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# THE SUPREME COURT RULES ON STATEMENTS AGAINST INTEREST*

Michael M. Martin**

## INTRODUCTION

Reliability has been defined as "worthy of dependence" or "of proven consistency in producing satisfactory results."[1] It is a common concept as well as a quality for which individuals search in their everyday transactions, such as purchasing a car or selecting an express delivery service. It similarly shapes the rules of evidence pertaining to hearsay. Both common law and modern evidentiary codes ban the admission of extrajudicial statements offered to prove the truth of a matter asserted because they are not made under oath, in the presence of the trier of fact, and subject to cross-examination.[2] Without these safeguards, the trier of fact cannot evaluate the witness' perception, memory, or narration, and therefore not the statement's reliability. Furthermore, the use of hearsay denies those against whom the statement is offered the opportunity to both challenge the information itself and confront its declarant.[3]

There are, however, instances in which evidence that otherwise would qualify as hearsay possesses sufficient indicia of reliability

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1. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1917 (3d ed. 1986).

2. FED. R. EVID. art. VIII advisory committee's note.

3. *See, e.g.*, United States v. Verrusio, 803 F.2d 885, 893-94 (7th Cir. 1986) (excluding hearsay because "the use of second-hand testimony deprives the trier-of-fact of an opportunity to observe the declarant's demeanor and to judge his credibility and denies the opposing party its right to cross examine the declarant"); *In re* Hoffman, 138 A.D.2d 785, 786, 525 N.Y.S.2d 423, 424 (3d Dep't 1988) (allowing hearsay testimony into evidence would be tantamount to denying opposing party full opportunity for cross examination).



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to merit admission.[4] Some kinds of hearsay provide the trier of fact with a more accurate source of facts than a witness' first hand remembrance of information, and therefore, an exception is made to the rule excluding hearsay.[5] In other cases, exceptions are made because the hearsay has circumstantial guarantees of trustworthiness that, although not equivalent to in-court testimony, at least provide sufficient reliability so that admission is preferable to the loss of relevant evidence.[6] The hearsay exception for declarations against interest falls into the latter category.[7]

## I. STATEMENTS AGAINST INTEREST

The reliability of declarations against interest stems from the requirement that the statements are so contrary to the declarant's interest that a reasonable person in the declarant's position would not have uttered them unless the person believed them to be true.[8] Although the assumption that people do not make self-

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

5. Some of the exceptions to the hearsay rule that may provide evidence more accurate than a witness' memory of the event include: FED. R. EVID. 803(5) (recorded recollection); FED. R. EVID. 803(6) (business records); FED. R. EVID. 803(14)-(15) (documents and statements affecting an interest in property); FED. R. EVID. 803(12) (marriage and birth certificates).

6. *E.g.*, FED. R. EVID. 803(2) (excited utterances) and FED R. EVID. 804(b)(2) (dying declarations).

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

8. FED. R. EVID. 804(b)(3). Rule 804(b)(3) provides:

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

*Id. See, e.g.*, United States v. Harty, 930 F.2d 1257, 1264 (7th Cir.), *cert. denied*, 112 S. Ct. 262 (1991) ("[T]he circumstantial guaranty of reliability for

damaging remarks unless they are true provides the circumstantial guarantee of reliability for these utterances, it is also the focus of debate. Not only might individuals have ulterior motives for making statements contrary to their interests, but they also might combine incriminating information and neutral or self-serving facts in the same declaration.

The United States Supreme Court recently addressed this latter issue in the criminal context in *Williamson v. United States*.[9] Writing for the Court, Justice O'Connor held that Federal Rule of Evidence 804(b)(3) applies solely to statements that are disserving.[10] While the Court generated four opinions,[11] in unanimously reversing the case, Justice O'Connor's opinion is consistent with the weight of judicial authority and the rule's emphasis on reliability.

The common law traditionally confined the admission of statements against interest to utterances damaging to pecuniary or proprietary interests.[12] Case law gradually eroded this limitation and recognized exposure to criminal liability as an interest worthy of the exception. As Justice Holmes opined in his oft-quoted dissent in *Donnelly v. United States*,[13] "[N]o other statement is so much against interest as a confession of murder, it

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declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." (citing FED. R. EVID. 804(b)(3) advisory committee's note)).

9. 114 S. Ct. 2431 (1994).

10. *Id.* at 2435.

11. Justice O'Connor wrote the majority opinion. *Id.* at 2431. There were concurring opinions by Justices Scalia, *id.* at 2438, Ginsburg (joined by Justices Blackmun, Stevens, and Souter), *id.* at 2438, and Kennedy (joined by the Chief Justice and Justice Thomas), *id.* at 2440.

12. FED. R. EVID. 804(b)(3) advisory committee's note. *See* 4 WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[04] (discussing thirty-five states that have adopted the declaration against penal interest exception into their evidence codes).

13. 228 U.S. 243 (1913).

is far more calculated to convince than dying declarations, which would be let in to hang a man . . . ."[14]

Despite this relaxation, courts still rejected statements against interest by third parties which implicated a criminal defendant. The Sixth Amendment's Confrontation Clause guarantees criminal defendants the opportunity to confront and cross-examine witnesses against them[15] in order to promote fairness, reliability, and the pursuit of truth in criminal trials.[16] These goals are threatened when prosecutors seek to admit a third party's confession against an accused without the benefit of cross-examination. Such evidence is hearsay, subject to the general dangers of inaccuracy, as well as the specific concerns regarding the speaker's motivation.[17] Consequently, courts rejected such testimony as "inevitably suspect" and overly prejudicial.[18]

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14. *Id.* at 278 (Holmes, J., dissenting) (citing Mattox v. United States, 146 U.S. 140 (1892)).

15. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him . . . ." *See* Pointer v. Texas, 380 U.S. 400, 403 (1965) (declaring the Sixth Amendment's right of an accused to confront witnesses against him "'a fundamental right . . . made obligatory on the states by the Fourteenth Amendment'" (citing Malloy v. Hogan, 378 U.S. 1, 6 (1963))).

16. Lee v. Illinois, 476 U.S. 530, 540 (1986). On a symbolic level

> the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails . . . . The Confrontation Clause advances these goals by ensuring convictions will not be based on the charges of unseen and unknown-and hence unchallengeable-individuals.

*Id.*

17. *Id.* at 541. *See* Bruton v. United States, 391 U.S. 123, 141-42 (1968) ("Whereas the defendant's own confession possesses greater reliability and evidentiary value than ordinary hearsay, the codefendant's confession implicating the defendant is intrinsically much less reliable.") (White, J., dissenting).

18. *Bruton*, 391 U.S. at 136 (recognizing that a codefendant's testimony is unreliable by demonstrating that when an accomplice takes the stand, the jury is instructed to weigh the testimony carefully because of the accomplice's motivation to shift the blame to defendant).

In *Dutton v. Evans*,[19] however, the United States Supreme Court held that an extrajudicial statement made by a declarant, who could have been produced but was not, and which was inculpating to the defendant was admissible.[20] The Court reasoned that because the declarant's statement was "spontaneous" and "against his penal interest," it possessed "the indicia of reliability . . . widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the defendant."[21]

## II. DISSERVING, SELF-SERVING STATEMENTS

A third-party declaration inculpating a criminal defendant is an example of a general problem in applying the exception. To what extent should the exception permit admission of statements that combine disserving with self-serving or neutral aspects? Despite academic debate over this issue, and some cautionary language in the opinions, the New York courts have consistently rejected the use of collateral[22] statements in criminal cases, as have most federal courts of appeals faced with the question. Reviewing the decisional law on this issue provides context and support for the United States Supreme Court's ruling in *Williamson*.

The text of Federal Rule 804(b)(3) does not specifically address statements against interest which also contain remarks that are either favorable or neutral to the declarant's interest.[23] This lack of guidance is problematic, as the mere fact that a person makes a broad self-inculpatory confession does not guarantee that all aspects of the confession are credible. In fact, "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems partially persuasive because of its self-

19. 400 U.S. 74 (1970).

20. *Id.* at 89.

21. *Id.*

22. I.e., "self serving or neutral."

23. *See supra* note 8 and accompanying text; *see also* Williamson v. United States, 114 S. Ct. 2431, 2441 (1994) (Kennedy, J., concurring). For a general overview on this issue, see JACK B. WEINSTEIN & MARGRET A. BERGER, WEINSTEIN ON EVIDENCE ¶ 804(b)(3), at 150-51 (1993).

inculpatory nature."[24] This possibility is acute in the context of third-party confessions offered against a criminal defendant because declarants may have ulterior motives for confessing. For instance, "if during custodial interrogation the declarant perceived an opportunity to curry favor with the government by implicating both himself and a third party, he may choose this course in the hope of gaining immunity or a reduced sentence."[25] Thus, collateral statements lack the indicia of reliability necessary to merit admission.

Recognizing this credibility problem, New York courts consistently reject collateral statements under the state hearsay exception for declarations against interest. In 1970 New York recognized the admissibility of statements against penal interest.[26] In 1978, faced with third-party statements inculpating a criminal defendant, the Court of Appeals stated in *People v. Maerling*[27] that because "a statement may in part be disserving and in part self-serving, ideally courts should only admit that portion of an inculpatory statement which is opposed to a declarant's interest."[28] While the court conceded the need for individualized determination when such editing would prejudicially destroy the context of the statement,[29] it stressed the importance of scrutinizing inculpatory declarations against interest in light of due process considerations.[30] The "highly disserving nature" of declarations against interest justified their admission. The court held that because "neutral and self-serving statements do not bear the same guarantee of reliability as do the

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

25. *See* United States v. Katsougrakis, 715 F.2d 769, 774 (2d Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *see also* United States v. Oliver, 626 F.2d 254, 261 (2d Cir. 1980).

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

27. 46 N.Y.2d 289, 385 N.E.2d 1245, 413 N.Y.S.2d 316 (1978).

28. *Id.* at 298, 385 N.E.2d at 1250, 413 N.Y.S.2d at 322.

29. *Id.* at 298-99, 385 N.E.2d at 1250, 413 N.Y.S.2d at 322.

30. *Id.* at 298, 385 N.E.2d at 1250, 413 N.Y.S.2d at 321.

disserving ones contained in the same declaration," the collateral statements were inadmissible.[31]

The New York Court of Appeals has consistently applied this rule. For instance, in *People v. Thomas*,[32] the court affirmed the use of portions of a codefendant's plea bargain to prove an element of the crime for which the defendant was accused. According to the court, because the plea allocution pertained solely to establishing the criminal element at issue,[33] it complied with the rule that "within practical limitations, only the portion of the statement opposed to the declarant's interest should be admitted."[34]

Similarly, in *People v. Geoghegan*,[35] the court rejected testimony by a detective who recounted a coconspirator's confession.[36] The reason the court rejected this testimony was because the coconspirator had a motive to falsify, which made his confession unreliable in inculpating the defendant.[37] The court discerned a motive to falsify from the circumstances surrounding the coconspirator's confession: he acknowledged his role in the crimes only after discovering that the police already knew of his participation, then confessed only to less culpable offenses while implicating the defendant in the serious crimes.[38] Since the declarant had "powerful incentives" to minimize his role and to blame others, his statements potentially were self-serving and, thus, were inadmissible.[39]

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31. *Id.* at 299, 385 N.E.2d at 1250, 413 N.Y.S.2d at 322.

32. 68 N.Y.2d 194, 500 N.E.2d 293, 507 N.Y.S.2d 973 (1986).

33. *Id.* at 196-201, 500 N.E.2d at 294-97, 507 N.Y.S.2d at 974-77.

34. *Id.* at 198, 500 N.E.2d at 295, 507 N.Y.S.2d at 975.

35. 51 N.Y.2d 45, 409 N.E.2d 975, 431 N.Y.S.2d 502 (1980).

36. *Id.* at 49, 409 N.E.2d at 976, 431 N.Y.S.2d at 504.

37. *Id.* at 50, 409 N.E.2d at 976, 431 N.Y.S.2d at 504. The court found that the codefendant had powerful incentives to minimize his own role in the crime and to put the blame on the others. Therefore, as a matter of law, his testimony should not be admissible to prove the guilt of another. *Id.* at 50, 409 N.E.2d at 977-76, 431 N.Y.S.2d at 504.

38. *Id.* at 49, 409 N.E.2d at 976, 431 N.Y.S.2d at 504.

39. *Id.* at 50, 409 N.E.2d at 976-77, 431 N.Y.S.2d at 504-05.

Finally, the court rejected the custodial confession of an accomplice in a murder trial in *People v. Brensic*.[40] In reviewing the standards for admitting inculpatory declarations against penal interest, the court stated that once a judge determines that evidence satisfies the four criteria for admissibility,[41] "it should admit only the portion of that statement which is opposed to the declarant's interest since the guarantee of reliability contained in declarations against penal interest exists only to the extent the statement is disserving to the declarant."[42] Since the confession at issue did not rule out the possibility that declarant had a motive to falsify, its reliability was suspect and the statements were inadmissible.[43]

Like the New York Court of Appeals, most federal courts of appeals have ruled that collateral statements are inadmissible under the hearsay exception for statements against penal interest. The Seventh Circuit was the first to rule on this issue in *United States v. Seyfried*.[44] Faced with determining whether the statement by the defendant's convicted coconspirator that "[n]o other person had knowledge of or participated with me in the . . . robbery,"[45] the court denied that the confession had to be admitted in its entirety in determining whether it was against penal interest.[46] Instead, the court held that "[w]here a statement is clearly separable, part of which is against one's interest and part is not, only that part which is against one's interest and,

40. 70 N.Y.2d 9, 509 N.E.2d 1226, 517 N.Y.S.2d 120 (1987).

41. The four criteria that must be established in order for a statement against interest to be admissible are: (1) The declarant is unavailable; (2) the declarant's awareness at the time that the statement was made was against the declarant's interest; (3) the declarant's knowledge of underlying facts; and (4) corroborating circumstances independent of the statement. *See, e.g.*, People v. Maerling, 46 N.Y.2d 289, 298-99, 385 N.E.2d 1245, 1250-51, 413 N.Y.S.2d 316, 321-22.

42. *Brensic*, 70 N.Y.2d at 16, 509 N.E.2d at 1229, 517 N.Y.S.2d at 123.

43. *Id.*

44. 435 F.2d 696 (7th Cir. 1971).

45. *Id.* at 697.

46. *Id.* at 698.

therefore, has some inherent trustworthiness should be admitted."[47]

The Second Circuit addressed this issue in the context of an appeal from a conviction for violating federal narcotics laws in *United States v. Marquez*.[48] The court upheld the trial court's rejection of a codefendant's statement that "the other guys had nothing to do" with the drug crimes since it did not subject the declarant to further criminal liability and, thus, lacked "the inherent reliability which justifies the declaration against [penal] interest exception to the hearsay rule."[49]

Similarly, the Eighth Circuit, in *United States v. Lilley*,[50] rejected hearsay testimony in reversing a defendant's conviction for "obstructing correspondence and of uttering and publishing a forged treasury check."[51] The court held that testimony by a federal agent regarding the defendant's husband's role in his wife's crimes fell beyond the parameters of Rule 804(b)(3). Although the court found the husband's statements somewhat self-incriminating, it deemed them a clear attempt "to . . . foist blame . . . onto his wife, thus exculpating himself, or at least minimizing his criminal liability."[52] The Tenth Circuit quoted extensively from this opinion to justify severing inculpatory testimony from exculpatory statements in *United States v. Porter*.[53]

This case law represents a consistent trend of excluding from the scope of Rule 804(b)(3) remarks collateral to a declarant's statements against penal interest in criminal prosecutions. Although the text of Rule 804(b)(3) does not explicitly command

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47. *Id.*

48. 462 F.2d 893 (2d Cir. 1972).

49. *Id.* at 895.

50. 581 F.2d 182 (8th Cir. 1978).

51. *Id.* at 182.

52. *Id.* at 187.

53. 881 F.2d 878, 882-83 (10th Cir. 1989). Defendant's sister was allowed to testify to his involvement in certain bank robberies. However, the sister was unable to testify about his statements that indicated that the defendant's brother was innocent. *Id.* at 881-82.

this result,[54] the policies underlying evidentiary and constitutional law mandate it. The Rules' preference for reliable testimony and the Sixth Amendment's concern for fair criminal trials support the proposition that only statements which sufficiently endanger the declarant's penal interest are trustworthy enough to merit the attention of the trier of fact. Similar reasoning pervades the Supreme Court's opinion in *Williamson v. United States*.[55]

## III. WILLIAMSON V. UNITED STATES

*Williamson* arose out of an interstate drug conspiracy.[56] A Georgia deputy sheriff stopped a rental car driven by Harris for weaving on the highway.[57] As a result of a consensual search of the car, the sheriff found nineteen kilograms of cocaine in the trunk and arrested Harris.[58] Shortly following the arrest, Harris told a DEA agent that he obtained the cocaine from an unidentified Cuban in Florida, that the drugs belonged to Williamson, and that he was to deliver the drugs that night to a particular dumpster.[59]

The DEA agent attempted to arrange a controlled delivery of the drugs, but Harris stopped him by confessing that he lied about the Cuban and his plans for the drugs because he was afraid of Williamson.[60] He explained that he was transporting the drugs to Atlanta for Williamson, who had been traveling in front of him in another rental car. He claimed that Williamson had seen the police stop his car and that, consequently, it would be futile to make a controlled delivery.[61] Although Harris freely implicated himself throughout his discussions with the DEA, "he did not want his story to be recorded and he refused to sign a

54. *See supra* note 8 (discussing Federal Rule of Evidence 804(b)(3)).
55. 114 S. Ct. 2431 (1994).
56. *Id.* at 2433.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 2434.
61. *Id.*

written" transcript of it.[62] In addition, the DEA agent promised that he would report any cooperation by Harris to the United States Attorney, but promised Harris no reward for such cooperation.[63]

When called to testify at trial, Harris refused, despite both an offer of immunity from the prosecution and a court order.[64] The district court ruled that under Federal Rule of Evidence 804(b)(3), the DEA agent could relate what Harris had told him. The court reasoned that Harris' statements clearly implicated himself and were against his penal interest, Harris was unavailable to testify, and corroborating circumstances ensured the trustworthiness of his testimony.[65] The court admitted the testimony and Williamson ultimately was convicted of various drug crimes in violation of federal law. He appealed his conviction on the grounds that the admission of Harris' statements violated both Rule 804(b)(3) and the Sixth Amendment's Confrontation Clause.[66] Although the Eleventh Circuit affirmed the conviction without opinion,[67] the Supreme Court granted certiorari.[68]

## IV. MAJORITY OPINION

While the United States Supreme Court unanimously vacated and remanded the case on the basis that the lower courts improperly applied Rule 804(b)(3), the Justices disagreed on the Rule's precise scope.[69] Writing for six members of the Court, Justice O'Connor held that the Rule covers only statements against penal interest that are disserving and excludes those

62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. United States v. Williamson, 981 F.2d 1262 (11th Cir. 1992).
68. Williamson v. United States, 114 S. Ct. 681 (1994).
69. *See infra* notes 88-93 and accompanying text.

which are neutral or self-serving.[70] She focused her opinion on three main points.

Justice O'Connor first asserted that determining the scope of Rule 804(b)(3) required discerning the meaning of "statement" as used in the Rule's text.[71] She explained that defining "statement" as "a report or narrative,"[72] would sweep Harris' entire confession within Rule 804(b)(3)'s exception to the hearsay rule "so long as in the aggregate the confession sufficiently inculpates him."[73] Alternatively, defining "statement" as "a single declaration or remark"[74] would confine the Rule to those remarks within a confession that are "individually self-inculpatory."[75]

Despite the Rule's lack of textual guidance regarding these two options, Justice O'Connor contended that the principles behind it mandated a narrower meaning of "statement."[76] Rule 804(b)(3) is premised on the assumption that "reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true,"[77] and this assumption is inapplicable to the broader meaning of "statement."[78] The fact that a statement is self-

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70. *Williamson*, 114 S. Ct. at 2435-36. Justice O'Connor explained in her majority opinion that the "district court may not just assume for purposes of Rule 804(b)(3) that a statement is self inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else." *Id.* at 2435.

71. *Id.* at 2434. Justice O'Connor explained that pursuant to Federal Rule of Evidence 801(a)(1) a statement is "an oral or written assertion." *Id.*

72. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2229 (3d ed. 1961)).

73. *Id.*

74. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2229 (3d ed. 1961)).

75. *Id.* at 2434-35.

76. *Id.* at 2435. Justice O'Connor explained that one of the most effective ways to lie is to mix falsehood with the truth, especially if that truth is against the declarant's interest. For this reason, among others, Justice O'Connor felt a narrower definition of what a statement is pursuant to 804(b)(3) was to be implied from the Rule. *Id.*

77. *Id.*

78. *Id.*

inculpatory provides indicia of its truthfulness. However, simply because "a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability."[79] Consequently, individual neutral or self-serving remarks within a broad inculpatory statement merit exclusion as hearsay.[80]

Second, Justice O'Connor rejected the government's contention that the Advisory Committee's Note to Rule 804(b)(3) supported the admission of statements collateral to declarations against penal interest.[81] She observed the ambiguity of both the Rule and its Advisory Committee's Note, as well as the division in the academic commentary on this question. Nevertheless, she declined to "lightly assume that the ambiguous language means anything so inconsistent with the Rule's underlying theory."[82]

Finally, Justice O'Connor asserted that the Court's ruling would preserve the purpose of the hearsay exception for statements against penal interest.[83] She emphasized that, under *Williamson*, "confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor."[84] Furthermore, she stressed the necessity of viewing all statements against penal interest within the context of their utterance, for even statements which are facially neutral may potentially be against the declarant's interest in light of the circumstances surrounding their making.[85] Applying these principles, Justice O'Connor concluded that the district court failed to make a searching, fact-intensive inquiry as to whether each of Harris' statements truly was self-

79. *Id.*

80. *Id.* The majority of the Court stated "that collateral statements, even ones that are neutral as to interest . . . should [not] be treated any differently from other hearsay statements that are generally excluded." *Id.*

81. *Id.*

82. *Id.* at 2436.

83. *Id.* Justice O'Connor denies that her interpretation of Federal Rule of Evidence 804(b)(3) would "eviscerate the against penal interest exception" or make the exception "lack meaningful effect." *Id.*

84. *Id.*

85. *Id.* at 2436-37.

inculpatory, and reversed and remanded the case.[86] Because of this disposition, it was unnecessary to reach the Confrontation Clause issue.[87]

## V. OTHER VIEWS

Six members of the Court agreed with Justice O'Connor's standard. Nevertheless, Justice Scalia wrote separately to express his view that the relevant inquiry in determining the admissibility of any statement against interest "must always be whether the particular remark at issue (and not the extended narrative) meets the standard set forth in the Rule."[88] In addition, Justice Ginsburg wrote for three other members of the Court, both to concur with Justice O'Connor's legal analysis and to disagree with her application of the standard to the facts of the case.[89]

Finally, Justice Kennedy, joined by Justice Thomas and Chief Justice Rehnquist, wrote an extensive opinion accepting the majority's result, but criticizing its analysis of Rule 804(b)(3).[90] Justice Kennedy argued for a broader meaning of the term "statement." The concurring opinion cited various commentators and the Advisory Committee's Notes as supporting his position.[91] Justice Kennedy advocated a standard which would admit all statements related to precise declarations against penal interest, subject to two limitations. First, courts should exclude a collateral statement that "is so self-serving as to render it

86. *Id.* at 2437-38. The Court explained that the question to be answered concerning Federal Rule of Evidence 804(b)(3) is "whether the statement was sufficiently against the declarant's penal interest, that a reasonable person in the declarant's position would not have made the statement, unless believing it to be true, and this question can only be answered in light of all the surrounding circumstances." *Id.* at 2437. (citations omitted).

87. *Id.* at 2437.

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

89. *Id.* at 2438-40 (Ginsburg, J., concurring). Justice Ginsburg concluded that since the declarant's self inculpatory statements were too intertwined with his attempt to blame a codefendant, all of his statements should be considered inadmissible. *Id.*

90. *Id.* at 2440.

91. *Id.* at 2441-42 (Kennedy, J., concurring).

unreliable."[92] In addition, in cases involving a statement made under circumstances in which the declarant has "a significant motivation to obtain favorable treatment . . . the entire statement should be inadmissible."[93]

## CONCLUSION

Despite the disagreement among the Court's members regarding the precise scope of Rule 804(b)(3), it is evident that the majority of its members advocate a cautious, narrow approach to hearsay testimony offered under its authority. This approach comports with the view of the New York state courts, as well as that of most federal courts of appeals. It reaffirms the importance of ensuring that statements admitted through hearsay exceptions to the rules of evidence are sufficiently reliable to merit the trier of fact's attention. In addition, it promotes a criminal defendant's right to confront and cross-examine witnesses against him.

92. *Id.* at 2445 (Kennedy, J., concurring).
93. *Id.* at 2445.