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Declarations Against Penal Interest: What Must Be Corroborated Under the Newly Enacted Federal Rules of Evidence, Rule 804(b)(3)?

DECLARATIONS AGAINST PENAL INTEREST: WHAT MUST BE CORROBORATED UNDER THE NEWLY ENACTED FEDERAL RULE OF EVIDENCE, RULE 804(b)(3)?

INTRODUCTION

Defendant is accused of the larceny of a vase. Outside of court, Smith declares that he and not the defendant stole the vase. Subsequent to this declaration, Smith dies. At the defendant's trial, his counsel seeks to admit testimony of Smith's declaration in an attempt to exculpate the defendant. But the prosecution raises the objection that the out-of-court declaration is hearsay[1] and therefore inadmissible. Defense counsel will reply that Smith's out-of-court declaration against penal interest[2] comes within the exception to the hearsay rule admitting declarations against interest.

The traditional statement of the declaration against interest exception[3] permits introduction of hearsay declarations upon the satisfaction of certain criteria: (1) that the declarant is not a party

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1. *See* California v. Green, 399 U.S. 149 (1970) where the Court stated:
> The hearsay rule, which has long been recognized and respected by virtually every state, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

Id. at 158; *accord*, Chambers v. Mississippi, 410 U.S. 284, 298 (1973).

2. A statement is against penal interest when it may subject the declarant to criminal prosecution. The threat of incarceration is a deterrent to the making of such statements. By jeopardizing liberty, the statement is clearly against the declarant's interest. So the assumption is that one would not make such a potentially harmful statement unless he knew the facts asserted to be true.

3. Alexander Grants' Sons v. Phoenix Assurance Co., 25 App. Div. 2d 93, 95, 267 N.Y.S.2d 220, 222-23 (1966); G.M. McKelvey Co. v. General Gas Co. of America, 2 Ohio Op. 2d 345, 347, 142 N.E.2d 854, 855-56 (Sup. Ct. 1957); C. MCCORMICK, LAW OF EVIDENCE §§ 276-80 (2d ed. 1972); J. RICHARDSON, LAW OF EVIDENCE 230-31 (9th ed. 1964); 5 J. WIGMORE, EVIDENCE §§ 1455-77 (3d ed. 1940); Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1 (1944); Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451 (1952); Morgan, *Declarations Against Interest in Texas*, 10 TEX. L. REV. 399 (1932). *See also* E. MORGAN, BASIC PROBLEMS OF EVIDENCE 290 (1961) (listing possible additions to criteria); Note, *Evidence—Declaration Against Penal Interest*, 24 ARK. L. REV. 567 (1971) (asserting additional requirements that declarant have no motive to falsify). But the latter view seems incorrect on the ground that motive to falsify is already contained in the determination of whether the statement is against interest.

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to the action[4] and is now unavailable;[5] (2) that the statement contains facts immediately and substantially prejudicial to the declarant's proprietary or pecuniary interest;[6] and (3) that the declarant knew the statement to be contrary to his interest when he made it.[7] Under this traditional rule, Smith's out-of-court declaration would not be admissible on the ground that it was against his penal interest and not against any pecuniary or proprietary interest. However, under the Federal Rules of Evidence, rule 804(b)(3), Smith's declaration against penal interest would be admissible if corroborated.[8]

The federal rule neither defines what needs to be corroborated nor describes which corroborating circumstances insure admissibil-

4. There are crucial distinctions between party admissions and declarations against interest. An admission is primary evidence receivable even though the declarant is available; it need not be against interest when made; and it is made either by a party opponent or one in privity with the party opponent. Dissimilarly, a declaration against interest is secondary evidence; it is receivable, under the traditional view, only where the declarant is unavailable; and it must be against the declarant's interest at the time it was made. C. MCCORMICK, *supra* note 2, at § 276; 31A C.J.S. *Evidence* § 217 (1964).

5. Originally only the death of the declarant qualified for purposes of unavailability. Later in the common law development, absence from the jurisdiction qualified. Now the trend is to recognize the privilege against self-incrimination as meeting the unavailability requirement. *See* 5 J. WIGMORE, *supra* note 3, at § 1456; Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, *supra* note 3, at 6-8; Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451, 475 (1952); Comment, *Evidence: The Unavailability Requirement of Declaration Against Interest Hearsay*, 55 IA. L. REV. 477 (1969); 31A C.J.S. *Evidence* § 218 (1964).

6. *See* note 2 *supra*.

7. There are two general rationales upon which trustworthiness of declarations against interest may be predicated. One is that if the underlying facts of the declaration will cause the declarant substantial harm, it is unlikely that he will concede or admit their existence unless they are true. Under the rather theoretical second rationale, if the statement itself is contrary to the declarant's interest it is improbable that he would consciously make such an unfavorable statement falsely. Wigmore and Morgan reject the latter, observing that a declarant rarely conceives of making evidence against himself. 5 WIGMORE, *supra* note 3, at § 1462; Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451, 454-55 (1952); *accord*, MODEL CODE OF EVIDENCE rule 509, Comment c (1942).

8. Rule 804. Hearsay Exceptions: Declarant Unavailable . . . (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (3) statements against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. R. EVID., Pub. L. No. 93-595, art. 8 (Jan. 2, 1975) [hereinafter cited as rule 804(b)(3)].

ity. The purpose of this note is to assist trial judges and attorneys in the application of the corroboration requirement of rule 804(b)(3). In furtherance of this objective, the historical development of admissibility of declarations against penal interest is traced. To facilitate understanding of the penal interest and corroboration aspects of rule 804(b)(3), the reasons both for and against the traditional rule excluding statements contrary to penal interest are examined. The rationale and policy behind each of the three main trends in this area—(1) traditional rule of exclusion, (2) liberal view of admissibility, and (3) admissibility only where special circumstances are found—are analyzed and related to the corroboration requirement of the federal rule. Thus far, no writer has categorized the various approaches to the special-circumstances trend. Such a study is undertaken in this note. Upon analysis, five distinct approaches to the special-circumstances trend emerge. This study and categorization are crucial both to a complete historical perspective of declarations against penal interest and to lay foundation for analogies to the corroboration requirement of rule 804(b)(3).

HISTORICAL DEVELOPMENT OF ADMISSIBILITY OF DECLARATIONS AGAINST PENAL INTEREST

The rule which excludes statements against the declarant's penal interest[9] was first established in England in the *Sussex Perrage* case.[10] This view was adopted in the United States as the majority rule in both federal[11] and state jurisdictions.[12] An examination of the debate surrounding the rule will provide an understanding of the penal interest aspect of rule 804(b)(3) and suggest reasons for its corroboration requirement.

9. *See* 5 J. WIGMORE, *supra* note 3, at § 1476 (tracing origins, noting a disregard of prior precedent by the English courts, and criticizing the limitation to pecuniary and proprietary interests).

10. 11 Cl. & F. 85, 8 Eng. Rep. 1034 (1844) (rejecting declarations by an unavailable clergyman that he had performed a certain marriage, a fact which would subject him to criminal prosecution).

11. Donnelly v. United States, 228 U.S. 243, *rehearing denied*, 228 U.S. 708 (1913); Scolari v. United States, 406 F.2d 563 (9th Cir.), *cert. denied*, 395 U.S. 981 (1969).

12. Annot., 35 A.L.R. 441 (1923); Annot., 48 A.L.R. 348 (1926); 20 AM. JUR. *Evidence* § 495 (1939); 22A C.J.A. *Criminal Law* § 749 (1964).

Reasons For and Against Admissibility of Declarations Against Penal Interest

Courts have justified the exclusion of statements against penal interest for a variety of reasons. First, such declarations are hearsay, fitting no recognized exception to the hearsay rule. Early in the history of the Supreme Court, Chief Justice Marshall warned:

> [T]he danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all.[13]

One hundred years after Chief Justice Marshall's admonition, the Court excluded the declaration of a third party which may have exculpated the defendant of murder liability. Relying on the traditional hearsay objection, the Court reasoned that (a) the jury had no opportunity to observe the demeanor of the out-of-court declarant, (b) there was no opportunity for cross examination either at the time the statement was made or at the time of the trial, since the declarant was unavailable, and (c) the declarant was not under oath when he made the statement.[14]

A second justification for the exclusion of declarations against penal interest is the fear of perjured testimony by witnesses or false confessions by third-party declarants.

> Everyone accused of crime would be tempted to introduce perjured testimony concerning statements of some third person, then beyond the jurisdiction of the court, admitting that such third person and not the defendant, had committed the crime in question, and the experience of courts renders it certain that many would yield to such a temptation.[15]

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13. Queen v. Hepburn, 11 U.S. (1 Cranch) 290 (1813) (discussing hearsay rule in general).

14. Donnelly v. United States, 228 U.S. 243 (1913); *accord*, Brown v. State, 99 Miss. 719, 727-28, 55 So. 961, 962 (1911).

15. Brennan v. State, 151 Md. 265, 134 A. 148, 150 (1926); *accord*, Chambers v. Mississippi, 410 U.S. 284 (1973); Lyon v. State, 22 Ga. 399 (1857); Munshower v. State, 55 Md. 11 (1880); Davis v. State, 8 Okla. Crim. 515, 128 P. 1097 (1913); Comment, *The Admission Into*

Numerous illustrations showing the reality of this suspicion can be found in case law. For example, in *Commonwealth v. Wakelin*,[16] the defendant offered into evidence, surprisingly without objection, the declaration of a man named Ducharme to the effect that he, and not the defendant, had committed the murder. At the time Ducharme made the declaration, he was awaiting execution at the state prison. Thus, he knew before he made the incriminating declaration that he would not be available for further prosecution. Similarly, in *McCoslin v. State*,[17] the defendant offered a declaration of an alleged accomplice in which the accomplice stated that he alone committed the crime with which the defendant was charged. The accomplice, however, was not subject to the deterrent effect of additional prosecution since he would suffer the same amount of punishment whether committing the crime alone or in conjunction with the defendant.[18]

The Supreme Court has recently noted that declarations of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or proprietary interest.[19] Although motive to falsify may render the declaration not against interest, actual detection of such motive is often difficult. Motives for falsification may vary from a desire to exculpate a friend to a desire to frustrate the criminal processes. In addition, the unavailability of the declarant fosters the suspicion that both his declaration and absence from prosecution are part of a scheme to falsify. Since a defendant in a criminal prosecution need raise only a reasonable doubt, courts may understandably fear that easily perjured testimony or false declarations

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Evidence of Extra-Judicial Confession of Guilt Made By Third Parties, 23 MD. L. REV. 178 (1963).

16. 230 Mass. 567, 120 N.E. 209 (1918).

17. 96 Tex. Crim. 175, 256 S.W. 294 (1923).

18. *Contra*, People v. Riccardi, 40 App. Div. 1083, 338 N.Y.S.2d 598 (1972), *cert. denied* 94 S.Ct. 47 (1974) (declarant's statement not against penal interest where, prior to his execution, he was not subject to the deterrent effect of potential prosecution). *See also* United States v. Dovico, 261 F. Supp. 862 (S.D.N.Y. 1966), *aff'd* 380 F.2d 325 (2d Cir.), *cert. denied* 389 U.S. 944 (1967) (declaration not against penal interest where declarant already serving sentence for same occurrence). Where the declarant knows that he will not be available for criminal prosecution, the deterrent effect of potential criminal sanctions does not insure trustworthiness. The declaration is theoretically against penal interest, but the underlying rationale for the exception does not apply. Thus, the evidence should be inadmissible.

19. Chambers v. Mississippi, 410 U.S. 284 (1973).

will exculpate a guilty party. The crux of this reasoning is the concept of an inherent lack of trustworthiness in the truth of the declaration.[20]

Additional but less persuasive reasons have been submitted for the exclusion of statements against penal interest. Admissibility may lead to investigation of collateral matters and divert the jury from the real issue to be determined by it.[21] The rule may be the remnant of a day when courts were more distrustful of juries and more prone to construe the law harshly against the person accused of the crime.[22] Or finally, the declaration, if true, would render the declarant morally incompetent as a witness.[23]

The preceding objections have traditionally resulted in exclusion of declarations against penal interest. Although rule 804(b)(3) admits such declarations, these objections suggest reasons for its corroboration requirement.

On the other hand, several arguments have been advanced for the abandonment of the rule which excludes declarations against penal interest. To say the evidence is inadmissible merely because it is hearsay, begs the question. The better approach is to ask whether the rationale behind other hearsay exceptions—need and trustworthiness—applies to statements against penal interest.[24] The fact that the declaration is against interest guarantees its trustworthiness. The declarant's unavailability creates a need for the second-hand evidence.

In addition, strict adherence to the traditional hearsay limitation ignores the underlying rationale of the declaration-against-interest exception. The broad language of this rationale— the aver-

20. C. McCormick, Law of Evidence § 255 (1954); 5 J. Wigmore, *supra* note 3, at §§ 1476-77, Morgan, *Declarations Against Interest*, 5 Vand. L. Rev. 451, 475 (1952).

21. Seibert v. State, 133 Md. 309, 314, 105 A. 161, 163 (1918); State v. Fletcher, 240 Or. 295, 33 P. 575 (1893).

22. Annot., 35 A.L.R. 445 (1923).

23. Fonville v. Atlanta & C. Air Line Ry. Co., 93 S.C. 287, 75 S.E. 172, *rehearing denied*, 93 S.C. 295, 76 S.E. 615 (1912); Tom Love Co. v. Maryland Casualty Co., 166 Tenn. 275, 61 S.W.2d 672 (1933); Sible v. State, 3 Heisk (Tenn.) 137 (1871). *See also* Heydon, *The Corroboration of Accomplices*, 1973 Crim. L. Rep. 264-65 (noting old view where corroboration required in accomplice context due to self-declared moral and criminal guilt).

24. Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923); 5 J. Wigmore, *supra* note 3, at § 1457.

age person will not concede even to himself the existence of a fact contrary to his interest unless he knows it to exist—would logically include declarations against penal interest as well as those against pecuniary or proprietary interest. As a result, the distinction between declarations against penal interest and those against pecuniary or proprietary is illogical. In effect, the traditional limitation relegates the loss of one's liberty secondary to the loss of one's money or land. That is, statements jeopardizing one's money or land are considered inherently more trustworthy than those statements which jeopardize one's liberty. The patent absurdity of this idea[25] was noted by Judge Bergan of the New York Court of Appeals:

> The distinction which would authorize a court to receive proof that a man admitted he never had title to an Elgin watch, but not to receive proof that he had admitted striking Jones over the head with a club, assuming the equal relevancy of both statements, does not readily withstand analysis.[26]

Another reason in favor of admissibility of declarations against penal interest is a reply to the fear-of-perjury objection:[27] the possibility of perjury and falsification is present in all cases. The truth of the declaration itself and the credibility of the witness who undertakes to repeat the declaration, like the truthfulness of other testimony, must address itself to and be settled by the jury rather than being an issue of admissibility.

Finally, the concept of justice in our American courts[28] mandates admissibility of declarations against the penal interest of a third party which tend to exculpate the accused. It is better to risk letting a guilty man go free rather than to convict an innocent one. The fear of diverting the jury to collateral matters, the anachronistic

25. *See* People v. Spriggs, 60 Cal. 2d 868, 36 Cal. Rptr. 841, 845, 389 P.2d 377, 381 (1964); In re Wininger's Petition, 337 P.2d 445, 454 (Okla. Crim. 1959) (dissent); 5 J. WIGMORE, *supra* note 3, at § 1476; Morgan, *Declarations Against Interest in Texas*, 10 TEX. L. REV. 399 (1932); Note, *Evidence: Declarations Against Penal Interest—A Plea For Parity*, 5 TULSA L.J. 302, 313 (1968). *See also* 5 J. WIGMORE, *supra* note 3, at §§ 1420-22.

26. People v. Brown, 26 N.Y.2d 88, 90, 308 N.Y.S.2d 825, 827, 257 N.E.2d 16,17 (1970).

27. Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923); 5 J. WIGMORE, *supra* note 3, at § 1477.

28. Donnelly v. United States, 228 U.S. 243 (1913) (Holmes, J., dissenting); 5 J. WIGMORE, *supra* note 3, at § 1477.

idea that a person admitting criminal guilt is morally incompetent to give testimony, and the prior tendency to construe the law harshly against the accused all fail to take account of the need for admissibility in the interests of justice.

Approaches Which Admit Declarations Against Penal Interest

The debate on whether to admit declarations against penal interest has resulted in several approaches to the problem. Some courts have reaffirmed but circumvented the rule of exclusion by finding that a particular declaration was against both penal and pecuniary interest, admitting the evidence on the latter ground.[29] Two other trends in the law openly reject the hearsay limitation on statements against penal interest. Each has its own distinct policy reasons. The more liberal view extends the rationale behind declarations against interest to its logical limit. The evidence is admitted because it is against the declarant's interest, and this fact *per se* suffices as a substitute for cross-examination and guarantees its inherent trustworthiness.[30]

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29. *E.g.*, Weber v. Chicago, R.I. & P. Ry. Co., 175 Iowa 358, 151 N.W. 852 (1915) (declaration that third party had unbolted rail causing derailment of train was against both penal and pecuniary interests, but admissible on the latter ground).

30. Donnelly v. United States, 228 U.S. 243 (1913) (Holmes, J., dissenting); Mason v. United States, 257 F.2d 359 (10th Cir. 1958), *cert. denied* 358 U.S. 831 (1959) (defendant failed to show that the out-of-court statement was voluntary and against the penal interest of the declarant, but dicta to the effect that statements against penal interest *per se* are admissible); United States v. Miller, 277 F. Supp. 200 (D. Conn. 1967) (willingness to reconsider old rule in light of shifting weight of authority); Deike v. Great A. & P. Tea Co., 3 Ariz. 430, 415 P.2d 145 (1966) (dicta); Pollock v. Sup. Ct. for L.A. Cty., 272 Cal. 2d 548, 77 Cal. Rptr. 565 (C.A.2d Dist. Div. 5 1969); People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 381, 36 Cal. Rptr. 841, 845 (1964) (". . . a person's interest against being criminally implicated gives reasonable assurance of the veracity of his statement against that interest."); State v. Leong, 51 Haw. 581, 465 P.2d 560 (1970); People v. Archibald, 129 Ill. 2d 400, 263 N.E.2d 711 (1970); State v. Parrish, 205 Kan. 178, 468 P.2d 143 (1970) (based on statute, K.S.A. 60-460(j)); State v. O'Clair, 292 A.2d 186 (Me. 1972) (statement not against penal interest, but court willing to review old rule); Osbourne v. Purdom, 250 S.W.2d 159 (Mo. 1952); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945) (admissibility expressly limited to civil cases by the subsequent decision in State v. Brown, 404 S.W.2d 179 (Mo. 1966)); Goff v. State, 496 P.2d 160 (Nev. 1962) (based on Nevada statute, N.R.S. 51.345(1)); Band Refuse Removal v. Fair Lawn, 62 N.J. 552, 163 A.2d 465 (1960) (Appellate Division of New Jersey Superior Court affirming trial judge's admission of declaration against penal interest, and noting the New Jersey Proposed Rule of Evidence 63(10) would make such declaration admissible); People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970); State v. Sanders, 27 Utah 2d 354, 496 P.2d 270 (1972) (based on Utah statute, 63(10)); WEST'S ANN. CAL. EVIDENCE CODE, § 1230; NEW JERSEY EVIDENCE RULE 63(10); MODEL CODE OF EVIDENCE rule 509 (1942); UNIFORM

The more conservative view which rejects the hearsay limitation is the special-circumstances trend.[31] Under this approach, a trial judge may admit declarations against penal interest where circumstances insure a special need and/or special trustworthiness. Although the special-circumstances cases are relatively few in number, a study of this trend reveals that five separate jurisdictional prerequisites to admissibility have developed. Each employs a balancing-of-interest test. On one side is the danger of fabrication and the possibility of freeing a guilty man. On the other side is the need for such evidence in order to prevent injustice to an innocent man and the circumstances insuring a trustworthiness necessary to preserve jury integrity. A preliminary categorization of these five approaches to admissibility demonstrates the various jurisdictional emphases placed on need and/or trustworthiness: (1) Texas rule: circumstances showing both special need and special trustworthiness; (2) Maryland rule: circumstances showing either special need or special trustworthiness; (3) Illinois rule: emphasis primarily on need; (4) Virginia rule: emphasis primarily on trustworthiness; and (5) strict application of Virginia rule: trustworthiness in fact. The five approaches to special circumstances differ only in the amount of weight given to need and/or trustworthiness.

The methodology used by this writer to categorize these approaches is first to isolate the special circumstances of each particular case. Then an inquiry is made into whether the circumstances insure special need for the evidence or whether the circumstances insure special trustworthiness of the facts underlying the declaration. For instance, a court may admit a declaration against penal interest where the special circumstances are the following: the de-

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CODE OF EVIDENCE rule 63(10) (1965); C. MCCORMICK, *supra* note 3, at § 278; 5 J. WIGMORE, *supra* note 3, at § 1477 (labelling the traditional rule a "barbarous" doctrine); 22A C.J.S. *Criminal Law* § 749 (1964). *See also* United States v. Dovico, 380 F.2d 325 (2d Cir. 1967); United States v. Annunziato, 293 F.2d 373 (2d Cir.), *cert. denied* 368 U.S. 919 (1961).

31. *See* Masons' Fraternal Acci. Assoc. v. Riley, 65 Ark. 261, 45 S.W. 684 (1898) (apparently limited to civil cases); State v. Larsen, 91 Idaho 42, 415 P.2d 685 (1966); People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952); Brady v. State, 226 Md. 422, 174 A.2d 167 (1961), *aff'd* 373 U.S. 83 (1963); Thomas v. State, 186 Md. 446, 47 A.2d 43 (1946); Brennan v. State, 151 Md. 265, 134 A. 148 (1926); In re Wininger's Petition, 337 P.2d 445 (Okla. Crim. 1959) (dissent); State v. Fletcher, 24 Or. 295, 33 P. 575 (1893) (dictum); Cameron v. State, 153 Tex. Crim. 636, 141 S.W.2d 654 (1940); Wise v. State, 101 Tex.Crim. 58, 273 S.W. 850 (1925); Newburry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923).

fendant alleges that his confession was coerced; the defendant's confession is substantially the only evidence against him; and the defendant's confession does not coincide with many of the known facts surrounding the crime. The effect of these circumstances is to cast doubt on the veracity of the defendant's confession and ultimate guilt. There is an obvious risk of convicting an innocent man. Thus, justice creates a special need for additional evidence. For purposes of admissibility, the court in no way focuses on the truthfulness of the facts underlying the third party's declaration against penal interest. Alternatively, a court may admit declarations against penal interest where the circumstances show a special trustworthiness of the declaration. For example, circumstances showing the declarant's opportunity to commit the crime increase the probability that the facts underlying the declarant's statement are actually true. In this latter example, the emphasis is on the trustworthiness of the facts asserted in the declarant's statement, not on the need to prevent injustice to the defendant. The methodology has a dual purpose. It provides a basis for understanding the approaches to the special-circumstances trend, and it lays foundation for analogies to the corroboration requirement of rule 804(b)(3).

Analogy Between the Corroboration Requirement of Rule 804(b)(3) and Selected Jurisdictional Approaches to the Special Circumstances Trend

Both the 1969 Preliminary Draft and the 1971 Revised Draft of rule 804(b)(3) incorporated the liberal view of admissibility of declarations against penal interest. Extending to its logical limit the rationale behind the declaration-against-interest exception to the hearsay rule, the drafters of the proposed federal rules found no need for a corroboration requirement. However, the corroboration prerequisite was ultimately added in the rules adopted by the Court in 1972 as a compromise with those who believed that the circumstances surrounding declarations against penal interest were such as to create a high probability of fabrication.[32]

There is no reported case law which speaks in terms of corrobor-

32. Letter from Professor Edward W. Cleary, Professor of Law at Arizona State University and reporter for the Federal Rules of Evidence, to the *Valparaiso Law Review*, Oct. 25, 1974, on file in Valparaiso Law Library.

ation of third-party declarations against penal interest. Nonetheless, rule 804(b)(3) can easily be analogized to the special-circumstances trend. This trend, like the corroboration requirement of rule 804(b)(3), is a compromise between the traditional rule which assumes an inherent unreliability and the liberal view which assumes the opposite—that the statement is in fact inherently trustworthy. Both the special-circumstances trend and the federal rule admit declarations against penal interest after a showing of special or corroborating circumstances. This fact indicates that both approaches still retain the traditional idea that a declaration against penal interest is inherently untrustworthy. Otherwise, there would be no need for a showing of special or corroborating circumstances in addition to the fact that the statement is against interest.

But a closer look at the corroboration requirement of rule 804(b)(3) reveals that it is narrower in application than some of the special-circumstances approaches. The distinguishing feature of the rule is that it assumes an inherent need for this second-hand evidence. The language of the federal rule requires that the evidence tend "to exculpate the accused."[33] This may be resolved by a simple inquiry. If true, would the declarant's statement exonerate the defendant? If the answer is affirmative, the express purpose for admissibility has been satisfied. There is no further requirement that the circumstances corroborate a need for the evidence. Notably, the official comments to rule 804(b)(3) state that "the requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication."[34] The exclusive reason for corroboration, as stated by the official comments, is to insure the trustworthiness of the facts underlying the declaration. No mention is made of requiring circumstances corroborative of special need for the evidence.[35] Consequently, those approaches to the special-circumstances trend which focus on circumstances requiring a special need for the evidence are not analogous to rule 804(b)(3). How-

33. *See* note 8 *supra*.

34. RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 137 (West 1973) (citation is to the comments of the proposed federal rules of evidence, since the official comments to the newly enacted federal rules are unavailable at the time of publication of this note).

35. It can also be argued that operation of rule 804(b)(3) assumes an inherent need for the second-hand evidence. That is, the rule operates to admit evidence which was formerly inadmissible. Without an inherent need, the evidence would be totally excluded.

ever, those cases which require circumstances demonstrating a special trustworthiness will be of substantial value as precedent for the application of the federal rule.[36]

EXAMINATION OF THE FIVE APPROACHES TO THE SPECIAL-CIRCUMSTANCES TREND

Texas Rule: Circumstances Showing Both Special Need and Special Trustworthiness

Texas courts admit declarations against penal interest when three criteria are satisfied. First, there must be a risk of convicting an innocent man.[37] Thus, where the prosecution relies on circumstantial evidence and no direct evidence, the needs of justice require the admission of the evidence.[38] Second, the declaration if true must exculpate the accused.[39] Third, the person making the declaration must have been so situated that he might have committed the crime.[40]

A comparison of this test to rule 804(b)(3) reveals that the first two criteria are not analogous to the corroboration requirement. The first criterion of the Texas rule requires circumstances showing a need for the evidence. Rule 804(b)(3) obviates corroboration of this by assuming an inherent need. The second criterion goes to the purpose for which the evidence is offered. Similarly the federal rule requires that the evidence be exculpatory in nature. This requirement is not concerned with corroboration, but rather, with an initial

36. Until the federal rules of evidence became law on January 2, 1975, the federal jurisdictions had been bound by the precedent of Donnelly v. United States, 228 U.S. 243 (1913). As a result, the special-circumstances trend is composed of state cases. This fact should not lessen their value as guidelines for application of the federal rule. Since the rule neither defines what needs to be corroborated nor describes what circumstances insure admissibility, a general analogy based on sameness of policy and underlying rationale should withstand scrutiny.

37. Cameron v. State, 153 Tex. Crim. 29, 217 S.W.2d 23 (1949); Morris v. State, 131 Tex. Crim. 338, 98 S.W.2d 200 (1936); Wise v. State, 101 Tex. Crim. 58, 273 S.W. 850 (1925); Stone v. State, 98 Tex. Crim. 364, 265 S.W. 900 (1924). *See also* Morgan, *Declarations Against Interest in Texas*, 10 TEX. L. REV. 399 (1932).

38. The need for such evidence—the threat of losing it entirely at the risk of convicting an innocent man—is lessened where there is direct or compelling evidence indicating the guilt of the accused. Of course, the defendant may need the evidence more than otherwise, but the risk of convicting an innocent man is minimized.

39. *See* note 37 *supra*.

40. *See* note 37 *supra*.

inquiry by the court whether the evidence would exculpate the defendant.

The third criterion of the Texas rule is analogous to the corroboration requirement. The purpose of both the third criterion and the federal rule is to insure the trustworthiness of the facts asserted within the declaration. Circumstances showing the declarant's opportunity to commit the crime increase the probability that the facts underlying the declarant's statement are actually true. By analogy to this third criterion, a showing that the declarant had an opportunity to commit the crime asserted within his declaration would suffice as meeting the corroboration requirement of rule 804(b)(3).

Maryland Rule: Circumstances Showing Either Special Need or Special Trustworthiness

In 1880, Maryland followed the majority rule, excluding statements against the declarant's penal interest.[41] But an exception to the traditional rule was recognized in *Brennan v. State*,[42] a bastardy case where the defendant sought to prove his innocence by establishing the paternity of a third-party declarant. The special circumstances were that the declaration of paternity was contained in a letter in the handwriting of the declarant; that the declarant, a married man, committed suicide on the very day of the birth of the illegitimate child; that the testimony regarding its contents, the letter having been lost, was to come from the declarant's sister; and that the proferred testimony would be to the effect that the declarant committed suicide for the sole reason of his paternity. Noting that the witness had no motive to falsify and that the declarant's acts subsequent to the crime indicated that a reasonable man would not act in such a manner unless he committed the crime, the *Brennan* court said:

> Men do not commit suicide in order to assist a rival and comparative stranger to defend a bastardy charge, nor would the relatives of a suicide in such cases as this ordinar-

41. Munshower v State, 55 Md. 11 (1880); Comment, *The Admission Into Evidence of Extra-Judicial Confession of Guilt Made By Third Parties*, 23 MD. L. REV. 178 (1963).

42. 151 Md. 265, 134 A. 148 (1926).

ily conspire with his rival to perjure themselves in his defense.[43]

Thus, the *Brennan* case emphasizes the particular reliability of the facts underlying the declaration as a condition precedent to admissibility.

Twenty years later in *Thomas v. State*,[44] the Maryland Court of Appeals again applied a special-circumstances approach. In *Thomas*, the officer investigating the crime had been so diligent in investigating the murder that he obtained confessions from both the defendant and a third party. Noting that the declarant's statement if true would be inconsistent with the defendant's guilt, the court formulated the following three rules of admissibility:[45] (1) where a witness has made a written confession that he committed the crime with which the defendant is charged, the defendant should be allowed to introduce the confession in evidence and question him concerning the confession and the circumstances under which it was made; (2) where an officer has secured contradictory confessions from two different persons, the defense should be permitted to question the officer about both confessions; and (3) a confession by a third party is admissible unless it appears that there was some collusion in obtaining it.[46]

Actually, the third requirement of absence of collusion is not an independent criterion, but rather, a part of the initial determination of whether the statement is in fact against interest. Read as a whole, the special circumstances of the *Thomas* case—two conflicting confessions—focus on the need for admissibility. The reason to disbelieve the defendant's guilt is greater where there are two conflicting confessions. And, discounting patently false confessions by third persons, the risk of convicting an innocent man is greater. Thus,

43. *Id.* at 272, 134 A. at 151. *See* Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, *supra* note 3 at 42 (asserting that this would not be a declaration against interest since the declarant would not expect to be subject to prosecution and punishment).

44. 186 Md. 446, 47 A.2d 43 (1946).

45. *Id.* at 452, 47 A.2d at 46.

46. In *Thomas*, the defendant's second-degree murder conviction was reversed and remanded on other grounds. So the *Thomas* rules were merely dicta until specifically applied in Brady v. State, 226 Md. 422, 174 A.2d 167 (1961). Subsequently in Dyson v. State, 238 Md. 398, 209 A.2d 609 (1965), the *Brady-Thomas* criteria were applied to admit a third party's declaration that he in fact committed the rape for which the defendant was charged.

conflicting confessions give rise to a need for the evidence in the interests of justice. The *Thomas* court did not emphasize circumstances which guard against the fabrication of the third party's declaration against penal interest.

There has been an obvious development in the Maryland rule. It first evolved from the traditional exclusionary rule to the *Brennan*-type special-circumstances rule which insures the trustworthiness of the declaration. Next Maryland courts recognized admissibility where there are conflicting declarations of criminal liability, a situation giving rise to the need for the evidence. The practical effect of this development is, when either special trustworthiness or special need is present, the declaration against penal interest should be admitted.

For purposes of defining the corroboration requirement of rule 804(b)(3), the *Brennan* case presents the following proposition: where the witness has no motive to falsify, where the declarant had an opportunity to commit the crime, and where the declarant's acts subsequent to the crime indicate that a reasonable man would not act in such a manner unless he committed the crime, then the corroboration requirement is met and the declaration against penal interest should be admitted to prove the truth of the facts therein asserted. The analogy between *Brennan* and the federal rule is founded in the emphasis of circumstances insuring trustworthiness of the underlying facts asserted in the declaration. The other half of the Maryland rule emphasizing need is crucial to an understanding of the development of the various approaches to the special-circumstances trend. But since the federal rule does not require circumstances corroborative of need, the *Thomas* case has no application. The analogy is confined to *Brennan*.

Illinois Rule: Emphasis Primarily on Need

In *People v. Lettrich*,[47] the court held that extrajudicial declarations of a third party to the effect that he committed a crime are hearsay. Even though such declarations were against interest, the court held this evidence inadmissible except "where it is obvious that justice demands a departure."[48]

47. 413 Ill. 172, 108 N.E.2d 488 (1952).
48. *Id.* at 178, 108 N.E.2d at 492.

But the special circumstances in this case justified admission of the declaration. The defendant alleged that his confession had been coerced. The confession, substantially the only evidence against the defendant, did not coincide with many of the known facts. The effect of these circumstances was to cast doubt on the veracity of the defendant's confession and ultimate guilt. Because the situation presented a high risk of convicting an innocent man, there was a special need for the second-hand evidence. On the issue of admissibility, the court did not emphasize the trustworthiness of the facts asserted in the third party's declaration against penal interest.

Lettrich represents a distinct approach to the special-circumstances trend because of its primary emphasis on need. As such, it is important to a comprehensive examination of this trend.[49] However, *Lettrich* is not relevant to the corroboration requirement of rule 804(b)(3), since the federal rule does not require circumstances corroborative of need.

Virginia Rule: Emphasis Primarily on Trustworthiness

A Virginia police officer had been murdered in *Hines v. Commonwealth*.[50] A third party appeared to be as closely linked to the crime as the accused. In fact, the third party was a bootlegger wanted by the police. He had threatened the life of any officer who tried to apprehend him. He owned a weapon of the same caliber as the murder weapon. He was about the same size as the man seen to run from the site of the crime. And he declared that he had killed the officer. Recognizing that motive and opportunity provided a sufficient guarantee of trustworthiness of the facts asserted, the *Hines* court admitted the declaration against penal interest.

Subsequently in *Newburry v. Commonwealth*,[51] the court held

49. In the subsequent case of People v. Dowling, 95 Ill. 2d 223, 238 N.E.2d 131 (1968), the court did not find any special circumstances giving rise to a need of admissibility in the interests of justice. The court apparently saw no danger of convicting an innocent man where there was direct, unequivocal and unimpeached testimony of eyewitnesses to the defendant's guilt. Similarly in People v. Moscatello, 112 Ill. 2d 16, 251 N.E.2d 532 (1969), the court found no compelling circumstances where the declarant had a motive to falsify in order to avoid a more serious prosecution and where the defendant was identified as the guilty party by eyewitnesses.

50. 136 Va. 728, 117 S.E. 843 (1923).

51. 191 Va. 445, 61 S.E.2d 318 (1950).

it to be reversible error to exclude the written confession of a defendant that would exonerate his codefendant. In this instance, two witnesses could testify to the declaration. The declarant had both an opportunity to commit the murder and a dislike for the deceased. Applying the *Hines* special-circumstances test, the *Newburry* court admitted the declaration against penal interest.

In both *Hines* and *Newburry* the effect of circumstances showing the declarant's motive and opportunity was to increase the probability of the truthfulness of his declaration. Beyond this, the Virginia courts did not require a showing of special need for the evidence. By analogy to the Virginia rule, whenever circumstances corroborate motive and opportunity of the declarant, the test of admissibility has been satisfied under rule 804(b)(3).

Strict Application of the Virginia Rule: Trustworthiness in Fact

Other states apply a stricter standard for admissibility than that used by Virginia. In *State v. Larsen*,[52] the Idaho court held,

> . . . third-party confessions, made out of court, are admissible only where there is other substantial evidence which tends to show clearly that the declarant is in fact guilty of the crime for which the accused is on trial. . . .[53]

The *Larsen* court affirmed a conviction for first-degree murder after excluding the declaration of a third party who admitted the killing. Under the less stringent Virginia rule, the requisite showing of trustworthiness would have been met, and the admissibility of the evidence may have resulted in a different verdict.

An examination of the circumstances in *Larsen* demonstrates the special trustworthiness of the facts asserted in the declaration. The declarant not only admitted the crime for which the defendant

52. 91 Idaho 42, 415 P.2d 685 (1966); State v. Sejuelas, 94 N.J. 576, 229 A.2d 659 (1967) (applying the compelling-evidence test of admissibility prior to adoption of NEW JERSEY STATUTES ANNOTATED 63(10)). *See also* State v. Fletcher, 240 Or. 295, 33 P. 575 (1893) (dictum) (test for admissibility of third party declaration against penal interest is whether there is compelling evidence connecting the defendant with the corpus delicti, *i.e.*, a train of facts or circumstances which clearly point to the declarant, rather than the defendant, as the guilty party). This seems to confuse the distinction between admissibility of confessions and admissibility of declarations against interest.

53. *Id.* at 49, 415 P.2d at 692.

was subsequently convicted, but he also described in detail other elements of the particular murder. His car and spare tire were spotted with human blood, although no offer of proof was made to show that it was the blood of the deceased. Weeds similar to those found at the site of the grave were found on his car. He was off work and had an opportunity to commit the murder. And prior to the killing, he had had sexual relations with the victim, a pregnant and unmarried girl. But the declaration was not admitted into evidence.

The *Larsen* case stands for the following proposition: the corroboration requirement is not met until compelling evidence clearly demonstrates that the declarant was in fact the person guilty of the crime. This test for admissibility certainly insures the truthfulness of the declaration. But it takes little account of the need for such declarations—the fear of losing all evidence of the declarant's guilt at the risk of convicting an innocent man. For that reason, the *Larsen* test is diametrically opposed to rule 804(b)(3), which assumes a greater need for the evidence. The *Larsen* test places the defendant in the role of prosecutor trying to establish beyond a reasonable doubt the guilt of a third party. This effectively negates the application of rule 804(b)(3) due to the inherent difficulty of proving guilt in fact.[54] Of course, some cases may present compelling evidence of the third party's guilt. But as a minimum standard for admissibility it is manifestly unfair. Thus, no analogy can be drawn.

54. *Cf.* Belvin v. United States, 273 F.2d 583 (5th Cir. 1960); Sells v. United States, 262 F.2d 815 (10th Cir. 1958) (corroboration of a confession need not in itself be sufficient preponderately to establish guilt, and need not of itself establish the corpus delicti; but it is required merely that the prosecution produce independent evidence sufficiently supporting the essential admitted facts to justify a jury inference of the truth of the admitted facts or tending to establish the trustworthiness of the statement, *i.e.*, material proof of the offense discovered as a result of the confession); Adams v. State, 32 Ala. 367, 26 So. 2d 216 (1946); People v. Masse, 5 N.Y.2d 217, 182 N.Y.S.2d 821, 156 N.E.2d 452 (1959) (rape case holding circumstantial evidence sufficient for corroboration purposes); People v. Imperiale, 14 Misc. 2d 887, 180 N.Y.S.2d 814 (Ct. Spec. Sess., Kings City 1957) (rape case holding that circumstantial evidence need not necessarily be such as to exclude every hypothesis except that of guilt); People v. Elston, 186 App. Div. 224, 174 N.Y.S. 1 (1919) (rape case holding that corroborating evidence need not be direct and positive or conclusive); Leckie v. Lynchburg Trust and Sav. Bank, 191 Va. 360, 60 S.E.2d 923 (1950); Burton's Ex'r. v. Manson, 142 Va. 500, 129 S.E. 356 (1925) (unnecessary that declaration be corrobarated in every particular or that corroborative evidence itself be sufficient to support a verdict).

RECOMMENDATIONS

Given rule 804(b)(3), this author recommends that a showing of any one corroborating circumstance noted in the special-circumstances cases be sufficient as meeting the condition precedent to admissibility. Thus, any of the following types of corroborating evidence should satisfy the trustworthiness standard: opportunity, motive, or acts subsequent to the crime. Further, two potentially troublesome factors should require no corroboration at all.

First, was the declaration in fact made? That is, did the declarant actually say what he is alleged to have said? By analogy to well-established law of confessions,[55] this does not require corroboration. It would be extremely difficult in most cases to find two witnesses to whom the declarant made the statement against penal interest. One willing witness should suffice, the corroborating circumstance buttressing the probable truthfulness of the declaration.

The second factor which should not require corroboration is whether the declarant has a motive to falsify. This inquiry is properly left either to the initial determination of whether the declaration was against interest or to the later jury determination of credibility and weight of evidence. Likewise, whether the witness has motive to falsify is properly a jury determination of credibility, a matter easily checked during cross-examination.

Many of the special-circumstances cases required more than one corroborating circumstance. One may suspect that if an analogy is valid between them and the federal rule, then the rule should also require more than one corroborating circumstance. But those special-circumstances cases which involved a showing of more than one corroborating circumstance can easily be explained by looking to the period in which they were decided. They were necessarily more demanding since admissibility of statements against penal interest was in direct conflict with the then-existing weight of authority.[56] But today the trend is toward a full recognition of the

55. Cash v. United States, 265 F.2d 346 (D.C. Cir. 1956), *cert. denied* 359 U.S. 973 (1959) (corroboration required to render a confession admissible is corroboration of truth or trustworthiness of the confession and not corroboration of fact that confession was made).

56. The court in Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923) stated:

> [W]e are disposed to think that the evidence of even a bare confession by a deceased or unavailable witness ought to go to the jury for what they may consider

inherent trustworthiness of declarations against penal interest.[57]

The rationale which admits declarations against pecuniary or proprietary interests is logically being extended to include declarations against penal interest. Although the federal rule is out of line with this recognition, the pressures which previously may have compelled higher degrees of corroboration no longer exist. In addition, both the new trend and the federal rule agree on one fact: the need for the evidence outweighs the danger of erroneous acquittals.

When the trial judge exercises his discretion on issues of admissibility, weighing the various factors, it should be clear that one corroborating circumstance suffices for purposes of justice. It is better to free a guilty man than to convict an innocent one. This is consistent with the underlying assumption of need embodied in rule 804(b)(3). And it is consistent with the idea that additional corroborating circumstances should go to the weight of proof rather than its admissibility.

The distinction between burden of proof and admissibility is a crucial one. It is absurd and unjust to place a defendant, faced with potential incarceration, in the role of the prosecutor, trying to establish beyond a reasonable doubt the guilt of a third party. A higher requirement of corroboration is a perversion of the balancing-of-interests test used for admissibility, a confusion of the issues of admissibility and burden of proof, and a negation of the overriding element of need assumed by rule 804(b)(3). Of course, the corroboration requirement will operate as a means of taking some evidence away from the jury for fear that it will return an erroneous acquittal. But a requirement that more than one corroborating circumstance be shown demonstrates a mistrust of the jury which is inconsistent with recent Supreme Court decisions which have stressed the fundamental role of the jury in the American system of justice.[58]

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it worth; but as our decision here must be regarded as out of line with the current of authority, we will expressly limit its effect as precedent in this court to the particular facts of the case in hand.

Id. at 848.

57. *See* note 30 *supra*.

58. Duncan v. Louisiana, 391 U.S. 145 (1968) (in most cases, juries understand the evidence, properly evaluate it, and come to sound conclusions).

CONCLUSION

Analysis of the corroboration requirement of rule 804(b)(3) reveals its distinguishing characteristic. It assumes an inherent need for second-hand evidence. This need arises from the declarant's unavailability and from the risk of convicting an innocent man. The official comments state that the exclusive purpose of the corroboration requirement is to prevent fabrication.[59] The effect of this purpose is to insure the probability of the truth of facts underlying the declaration. Consequently, corroboration of a special need for the evidence is unnecessary. And the special-circumstances cases which require combinations of need and trustworthiness are of substantial value.

The initial basis for analogy between the corroboration requirement of rule 804(b)(3) and selected approaches to the special-circumstances trend is the sameness of the underlying policies—(1) that a declaration against penal interest is inherently unreliable, but (2) that interests of justice create a need for the second-hand evidence. The second basis for analogy is the similar emphasis on circumstances insuring the trustworthiness of the facts asserted in the declaration.

Due to the requirement of trustworthiness, selected approaches to the special-circumstances trend can be condensed into propositions or guidelines for the application of the corroboration requirement of the federal rule. For instance, the following proposition can be gleaned from the Texas rule: where the person making the declaration is so situated that he might have committed the crime, then the corroboration necessary for admissibility is satisfied. From the Maryland either-or test, the *Brennan* case stands as precedent for the following proposition: where the witness has no motive to falsify, where the declarant had an opportunity to commit the crime, and where the declarant's acts subsequent to the crime indicate that a reasonable man would not act in such a manner unless he committed the crime, the corroboration requirement is satisfied. From the Virginia rule, the *Hines* case stands for the following proposition: where the third-party declarant is shown to have both motive and

59. *See* note 34 *supra*.

opportunity to commit the particular crime asserted, then the corroboration requirement is satisfied.

Although each of the three propositions requires circumstances corroborative of the declarant's opportunity to commit the crime asserted, none of the three propositions matches another in all of its prerequisites to admissibility. Future decisions will demonstrate which prerequisite or prerequisites to admissibility is determinative for the newly enacted rule 804(b)(3).