicion. However, instead of ruling that such statements are never admissible, the Court decided to rely on the rationale underlying Rule 804(b)(3), that people do not make statements against their penal interest unless they believe they are true, to guarantee the reliability of out-of-court statements.²⁴³ Contrary to the court's reasoning in *Ciccarelli*, one of Justice O'Connor's examples of admissible statements, "Sam and I went to Joe's house,"²⁴⁴ clearly refers to a person other than the declarant. Justice O'Connor reasoned that this statement might be against the declarant's interest if a reasonable person in the declarant's shoes would realize that being linked to Joe's and Sam would implicate the declarant in Joe and Sam's conspiracy.²⁴⁵

This example also underscores the *Ciccarelli* court's second mistake. The court did not follow Justice O'Connor's instruction that courts must look at the surrounding circumstances and view the statements in context to determine whether they are individually admissi-

²³⁹ Take, for example, Justice O'Connor's hypothetical statement, "Sam and I went to Joe's house." *Id.* at 2437. Under the court's reasoning in *Ciccarelli* (that only individually inculpatory words without reference to other actors may be admissible), the references to Sam and Joe would have to be redacted, leaving "I went to house." This statement makes no sense and it is difficult to imagine a hypothetical in which it could be used against or in favor of a third party defendant.

²⁴⁰ See *Ciccarelli v. Gichner Systems Group, Inc.*, No. CIV.A.1:CV-93-643, 1994 WL 483873, at *6 (M.D. Pa. Sept. 6, 1994). The court in *Ciccarelli* stated that "According to *Williamson*, the only portions of that paragraph that are admissible are those that specifically refer to Mr. Woodend, not those that refer to any other persons." *Id.*

²⁴¹ Petitioner's Brief, 1994 WL 192030 at *3-4, *Williamson v. United States*, 114 S. Ct. 2431 (1994) (No. 93-5256).

²⁴² See *Williamson*, 114 S. Ct. at 2434-35.

²⁴³ *Id.* at 2435.

²⁴⁴ *Id.* at 2437.

²⁴⁵ *Id.* In his concurrence, Justice Scalia explicitly noted that "a declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissible merely because the declarant names another person or implicates a possible codefendant." *Id.* at 2438.

ble.²⁴⁶ Instead, the court looked only to the text of the affidavit.²⁴⁷ Regardless, because the Supreme Court did not explicitly define what constitutes the proper "context" or "surrounding circumstances," it is foreseeable that lower courts may limit their inquiry to the text of the statement itself. Justice O'Connor's examples go against this approach and suggest that courts should inquire into factual circumstances surrounding the making of the larger statement, not merely the sentences surrounding the statement against interest itself.²⁴⁸

As the *Ciccarelli* decision illustrates, the problems posed by statements against penal interest may cause confusion for parties attempting to implement the exception as well as for courts attempting to determine the admissibility of statements. Practitioners and prosecutors would be wise to note the impact that the *Williamson* decision may have on lower court decisions in their jurisdiction. Because Justice O'Connor adopted a narrow approach to Rule 804(b)(3), several past lower court cases may be called into question or overruled by the *Williamson* decision. Practitioners and prosecutors should also note that collateral statements may be admissible under the catch-all exception of Federal Rule of Evidence 804(b)(5) if the statements bear circumstantial guarantees of trustworthiness.²⁴⁹

VI. CONCLUSION

Justice O'Connor properly determined that Rule 804(b)(3) does not allow the admission of collateral statements, even if they are contained within a broader narrative that is generally self-inculpatory. By adopting a narrow interpretation of Rule 804(b)(3), the majority correctly concluded that only those statements that are individually self-inculpatory are admissible as statements against interest. This conclu-

²⁴⁶ See *id.* at 2436.

²⁴⁷ See *Ciccarelli v. Gichner Systems Group, Inc.*, No. CIV.A.1: CV-93-643, 1994 WL 483873 at *6 (M.D. Pa. Sept. 6 1994).

²⁴⁸ See *Williamson*, 114 S. Ct. at 2436-37. On this issue, Justice O'Connor stated,

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. "I hid the gun in Joe's apartment" may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory. . . . And other statements that give the police significant details about the crime may also, *depending on the situation*, be against the declarant's interest.

Id. (emphasis added).

This language suggests that courts should consider the case as a whole when determining whether a statement is against interest instead of looking solely at the individually self-inculpatory statement in the context of the larger statement. In addition, Justice O'Connor's concern about the risk that the declarant made the statement to curry favor or shift blame suggests that courts must consider the surrounding facts.

²⁴⁹ See *Williamson*, 114 S. Ct. at 2437 n.1.

sion is in line with the rationale underlying Rule 804(b)(3) and follows the statutory directive of the Rule.

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