

**Comments on the Proposed Amendment to Federal Rule of Evidence 804(b)(3)**

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**1. Introduction**

I thank the Committee for the opportunity to comment on the proposed amendment to Federal Rule of Evidence 804(b)(3). I have taught Evidence for more than a quarter century, and I have written extensively – one might even say obsessively – on issues related to hearsay and the Confrontation Clause. I have also participated in litigation related to the Confrontation Clause, most often, I have been an *amicus*, but occasionally representing a party, including the successful representation of the petitioner in *Hammon v Indiana*, decided together with *Davis v. Washington*, 547 U.S. 813 (2006).

This proposal aims, commendably, to eliminate an oddity in evidentiary law. It does so in a far simpler way than the prior attempt, which was withdrawn after the decision in *Crawford v. Washington*, 541 U.S. 36 (2004). But some problems remain, and a couple are added

Starting with narrower concerns first: The Advisory Committee Note contains an assertion of constitutional law that is at least potentially misleading. Neither the proposed amendment nor the Note deals with a significant source of confusion that was squarely addressed by the Note proposed by the Committee in conjunction with the prior proposal

More broadly, the proposal eliminates an asymmetry by moving in what I believe is the wrong direction, extending rather than eliminating a bad rule that rests on an unsound theoretical basis. In practice it probably will not achieve its objective; to the extent it addresses any problem, it is one that *Crawford* has at least largely solved. If it has any substantial effect, I believe it will be to add to the muddle of hearsay law. There is a more serious problem related to Rule 804(b)(3), the one associated with *Williamson v. United States*, 512 U.S. 594 (1994), but this proposal does not address it. Adopting this proposal would fly in the face of the longstanding principle that changes in the Rules should not be adopted unless they are “considered absolutely necessary to the proper administration of justice,” Report of Advisory Committee to Standing Committee, May 15, 2007, p. 2.

**2. The Committee Note prejudices an important question of constitutional law.**

The proposed Committee Note reports that some post-*Crawford* courts have held that for a statement to be admissible against an accused under Rule 804(b)(3) it must be “made in informal circumstances and not knowingly to a law enforcement officer.” And, the Note then says, “those very requirements of admissibility assure that the statement is not testimonial under

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*Crawford.*"

This statement is at least potentially misleading. Suppose that a privately employed victims' counselor says to an alleged victim, "Let's chat informally about what happened. One good thing is that then if there is a trial and you didn't want to testify there, I could tell the jury what he did to you." I believe that in response if the complainant recounts a crime, that statement should plainly be considered testimonial. At least it is plausible that the statement should be considered testimonial, and no binding authority holds otherwise. (I am aware of the *dictum* in *Giles v California* that might suggest that a statement not made to a law enforcement officer cannot be testimonial, but that plainly is no more than *dictum* and did not address a setting as in the hypothetical, in which the declarant speaks with clear anticipation that the statement will be used for evidentiary purposes )

But if the hypothetical statement is indeed testimonial, how would a court infer that from the Committee's Note? The statement is not made to a law enforcement officer. And at least arguably, it is informal. It is possible that a trial court would say that, notwithstanding the counselor's attempt to infuse the surroundings with an informal aura, the statement is formal because it is made in anticipation of evidentiary use. And indeed, I have argued that if there is a formality test as part of the definition of "testimonial" it should be satisfied by such anticipation, and that such an understanding is consistent with the *Davis* Court's comments on formality. But there is no guarantee that a trial court disposed to look to the Committee for guidance would think in those terms; it might well focus on the informality of the setting, including the lack of a signature or oath, and not on the anticipated use.

### **3. The proposal fails to prevent exclusion based on doubts about the witness's credibility.**

The Rule is capable of being read to call for consideration of the credibility of the in-court witness in determining the admissibility of a statement against penal interest. This is not an appropriate consideration in applying the Rule. The credibility of the in-court witness is not a hearsay concern, at least not a substantial one. The rule against hearsay is motivated primarily by concern that the out-of-court declaration may not be true, not by concern that the witness in court who reports that declaration may be testifying falsely.

I do not doubt that if evidentiary rules admit a statement inculcating the declarant and exculpating an accused, there is a strong incentive for the accused and a cooperating witness to fabricate a statement purportedly made by a third person admitting culpability and exculpating the accused. But we do not generally exclude the testimony of a percipient witness on the ground that the testimony is of a type that is often false. The truth of the testimony is for the jury to determine. The reporting witness purports to be speaking from personal knowledge and is subject to the usual conditions of testimony – oath, the visibility of demeanor evidence, and cross-examination. It is not apparent why it should be more difficult for a fact-finder to detect falsehoods in such a witness's testimony than to detect falsehoods in any other witness's testimony.

Unfortunately, some federal courts *have* treated the credibility of the witness as a proper concern in applying Rule 804(b)(3)<sup>1</sup> – as have some state courts in applying similar rules.<sup>2</sup> One of the federal decisions doing this is *United States v. Alvarez*, 584 F.2d 694, 701 (5<sup>th</sup> Cir. 1978), which is one of the two federal decisions cited by the draft Committee Note as having already imposed a corroboration requirement on prosecution evidence. To some extent, the problem may be attributable to the original Committee's comment that the corroboration requirement was based in part on "suspicions of fabrication . . . of the fact of the making of the confession "

The Committee's draft Note to the 2003 proposal indicated squarely that consideration of

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<sup>1</sup> See, e.g., *United States v. Bagley*, 537 F.2d 162, 167-68 (5<sup>th</sup> Cir. 1976); *United States v. Alvarez*, 584 F.2d 694, 701 (5<sup>th</sup> Cir. 1976); *United States v. Rasmussen*, 790 F.2d 55 (8<sup>th</sup> Cir. 1986), *United States v. Hendrieth*, 922 F.2d 748, 750 (11<sup>th</sup> Cir. 1991) ("The district court found Walker [the in-court witness] completely unworthy of belief and, as a result, was unable to determine what, if any, statements actually were made by Payne. See [*Alvarez*]. [Declarant] Payne's statements, thus, were properly excluded under the rules of evidence."), *United States v. Walker*, 59 F.3d 1196 (11<sup>th</sup> Cir. 1995), *United States v. Johnson*, 904 F.Supp. 1303 (M.D. Ala. 1995); *United States v. Benton*, 57 M.J. 24, 31 (U.S. C.A.A.F. 2002). The Ninth Circuit has declined to resolve the issue, *United States v. Satterfield*, 572 F.2d 687, 692 (9<sup>th</sup> Cir. 1978), but one concurring judge explicitly would have held "that the trial judge in applying the last sentence of Rule 804(b)(3) could evaluate the trustworthiness of a witness to the alleged statement . . ." *Id.* at 694 (Sneed, J., concurring). A district court decision within that Circuit also adopted that position, albeit in a case involving an inculpatory statement. *United States v. Fernandez*, 172 F.Supp.2d 1265, 1277 (C.D. Cal. 2001) ("the better approach is that taken by the Fifth Circuit, under which the trial court may evaluate the credibility of the relator").

I have drawn the citations in this footnote and the next one from my comments on the 2003 proposal, and have not attempted to find more recent cases.

<sup>2</sup> *People v. Barrera*, 451 Mich. 261, 280 (1996); *State v. Woods*, 101 Nev. 128, 132-33 (1985); *Laumer v. United States*, 409 A.2d 190, 199 (DC 1979) (Requiring "a three-step inquiry to ascertain (1) whether the declarant, in fact, made a statement; (2) whether the declarant is unavailable; and (3) whether corroborating circumstances clearly indicate the trustworthiness of the statement. . . . In determining whether the declarant in fact made the proffered statement, the trial court's focus is . . . on the veracity of the witness who repeats the declaration."), *Harris v. United States*, 668 A.2d 839 (D.C. 1995); *cf.* *People v. Bowl*, 111 Ill. 2d 58, 68 (1986) (upholding trial court's rejection of testimony where in-court witness "was not a party to the claimed conversation; he would say he overheard the parties. [He] was walking back and forth during the conversation, and the court said it was not clear . . . whether [he] heard all or part of the conversation."), *Lee v. Kolb*, 738 F. Supp. 1244, 1246 (habeas review finding no due process violation, reporting Wisconsin trial court as having excluded exculpatory hearsay "on the grounds that the testimony was uncorroborated and that the [in-court] witness lacked credibility because he was the defendant's brother.")

the credibility of the in-court witness is not proper practice. It said:

The credibility of the witness who relates the statement in court is not . . . a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

The substance of that statement is just right. In my comments on the 2003 proposal, I suggested, however, that such a statement in the Note would not be sufficient to relieve the confusion: Even if a court is inclined in general to give weight to Committee commentary, it may not be willing to treat the Note as altering a rule of construction that the court has adopted with respect to a Rule that, so far as it applies to evidence offered by the accused, remains unchanged.

Accordingly, I believe it would be better to incorporate a clarification in the body of the Rule itself. But at least a comment like that in the 2003 Note should be included. I understand that there may be some doubt about the propriety of including material such as this in the Committee Note. If so, that would be baffling to me. The original Note is part of the source of confusion; its successor ought to be able to relieve the problem. But as it stands, the current draft, by citing the *Alvarez* opinion, compounds the problem.

#### **4. The Corroboration Rule Should be Eliminated Rather than Extended.**

Now I turn to the substance of the proposed amendment

The existence of an evidentiary rule, in this case a corroboration requirement, that is tougher on evidence offered by an accused than it is on comparable evidence offered by a prosecutor has seemed very unfair and anomalous. The Committee is right to consider eliminating the disparity. Asymmetry in criminal law is not itself unusual or disturbing – the criminal justice system is rife with asymmetries – and the question whether there is a genuine asymmetry here is more complex than may appear at first glance. The contexts of prosecution and defense evidence are sufficiently different that comparison is difficult, and in some cases in which courts might be tempted to apply the exception in favor of the prosecution the Confrontation Clause will foreclose the possibility. Nevertheless, it is odd at least to impose a greater limitation on an accused's evidence that someone else took blame and exculpated him than on prosecution evidence that someone admitted to partial blame and cast blame on the accused as well. Of course, there are two basic ways to eliminate the disparity – eliminate the corroboration requirement for defense evidence or extend it to prosecutorial evidence. The Committee proposes the second alternative. I believe the first is far preferable.

*a The Corroboration Requirement is a Bad Rule as Applied to Statements Exculpating the Accused*

As indicated in Section 3 of this Commentary, the possibility, however substantial, that

an in-court witness is fabricating a confession by a third party that exculpates the accused is not an appropriate hearsay concern – and as I understand it, the Committee agrees.

The hearsay concern with respect to these statements is that, even though the witness reporting the statement is telling the truth, the statement itself is unreliable. But why should that be? Note that this branch of the argument requires us to assume that the declarant actually did make the statement acknowledging the declarant's own culpability and absolving the accused. Certainly there are situations in which there is reason to doubt the veracity of such a statement – for example, an aged parent shifting blame onto herself and away from a young son, a declarant who is virtually conviction-proof because he is already serving a life sentence for murder,<sup>3</sup> or one who has no fear of conviction because he knows the prosecution could not prove an essential aspect of the crime against him.<sup>4</sup> But as a class, this type of statement – “He didn’t do it; I did.” – appears to be highly probative evidence.<sup>5</sup>

A penal interest is a particularly strong one. It is rather rare that a declarant would have an incentive to bring culpability on himself and exculpate another person who is probably already under suspicion (or at least, by hypothesis, becomes accused) if in fact the other person rather than the declarant committed the crime. And when there are significant reasons to doubt the veracity of the statement, they should usually be easy enough to understand and explain to a factfinder.

A defendant's own exculpatory testimony is the paradigm of unreliable evidence, and yet we not only tolerate it but we regard the defendant's right to present it as fundamental;<sup>6</sup> we recognize that the jury can take into account the factors warranting skepticism in assessing it. The situation here is much the same. It is singularly inappropriate for a court to deny an accused the ability to inform the jury that another person took the blame and absolved the accused, because the court does not regard the statement as reliable.

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<sup>3</sup> *United States v. Silverstein*, 732 F.2d 1338 (7th Cir. 1984)

<sup>4</sup> *Cf. United States v. Lowe*, 65 F.3d 1137 (4th Cir. 1995). The *Lowe* court shows that the Government could not place the declarant at the scene of the crime; it does not show that the declarant knew this to be true.

If one were determined to exclude a statement exculpating the defendant and inculpating the declarant but made in circumstances rendering it highly unlikely that the declarant would be prosecuted, a better ground might be that statements made without genuine fear of prosecution do not fit within the exception in the first place.

<sup>5</sup> I prefer avoiding the term “reliable,” for reasons I explain later. But under any definition that would not be unduly narrow, statements shifting blame from another to oneself should be considered very reliable.

<sup>6</sup> *Rock v. Arkansas*, 483 U.S. 44 (1987)

I suppose the strongest argument in favor of the corroboration requirement is that one would expect corroboration if the statement were true. But that, I believe, is true of hearsay falling within any exemption, and there is no particular reason to believe that it is more true of statements fitting within this exemption than of others. Indeed, I would think it is *less* true of the against-penal-interest exemption – which by its nature often applies to events conducted in secret – than it is of, say, the present-sense impression exemption, for which a corroboration requirement was considered but rejected.

As applied to exculpatory evidence, the corroborating circumstances requirement can do great harm; it sometimes results in the exclusion of evidence that might have helped contribute to reasonable doubt that the accused is guilty.<sup>7</sup> Even if such a wrongful exclusion is ultimately reversed<sup>8</sup> – and we can have no guarantee that this occurs regularly – the initial exclusion has done substantial harm. Indeed, even if the statement would not contribute to a conclusion of reasonable doubt, the very existence of the issue complicates the case, adding an issue for appeal. And to what end? It is hard to discern any good that the corroboration requirement does. If it is apparent to the court that the exculpatory statement is false, then why can the prosecutor not make this fact apparent to the jury? And if the falsity is not so readily apparent, then surely the statement ought to be admitted.

Our system treats wrongful convictions as far worse than false acquittals; that is the value judgment underlying the "beyond a reasonable doubt" standard. Given this calculus, the application of a corroboration requirement to statements against interest offered to exculpate an accused is terrible. To be justified, the requirement should prevent far more false acquittals than the number of false convictions to which it leads. But it is hard to be confident that the corroboration requirement has prevented so much as one acquittal of a defendant who was, and

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<sup>7</sup> This is a point made in Prof. Capra's memo to the Committee of March 15, 2002, at 41 (citing *United States v. McDonald*, 688 F.2d 224 (4th Cir. 1982) and *United States v. Amerson*, 185 F.3d 676 (7th Cir. 1999), as examples of cases "where claims can be made that the corroboration requirement has been set too high for criminal defendants – who, after all, have a constitutional right to an effective defense" and quoting *Federal Rules of Evidence Manual* (of which Prof. Capra is a co-author, the quotation is from § 804.02[9]). ""We believe that the burden placed on the accused has in many cases been too high – so high that the exception itself often has little utility. It makes no sense to apply the corroboration standard so strictly that, if the defendant can meet it, he will probably never have been charged or tried in the first place." To the cases cited by Prof. Capra, one might add others in which an excluded statement may, if admitted, have contributed to a conclusion of reasonable doubt. See, e.g., *United States v. Bumpass*, 60 F.3d 1099 (4th Cir. 1995); *United States v. Metz*, 608 F.2d 147 (5th Cir. 1979); *United States v. Gillette*, 547 F.2d 743 (2d Cir. 1976).

<sup>8</sup> E.g., *United States v. Nagib*, 56 F.3d 798 (7th Cir. 1995), *United States v. Garcia*, 986 F.2d 1135 (7th Cir. 1993); *Gooch v. McVicar*, 953 F.Supp. 1001 (N.D. Ill. 1997) (habeas review of state conviction)

ought to have been, convicted; I have not seen anybody argue that it has.<sup>9</sup> And at the same time we know that the requirement sometimes creates the danger that a defendant will be wrongfully convicted – and it always adds complexity to litigation. It is a bad rule.

*b Especially Given that the Committee Seeks Changes in this Rule, It Should Not Hesitate to Get the Rule Right*

A reading of Prof. Capra's memo of March 15, 2002 suggests that the principal reason for not eliminating the corroboration requirement as applied to exculpatory statements is that it would work a change in the law, and in the policy adopted by Congress when the Rules were adopted. I am not sure the asymmetry here is so sharp, whether explicitly or implicitly. At the same time Congress imposed the requirement on defense evidence, it declined to impose it on prosecution evidence. In any event, I do not believe the Committee should let such a consideration prevent it from proposing a change in a bad rule, especially given that the Committee wishes to amend this particular Rule. True, Congress adopted its policy three decades ago. But it made the Rules amendable through the procedures of the Rules Enabling Act, and this Committee is the body that initiates changes. How else is the law to change? The courts must apply the Rules as they stand; they can apply them flexibly, but they cannot ignore a requirement simply because it appears to them ill-advised. Congress cannot be expected to take the initiative in such a matter as this; by invoking the Rules Enabling Act procedure. Congress indicated that it did not want to be the initiator in ordinary course, and it has not been. If an amendment is objectionable to Congress – this Congress, not one of thirty years ago – it has statutorily-reserved means of expressing its will efficiently. The question is not whether the facts have changed, whether exculpatory statements have somehow become more reliable as a class. The question is whether, from the perspective of today, the corroboration requirement as it stands appears so bad that it should be changed. I think the answer is clearly in the affirmative. One might take the view of "Let well enough alone." The Committee cannot be expected to try to make the Rules perfect. But the Committee has decided to examine this Rule, and the asymmetry cutting against the accused makes it a good candidate for close scrutiny. Once the Committee has embarked on such a consideration, I believe it should try to make the law as good as it can, and not decline to propose the eradication of a bad aspect of the Rule because that is the current law

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<sup>9</sup> In his memo of March 15, 2002, at 42-43, Prof. Capra argues that "*Lowe* shows the danger of admitting exculpatory declarations against penal interest without any corroborating circumstance requirement." But his argument shows only reasons for regarding the statement as unreliable – the risk that the declarant would be prosecuted was assertedly minimal and he and the defendant were fellow union members. He offers no argument to show that, assuming the statement was indeed unreliable, the jury could not understand or accord appropriate weight to the considerations making it so.

It is worth noting that in *Lowe* there was evidence tending to confirm the truth of the against-interest statement excluded for want of corroboration, but this other evidence was excluded because the defendant did not offer it at the proper time.

If the Committee agrees, I believe its responsibility is to initiate a change. If the other bodies in the rule-making process disagree, they will act as they see fit, but this Committee will have performed the function for which it was created.

*c. A corroboration requirement as applied to prosecution evidence is unwarranted and would accomplish little.*

Now consider the effect of the corroboration requirement that the Committee proposes for prosecution evidence. I will assume, along with the Committee, that the requirement will apply only to statements deemed non-testimonial for purposes of the Confrontation Clause. I do not share the Committee's confidence that the Rule does not apply by its own terms to testimonial statements, but if it does the Confrontation Clause will operate without need to rely on the rule against hearsay. It may be that the Supreme Court will define the category of testimonial evidence too narrowly in this context, in which case the hearsay exception would admit some evidence that should, but is not, excluded by the Confrontation Clause. If so, the Committee could decide that the hearsay exception should be drawn more narrowly, but such a limitation would not be based on reliability concerns, and a corroboration requirement would not satisfy the problem.

The justification now presented by the Committee for imposition of the corroboration requirement on prosecution evidence is that there is no Confrontation Clause protection against non-testimonial hearsay. (This, of course, was not a justification when the Committee first proposed such a requirement, before *Crawford*.) Accordingly, the Committee says:

If the prosecution has to show only that a declarant made a statement that tended to disserve his interest – i.e., all that is required under the terms of the existing rule – then it might well be that unreliable hearsay could be admitted against an accused

Report of Advisory Committee to Standing Committee, May 12, 2008, p. 2.

I believe four points ought to be borne in mind in assessing this statement. First, the standard justification for the hearsay exception is that the fact that the declarant makes the statement against her interest is strongly indicative that the statement is true. It is far more likely that a declarant would make a statement hurting her interests if it is true than if it is not true. The text of the Rule itself explicitly incorporates a reliability standard on this basis; so far as relevant for this purpose, the Rule provides an exception for “[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.” That a statement fits within the exception, therefore, is in itself a good indication that the statement is highly probative evidence of what it asserts.

Second, given that the statement is not testimonial, and so presumably not knowingly made to known law enforcement authorities or with the anticipation that it will be passed on to

them, there is no particular reason to regard it as *untrustworthy*. Some jurisdictions have previously treated self-inculpatory statements to law enforcement as within the exception, notwithstanding the danger that the declarant is “currying favor” with the authorities. But after *Crawford* that is no longer a possibility.

Third, the standard rhetoric of hearsay doctrine notwithstanding, it would be hard to maintain that the rule against hearsay, as qualified by the many exemptions to it, generally excludes unreliable evidence. Conspiracy statements, for example, are notoriously unreliable, a fact that has been noted many times. Hearsay doctrine does not even pretend to apply a reliability filter to them. *Bourjaily v United States*. I believe it requires suspension of disbelief to accept the proposition that simply because a person makes a statement while under the stress of an exciting condition the statement is particularly reliable.

Finally, hearsay law *ought* to tolerate evidence that is sufficiently probative even if it is not reasonably characterized as reliable. Trials are based on unreliable evidence – including, in some cases, the conflicting accounts of interested participants and eye-witnesses. We depend on the trier of fact to do its best to ascertain the truth from all the information presented to it. Suppose evidentiary law genuinely excluded hearsay unless it were reliable. What standard of reliability should be used? One possible standard is that it is extremely probable that the statement is true. But that essentially means that the statement cannot be admitted unless the court first determines the bottom line in accordance with the position taken by the proponent – that is, the court determines that it is highly probable that the underlying fact that the evidence is offered to prove is true. Such a standard would take the fact-finding function from the jury. Or perhaps reliability means that it is extremely unlikely that the statement would be made unless it were true. That is a coherent meaning, but it is still overly abstemious, if hearsay had to meet that standard to gain admission, we would be denying too much useful information to the jury.

Of course, I am not suggesting that the Committee ought to take this opportunity to recast the theoretical basis for all of hearsay law. But I am suggesting that the Committee ought not indulge further in legal fiction, that the rules of evidence can, should, and do identify certain categories of hearsay as highly reliable and admit only statements meeting that standard. We should approach the problem with clear eyes. *Crawford* helps in this by focusing our attention on how slippery application of a supposed reliability standard necessarily is

In short, what is at stake here is a category of evidence that (assuming there is no confrontation problem) should be admitted – it is non-testimonial hearsay that by definition meets a standard that much hearsay that is routinely admitted cannot satisfy

In large part because this evidence does have a strong claim to admission, I do not believe that adoption of the proposed amendment would have much effect – courts would not often exclude prosecution evidence under the corroboration requirement. It is notable in this regard that the Committee does not cite any cases – not a line of decisions, or even a single case or a plausible hypothetical – in which adoption of the requirement would make a difference.

The Committee Note cites two cases in which courts have applied a corroboration requirement to statements against penal interest offered by the prosecution. Both are both pre-*Crawford* – not surprising, perhaps, because *Crawford* has removed most of the difficulty in this area by ensuring exclusion in the most egregious settings, involving statements deemed testimonial. One of the two cases, *Alvarez, supra*, from 1978, involved a statement that now would presumably be admitted under the exemption for conspirators’ statements; the *Alvarez* court applied the since-discarded rule requiring that the predicate for that exemption be established entirely by independent evidence. In the other, *United States v Shukri*, 207 F.3d 412 (7<sup>th</sup> Cir. 2000), the court held that the corroboration requirement was met.

I do not claim that the corroboration requirement would *never* make a difference. At least theoretically, it is different from, and in some settings more stringent than, the test woven into the fabric of Rule 804(b)(3), so one could imagine cases in which it would cause an otherwise admissible statement to be excluded. But I believe there is no basis to conclude that such cases would be more than very occasional. And that means that if the Committee’s aim has been to eliminate the asymmetry in the Rule it is doing so in form only. The real asymmetry will remain virtually unaltered.

#### **5. The Committee Should Consider the Problem Associated with the *Williamson* Case.**

While the Committee is examining the hearsay exception for declarations against interest, and the consequences of *Crawford*, I think it would be worthwhile to consider the problem associated with *Williamson v United States*, 512 U.S. 594 (1994), of what (if any) assertions not in themselves adverse to the declarant’s interest are nevertheless so associated with an adverse declaration as to fall within the exception. Courts have wrestled with this problem for many years and have devised a variety of solutions. In *Williamson*, the Supreme Court offered an answer to the problem that is, I believe, significantly more restrictive than any of the solutions previously adopted by courts: For purposes of the exception, *Williamson* held, a statement is a single assertion of fact, and so if an assertion is not in itself against interest it does not fall within the exception. *Williamson* does acknowledge that determination of whether the particular assertion is against interest depends on the full context, so that an assertion may be against interest even though it does not appear to be adverse on its face. But if, taking context into account, the particular assertion at issue does not appear to have been against interest, it does not matter that the assertion is part, even an integral part, of a narration that is decidedly against interest.

*Williamson* involved post-arrest statements against penal interest made to the police by an accomplice of the accused that inculcated the accused as well as the declarant. I believe that these factors probably account for the Court’s inclination to construe the exception narrowly, because if the statement had been admitted against *Williamson* it would have amounted to testimony against him – a witness making a statement to the police knowing full well that it would be used for evidentiary purposes. Notice that the same factors mean that the case fits the mold of *Crawford*. If *Crawford* had been decided first, that decision clearly would have

foreclosed admissibility of the statement against Williamson on constitutional grounds, even had the federal courts deemed the hearsay exception to apply to the part inculcating the accused.<sup>10</sup> *Williamson*, in this view, was a temporary and rather ill-fitting expedient to fill the role better performed, on constitutional grounds, by *Crawford*.

But *Crawford* does not render *Williamson* moot. On the contrary, the logic actually enunciated by the court in *Williamson* is not limited to statements that are against penal interest or that are offered against an accused. And the federal courts have extended the doctrine of *Williamson* to cover statements offered in a civil case<sup>11</sup> and, albeit over resistance, to statements against pecuniary interest.<sup>12</sup> Thus, *Williamson* exerts a considerable narrowing effect on the hearsay exception in circumstances in which the confrontation right does not apply. In my view, then, we have a considerable irony: *Williamson* will have no incremental effect in the situation for which it was designed, but will restrict the scope of the hearsay exception in all other contexts.

This might be a satisfactory situation if *Williamson* represented an inevitable reading of Rule 804(b)(3), or the most suitable construction of the hearsay exception. But the fact that *Williamson* has been rejected by numerous state courts – and in particular courts construing rules materially identical to Rule 804(b)(3) – suggests that it is neither.<sup>13</sup> *Williamson* not only severely restricts prior law. It also, if faithfully applied, makes of critical importance the question of whether a given declaration should be considered a single assertion or multiple assertions.<sup>14</sup> The

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<sup>10</sup> I am putting aside, because it was not discussed, the possibility that Williamson could have been held to have forfeited his right to confront the declarant by intimidating him.

<sup>11</sup> See, e.g., *De Jager Constr., Inc. v. Schleiminger*, 938 F.Supp. 446, 447 n. 3 (W.D. Mich.1996); *Kettenbach v Demoulas*, 901 F.Supp. 486, 500 n. 14 (D.Mass.1995); John J Capowski, *Statements Against Interest, Reliability, and the Confrontation Clause*, 28 Seton Hall L.Rev. 471, 506 (1997).

<sup>12</sup> See *Silverstein v. Chase*, 260 F.3d 142 (2001) (reversing district court), see also *Schumpf v Gerald, Inc.*, 52 F.Supp.2d 976, 985- 86 (E.D.Wis.1999); *Ciccarelli v Gichner Sys Group, Inc.*, 862 F.Supp. 1293, 1298 & n. 3 (M.D.Pa.1994).

<sup>13</sup> See *State v Sonthikoummane*, 145 N.H. 316, 769 A.2d 330 (2000, modified 2001); *State v Hills*, 264 Kan. 437, 957 P.2d 496 (1998); *People v Newton*, 966 P.2d 563 (Colo. 1998), *State v Wilson*, 918 P.2d 826 (Or. 1996), *Chandler v Commonwealth*, 249 Va. 270, 455 S E 2d 219 (1995), *People v Taylor*, 482 Mich. 368, 759 N.W.2d 361 (2008); *State v Julian*, 129 Ohio App 3d 828, 719 N.E.2d 96 (1998)

<sup>14</sup> “I went to Joe’s house. Sam went, too” would presumably be considered two separate assertions under *Williamson*. “We [understood in context to refer to Sam and the declarant] went to Joe’s house” would probably be considered a single assertion. I am unsure about “Sam and I

application of hearsay law should not depend on fine points of grammar.

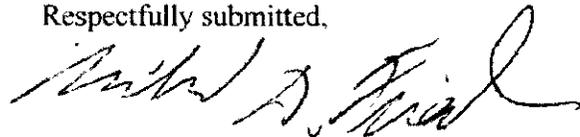
I believe that when a non-adverse assertion is part of a broader statement with an adverse assertion, the question the court should ask in deciding whether the non-adverse statement should be deemed to fall within the exception is basically this: Given that the declarant's inclination to tell the truth was so strong that she made the adverse assertion, even though doing so was against her other interests, does it appear probable that the declarant would have made the non-adverse assertion only if she believed it to be true? If the answer is positive, then the non-adverse assertion ought to be brought within the exception

Let me also offer a few words about the politics of such an amendment. I recognize that the Committee might be reluctant to offer an amendment that might appear to have the effect of nullifying a decision by the Supreme Court. But of course, the Court can only interpret the Rules as they exist, and Rule 804(b)(3) as it exists does not give guidance on the matter of collateral statements. The purpose of an amendment such as the one I am presenting would be to give such guidance. Furthermore, the situation has changed since *Williamson*. *Crawford* has made *Williamson* unnecessary in the principal situation to which it had applied. And the hostile reception to *Williamson* in the state courts not only raises cautions about the merits of the decision but indicates that the decision is not fostering the goal of uniformity. I do not believe the Committee should hesitate to improve the law in this area.

### Conclusion

Rule 804(b)(3) certainly offers room for improvement. The corroboration requirement for defense evidence should be eliminated. The *Williamson* rule is overly restrictive, and reconsideration of it would be warranted. The current proposal does nothing about these matters. It provides symmetry in form only. It is unlikely to have any substantial effect on decisions, and if it does that effect would be to exclude evidence of significant probative value. The justification for extending the corroboration requirement is based on a legal fiction on which evidentiary discourse should no longer rely. The Committee Note may well be misleading. On balance, then, I believe the proposal will do little good and some harm – and in any event, the proposal does not meet the “ain’t broke, don’t fix” orientation articulated by the Committee in its 2007 Report.

Respectfully submitted,



Richard D. Friedman

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went to Joe's house.”