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February 14, 2009

08-EV-004

Peter G. McCabe
Secretary, Committee on Rules
of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Amendment to Federal Rule of Evidence 804(b)(3)

I have taught evidence for more than 25 years, the majority of that time at Loyola Law School, Los Angeles. I am also and I am a member of the ABA Criminal Justice Section Committee on Rules of Criminal Procedure, Evidence, and Police Practices. I am writing in qualified support of the recommendation of the Advisory Committee on Evidence Rules that Federal Rule of Evidence 804(b)(3) be amended to impose a corroboration requirement on both the prosecution and the defense when offering a statement against interest. I want to emphasize that I speak only for myself, and not on behalf of the Committee or my Law School.

I favor adoption of the proposed amendment in principle but would like to offer a couple of comments. *First*, the proposed amendment would substitute the current wording requiring the defendant to offer corroborating evidence with the following: "A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." As David F. Binder, Esq. has pointed out in his letter commenting on the proposed amendment, the phrase "is not admissible" might be read by some to suggest that such a statement may not be admitted even if it satisfies the requirements of another hearsay exception. Though the phrase "is not admissible" is already part of the rule, I believe Mr. Binder has made a valid point and that the occasion of a proposed amendment to the rule presents an opportunity to correct a possible misconception. Mr Binder has suggested alternative wording. I offer the following:

> A statement tending to expose the declarant to criminal liability and offered in a criminal case does not satisfy the requirements of this exception unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Either alternative version of this sentence would avoid any potential misunderstanding.

Second, though I believe it makes good sense to treat the prosecution and defense equally when either wishes to offer a declaration against penal interest, I wonder exactly when, after Crawford v. Washington, 541 U.S. 36 (2004), a declaration against interest offered by the government would satisfy the demands of the Confrontation Clause. The proposed Advisory Committee Note dismisses the issue summarily:

> The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause. The Supreme Court in *Crawford* ... held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Courts after *Crawford* have held that for a statement to be admissible under Rule 804(b)(3), it must be made in informal circumstances and not knowingly to a law enforcement officer – and those very requirements of admissibility assure that the statement is not testimonial under *Crawford.*

To understand the likely effect of the proposed amendment, it is necessary also to take into account the Supreme Court's decision in Williamson v. United States, 512 U.S. 594 (1994). There, the Court held that the trial court must scrutinize all parts of any purported declaration against interest to determine if each is actually against the declarant's interest. Only those parts of the statement that satisfy that criterion may be admitted. In its Report to the Standing Committee, the Evidence Advisory Committee gave the following characterization of how *Williamson* and *Crawford* interact:

> A statement is "testimonial" when it is made to law enforcement officers with the primary motivation that it will be used in a criminal prosecution – but such a statement cannot be a declaration against penal interest because the Supreme Court held in *Williamson v. United States* that statements made to law enforcement officers cannot qualify under the exception as a matter of evidence law. Because of the fit between the hearsay exception and the right to confrontation, Committee members saw no need to refer to the *Crawford* standard in the text of the rule....

I'm not sure that this statement is complete or that it really catches the impact of the two cases on the prosecution's opportunity to present declarations against penal interest. Taking the requirements *Williamson* and *Crawford* together, it seems to me that very few such statements will qualify. Please consider the following hypothetical: *Declarant, a jail inmate, tells another inmate details of a crime he committed along with Defendant The details have not been reported in the press, nor has the identity of possible perpetrators*. Some thoughts about the declarant's statement·

1. The statement's recitation of details arguably qualifies as a declaration against penal interest because, under the circumstances, a reasonable person is not likely to lie unless the statement is true. Specifically, a

reasonable person would be aware that the other inmate might try to "sell" the information to obtain some personal advantage in his own case.

2. There is a strong possibility that the part of the Declarant's statement that names Defendant is not against Declarant's penal interest, but assume for the moment that, under the circumstances of the case, it is.

3. Based on these considerations, the statement appears to satisfy the reliability concerns of the hearsay rule.

4. However, if the statement is reliable because a reasonable person would not lie under the circumstances, isn't it more likely that the statement qualifies as testimonial under *Crawford*? Granted, the statement was not made to law enforcement, but if the entire foundation for reliability is knowledge that the person to whom the statement is made might use the statement in discussions with law enforcement, that suggests a strong "testimonial" feel. If the court agrees, then the statement is not admissible.

5. If the above analysis is correct, when would a declaration against penal interest ever be admissible against a criminal defendant? The answer, I think, is rarely.

6. Conclusion: If the government is unlikely to be able to present evidence of declarations against penal interest, an amendment to FRE 804(b)(3) is not needed.

Even if my reasoning is correct and the amendment should not affect admissibility of declarations against interest in real cases, the amendment can still be justified on at least two grounds: First, even after *Williamson* and *Crawford*, courts in every federal circuit have authorized admission of statements against interest when offered by the prosecution. For example, in United States v. Franklin, 415 U.S. 537 (6th Cir. 2005), declarant's statements made to a friend that incriminated himself as well as Franklin were deemed nontestimonial and admissible under the exception for declarations against interest. In United States v. Watson, 525 U.S. 583 (7th Cir. 2008), one of the perpetrators of a bank robbery agreed to cooperate with the government and surreptitiously recorded a conversation with defendant Anthony. During that conversation, Anthony implicated both himself and Watson. The court held that Anthony's statement qualified as a declaration against interest and that the statement was nontestimonial even though Anthony could not have anticipated that it would be used against him at a trial.

The second reason I favor the amendment is on the basis noted earlier: that it is sensible and fair to level the playing field by imposing the same restrictions on the prosecution as are imposed on the accused.

Thank you for offering the opportunity to comment on this proposed amendment.

Sincerely,

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